Constitutional Law - First Amendment - Right of Newsmen Not to Reveal Confidential Sources of Information to a Grand Jury

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Case Comment

CONSTITUTIONAL LAW-FIRST AMENDMENT-RIGHT OF NEWSMEN NOT TO REVEAL CONFIDENTIAL SOURCES OF INFORMATION TO A GRAND JURY—The Supreme Court has held that in a grand jury setting, a newsman’s status is the same as that of any other citizen and therefore he must respond to subpoena and answer all relevant questions relating to any investigation into the commission of crime.

*Branzburg v. Hayes, 408 U.S. 665 (1972).*

On June 29, 1972, Earl Caldwell,1 Paul Branzburg,2 and Paul Pappas3 had their day in court.4 The issue, according to the majority of the Supreme Court,5 involved the obligation of reporters to respond to grand jury subpoenas, like other citizens, and “to answer questions relevant to an investigation into the commission of crime.” The Court held that newsmen must appear and testify. It overturned no prior High Court rulings, and inferred that it felt the conclusion was consistent with historical first amendment interpretation.7

Briefly, the impact of the *Branzburg* decision can be estimated by considering its possible effect on investigative reporting in general, and the corollary effect on the public’s right to the free flow of information and news.

THE BACKGROUND OF THE DECISION

When faced with testifying before a grand jury, the newsman is confronted with a dilemma. He may tell what he knows, thereby jeopardizing his confidential relationship with his source of information; or he can choose to be cited for contempt and go to jail.8 Of course, any grand

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1. Los Angeles correspondent, New York Times, N.Y., N.Y.
2. Staff reporter, Courier-Journal, Louisville, Kentucky.
5. Id. at 665; see id. at 709 (Powell, J., concurring).
6. Id. at 682.
7. “Congress shall make no law ... abridging the freedom of speech, or of the press. ...” U.S. Const. amend I. The question of whether a newsman has a constitutional right not to disclose his sources of information has not been previously before the Court. Certiorari has been denied three times in the past: Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); Murphy v. Colorado, cert. denied, 365 U.S. 843 (1961); State v. Buchanan, 250 Ore. 244, 436 F.2d 729, cert. denied, 392 U.S. 905 (1968).
8. This assumes that a newsman has been subpoenaed before a grand jury in a jurisdic-
jury subpoena is subject to a motion to quash but *Branzburg* has placed an unduly heavy burden of proof upon the newsman who pursues this line of attack. Justice Powell, in his concurring opinion, read the majority opinion as holding that before a motion to quash is granted, the *reporter* must show that the grand jury lacks probable cause to believe that the information sought bears more than a remote relationship to the crime being investigated. Furthermore, he must also demonstrate to a court that the information, if elicited, would not be of any assistance to the grand jury. The dissenting opinion of Mr. Justice Stewart, on the other hand, would place this *weighty* burden on the shoulders of the *party seeking the testimony*.11

There are no statistics that indicate how many members of the news media reached some kind of compromise with the adverse side in a grand jury setting when a reporter was faced with the choice of responding to, or ignoring, a subpoena. From all indications, the incidence of compromise is high.12 However, case law in this area demonstrates that newsmen have been willing to exhaust their remedies and then go to jail, if necessary, to protect their sources of information, where all attempts to compromise have failed.

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9. 408 U.S. at 708.
10. Id. at 709 (Powell, J., concurring).
11. The dissenting opinion of Mr. Justice Stewart places the burden on the government to show probable cause, lack of alternative means less destructive of first amendment rights, and compelling and overriding interest. *Id.* at 743. The majority, by recognizing that in pursuing the remedy of a motion to quash, the burden of proof is on the newsman, may have all but foreclosed any chance, from the outset, of deciding the case differently on the merits. At least, one could get this impression from the Court's overreliance and blind faith in this single remedy. *See id.* at 708.

> It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interest of the grand jury with the interests of the news media.

In these negotiations...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 news media.

R. Cramton, Assistant Attorney General, addressing himself to this guideline, stated, "Under the guidelines the vast majority of situations of potential conflict between the Department and the press have been satisfactorily resolved by negotiation." *Hearing on Newsmen's Privilege Before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 32 (1972)* (statement of Rover Cramton) [hereinafter cited as *Hearings*].
Case Comment

Any attempt to assert a common law privilege of a right to confidence has never met with success. In most cases, the courts reasoned that the public has a right to every man’s evidence. Others said that there was a common law duty to tell what one knows; still others weighed the public interest in the smooth administration of justice against private considerations and found little or no reason for a privilege.

Perhaps in reaction to the judiciary’s cool reception to assertions of a common law privilege, statutes began to appear in the late nineteenth century that attempted to strike a proper balance between the public’s right to an uninterrupted flow of information and the fair administration of justice. A majority of states felt, as Mr. Justice Douglas expressed in his dissent in Branzburg that “all of the ‘balancing’ was done by those who wrote the Bill of Rights.” At any rate the shield statutes of an absolute nature indicate:

Whether the incidence of compromise will remain high is directly related to the issue of what weight the guidelines will have in a court of law. To this date, in the area of newsmen’s privilege, there is no indication, one way or the other, that the guidelines will be given the effect of law. However, if one were to analogize to other fields of administrative law, for example, one might be encouraged by the strong tendency to give legal significance to such things as guidelines and executive orders.

