

Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen

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AFTER Senator Sam J. Ervin, Jr. had spent two months presiding over hearings on Senate bills to create a testimonial privilege for newsmen, he commented that he had never dealt with any more difficult issue in the years he had been in Congress.¹

The issuance of subpoenas to newsmen raises many questions, and it would be foolish for any author of an article to assume that he could answer them all. Indeed, if there is any solution to the problems presented by subpoenas, it is to let them be resolved on a case-by-case basis so that, in effect, a common law of subpoenas may develop. In time, this evolutionary process of the law may assist us in answering these questions.

Perhaps this is what Justice Powell had in mind when he wrote in his concurring opinion in *Branzburg v. Hayes*:²

The asserted claim to [a newsman's] privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.³

I say "perhaps" because Justice Powell's opinion is singularly opaque, albeit the key to the five to four decision in the *Branzburg* case. This article will dissect that case, and particularly Justice Powell's concurring opinion, in an effort to articulate the qualified newsman's privilege actually favored by a numerical majority of the Court. An analysis of post-*Branzburg* decisional law will follow, illustrative of the growing

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1. *Hearings on S. 36 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., at 387 (1973).

2. 408 U.S. 665 (1972).

3. *Id.* at 710 (Powell, J., concurring).

body of cases from which the Court will be able to draw when it is confronted again with the qualified privilege issue.

Branzburg v. Hayes

The Branzburg Cases

Branzburg v. Hayes arose out of two stories written by Paul Branzburg, a reporter for the *Louisville Courier-Journal*. The first was about the making of hashish, illustrated with a picture of the hands of a person doing so. The second story discussed the use of drugs in Frankfort, Kentucky, and described numerous conversations with unnamed drug users.

On the basis of the stories, Branzburg was subpoenaed by two separate grand juries. In the first case, he refused to say who he had seen making the hashish. Ruling on Branzburg's appeal of a lower court order that he answer the grand jury's questions, the Court of Appeals of Kentucky held⁴ that the state statute⁵ which protects newsmen from having to reveal sources does not protect persons who witness the commission of crimes.⁶ The court therefore required Branzburg to testify.

In the second case, Branzburg refused both to disclose the names of those persons who had told him drugs were being used in Frankfort, and to reveal other information given to him in confidence. The lower court granted Branzburg a protective order so that he would not have to testify as to his sources, but required him to appear to claim the privilege. Branzburg had argued that he had a First Amendment privilege not to appear at all before the grand jury, since once he went into the grand jury room there was no way for his sources to know whether or not he was testifying as to confidential information. Contempt proceedings were brought, and the Kentucky Court of Appeals denied a petition for prohibition and order that the subpoena be quashed.⁷

4. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1970).

5. "421.100. Newspaper, radio or television broadcasting station personnel need not disclose source of information.

"No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the general assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected." KY. REV. STAT. § 421.100 (1969).

6. *Branzburg v. Pound*, 461 S.W.2d 345, 347-48 (Ky. Ct. App. 1970).

7. *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. Ct. App. 1971).

Branzburg sought review of both cases in the United States Supreme Court.

Succinctly, then, the issue raised in the first case (*Branzburg I*) was whether a reporter who had witnessed a crime could, under the First Amendment, be required to testify before a grand jury as to what he had seen. The issue in the second case (*Branzburg II*) was whether a reporter could be required to appear before a grand jury in order to claim a privilege against such testimony.

The Caldwell Case

Branzburg II raised the same question as *Caldwell v. United States*,⁸ which was consolidated with it for decision by the Supreme Court. Earl Caldwell was a black reporter who had been assigned by *The New York Times* to cover the activities of the Black Panthers on the West Coast. He had been sent to take the place of a white reporter who had been unable to develop an appropriate relationship with the Black Panthers. Caldwell had interviewed Black Panthers at their headquarters and had written sixteen articles about them during 1969.⁹ One of his interviews was with David Hilliard, a Black Panther leader, whom Caldwell described as having said that he wished to kill President Nixon.

Caldwell was first served with a subpoena duces tecum by the grand jury which asked him to bring with him to the grand jury hearing all of his notes and recordings relating to his interviews and conversations with the Black Panthers.¹⁰ After Caldwell and *The New York Times* objected to the scope of the subpoena, the government withdrew it and substituted a second one, which required Caldwell to appear before the grand jury and to testify as to his conversations with the Black Panthers.¹¹

8. 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

9. Brief for Respondent Caldwell at 4, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

10. Caldwell suspected that the conversations at the Black Panther's headquarters had been wiretapped. He argued at both the district court and court of appeals for a hearing under *Alderman v. United States*, 394 U.S. 165 (1969). See Memorandum of Points and Authorities in Support of Motion to Quash Grand Jury Subpoenas at 29-30, Application of Caldwell, 311 F. Supp. 538 (N.D. Cal.), *rev'd in part sub nom.*, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972); Brief for Appellant Caldwell at 69, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

