RAS 11516

BEFORE THE
UNITED STATES NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

In the Matter of Subpoena Issued to)	Case No. 1-2003-037	July 29, 2004 (3:42pm)
)		
Rene Chun)		OFFICE OF SECRETARY RULEMAKINGS AND ADJUDICATIONS STAFF

MOTION TO QUASH SUBPOENA

Rene Chun, through his undersigned counsel, hereby moves to quash the subpoena served on him (through his counsel) on July 8, 2004. Mr. Chun is a respected, widely published, free-lance journalist. The subpoena orders Mr. Chun to appear before NRC investigators on July 30, 2004, to provide testimony and to produce for the NRC "[a]ny and all handwritten notes and any and all recordings of any interviews with Mr. Foster ZEH that were made in preparation for your article entitled: 'The China Syndrome 2003.'" The article referred to in the subpoena was published in the May 2003 issue of *Playboy Magazine.*

This subpoena should be quashed because Mr. Chun is a journalist and the subpoena is plainly designed to intrude into constitutionally-protected spheres of news-gathering and reporting. To protect journalists from undue, and unconstitutional, intrusion, the Justice Department has established rules governing the issuance of subpoenas to members of the news media. The subpoena here must be quashed because the Commission has disregarded entirely those rules. Compounding the problem, the subpoena violates the First Amendment. Courts have repeatedly acknowledged the chilling effect and resulting self-censorship that discovery of a journalist's unpublished information would have on the gathering and reporting of news. To ensure that journalists receive the protection necessary to carry out their constitutionally

protected news-gathering and reporting activities, courts employ a balancing test that requires the government to demonstrate, at a minimum, that the information sought is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3) not obtainable from other sources. As we explain below, the Commission can make none of these showings. Accordingly, the subpoena should be quashed.[1]

1. The Subpoena Was Issued In Violation of Department of Justice Rules Governing the Issuance of Subpoenas to Members of the News Media.[2] It is evident from the face of the subpoena that the Commission's investigative staff made no effort to comply with long-standing Justice Department rules governing the issuance of subpoenas to members of the press. *See* 28 C.F.R. § 50.10. As the policy states: "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." *Id.* The rules go on to set forth a

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[1] The filing of this motion should not be viewed by the Commission as a concession on Mr. Chun's part that the Commission is empowered to issue subpoenas to non-licensees or their agents pursuant to 42 U.S.C. § 2201(c).

[2] Although these regulations do not, as a technical matter, extend to administrative subpoenas issued by the Commission, they do as a practical matter. The Commission has no independent authority to enforce subpoenas, but must bring an action in a United States District Court to do so; in that event, the Justice Department would be constrained to follow its own regulations and could not bring an enforcement proceeding unless these regulations were adhered to strictly. Moreover, the courts generally look to the Justice Department rules in subpoena enforcement cases. *See, e.g., McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5, 8 (2d Cir. 1982).

number of steps investigators must take prior to resorting to the issuance of a subpoena, many of which are applicable here, including:

> (a) In determining whether to request issuance of a subpoena to a member of the news media . . . the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.
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> (b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, and similarly all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media.
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> (c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

Id. §§ 50.10(a) - (c). The rules go to make clear that the burden on the investigative staff is far higher than in a criminal proceeding, requiring "reasonable grounds, based on nonmedia sources, to believe that the information sought *is essential* to the successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, non-essential, or speculative information." *Id.* §50.10(f)(2) (emphasis added). And even if that threshold is met, the rules further provide that the "government should have unsuccessfully attempted to obtain the information from available nonmedia sources," that the "use of subpoenas to members of the news media should . . . be limited to the verification of published information," and "[e]ven subpoena requests for publicly disclosed information should be treated with care to avoid claims of harassment." *Id.* §§ 50.10(f)(3), (4) & (5).

Here, there can be no plausible claim that the Commission made an effort to comply with these requirements. First, the passage of time from the publication of the article and the issuance of the Commission's subpoena belies any claim that the information sought from Mr. Chen "is essential to the successful completion of the litigation in a case of substantial importance." *Id.* § 50(f)(2). Law enforcement agencies generally do not wait for more than seventeen months to interview key witnesses thought to be in the possession of "essential" information. Memories fade, documents are lost, and confusion sets in, all of which seriously undercut the value of whatever information is produced. For that reason, diligence, not delay, is required.