15. See id. Additionally, an interesting analysis of this area is found in Beaver, The Newsmen’s Code, The Claim of Privilege and Everyman’s Right to Evidence, 47 Ore. L. Rev. 243, 246 (1968) [hereinafter cited as Beaver].
19. Id.
20. 408 U.S. at 713 (Douglas, J., dissenting). Pennsylvania is a typical example. Its shield statute reads in part:
(a) No person, engaged on, connected with, or employed by any newspaper of general
nificantly impair the newsgather-informer relationship because of the uncertainties attending a qualified right.\textsuperscript{21}

Most of the case law that is tied into the first amendment has grown out of jurisdictions that profess to have qualified privilege legislation on the books and those states which have none. Additionally, the federal forum has been generous in providing adjudication which either accepts or rejects, on first amendment grounds, a qualified privilege. Where there is only "judge-made" law on the subject of qualified privilege, it must be kept in mind that the Supreme Court has now spoken. As to legislation already enacted by state legislatures, or to be enacted in the future, the Court upheld its validity.\textsuperscript{22}

The first time that a privilege was asserted under the first amendment was the 1958 case of \textit{Garland v. Torre}.\textsuperscript{23} In order to be successful
in a defamation suit against the Columbia Broadcasting System, Judy Garland needed the identity of a CBS executive who allegedly made libellous remarks to Marie Torre, a writer for the New York Herald Tribune. Miss Torre published these remarks and subsequently refused to answer, at a deposition, any questions relating to the identity of her source. When the district court ordered her to divulge the name of her source and she again refused, the court found her in contempt. This ruling was affirmed on appeal. As to the defense of freedom of the press, Judge Stewart (later to become Mr. Justice Stewart) observed that an attempt to compel disclosure may well infringe on press freedom;\(^{24}\) nevertheless, since the identity of the defendant's source is at the "heart" of the plaintiff's claim, "the paramount public interest in the fair administration of justice," should prevail.\(^{25}\) Miss Torre went to jail for ten days, which in all probability, convinced her sources of other confidential communications that she could be trusted in the future. This "heart of the matter" test, as it has been popularly labeled,\(^{26}\) was an attempt by Judge Stewart to strike a proper "balance" between the first amendment and the orderly operation of the machinery of justice. The test, however, is incomplete. Suppose that this "anonymous" CBS executive, in addition to confiding to Miss Torre, also permitted the allegedly libellous information to slip out at an office meeting. Assume further that after the article was published, an office employee of CBS went to Miss Garland and verified, after being promised he would not be subpoenaed, the fact that the statements were actually made. True, the identity of the person making the statement goes to the heart of a subsequent lawsuit, for without it, no suit could be entertained. However, in this situation, it is unnecessary to subpoena the reporter because the information is easily obtainable elsewhere. Under Judge Stewart's "heart of the matter," test, however, the reporter is still forced to testify, when the interests are balanced, therefore affording the press no real protection from first amendment encroachment.\(^{27}\)

Using *Torre* as support for its decision, the Supreme Court of Hawaii, in 1961, held that it is not a violation of the first amendment to compel a newsman to disclose the identity of his source of information if it is likely that the information sought is relevant to the issues being considered.\(^{28}\) As in *Torre*, the court recognized that the reporter's constitu-

\(^{24}\) 259 F.2d 545, 548 (2d Cir. 1958).

\(^{25}\) Id. at 549.

\(^{26}\) See generally Notes cited in note 23 supra.

\(^{27}\) However, as part of a three-pronged test, the worth of the "heart of the matter" test can be seen. See note 37 infra.

tional rights were being infringed. Nevertheless, the court felt that the reasonable likelihood of the evidence assisting the plaintiff in her case outweighed any first amendment rights that the reporter could assert.

The Court of Appeals for the Second Circuit and the Hawaii Supreme Court recognized that the first amendment arguments of press freedom and free flow of news were worthy of consideration. This in itself was a step in the direction toward the creation of a privilege, although each court felt, in the cases before it, the first amendment encroachment could be tolerated.

In sharp contrast to the apparent weakness inherent in the above-mentioned tests, the Court of Appeals for the Ninth Circuit promulgated a strong law. During a time when government was flexing its muscles, many saw the decision of the Ninth Circuit in *Caldwell v. United States* as a guiding light for other courts to follow. The Court of Appeals for the Ninth Circuit held that newsmen did not have to appear or testify before a grand jury, unless the government could first show a compelling need for his testimony which cannot be served by alternative means. After balancing the loss of the grand jury's ability

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29. *Id.* at 329, 367 F.2d at 480.
30. This has been referred to, by at least one commentator, as the "Reasonable Likelihood" test. *See* Yale Note, *supra* note 21, at 322. Unfortunately, it suffered from the same deficiency as the "heart of the matter" test, *i.e.*, incompleteness.
31. 434 F.2d 1081 (9th Cir. 1970).
32. A *New York Times* editorial in November, 1970, was typical of the reaction of the Fourth Estate to the *Caldwell* decision:

> The decision of the United States Court of Appeals in San Francisco requiring the Government to show a “compelling need” for a journalist’s evidence before ordering him to testify in secret grand jury hearings gives new protection to essential press freedoms that are particularly vital in times of widespread protest and dissent.