11. Brief for Respondent Caldwell at 7, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Caldwell moved to quash the second subpoena and sought a protective order allowing him to shield the identity of his sources. He argued that newsmen are entitled to a qualified privilege not to disclose sources and other information unless there is a showing of a compelling state interest in their testimony. This showing, he said, could be made if (1) the information sought was demonstrably relevant to a clearly-defined legitimate subject of governmental inquiry; (2) it affirmatively appeared that the inquiry was likely to turn up material information; and (3) the information sought was unobtainable by means less destructive of First Amendment freedoms.¹² Implicit in his choice of a motion to quash the subpoena, rather than merely one to modify it, was Caldwell's position that he was constitutionally protected from appearing at all, for the same reasons that *Branzburg* had urged before the Kentucky Court.¹³

The district court granted Caldwell's motion for a protective order, holding:

[H]e need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news . . . until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the Court.¹⁴

The court ruled, however, that Caldwell had to appear before the grand jury.¹⁵ Rather than appear, Caldwell appealed the district court's decision. His appeal was dismissed, apparently on the ground that the order was not appealable. He was then held in contempt by the district court.¹⁶

12. Memorandum of Points and Authorities at 19-32, Application of Caldwell, 311 F. Supp. 538 (N.D. Cal.), *rev'd in part sub nom.*, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

13. "Because the grand jury sits behind closed doors," Caldwell's lawyer argued, "his appearance there will itself cause irreparable injury to his relations with the Panthers." *Id.* at 26.

14. Application of Caldwell, 311 F. Supp. 358, 360 (N.D. Cal.), *rev'd in part sub nom.*, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

15. 434 F.2d at 1080, *citing* *Blair v. United States*, 250 U.S. 273, 281 (1919), and *United States v. Bryan*, 339 U.S. 323, 331 (1950).

16. 434 F.2d at 1083 n.2. After the appeal was dismissed, the term of the grand jury expired. A new subpoena containing the same protective provisions was issued after the new grand jury was sworn. The contempt order was a result of Caldwell's disregard of the order directing attendance pursuant to this subpoena. *Id.* Compare *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), in which the court stated that "ordinarily, orders denying or directing discovery are nonappealable interlocutory decisions . . ." but permitted an appeal under "special circumstances" which "attend motions for discovery made in a district other than the district in which the main action is brought." *Id.* at 780 n.3. The *Baker* case is discussed more fully in the text accompanying notes 114-19 *infra*.

The Ninth Circuit Court of Appeals held that there was no requirement for Caldwell to appear before the grand jury if there was no "compelling need" for such an appearance.¹⁷ The government filed a petition for a writ of certiorari with the United States Supreme Court. There, the preceding cases were consolidated in *In re Pappas*.¹⁸

The Pappas Case

Paul Pappas, a reporter for a Providence, Rhode Island, television station, had been inside a Black Panther headquarters at the time of riots in New Bedford, Massachusetts. He had been invited in to witness what the Black Panthers thought would be a raid on the headquarters. He was subpoenaed by the Bristol County Grand Jury to testify as to what he had seen during his stay, although in fact there had been no raid.¹⁹ Pappas testified before the grand jury as to what he had seen outside the Panther headquarters, but not as to what he had seen inside. He was subpoenaed a second time, but moved to quash on the authority of the district court's opinion in *Caldwell*. This motion was denied, and the denial was affirmed by the Supreme Judicial Court of Massachusetts.²⁰

The United States Supreme Court said that the Massachusetts Supreme Court had characterized the record in *Pappas* as "meager,"²¹ and therefore concluded that the only issue presented was "whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena."²² The Court went on to point out, "it is not clear what petitioner will be asked by the grand jury."²³ Technically, then, appearance was the only issue before the Court in *Pappas*, making it identical with *Caldwell* and *Branzburg II*. Accordingly, the Supreme Court was presented with three cases raising the issue of appearance before a grand jury and one raising the question of whether a reporter must testify as to crimes he has witnessed.

The Proposed Qualified Privilege

Each of the reporters argued for a qualified privilege. Caldwell's

17. *Caldwell v. United States*, 434 F.2d 1081, 1089 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

18. 358 Mass. 604, 266 N.E.2d 297 (1971).

19. *Id.* at 605, 266 N.E.2d at 298. It was not clear what information was sought by the subpoena. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972).

20. *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971).

21. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972).

22. *Id.*

23. *Id.*

position was substantially the same as that he had asserted in the district court—that before being required to appear there should be a showing of compelling state interest, *i.e.*, of relevance, materiality, and inability to obtain the same information elsewhere.²⁴ Pappas argued for roughly the same position:

The State must demonstrate at the outset that it has reason to believe from non-press sources that a crime has been committed, that the newsman has information relevant to the crime, and that there have been substantial but unsuccessful attempts to obtain this same information elsewhere.²⁵

Branzburg's position was much tougher and was very similar to the position *The New York Times* had taken in the Pentagon Papers case.²⁶ Branzburg argued that the state has the heavy burden of proving that the testimony of the reporter is absolutely necessary to prevent direct, immediate and irreparable prospective damage to the national security, human life and liberty.²⁷

Professor Alexander Bickel of the Yale Law School, representing the three major television networks, *The New York Times*, and five other amici, filed a brief supporting all three reporters. Bickel urged a three-part test somewhat similar to that proposed by Caldwell but much more difficult for the government to meet:

(1) The Government must clearly show there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. (2) The Government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. (3) The Government must clearly demonstrate a compelling and overriding interest in the information.²⁸

24. Caldwell's test proposed that for a compelling state interest to be present: "(1) The 'information sought' must be demonstrably relevant to a clearly defined legitimate subject of governmental inquiry

"(2) It must affirmatively appear that the inquiry is likely to turn up material information, that is: (a) that there is some factual basis for pursuing the investigation, and (b) that there is reasonable ground to conclude that the particular witness subpoenaed has information material to it. . . .

