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Tom Paine, the underground press and bloggers

By **Tom Miller**

MY NAME IS MILLER. I'm a journalist. I've written for the New York Times. I've been subpoenaed to a federal grand jury. I have refused to testify -- refused to even enter the grand jury chamber.

And that's where the similarity between Judith Miller and me ends. But my case may be instructive -- if not for her, then for less-famous journalists who may confront grand jury investigations, including all those bloggers who make the traditional, fuzzy definition of journalism less traditional and more fuzzy.

In the summer of 1971, I lived in Arizona and was writing about the antiwar movement and its cultural offspring. I also began covering regional struggles -- farmworkers and copper miners, immigrants and environmentalists -- and had my hands full writing for the underground press and some sea-level publications. Because my beliefs were similar to the people I was writing about, they trusted me.

The grand jury that subpoenaed me that summer was not just any grand jury. This was one set up by Richard Nixon's Justice Department expressly to look into "subversive" activity. Tucson had a virile antiwar movement and frequent demonstrations.

Fortunately, Tucson lies within the jurisdiction of the U.S. 9th Circuit Court of Appeals, whose judges had not long before ruled in favor of Earl Caldwell, a New York Times reporter who'd been subpoenaed to testify about his interviews with the Black Panthers. Caldwell argued that he had sensitive sources whose confidence he had built up, and to appear behind closed doors would make these people, who were already suspicious of him, even more so. They'd clam up.

The court quashed the subpoena, in effect affirming Caldwell's claim of reportorial privilege.

And so I argued the same: that I had vulnerable news sources, that no one else was writing about their activities and that they would no longer trust me if I cooperated with the Justice Department. For me to go before a grand jury would essentially blot out writing about the antiwar movement from my area and make journalism more

difficult to perform elsewhere. The free flow of information would be staunched. It would interfere with the 1st Amendment guarantee of freedom of the press. The odor of the grand jury room would have permeated my skin.

Get it?

Not everyone did. I was no conventional reporter like Earl Caldwell. I was freelance (strike one), writing for the underground press (strike two) and openly sympathetic to my subjects (foul ball). I wanted to show the court that I, too, was entitled to 1st Amendment protection, so I set out to show that not only was I a writer but that the creative -- although amateurish -- underground press was as valid as a professional daily. The Constitution does not ask for circulation figures or rule out sloppiness. (Bloggers take note.)

I moved to quash the subpoena.

My judge was the late William Frey, a Nixon appointee known for his conservative outlook. To bolster my case that even a freelancer for the underground press was entitled to reporters' rights, I invited colleagues across the country to write affidavits on my behalf addressing the issues -- first, that empathy for my subjects shouldn't matter, and, second, that the underground press was a valid news source.

My cohorts came through. A fellow who had been my editor at Rolling Stone wrote on my behalf, as did an editor at Alfred A. Knopf, who drew parallels to Thomas Paine and "Common Sense." Underground newspapers, that editor wrote, are "highly regarded by those in the publishing industry who wish to maintain knowledge of the drifts or radical action in the United States." The late Tom Forcade of the Underground Press Syndicate called my subpoena severe, shocking and reprehensible. An editor at the Chicago Sun-Times for whom I'd been reviewing books said my knowledge of the antiwar movement was reflected in my book reviews. A reporter for a Phoenix radio station wrote to the judge, "There is only one way to cover 'the underground,' and that is to become a part of it." Muckraker James Ridgeway chimed in, as did Liberation News Service, the AP of the underground press. These responses were gratifying to me and annoying to the Justice Department attorneys, whose arguments now had to ward off the pesky 1st Amendment.

And argue they did. They claimed that I was an activist in reporter's clothing. In the federal courthouse hall, a Justice Department attorney flown out from Washington said to my lawyer, "C'mon. You know this guy isn't a reporter."

Judge Frey read over the affidavits, plus my 17-page statement, and arrived at his decision. Miller "appears to be a member of the group about which he reports rather than an objective reporter," the judge wrote. "He occupies a dual capacity." No argument there. He then attacked the judges one level above him. "It appears that appellate court has seen fit to cloak such reporters with a special privilege classification under the guise of '1st amendment freedoms.' " The press, he continued, "has gained a privileged status which many members appear to be abusing by being active participants and press agents for causes, rather than reporters."

Frey concluded, however: "Mr. Miller's news sources are not as sensitive as Mr. Caldwell's" and "Mr. Miller does not so uniquely enjoy the trust and confidence of his sensitive news sources as did Caldwell, yet I am going to afford him the same broad privilege...."

I won. The Justice Department refused to tell Frey why they had wanted my testimony. My subpoena was quashed for good. Meanwhile, Caldwell's case, the precedent for mine, was reversed by the U.S. Supreme Court in the spring of 1972. So although the issue of my testimony was no longer in play, state and federal courts have been battling over questions of reporters' rights ever since.

And the Justice Department's arrogant belief that it had the power to decide who deserves to be called a journalist continues to echo. Frey would no doubt be apoplectic at the mere notion of the Constitution protecting the electronic descendants of Thomas Paine. For democracy to flourish, however, the 1st Amendment must be more flexible than the parchment upon which it was written. Odious though many bloggers may be, for instance, courts will need to accept them as journalists -- for the same reasons the court recognized my privilege to protect my sources.

My own case from decades ago and others in the current crop of journalist-confidentiality cases argue for a national shield law to protect journalists from revealing their sources -- with journalism defined broadly. As a result, the media could confidently perform their role as surrogate for the public, unencumbered by government subpoenas.

Sometimes a journalist has to resort to principle to make a point.

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