The Ninth Circuit ruling gives realistic recognition to the public stake in keeping informed about the plans, philosophy and activities of such revolutionary groups as the Black Panthers through channels that go beyond propaganda statements. Access to such information is jeopardized when these groups, inherently distrustful of the “establishment,” are made to fear that newsgatherers in whom they have confided can be called behind locked doors and forced to turn state informer.

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33. 434 F.2d 1081, 1089 (9th Cir. 1970). In Application of *Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970), the district court refused to quash the subpoena; however, it did issue a protective order stating that Caldwell did not have to answer questions concerning his sources of information “until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means.” The court of appeals agreed with the terms of this privilege. *See* 434 F.2d at 1086. However, the court of appeals, in an attempt to reaffirm this general principle, while at the same time extending it to the petitioner’s right not to appear, made no mention of alternative means:

> ... we hold that where it has been shown that the public’s First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness’s presence before judicial process properly can issue to require attendance.

It is unclear, to this writer, whether the court of appeals felt that the phrase “compelling need” was to be interpreted broadly so as to include “alternative means” or whether it
to administer justice against the "societal interest served by freedom of the press—the public's right to information," it reasoned that the first amendment provided a qualified privilege. Petitioner Caldwell stressed that he was dealing with a very sensitive group, and that he could not tell the grand jury any more than what he had already published, due to a protective order granted by the district court, and, hence, the likelihood of impact on his ability to continue his investigative reporting would be substantial if he were made to appear. The court answered:

[I]f this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren performance—one of no benefit to the grand jury. To destroy appellant's capacity as a news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the first amendment freedoms that are jeopardized.

If any competing public interest is ever to arise in a case such as this (where first amendment liberties are threatened by mere appearance at a grand jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the grand jury.

The court emphasized that its holding was a narrow one. By stating that "[i]t is not every news source that is as sensitive as the Black Panther felt that, in regard to "appearance," "compelling need" without "alternative means" would be a sufficient showing. It appears, from Judge Jameson's concurring opinion, that the court probably intended "compelling need" to encompass the entire test promulgated by the district court. See Yale Note, supra note 21, at 325. See also State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971) (buttresses this conclusion).

34. Nelson, supra note 18, at 672.
36. Affidavits filed with the district and circuit courts.
37. 434 F.2d 1081, 1089 (9th Cir. 1970) (emphasis added). The Court's test laid the groundwork for a three-pronged test urged by Mr. Justice Stewart, in his dissent in Bransburg:

[T]he government must (1) show that there is probable cause to believe that the newsman has information which is clearly of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information. 408 U.S. at 743. It was at this point in his dissenting opinion that Mr. Justice Stewart took pains to point out that this test was not wholly inconsistent with the "heart of the matter" test, promulgated by him in Torre, fourteen years previously:

The Court of Appeals for the Second Circuit declined to provide a testimonial privilege to a newsman called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: "It is to be noted that we are not dealing here with the use of judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality ... The question asked ... went to the heart of the plaintiff's claim ... (citations omitted).

Id. at 743 n.33. See also notes 11 & 27 supra.
38. 434 F.2d 1081, 1090 (9th Cir. 1970).
Party has been shown to be respecting the performance of the ‘establishment’ press” and the unique position that Caldwell occupied, it severely limited the impact of the decision.

Reaction to the decision by other courts was swift and, for the most part, uniform. Paul Branzburg asserted the constitutional argument of press freedom, relying heavily on Caldwell. The Kentucky court found Caldwell distinguishable and refused to follow suit. Massachusetts likewise expressed doubts concerning the soundness of the Caldwell holding. It rejected any idea of a constitutional privilege to refuse to appear and testify before a grand jury. It felt that there were sufficient safeguards, outside the Constitution to protect the press. Necessarily, therefore, the burden of proof was still on the newsman to “establish that the grand jury inquiry is improper.”

Although the constitutional right of a qualified privilege was recognized by Wisconsin in State v. Knops, it was not surprising that the court refused to apply it to the facts of the case. Knops, editor of an underground newspaper, refused to disclose to a grand jury the sources of information that he used in printing a story on the bombing at the University of Wisconsin. It was clear from a reading of the story that Knops' information was critical and lives could possibly be saved if the sources of the information were disclosed. The court admitted that its decision would have a chilling effect on the flow of information to the public but felt the need to protect innocent persons, in all cases, was an overriding factor.