"(3) The information sought must be unobtainable by means less destructive of First Amendment freedoms." Brief for Respondent Caldwell at 82-84, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

25. Brief for Petitioner Pappas at 46, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

26. See Brief for Petitioner *The New York Times Co.* at 58-63, *New York Times Co. v. United States*, 403 U.S. 713 (1971), reprinted in 2 *THE NEW YORK TIMES COMPANY V. UNITED STATES, A DOCUMENTARY HISTORY* 1146-51 (J. Goodale ed. 1971).

27. Brief for Petitioner Branzburg at 44, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

28. Brief for *The New York Times Co., National Broadcasting Co., Columbia*

The Branzburg Plurality Opinion

In his plurality opinion in *Branzburg v. Hayes*,²⁹ Justice White rejected the qualified privilege for newsmen and held that generally newsmen must (1) appear before grand juries and (2) answer all relevant questions during a criminal investigation. Accordingly—since he refused to accept the compelling need standard adopted below on the appearance issue—he reversed the Ninth Circuit decision in *Caldwell*, and stated that *Caldwell* would have to appear before the grand jury. The Court decided no other question in *Caldwell*, noting that “[o]ther issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.”³⁰

In *Branzburg I*, the Court required Branzburg to testify about the crimes he had seen. In *Branzburg II* he was required to appear: “[Branzburg] may be presumed to have observed . . . violations of the state narcotics laws”³¹ If Branzburg had made such observations, Justice White would require him to testify to them; otherwise, the sources would be protected by Kentucky law. In *Pappas*, the Court also required appearance before the grand jury.

Stewart's Dissent and Powell's Concurring Opinion

While the plurality opinion rejected the qualified privilege, three of the dissenters—Justice Stewart, Justice Marshall, and Justice Brennan—adopted it. In the words of Justice Stewart:

[T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation 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.³²

This, it may be noted, is almost a verbatim adoption of the test proposed in Professor Bickel's amicus brief. Justice Douglas, in his dissent, stated that only an absolute privilege for reporters would satisfy the First Amendment.³³

Broadcasting System, Inc., American Broadcasting Co., Chicago Sun-Times, Chicago Daily News, Associated Press Managing Editors Ass'n, Associated Press Broadcasters' Ass'n and Association of American Publishers, Inc. as Amici Curiae at 29, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

29. 408 U.S. 665 (1972).

30. *Id.* at 708.

31. *Id.*

32. *Id.* at 743 (Stewart, Brennan & Marshall, JJ., dissenting).

33. *Id.* at 712 (Douglas, J., dissenting).

The four plurality justices, then, seemingly rejected a qualified privilege. Three dissenters were in favor of it, and Douglas voted with them as most nearly representing his views. Thus, the key to the case is Justice Powell's view. Justice Stewart called the Powell opinion "enigmatic."³⁴ It is opaque at best. Since it is, however, the key to understanding *Branzburg*, an attempt must be made to penetrate it.

First, it is submitted that Justice Powell did adopt a qualified privilege for newsmen: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."³⁵ It follows that if reporters when subpoenaed to testify do have constitutional rights as to gathering news and protecting their sources, then they have a qualified privilege not to testify.

But the privilege will not apply to protect a reporter from appearing, since Justice Powell points out that "[t]he newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him."³⁶ This determination disposes of *Branzburg II*, *Pappas*, and *Caldwell*, the three cases dealing with appearance. It leaves one case for Justice Powell to decide, *Branzburg I*—the witnessing of a crime.

Justice Powell would require *Branzburg* to testify as to criminal behavior he had seen, or otherwise he would not have concurred with the plurality opinion. Yet Justice Powell makes it clear that under certain circumstances, even when witnessing a crime is involved, he would not force disclosure of sources.³⁷ Thus, putting aside the appearance issue for the moment, what *Branzburg v. Hayes* decides is limited to the fact pattern of *Branzburg I*, a witnessing of a crime by a newsman.

This narrow reading of the case is justified by the pains to which

34. *Id.* at 725.

35. *Id.* at 709 (Powell, J., concurring).

36. *Id.* at 710 n*. Powell does not say why the reporter should appear. White, in the plurality opinion, notes that newsmen are not guaranteed by the First Amendment special rights not granted other citizens, such as "a constitutional right of special access to information not available to the public generally"

"It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury" *Id.* at 684-85 (citations omitted). Powell does not explicate his reasons for joining the plurality on the appearance issue and therefore may approve White's reasoning on this point. Compare, however, Powell's dissent in *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811, 2815-27 (1974) (Powell, Brennan & Marshall, JJ., dissenting).

