

Contempt Hearing Held in Response to Reporter

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As we reported in December, reporter David Ashenfelter of the Detroit Free Press refused to answer questions about a confidential source during his deposition in a civil lawsuit. The move was noteworthy because Ashenfelter, who was not a party in the lawsuit, invoked the Fifth Amendment privilege against self-incrimination in refusing to give testimony. His earlier attempt to protect his source under the First Amendment had been rejected by the federal judge presiding over the case.

The grounds for Ashenfelter's invocation of the Fifth Amendment privilege was his fear that he could be prosecuted criminally if his source were revealed. The plaintiff in the lawsuit, who had sued the Justice Department under the federal Privacy Act, contended an unnamed Justice Department official committed a crime when he disclosed information about the plaintiff to Ashenfelter and that Ashenfelter was aiding that crime by refusing to identify the source. The plaintiff does not contend the article Ashenfelter wrote about him was inaccurate, only that the government should not have shared information about him.

At the time, the plaintiff's attorney indicated he was considering asking the court to hold Ashenfelter in contempt for refusing to testify. He in fact did so, and the court held a hearing Wednesday on that motion. The plaintiff's attorney asked that Ashenfelter be fined up to \$5,000 per day and that the Free Press be prohibited from reimbursing Ashenfelter for his payment of the fines.

In recent years, a number of reporters have been held in contempt for refusing to comply with subpoenas, with some incurring substantial fines and others spending time in jail. Highly publicized cases involving contempt sanctions against reporters include the Valerie Plame investigation, the Wen Ho Lee lawsuit, and the Hatfill lawsuit.

In the Hatfill case, USA Today reporter Toni Locy (and others) were subpoenaed in connection with a lawsuit Steven Hatfill -- like the plaintiff in the Ashenfelter matter -- brought under the Privacy Act against government agencies and officials for identifying him to journalists as a "person of interest" in the anthrax investigation. Locy was found in contempt for refusing to reveal her source, but the case settled while that ruling was under appeal.

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At the hearing on Wednesday, the presiding judge heard argument from Ashenfelter's attorney and the plaintiff's attorney. He also requested that Justice Department officials appear and comment on the likelihood that Ashenfelter would be prosecuted for a crime. When asked, these officials told the judge they could not say one way or the other whether Ashenfelter would face prosecution if he testified and revealed his source.

The judge did not rule on the contempt motion at the close of the hearing but rather will issue a written ruling in the coming days. We will monitor closely the outcome in this matter.