The large increase in the amount of subpoenas issued by federal grand juries, and the noted recalcitrance of the press to comply, led to the issuance of the Attorney General's guidelines in August, 1970. Idealistically, they can be looked upon as an attempt to “accomodate the competing constitutional and social interests” between press freedom and the orderly administration of justice. However, a close look at

39. Branzburg v. Meigs, No. W. 29-71 (Ky. Jan. 22, 1971). The court felt that Caldwell could be distinguished on two grounds: lack of evidence presented by Branzburg to show that his appearance would tend to affect his newsman-source relationship and the lack of a showing that the information Branzburg had was protected, thereby making an appearance by him a futile exercise. For an analysis see Nelson, supra note 18, at 673-74.
41. Id. at 303.
42. Nelson, supra note 18, at 675.
43. 49 Wis. 2d 647, 183 N.W.2d 93 (1971).
44. The paper was Kaleidoscope and the story was entitled “The Bombers Tell Why and What Next . . . .” For an analysis see Nelson, supra note 18, at 675-76.
45. 49 Wis. 2d at 657-58, 183 N.W.2d at 99.
46. See note 13 supra.
47. Hearings, supra note 12, at 31.
the guidelines is in order before one can make a realistic appraisal of their effect.

**DEPARTMENT OF JUSTICE GUIDELINES**

Basically, the first guideline acknowledges that "compulsory process in some circumstances may have a limiting effect on the exercise of first amendment rights," and this must, in all instances, be weighed against the public's interest in the fair administration of justice. Without exploring the other provisions of the guidelines, one thing is immediately apparent. The Attorney General, who occupies what can be fairly characterized as an adversary position, has decided that he shall be the one to hold the scales when this balancing is done.

The guidelines go on to provide for the seeking of information by "reasonable" alternative means before resorting to subpoena. Whether the word "reasonable" refers to all methods that are "less destructive of first amendment rights" is unclear. The guidelines, as worded, give no indication how far the government will go in the process of independent investigation before they will abandon such a route and request a subpoena. After all, it may cost thousands of dollars to embroil the FBI or another security organization in an investigation that could be considered worthless when compared with the cost, in dollars, of bringing a newsman before the grand jury. Further on, the guidelines restate the principle of using alternative means:

C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

As can be seen, the word "reasonable" is missing from the above principle. Whether this connotes an intention on the part of the govern-

49. *Id.*
50. This inherent weakness, *i.e.*, one of the two conflicting parties formulating "guides" and setting itself up as the ultimate arbiter, would be equally applicable to the American press, if they had decided to take the initiative. In effect, this was accomplished by the American Newspaper Guild in 1934, when they gave notice to the government that the Guild considered its members ethically bound not to disclose sources of information. See generally Guest & Stanzler, *supra* note 11, at 29.
53. The Assistant Attorney General states flatly that no subpoena will be sought unless "the information is not available from non-press sources." See note 47 *supra*. If this is the case, one questions the noticeable lack of pursuing alternative means before issuing a subpoena in the *Caldwell* instance. See 408 U.S. at 749 n.40 (Stewart, J., dissenting).
ment to exhaust all remedies, no matter what the "pocketbook" cost, is, again, a matter of interpretation.\textsuperscript{55}

The next two guidelines establish a negotiation procedure, in which both sides air their views.\textsuperscript{56} In addition, they emphatically divest anyone but the Attorney General of the power to request subpoenas.

The fifth and final guideline is the most important. In much detail, it outlines the principles which shall control the Attorney General's decision either to request or not to request the issuance of a subpoena. A "de facto" qualified privilege emerges from this provision.\textsuperscript{57} The government must show that independent evidence warrants the belief that a crime has occurred. Secondly, there must be sufficient cause to believe that the reporter has within his possession, essential information that goes to the crux of the claim of guilt or innocence. Furthermore, all attempts to obtain the information from other sources must have been unsuccessful before the press, as a source, will be considered. Thus, there are elements of the "heart of the matter" test,\textsuperscript{58} probable cause, compelling need, and the exhaustion of alternative means.\textsuperscript{59} Unlike

\begin{itemize}
  \item[55.] See note 53 supra.
  \item[56.] Guidelines, supra note 12 (third & fourth provisions).
  \item[57.] The fifth provision reads:
  
  In requesting the Attorney General's authorization for a subpoena, the following principles will apply:
  \begin{enumerate}
    \item[A.] There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigation.
    \item[B.] There should be sufficient reason to believe that the information sought is essential to the successful investigation particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.
    \item[C.] The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.
    \item[D.] Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.
    \item[E.] Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.
    \item[F.] Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.
    \item[G.] In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.
  \end{enumerate}

  \item[58.] Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).
  \item[59.] See 408 U.S. at 743 (Stewart, J., dissenting).
\end{itemize}
the qualified privilege espoused by the dissenters in Branzburg, however, the scope and extent of the privilege granted by the Attorney General is severely limited in two respects. First, the final paragraph of the fifth section contains a "savings clause" which all but defeats the alleged intent of the guidelines to accommodate both the interests of the government and the press. Because the Attorney General has the final "say" on a request, it follows that their application can be discriminatory. By its terms, the "savings clause" is subjective and prone to different interpretation by different people.

Secondly, and perhaps more importantly, as guidelines promulgated by the Department of Justice, they lack legal efficacy and finality. As noted, there can be no guarantee of uniform application when the Attorney General does not have to answer to any judicial body concerning his interpretation of the guidelines and similarly, there can be no permanence when administrations and "attorneys general come and go." It is no answer to respond to this argument by noting that a statutory privilege is also subject to non-uniform application, since, at the very least, judges are bound to administer justice within the four corners of the statute, their digressions being subject to judicial review.