37. See text accompanying notes 42-44 *infra*.

Justice Powell went in *Saxbe v. Washington Post Co.*³⁸ to point out that his opinion in *Branzburg* was extremely limited:

I emphasized the limited nature of the *Branzburg* holding in my concurring opinion: "The court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or the safeguarding of their sources." In addition to these explicit statements, a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated.³⁹

If Justice Powell, then, adopts a qualified privilege for newsmen, what are its limits? This is, of course, the heart of the enigma. It is conceivable that Justice Powell has not yet determined the matter for himself, and would prefer to have more case law develop before he articulates precisely what he has in mind.⁴⁰ But does he reject entirely the three-part test suggested by Justice Stewart which, simply stated, demands (a) relevance, (b) exhaustion of alternate sources, and (c) compelling national interest in the testimony?

It is quite clear that he *accepts* the relevance test, since he would quash the subpoena if "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation . . ."⁴¹ The requirement of establishing more than a remote and tenuous relationship, it would seem, is no more than a requirement to show relevance.

Justice Powell's views on the other two parts of the test are not clear. He stated that Stewart's proposal "would impose . . . heavy burdens of proof to be carried by the State."⁴² Whether Justice Powell was stating that the remainder of the test should fall because it is burdensome, or merely that the burden of proof is improperly placed and should be shifted from the state to the newsman, is unclear. A reasonable argument can be made that all that Powell intended was the shifting of the burden. If this is so, then the remaining two tests may survive, although the *onus probandi* is altered.

Dealing first with the requirement of compelling state interest, it

38. *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811 (1974).

39. *Id.* at 2819-20 (citations omitted) (Powell, Brennan & Marshall, JJ., dissenting).

40. "The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

41. *Id.*

42. *Id.* at 710 n*.

can be said that Justice Powell adopts the test to the extent that he requires the state to seek only information required by a legitimate law enforcement inquiry. In his words:

[N]o harassment of newsmen will be tolerated. . . . [I]f [the newsman] has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.⁴³

It is submitted that this formulation is not unlike the dissenting minority's compelling state interest test. The Powell statement differs mainly in requiring that the presence *vel non* of such an interest be demonstrated by the newsman rather than by the government.⁴⁴

What of the exhaustion of alternate sources test suggested by Justice Stewart, by Caldwell and by Bickel? Justice Powell is silent on this point, and the most that can be said is that he does not explicitly exclude exhaustion from the "balancing" he favors. However, the test, which requires that the newsman be called to testify only as a last resort, would seem to be a common sense way to accommodate First Amendment interests with the interest of the state in seeking testimony. And, as will be discussed below, many of the cases since *Branzburg* have adopted this exhaustion criterion.

The rule of a numerical majority of the justices in *Branzburg v. Hayes* can therefore be said narrowly to be that reporters have a qualified testimonial privilege, dependent on a showing by the newsman that (a) the testimony would be irrelevant, (b) the testimony would further no compelling state interest (*e.g.*, when the testimony is sought for purposes of harassment, not in good faith, or not for a legitimate purpose of law enforcement), or (c) the testimony is not required by other unspecified forms of balancing (*e.g.*, exhaustion of alternate sources).

43. *Id.* at 709-10.

44. This is of course different from the test for compelling state interest Bickel proposed on behalf of the various amici, which would limit the subpoenaing of newsmen to cases of serious crime. Compare *Gibson v. Florida Legislative Investigation Committee* which in discussing compelling state interest stated: "We understand this to mean—regardless of the label applied, be it 'nexus,' 'foundation,' or whatever—that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and subject of overriding and compelling state interest. . . . 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'" 372 U.S. 539, 546 (1963), quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1959).

Two ways to test the proposition that *Branzburg* actually does establish a qualified privilege comparable to that stated above are to ascertain what would have happened to the three "appearance" cases on remand, and to examine the relevant cases decided since *Branzburg*.

The Branzburg "Appearance" Trilogy on Remand

The first method must be speculative, since there was no further testimony in any of the appearance cases. In *Caldwell* and *Pappas* the grand juries were never reconvened to hear testimony (perhaps indicating that there never was any compelling interest in the newsmen's testimony). Branzburg was held in contempt *in absentia*, since Michigan would not extradite him to Kentucky.⁴⁵ Nevertheless, there is nothing in the *Branzburg* opinion that would have prohibited either Caldwell or Pappas from asserting on remand the privilege suggested by Powell.⁴⁶ The Court was very careful to point out that it did not have the basic facts of either case before it. Thus, it is probable that the reporters would have been required to answer some questions and permitted not to answer others, as was done in *Bursey v. United States*,⁴⁷ a Ninth Circuit case that came down the day after *Branzburg*.

Ironically, then, it is not unreasonable to say that perhaps the reporters did gain a certain victory in *Branzburg* after all. If in fact Earl Caldwell would have ended up testifying no differently under Powell's rule than he would have through the application of his own test—laying the appearance issue aside—it is hard to say he lost his case.