Second, there is no reason to think that Mr. Chun is in possession of information that is otherwise unavailable to the Commission. After all, Mr. Chun is not a licensee, employed by a licensee, or an agent of a licensee, and he has no first-hand knowledge of the nuclear power industry. He is a journalist. In his article, "The China Syndrome 2003," Mr. Chun identified his sources of information for all key aspects of his article. He explained what he had learned about flaws in defensive measures taken to protect nuclear facilities, but also how he came to possess that information. There are no unnamed or ambiguous sources in the article. Thus, the only reason to interrogate Mr. Chun is to learn about the news-gathering and reporting efforts Mr. Chun and his editors at Playboy undertook to prepare the article. The Commission is not entitled to any of this information under Justice Department rules, and, as explained below, the Commission's demand for it is at odds with the First Amendment.

Third, the Commission has disregarded entirely the Justice Department rules requiring that "[n]egotiations with the media shall be pursued *in all cases* in which a subpoena to a member of the news media is contemplated." *Id.* § 50.10(c) (emphasis added). The

Commission's failure to comply with this requirement heightens our concern that the Commission is simply engaged in a fishing expedition designed to discourage Mr. Chun and other reporters from writing articles critical of the Commission. Not only did the Commission fail to enter into negotiations with Mr. Chun, but it made matters worse by failing "to make clear what its needs are in a particular case." *Id.* If the Commission had done so, it might have provided a basis for a dialogue between Mr. Chun and the Commission, rather than the Commission's precipitous resort to the subpoena process. For all appearances, this subpoena looks like an angry agency striking back at a reporter who deigned to publish an article criticizing the agency's performance of its duties. The Justice Department rules are designed to prevent such an occurrence, and the Commission's failure to abide by the Justice Department's rules only fuels our concern about the nature of this proceeding.

2. Enforcement of the Subpoena Would Violate Mr. Chun's First Amendment Rights as a Member of the News Media. At least since the Supreme Court's landmark ruling in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), it has been commonly understood that the news-gathering and editorial processes are entitled to protection under the First Amendment: "Without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. The Court unanimously agreed that reporters are entitled to some measure of qualified First Amendment protection from government subpoenas. While the Court held, in a plurality opinion, that the reporters could be compelled to reveal sources to a grand jury in the course of a criminal proceeding on the facts presented, the Court also stated that "news gathering is not without its First Amendment protections . . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Id.* at 707-08.

The question here is whether Mr. Chun, a journalist, is entitled to First Amendment protection for his news-gathering and reporting activities, and the answer to that question, given the circumstances here, is unequivocally "yes." There is now wide recognition in the federal circuits that journalists have a First Amendment privilege against compelled disclosure of their news-gathering activities.[3] Courts have repeatedly acknowledged the chilling effect and resulting self-censorship that discovery of a journalist's unpublished information would have on the gathering and reporting of news. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Society's interest in protecting the integrity of the newsgathering process, and in insuring the free flow of information to the public is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'") (quoting *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (Brennan, J. dissenting)). Indeed, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have all interpreted *Branzburg* as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.[4]

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[3] *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press,* 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

[4] *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Bruno v. Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1982); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980); *LaRouche v. National Broad Co.*, 780 F.2d 1134 (4th Cir. 1986); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir.

These cases all recognize that the press is entitled to some degree of protection against intrusion into its newsgathering activities. Indeed, the vitality and independence of the press would certainly suffer without such protection, a result that Justice White cautioned against in his pivotal concurrence in *Branzburg*: "[w]e do not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of the government." *Branzburg*, 408 U.S. at 709 (White, J. concurring). Most important, the resulting harm injures the American people, who depend on and benefit from a free and independent press.

In light of these essential and unique functions of the press, the courts have recognized that the failure to enforce a journalist's privilege will have profound consequences, including: (1) the free flow of information to the public will be hampered as confidential informants begin to understand that their identity and information will not be protected; (2) the public will begin to think of journalists as investigators for the government and private litigants, as opposed to independent news-gatherers serving the public interest; (3) the press will be burdened by an overwhelming number of requests for assistance by litigators in civil and criminal cases; and (4) journalists will curtail their research if they are required to serve as evidence collectors in addition to their traditional role as gatherers and disseminators of news and information. *See generally* cases cited in nn.3 & 4, *supra*.