Additionally, it is axiomatic that there are situations in which the government will not be involved. The guidelines provide no assistance in the area of private litigation.

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60. See note 57 supra (final clause). Also, consider this exchange of views between Representative Kastenmeier and Assistant Attorney General Cramton:

Mr. Kastenmeier: I would think that that paragraph would not give you a very good feeling of security about what might happen, whether we are in an emergency or not in an emergency.

Mr. Cramton: I can understand that this qualification, put in out of bureaucratic caution, would tend to give rise to some concern. On the other hand, I do not know of a single instance in which there has been such an emergency or a departure from the guidelines since they have gone into effect in August of 1970.

Mr. Kastenmeier: This subcommittee had a measure before the last year, involving the repeal of title II of the Internal Security Act. It has been argued that the Federal Government had not, in recent years, had recourse to putting people into detention camps. Nonetheless, Congress felt that it was desirable to remove the legal possibility of such an act, partially to allay fear among American citizens. Doubtless we shall hear from the news gatherers, that while guidelines do exist something more is needed by way of reassurance. Hearings, supra note 12, at 35.

61. See note 57 supra.

62. Robert Finchberg, Chairman, Freedom of Information Committee, American Society of Newspaper Editors, appearing before House Subcommittee No. 3, states, "[A]ttorneys-general come and go. The guidelines do not have the force of law and they could be modified, limited and abandoned at any time." Hearings, supra note 12, at 50. See also Yale Note, supra note 21, at 323-24.

63. Hearings, supra note 12, at 50.

64. See, e.g., Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).
The Supreme Court Decision

The court, in examining statutory law, prior adjudication and the Attorney General's guidelines, when it decided to pass on the matter of a newsman's constitutional right not to divulge confidential sources of information to a grand jury, had three options open. Initially, it could have established an absolute privilege. Alternatively, some form of qualified privilege could have been promulgated. Finally, the Court could have rejected the first amendment argument. It rejected any privilege on its belief that an absolute or qualified privilege would unduly hamper the administration of justice, and at the same time, equally infringe upon the free flow of information.

The Court's holding on the first amendment issue is straightforward:

On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

This writer does not question the importance of the grand jury. What is questioned, however, is the balancing of the role of the grand jury against the burden on news gathering in order to arrive at a holding so absolute in nature. If it be conceded that the two public rights which are involved here, i.e., the public's right to the free and uninterrupted flow of information, and its right to "everyman's evidence," are always going to conflict in the area of forced disclosure of confidential sources and information, it follows that an absolute rejection of a privilege is inappropriate. While the free flow of news is a general precept, not

65. See generally 408 U.S. at 665-707.
66. Of course, initially the Court could have denied certiorari, but this was just not possible when the ideological make-up of the Court is considered in the timely nature of the issue and the great divisions of opinion throughout various jurisdictions. See generally Barron, Does the Public Have a Right to Everyman's Evidence or Should Newsmen be Exempt, 1 STUDENT LAW. 8 (No. 4, Dec. 1972) [hereinafter cited as Barron].
67. 408 U.S. at 690-91. Although mention is made to "criminal trials," the import of the decision seems to extend only to the grand jury setting, since, in the cases before the Court, the right to compel the appearance or testimony of newsmen in front of a grand jury was solely at issue. The Court states:

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.
Id. at 682.
68. The majority continuously refers to balancing the right of the press to gather news against the right of the public to every man's evidence (fair administration of justice). However, it is the position of most experts that it is not "news gathering" that rests on
subject to *ad hoc* considerations save in the interest of national security, the policy of compulsory disclosure and the public's interest in the grand jury's function concerning the fair administration of justice, on the other hand, would seem to vary with the circumstances. The Supreme Court has historically balanced first amendment interests "in each particular case." Depending on the circumstances, the public interest may be inhibited, rather than promoted, by applying absolute standards as the Court requires. In those states that have heretofore required circumstantial evaluation, there is no evidence that the system has suffered.

The Court refused to consider granting a qualified privilege, circumscribed by the requirement of compelling need, because of the inherent difficulty in applying such a rule. Furthermore, it reasoned that any possible deleterious effect on an informant's willingness to disclose to a newspaper confidential information would be the same whether a qualified privilege was granted or withheld. In support of this argument, it excerpts a portion from a recent law review article. Unlike the Court, however, the writer of that article was attempting to support an argument for an *absolute* privilege at the grand jury level. When the Court rejects any notion of a privilege, the deterrent effect cannot be anything but far reaching. Newsmen and informants are told that they can never assume that disclosure will be subject to protection. In fact, a conclusive presumption is created; a rule of law is laid down that the newsman and the informant will forever be subject to grand jury scrutiny. Conversely, the presumption, when dealing with a qualified privilege, is in favor of the newsman not having to disclose his source of information unless and until certain things can be proven. Unquestionably, there shall be some deterrence by placing into the