45. Personal communication with Paul M. Branzburg, August 1, 1974.

46. As noted, whether exhaustion of sources fits within whatever general balancing remains unparticularized by Powell is speculative. Presumably he would not require such exhaustion in *Branzburg I*, since there is no such requirement in White's opinion, in which he joins. In *Branzburg I*, however, there may be no alternate source since the reporter alone apparently witnessed the making of hashish. On remand, then, in *Pappas* and *Caldwell*, it may be said only that Powell might not require exhaustion of alternate sources if the fact situations were analogous to *Branzburg I*. As to other fact situations, we do not know whether he would or would not require it. Thus, it would not be proper to generalize from Powell's formulation in *Branzburg* to the proposition that a reporter could be required to testify in every instance in which he was an eyewitness to a crime, without there first being a showing of exhaustion of alternate sources.

47. 466 F.2d 1059 (9th Cir. 1972). See text accompanying notes 48-60 *infra*.

In fact, one of the reasons counsel for Caldwell decided to appeal the appearance issue after winning a qualified privilege in the district court was an apprehension that the government might possibly penetrate the privilege proposed there by Caldwell in some unknown respect, forcing testimony, albeit of an extremely limited nature, from Caldwell. Personal communication from Anthony Amsterdam, April 1971.

The Cases Since *Branzburg v. Hayes*

As of mid-1974, there had been nearly two dozen newsmen's subpoena cases decided since *Branzburg*, and there will no doubt be more. Many of the decisions appear confused and even wrong in their application of *Branzburg*, which, as discussed above, actually ratifies a qualified newsmen's privilege. A majority of the cases have recognized that such a privilege exists, but there is hardly unanimity on the point.

The following generalizations may be attempted:

(a) when courts are presented with the question of the witnessing of a crime by a reporter, they usually require the reporter to testify;

(b) when presented with the question of possible criminal evidence on a tape in a reporter's possession, they frequently require production of the tape;

(c) in other criminal contexts, such as questions involving pretrial publicity, several courts have not required testimony as to sources and other information in the possession of a reporter;

(d) in civil cases generally there is reluctance to require reporters to testify, although in libel cases testimony will be required if the court believes there is a compelling interest in the testimony, that is, that it "goes to the heart of the matter."

Each of these areas will be analyzed.

The Bursey Case and Witnessing Crimes

The day following the *Branzburg* decision, the Ninth Circuit Court of Appeals handed down its decision in *Bursey v. United States*.⁴⁸ Brenda Joyce Presley and Sherrie Bursey were reporters for the *Black Panther* newspaper who were subpoenaed by a grand jury to be questioned about the paper, meetings of the Panthers, and David Hilliard's speech threatening President Nixon, which had been reported in the *Black Panther*.

They testified several times before the grand jury, answering some questions (including whether they had any information about a plot to kill the president) but refusing to answer inquiries relating to information received in confidence or relating to the management of the paper.⁴⁹ Following a motion by the grand jury to compel testimony, the district court (the same court that decided *Caldwell*) granted a protective order which stated in part that Bursey and Presley should not

48. 466 F.2d 1059 (9th Cir. 1972).

49. The questions are listed in *id.* at 1068-71.

be required to reveal confidential information received, developed or maintained by them as professional journalists unless the government showed a compelling and overriding national interest requiring their testimony.⁵⁰

After the granting of this order, the grand jury filed with the court an affidavit from the Department of Justice which reprinted various news articles containing revolutionary exhortations by Panther leaders, including a *New York Times* article which quoted Hilliard as saying, "We advocate the very direct overthrow of the government by way of force and violence."⁵¹ The district court concluded that through this affidavit the government had "established a compelling and overriding national interest to which the conflicting constitutional rights of the respondents must give way,"⁵² and required Bursey and Presley to answer all questions.

There were fifty-six questions which Bursey and Presley refused to answer. On appeal, the Ninth Circuit required that only seventeen of the questions be answered, insofar as the government had not met its burden of establishing, as to the remaining questions, "that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests."⁵³ The court went on to point out:

When the collision occurs in the context of a grand jury investigation, the Government's burden is not met unless it establishes that the Government's interest in the subject matter of the investigation is "immediate, substantial, and subordinating," that there is a "substantial connection" between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining information is not more drastic than necessary to forward the asserted governmental interest.⁵⁴

Accordingly, Bursey and Presley did not have to answer generally questions seeking the identities of persons who edited or worked on the paper or details of how it was edited.⁵⁵

50. *In re Grand Jury Witnesses*, 322 F. Supp. 573, 574 (N.D. Cal. 1970). This order was in the same form as the one the district court had previously granted Caldwell.

51. *Bursey v. United States*, 466 F.2d 1059, 1068 (1972).

52. 322 F. Supp. at 578.

53. 466 F.2d at 1083, citing *In re Stolar*, 401 U.S. 23 (1971), *United States v. O'Brien*, 391 U.S. 367 (1968), *De Gregory v. Attorney General*, 383 U.S. 825 (1966), and *Shelton v. Tucker*, 364 U.S. 479 (1960).

54. 466 F.2d at 1083.