To guard against these consequences, most courts apply the three-prong test set forth in *Branzburg* and *Miller* to determine if the government has met its burden to pierce the journalist's qualified privilege. The United States must show that the information sought is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3)

1981).

not obtainable from other sources. *Miller*, 621 F.2d at 726; *see also Gonzales v. NBC,* 186 F.3d 102, 106 (2d Cir. 1998); *United States v. Burke*, 700 F.2d 70, 77 (2nd Cir.), *cert. denied*, 464 U.S. 816 (1983). This test applies whether or not the information sought is "confidential." *See Gonzalez,* 186 F.3d at 105-08. As the Third Circuit held in *United States v. Cuthbertson*:

> The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. Therefore, we hold that the privilege extends to unpublished materials in the possession of CBS.

Cuthbertson, 630 F.2d at 147. Similarly, the Ninth Circuit in *Shoen v. Shoen*, which also addressed a subpoena to an author, held that news organizations should be free from:

> the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve nonbroadcast material; and the burden on journalist's time and resources in responding to subpoenas.

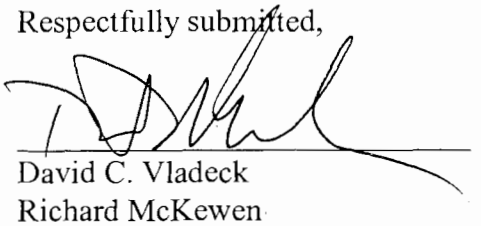
Shoen, 5 F.3d at 1294-95 (quoting *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988)). The *Shoen* court further concluded, in holding that a reporter's newsgathering activities were entitled to protection regardless of whether there had been a promise of confidentiality, that the "body of circuit case law and scholarly authority [is] so persuasive that we think it unnecessary to discuss the question further." 5 F.3d at 1295. "[W]hen facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play." *Id.* at 1292; *see also Shoen v. Shoen,* 48 F.3d 412, 416 (9th Cir. 1995) (*Shoen II*) (establishing a test to determine when a court can pierce the reporter's privilege).

It is clear that the Commission has failed to — and indeed, cannot — sustain its burden of proof here. As discussed above, the lengthy passage of time — well over a year — negates any suggestion that the information the Commission's investigators seek from Mr. Chun is "highly material and relevant." Nor is it plausible for the Commission to assert that any information in Mr. Chun's possession would be "necessary or critical to the maintenance of the claim or defense" by any party — the Commission or anyone the Commission intends to pursue in an enforcement action. While this consideration is often important when a *defendant* seeks to compel a journalist to reveal information necessary for a defense, *see, e.g., United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993) (upholding subpoena), it generally cuts against the government when it seeks to enforce a subpoena against a journalist. *See, e.g., United States v. Burke,* 700 F.2d 70 (2d Cir. 1983) (quashing subpoena). The final factor — a showing that the information is "not obtainable from other sources" — further undermines the Commission's position here. As explained above, Mr. Chun is not a licensee, an employee of a licensee, or an agent of a licensee, with first-hand knowledge of the nuclear power industry. The Commission has far superior resources to obtain whatever information it wants about the subject-matter Mr. Chun wrote about, and it is free to pursue the same sources and avenues of inquiry Mr. Chun pursued in writing "The China Syndrome 2003." What the Commission is not free to do is to force Mr. Chun to reveal his news-gathering and reporting efforts, which is the evident purpose of this subpoena.

CONCLUSION

For the reasons given above, the subpoena directed to Mr. Chun should be quashed.

Respectfully submitted,



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July 28, 2004

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July 28, 2004

Via Federal Express

Annette L. Vietti-Cook
Secretary to the Commission
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Re: *Case No. 1-2003-037*

Dear Ms. Vietti-Cook:

I represent Mr. Rene Chun, a New York-based journalist, who has been issued a subpoena in the above referenced matter. Enclosed please find an original and four copies of Mr. Chun's motion to quash the subpoena. Please direct any inquiries concerning this matter to me or my colleague Richard McKewen, Esq., and please ensure that no one contacts Mr. Chun without my prior approval.

Please let me know if you have any questions regarding this filing.

Respectfully,

David C. Vladeck

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