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71. Guest & Stanzler, *supra* note 11, at 37.
72. Id. at 38.
73. 408 U.S. at 702-03.
74. Id. at 702.
75. Id. at 702-03 n.39.
hands of individual judges the right to appraise, on an ad hoc basis, the claim of privilege. Equally certain, however, is the conclusion that this deterrent effect will be miniscule in comparison to that which shall now assuredly flow from the Court's holding.76

The difficulty in delineating the term “newsman” or in attempting to draw guidelines of a nondiscriminatory nature is real but hardly insurmountable.77 Thus far, seventeen states have been able to establish workable definitions.78 Similarly, the Supreme Court could have formulated a definition that would have easily satisfied all competing interests.79

As to the Court's argument that the creation of “sham newspapers” may become a problem,80 suffice it to say that statutes have been carefully drawn in this area that appear to have effectively delimited their application. What may remain, in rare instances, is a requirement of a court “to make some delicate judgments” of a factual nature,81 but, in any event, this hardly militates for an absolute rejection of any first amendment privilege.82

POSSIBLE EFFECTS OF THE DECISION: ANALYSIS

Basically, proponents of a qualified or absolute privilege trace the first amendment argument as follows: the first amendment implies that a certain source of news, specifically the informant, has a right to be protected, since he is part of the “news gathering” process; consequently, the right to protect these sources of information for the public good emerges, since, if the source is not protected, the flow of news to the public will be severely impaired.83 Now that the Supreme Court has denied the existence of a constitutional right of privilege, the issues of sources “drying up” takes on new significance.

The flow of news to the public in a state such as Pennsylvania, which recognizes a newsmen's privilege may have once been compatible

76. See note 21 supra.
77. 408 U.S. at 704. See also Yale Note, supra note 21, at 365 (rule promulgated which is similar to that contained in most privilege statutes).
78. See note 17 supra. Pennsylvania, for example, limits the privilege to a person: . . . engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news . . . .
79. See generally Guest & Stanzier, supra note 11, at 40, 41 (discussions of workable definitions and conflicting interests); Yale Note, supra note 21, at 365.
80. 408 U.S. at 705 n.40.
81. Id. at 745 (Stewart, J., dissenting).
82. Id.
83. Id. at 732-33. See also Barron, supra note 66, at 10; Yale Note, supra note 21, at 326-38.
with that of a state such as Oregon, which has never accepted the notion of press privilege. However, with the advent of the *Branzburg* decision, this cannot continue. *Branzburg* has successfully foreclosed any judicial determination that the first amendment should protect a newsman from disclosing his sources of information. Prior to this decision, the argument could always have been made that a state court had misconstrued the Constitution at sometime in the past. Whereas the first amendment could have been relied on to provide a healthy battleground in a state that has never considered the issue, it can no longer provide the framework for litigation. Future surveys, therefore, should show a marked disparity between those jurisdictions which have privilege legislation and those that have none.

Of course, it will remain impossible to survey the informants themselves. But it is only logical to assume that sources are going to be less loquacious. In the past, informants could gauge whether or not to divulge information to a reporter depending on what the courts around him were forcing the reporter to disclose. Presently, however, it is a foregone conclusion that if the subject matter is important enough to merit a grand jury probe, a reporter and his notes will be subpoenaed. The reaction of informants, therefore, is highly predictable.

Even the majority opinion recognized that the "argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational ... ;" nevertheless it goes on to state that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." This statement fails to take into account the inevitable impact of the Court's own holding that newsmen must now appear and testify, whereas in the past, it was, for the most part, an open question.

The frequency of newsmen being called to testify will now increase drastically, thereby further inhibiting the newsman-informant relation-

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85. 408 U.S. at 694. See also id. at 735-36 (Stewart, J., dissenting).
86. Contrary to the position taken by some commentators, primarily Beaver, informants are aware of changes in the law and the flow of important news is directly related to their willingness to talk with reporters. See Hume, *supra* note 8, at 78-79 (remarks of Earl Caldwell, Jack Anderson & Jack Nelson). See also Yale Note, *supra* note 21, at 330-34 (factual and empirical analysis that conclusively rebuts Beaver's premise).
87. 408 U.S. at 693. It should be noted that this concept is much less speculative than the Court's indulgent hypothetical situation—"sham newspapers." See id. at 705 n.40.
88. Id. at 693-94. It should be noted that this concept is much less speculative than the Court's indulgent hypothetical situation—"sham newspapers." See id. at 693-94.
ship. Previously, newsmen usually escaped from testifying because courts and prosecutors, mindful of the role of the press in the American scheme, were willing to forgo the issuance of a subpoena after negotiation with the newsmen, i.e., after discovering how much light a reporter was willing to shed on the issue at hand. With Branzburg removing any bargaining power that once existed, there is little to prevent a district attorney from requesting the issuance of a subpoena indiscriminately.

Likewise, this writer must agree with the two dissents in Branzburg concerning the likelihood of grand jury proceedings becoming more frequent, resulting in a large percentage of "fishing expeditions." Although the concurring opinion of Mr. Justice Powell leads one to believe that a grand jury should be wary of declaring "open season" on reporters, there is little in the majority opinion to suggest that "a meaningful 'probable cause' requirement" should be applied before subpoenaing a newsmen.