55. See *id.* at 1087-88. Specifically, they did not have to answer questions seeking to determine the person responsible for distributing the paper; the people who worked on particular issues of the *Black Panther*; the jobs these people performed; the person

On the other hand, they were required to answer questions concerning whether they had seen any firearms and explosives in the possession of the Black Panther Party, whether there had been any discussion or meetings concerning their use, and whether there had been any threats against the president at those meetings.⁵⁶ Thus, on the petition for rehearing the court distinguished between those questions regarding direct witnessing of possible criminal activity and those relating to news-gathering activities, even though the latter "might have something vaguely to do with conduct that might have criminal consequences."⁵⁷

Although the case was technically decided and released the day following *Branzburg*, the opinion was probably written before it. Accordingly, the government promptly moved for a rehearing on the ground that the *Burse* holding was inconsistent with *Branzburg*. The court denied this motion. It noted that *Burse*, unlike *Branzburg*, did not involve news-gathering or the question of appearance. The court emphasized that there was nothing in its holding to permit "a grand jury witness to refuse on First Amendment grounds to identify a person whom he has seen committing a crime."⁵⁸ The court concluded:

We have reexamined our analysis of the factors involved in balancing the First Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by *Branzburg*.⁵⁹

The court apparently applied the balancing test in this fashion: (a) it found no compelling governmental need for the testimony of the *Panther* reporters concerning their activities in publishing the paper, even though their activities may have been related to the criminal conduct which the government had a legitimate and compelling interest in investigating; and (b) it found no showing of the relevance of such testimony, *i.e.*, of a "substantial connection" between the information sought and the criminal conduct which the Government was investigat-

who did the layout work for the paper; the person who managed the distribution; the persons who worked on the distribution staff; the persons who worked on the subscription lists; the persons who decided what articles should be published; the person responsible for putting pictures around an article about Eldridge Cleaver; the person distributing the newspaper in pamphlet form; and the names of certain persons whose pictures appeared in a *Life Magazine* article about the Black Panthers. Compare *id.* at 1068-70, with *id.* at 1087-88.

56. *Id.* at 1086 n.20.

57. *Id.* at 1090-91.

58. *Id.*

59. *Id.* at 1091.

ing"⁶⁰ Conversely, the court did find that these standards were met by the questions concerning the witnessing of criminal activity.

Additional Cases Involving Witnessing of Crimes

A few weeks following *Burse*, the Court of Special Appeals of Maryland also decided a case dealing with the witnessing of a crime, *Lightman v. State*.⁶¹ David Lightman, a reporter for the *Baltimore Sun*, had written a story not unlike *Branzburg's* based on his observation of the use of marijuana in an Ocean City, Maryland, pipe store. Lightman argued that the Maryland statute covering sources⁶² protected him from disclosing to a state grand jury the name of the person who was using marijuana in the pipe shop.

The court disagreed, in an opinion thereafter affirmed per curiam by the Maryland Court of Appeals. It interpreted the word "source" narrowly, as had the Kentucky Supreme Court in *Branzburg I*, so as to exclude material taken out of the story. The court rejected the First Amendment argument urged upon it, and disposed of the Supreme Court's *Branzburg* decision in one sentence.⁶³ It viewed its task as merely one of interpreting the Maryland statute in the same manner as the Kentucky Supreme Court had in *Branzburg I*. Arguably, the court should have considered balancing the constitutional interests involved, particularly exhaustion of alternate sources. There was no showing in the case that Lightman's testimony was sought as the last resort; and, unlike *Branzburg I*, alternate sources of evidence should have been available, since the pipe store was easily identifiable.

A third post-*Branzburg* case involving witnessing of crimes is *Peo-*

60. *Id.*; *see id.* at 1083 & 1086-88. In the court's articulation of the balancing test, it deals with the alternate sources concept by noting that the means of obtaining the information should not be more drastic than "necessary" to further the government's interest. *Id.* at 1083. This test would not, apparently, require an exhaustion of alternate sources, only a showing of necessity.

61. 15 Md. App. 713, 294 A.2d 149, *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973).

62. "2. Employees on newspapers or for radio or television stations cannot be compelled to disclose source of news or information.

"No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed." MD. ANN. CODE art. 35, § 2 (1971).

63. "That no such violation of the federal constitutional guarantees exists in such circumstances has now been made clear by the Supreme Court of the United States in *Branzburg v. Hayes*." 15 Md. App. at 726, 294 A.2d at 157.

ple v. Dan.⁶⁴ This case arose after two television newsmen, Stewart Dan and Roland Barnes, were let into Attica prison during the riots there in 1972 and apparently witnessed some of the killings which took place. They were subpoenaed by a grand jury in upstate New York to testify as to what they had seen. The newsmen argued that the New York statute⁶⁵—which had been passed by the state legislature following the district court's decision in the *Caldwell* case—protected them, and that they had a constitutional privilege not to testify. The appellate division held, however, that the statute protects only sources, and not reporters who have been eyewitnesses to crimes.⁶⁶ The court ruled that there is no constitutional privilege, and declined to apply the balancing test.