From the above, it is evident that the fear of newsmen becoming prosecutorial arms of the state is real and cannot be easily avoided. The traditional role of the American press may have been weakened beyond repair by this decision, for it appears that not only did the court succeed in cutting off news and information at its source, but it possibly has frightened a sufficient number of editors and investigative reporters into "burying" stories rather than risk the arm of subpoena. Regardless of who decides that a story will not be aired, the informant, deciding not to give his information to the newsmen, or the newsmen, deciding the risk to his source outweighs the writing of the story, it is the public that will ultimately suffer. By forcing the newsmen to disclose the source of his information in a grand jury probe in one area of interest, the Court has in all probability foreclosed any chance of a similar story ever being uncovered and disclosed by the press at some future time in some other area of public interest. This, in turn, results in a hinderance, rather than an aid, to the administration of justice, the paramount concern of the majority.

89. See note 12 supra. See also Guest & Stanzler, supra note 11, at 48.
90. 408 U.S. at 719 (Douglas, J., dissenting); Id. at 744 (Stewart, J., dissenting).
91. Id. at 709-10 (Powell, J., concurring).
92. Id. at 744 n.34 (Stewart, J., dissenting).
93. Id. at 725.
94. Id. at 723-25 (Douglas, J., dissenting).
95. Id. at 724.
96. Id. at 746 Stewart, J., dissenting).
97. Id. Mr. Justice Stewart recognizes this all too clearly, referring to it as the "sad paradox of the Court's opinion."
The question of whether *Branzburg* will be extended beyond the point of grand jury inquiry is basically rhetorical. The Court selected the strongest facet of the adjudicatory process which carried with it the strongest arguments for the creation of a constitutional privilege—the grand jury—and rejected any notion that a constitutional privilege does or should exist. Therefore, the chances of any type of privilege attaching to criminal or civil trials has been effectively foreclosed.

The grand jury has, in the past, been singled out by commentators who have argued for some form of testimonial privilege for newsmen. Most refer to the grand jury's historically broad scope. Its broadness stems from the fact that it is not bound by strict rules of evidence. Additionally, it possesses a general investigatory right, as opposed to the restriction of investigating specific conduct or specific individuals. These aspects strengthen the argument for an absolute or qualified privilege at the grand jury level. Furthermore, it should be noted that anyone who enters the grand jury room, enters without the benefit of counsel at his side.

On the other hand, in a criminal trial, if a defendant requires the name of a newsman's informant, there are stronger reasons supporting disclosure, mainly the defendant's sixth amendment right. Likewise, in a civil context, the law of defamation, it can be argued, would be decimated by insulating the press from process when it is the press itself that is being sued. Both of these arguments should be examined more closely, however, because of the plethora of federal legislation that has been proposed in lieu of the holding in *Branzburg*.

A criminal defendant cannot compel the government to disclose the identity of an informant unless the defendant can demonstrate to the court that the identity is a crucial element of his defense. The justification for this privilege is the public interest in effective law enforce-

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98. See, e.g., Columbia Note, supra note 18, at 862; Yale Note, supra note 21, at 348-49.
100. Yale Note, supra note 21, at 348.
101. Id.
102. For an interesting discussion that points up possible fifth amendment problems as well as infringement of a defendant's sixth amendment right to compulsory process see Columbia Note, supra note 18, at 862-63. See also Guest & Stanzler, supra note 11, at 50-51.
103. See Columbia Note, supra note 18, at 862.
104. At least twenty bills were introduced by the time Subcommittee No. 3, Committee on the Judiciary, met to consider the impact of *Branzburg* and proposed legislation on the subject of newsmen's privilege. The Senate Subcommittee on Constitutional Rights, Committee on the Judiciary, has heard testimony on a least thirteen bills as of this writing. See Hearings, supra note 12, at 79-80.
ment. Similarly, the public interest in the free flow of news should be sufficient to require some showing by a defendant of compelling need before a newsman could be required to disclose the identity of his source. If a prosecutor desires a newsman's testimony, a similar test should be applied, since there are policy considerations that strongly militate against freeing an accused because of the obstinance of a third party.

Realistically, the only time that the press can be sued civilly in its official capacity is for defamation. Words that relate to public officials, public figures, or matters of public concern must be shown to have been published with knowledge of their falsity or with reckless disregard of whether they were false. This test, first applied in the landmark decision of *New York Times Co. v. Sullivan*, has, for the most part, insulated the press from liability for defamation in order to protect the "free flow of news" to the public.

There are instances, however, where the newsman publishes material that leads to a lawsuit between two private litigants. Suddenly, one of the parties feels that he cannot make out a case or defense unless the newsman can be forced to disclose more information or the identity of his source. Applying the same test as has been promulgated for the criminal trial, the newsman should not be forced to disclose anything until a plaintiff or defendant can show compelling need for the information that overrides any first amendment infringement on press freedom and the public's right to know.