Neither state court, it should be noted, was conceptually willing to interpret its statute to protect information, other than sources, in the possession of reporters.⁶⁷ Such information is of the same genus as "outtakes," the term used to describe that part of a television tape which has been edited out before showing on the screen.⁶⁸ The term

64. 41 App. Div. 2d 687 (N.Y. 1973).

65. See N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1973) (added by L. 1970, ch. 615, effective May 12, 1970), which states: "§ 79-h. Special provisions relating to persons employed by, or connected with, news media.

"(a) Definitions. As used in this section, the following definitions shall apply:

· · · · ·
"(8) 'News' shall mean written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

"(b) Exemption of professional journalists and newscasters from contempt.

"Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity."

66. 41 App. Div. 2d 687, 688 (N.Y. 1973).

67. *But cf. In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963) (holding that a statute substantially the same as Maryland's and Kentucky's protected tapes of an interview with a Philadelphia ward leader).

68. The term first came into wide public use when a House committee subpoenaed Frank Stanton, president of the Columbia Broadcasting System, to produce outtakes of "The Selling of The Pentagon." The committee wanted the outtakes to show that CBS had been prejudiced in its selection of material for the documentary. Stanton stated to the committee that he believed outtakes were protected by the First Amendment, and that he was willing to be held in contempt of Congress for maintaining his position.

is not limited to television tapes, however; it is applicable to any material edited out of an account, either by an editor or by a reporter. Thus, it is possible to fit within this category unedited proofs of stories, contact prints of still photographs, and events which reporters see but for a variety of reasons do not put in their stories—such as the identity of the person making hashish in *Branzburg's* story, the identity of the person using marijuana in *Lightman's* story, and the events seen by the television men in *People v. Dan*.

Generally speaking, newsmen seek to protect outtakes, in the generic sense, to protect the integrity of the editing process. It is clear that the First Amendment protects editing.⁶⁹ Thus far, however, no court since *Branzburg* has applied the balancing test to excuse reporters from testifying as to the witnessing of a crime even though such information has been taken out of their stories.⁷⁰ *Burse* itself required

The House eventually killed the contempt move on a procedural vote. See *N.Y. Times*, July 14, 1971, at 1, col. 8. See also *N.Y. Times*, July 2, 1971 at 1, col. 5.

69. "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publ. Co. v. Tornillo*, 94 S. Ct. 2831, 2839-40 (1974). See also *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973).

Nor does anything in *Burse* require that a newsman's privilege involve confidentiality, at least in the sense that characterizes the common law doctor-patient or lawyer-client privileges. The newsman's privilege, it is submitted, should cover activities protected under the First Amendment—such as gathering, editing and publishing the news—which may or may not be "confidential" in the traditional sense. There is nothing technically confidential about cutting up television tape to make a newscast or making notes to record a public event. Yet requiring the production of outtakes and notes would undoubtedly have an inhibiting effect on reporters and editors, and restrict their First Amendment rights.

There have been no decisions brought to the attention of the author requiring production of reporters' notes. In *Air Transportation Ass'n v. Professional Air Traffic Controllers Org.*, 313 F. Supp. 181 (E.D.N.Y. 1970), the court did *not* require such production. See *Record*, E.D.N.Y. Nos. 70-C-400-410, April 6, 1970, at 18-24, 36 & April 7, 1970, at 21, 38-39, 149-51 (testimony of *New York Times* reporter Robert Lindsay). See also *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *Spiva v. Francouer*, 39 Fla. Supp. 49 (Dade County Jud. Cir. 1973).

70. See, e.g., *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971), in which the Supreme Court of Wisconsin held that a reporter who had been told by an undis-

such testimony, as did *Lightman* and *Dan*. While one might urge that the courts should be more sensitive to the full scope of the issues presented to them in these cases, the approach they have taken is not unlike that taken in other outtake cases decided since *Branzburg* involving tapes and similar matters.

Criminal Cases Involving Tapes

At the time of the Watergate trial of Gordon Liddy *et al.*, the *Los Angeles Times* published an interview with Alfred Baldwin, a Watergate coconspirator who had been given immunity. The interview had been taped by a *Times* reporter. Upon reading the interview in the paper, and before the trial had begun, one of the defendants subpoenaed the tapes in their entirety for the purpose of impeaching Baldwin's testimony at trial.

The *Times* moved to quash the subpoena, arguing for a balancing test.⁷¹ The court denied the motion but seemingly adopted the concept of balancing.⁷² It stated, however, that "[i]f the 'striking of a proper balance' is required, as Mr. Justice Powell suggests, this Court will always strike the balance in favor of due process."⁷³ The court's view

closed source the names of the people responsible for bombing Sterling Hall on the University of Wisconsin campus must disclose that source, rejecting First Amendment arguments to the contrary.

71. See *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972). The tapes had been delivered by the reporter to the *Los Angeles Times* Washington bureau chief. Accordingly, the *Times* made its motion to quash as owner of the material.