106. *Id.* at 59.
107. If the defendant can show such a need, his sixth amendment right would necessarily outweigh any first amendment interest that the newsman might claim. This is consistent with the dictates of *Roviaro*, that held that the right of an individual to property prepare his defense is not absolute, but, in this type of situation, is subject to being balanced against "the public interest in protecting the flow of information." *Id.* at 62. See generally Guest & Stanzler, *supra* note 11, at 50-51.
108. Society, it can be said, has as much of a stake in sending a dangerous person to jail as it does in setting an innocent man free. Therefore, in my opinion, to draw a distinction between a defendant's right and a prosecutor's right to a newsman information cannot be supported to any appreciable extent. *But see* Guest & Stanzler, *supra* note 11, at 50-51; Columbia Note, *supra* note 18, at 863.
The above considerations, it appears, will not be controlling when the matter of extending the privilege beyond the grand jury is finally litigated, since the argument for the constitutional privilege at the grand jury level is more persuasive than a similar argument for a trial-level privilege. The Court has already decided to reject the stronger argument.

THE LEGISLATIVE ALTERNATIVE

Legislation presently on the books is, for the most part, insufficient to cope with the problems which are sure to arise in the future. Kentucky's shield law was twisted in order to cope with the grand jury's interest in Paul Branzburg. Peter Bridge, a newsman, was jailed for contempt under the guise of falling outside the penumbra of the New Jersey "absolute" shield law. Similarly, the California shield law was held not to apply to William Farr, a reporter who printed material concerning the Manson trial, which he obtained through an inside, confidential source. Ten years ago, the Pennsylvania Supreme Court refused to budge on the absolute scope of its shield law. Although today it is possible that the Pennsylvania statute would be given the same interpretation, it is unlikely because of the Supreme Court's holding that other interests, primarily the administration of justice, override any first amendment considerations. At the very least, this notion will have an impact on the state court's interpretation of its own legislative history.

The bills currently being considered by the Congress, run the gamut from weak and qualified to strong and absolute. Paralleling state

115. See note 20 supra.
117. Farr has been released by Mr. Justice Douglas, from serving his indefinite "sentence" pending the outcome of a decision of whether habeas corpus was properly denied by the district court which refused to consider the reporter's claim that the California statute of limitations in the criminal contempt area should be applied to his civil contempt conviction. Farr v. Pitchess, 93 S. Ct. 573 (Douglas, Circuit Justice, 1973).
120. For an example of the latter type, consider the following bill, introduced by Representative Waldie on July 20, 1972:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a person connected with or employed by the news media or press cannot be required by a court, the legislature, or any administrative body, to disclose before the Congress or any other Federal court or agency, any information or the source of any information procured for publication or broadcast.

H.R. 15972, 92d Cong., 2d Sess. (1972) [hereinafter cited as H.R. 15972]. Note, however, that this bill does not attempt to protect newsmen who are subpoenaed before state agencies or courts. Hence, by some, the bill could be considered qualified in nature, even though it extends absolute protection within the dimensions of the federal sphere.
statutes, most of the proposed legislation extends beyond the grand jury to the courts.\textsuperscript{121} If one considers constitutional conflicts which will arise because of the all-encompassing nature of proposed legislation, the legislation itself becomes constitutionally suspect.\textsuperscript{122} Therefore, the Congress might give the courts an opportunity to strike down all previously enacted shield legislation by innocently passing a law that ignores all other amendments but the first.

Thus, Congress should act diligently to pass a decisively formulated shield law, keeping in mind the constitutional rights of those who will eventually require, in the rare instance of overriding need, information of the type that the statute is generally designed to protect. If this can be done through an extremely narrowly drawn qualified privilege,\textsuperscript{123} all the better; if not, the only answer may be the creation of an absolute privilege. Whether such a statute could withstand constitutional attack appears uncertain, considering the presently "divided" court. If it does not, however, perhaps the Court, in holding the statute unconstitutional, would at least supply some guidelines within which the Congress could constructively devise fruitful legislation.

\textbf{CONCLUSION}

From all indications, the \textit{Branzburg} decision has dealt a severe blow to investigative reporting. Thus, it follows that the public will not be served to the fullest extent possible. The press informant, for the most part, will now be unwilling to disclose to newsmen important information that the public should receive. Therefore, the newsman will hopefully confront the dilemma as a challenge. Until meaningful legislation can be passed, the public's right to an uninterrupted flow of information will depend upon the newsman's steadfast refusal to divulge his sources, even if it means an indefinite jail sentence. Only then will the source feel secure enough to emerge from his place of hiding and assume again, a significant role in helping to present important news to the public.

\textsc{Ronald Carl Weingrad}

\textsuperscript{121} Compare, H.R. 15972, supra note 120, with PA. STAT. ANN. tit. 28, § 330 (Supp. 1972).
\textsuperscript{122} See pp. 674-75 supra.
\textsuperscript{123} Representative Whalen, in H.R. 16527, 92d Cong., 2d Sess. (1972), proposes to create a qualified privilege that is restrictive of first amendment rights only after a clear and convincing showing, by the party seeking disclosure, of relevance and probable cause, lack of alternative means, and compelling national interest. It, therefore, is identical with the test promulgated by the dissent in \textit{Branzburg}, set forth at note 37 supra. For this reason alone, if the Whalen Bill becomes law, it stands a good possibility of passing constitutional muster.