72. See *id.*

73. *Id.* at 215. It may be questioned whether the court actually engaged in balancing in this case since, while the court does not say it will always strike the balance in favor of the defendant in a criminal case, the statement seems to have that effect. Cf. *State v. Laughlin*, No. 73-530 (Monroe County, Fla. Jud. Cir., July 26, 1974). In this case, Ron Mason, a reporter for the *Florida Keys Keynoter* came across information after defendants' conviction which led him to believe they had been illegally overheard prior to their arrest on marijuana-smuggling charges. Mason informed defense counsel of this fact, but published no articles on it. To buttress a motion for a new trial, one of the defendants sought disclosure of Mason's source. The court, stating that it was required to balance "the public interest in protecting the flow of information against the individual's right to prepare his defense," denied the motion. Order Denying Motion for New Trial at 3. The court noted that there had been no showing that the prosecution had relied upon the illegal evidence, or that the reporter's testimony would help prove the defendant's right to a new trial. Moreover, the court said, "[I]t has not been shown that alternate sources of the desired information have been exhausted; . . . defendant has not shown . . . countervailing constitutional requirements, and absent such a showing, to require Mason to disclose his source would amount to nothing more than forcing the press to disclose its method of seeking out the news and its sources of information, clearly an infringement upon First Amendment freedoms." *Id.*

was that the defendant's right to impeach witnesses against him by the use of prior inconsistent statements outweighed the First Amendment interests of the reporter in protecting his outtakes. It should be noted that the court required production of the tapes regardless of whether there had been any showing of relevancy, exhaustion of alternate sources, or compelling interest.

Another case, *In re Lewis*,⁷⁴ involved the Pacifica, California, radio station KPFK. The station had received both a mimeographed document purportedly issued by "The Weather Underground," which contained information relative to the bombing of a government building, and a tape purportedly issued by "The Symbionese Liberation Army" relating to the Patty Hearst kidnapping case. The station broadcast the tape and the contents of the document, and copies of both were made available to law enforcement agencies. However, Station Manager Lewis refused to turn over the original tape or letter to a grand jury which had subpoenaed them in its investigation of possible violations of federal laws within its jurisdiction, claiming the station's right to protect its news sources. Citing *Branzburg*, the court of appeals agreed that Lewis had First Amendment rights, but concluded that these were not violated because there was no evidence that the grand jury's request was for harassment of the press and not for legitimate purposes of law enforcement.⁷⁵

Two similar cases, *In re Foster*⁷⁶ and *In re WBAI-FM v. Proskin*,⁷⁷ also involved Pacifica radio stations. In the *Foster* case, a letter from the Symbionese Liberation Army and the envelope in which it had been sent to station KPFA were seized pursuant to a search warrant and then bound over to a California state grand jury investigating the death of Oakland School Superintendent Marcus Foster. The station had broadcast the contents of the letter, but refused to respond to questions as to tapes and when the letter had been received. The California Superior Court interpreted the California statute protecting sources as shielding the station from responding to such questions.⁷⁸

74. No. 74-2170 (9th Cir., July 19, 1974).

75. *Id.* at 7.

76. Record, *In re Foster* (Alameda County, Cal. Super. Ct., Mar. 28, 1974) (transcript of hearing).

77. 42 App. Div. 2d 5 (N.Y. 1973).

78. See CAL. EVID. CODE § 1070 (West Supp. 1973). That section states:

"§ 1070. Newsman's refusal to disclose news source.

"A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, admin-

In the *Proskin* case, New York station WBAI received a letter threatening to blow up a state building on the Albany Mall. The station informed the police of the threat and disclosed the contents of the letter over the air, but refused to turn over the letter itself, on the theory that the handwriting could be traced to the unidentified source. The New York court, taking a different tack than the California tribunal, held that the state shield statute did not apply.⁷⁹ The majority did not consider the balancing test, although the dissenting opinion did.

Indiscriminate subpoenaing of tapes may well lead to indiscriminate subpoenaing of reporters' notes and outtakes, which could have serious effects on journalism and on the First Amendment. The demand for outtakes in *United States v. Liddy*⁸⁰ is an example of a sub-

istrative body or any other body having the power to issue subpoenas for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper.

"Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television."

79. *In re WBAI-FM v. Proskin*, 42 App. Div. 2d 5 (N.Y. 1973). For the text of the New York statute, see note 65 *supra*. Another similar case, decided before *Branzburg*, arose after the same station had taped phone calls with inmates during an uprising at the Tombs prison in New York City. The district attorney subpoenaed the tapes, but the station refused to turn them over on the grounds that voiceprints would permit identification of the prisoners whose voices had been recorded. The New York Supreme Court held that the New York statute did not protect the tapes. The issue became moot on appeal when the station concluded that it had never had possession of the tapes. The court of appeals recognized the First Amendment interest involved and that balancing might be required but declined to engage in it because of the mootness of the appeal. *People v. Goodman*, 39 App. Div. 2d 869 (N.Y. 1972). See also *In re Wolfe*, 39 App. Div. 2d 864, 333 N.Y.S.2d 299 (1972), in which a subpoena sought the original of a manuscript published by the *Village Voice*, and attributed to a Ricardo DeLeon, which described prison life. The court held that the New York statute (note 65 *supra*) only protected confidential relationships, and that in this case the source had already been disclosed. The court noted that if balancing were applied the interest of the press was "too remote to justify overriding the competing and compelling public interest in the fair administration of justice." 39 App. Div. 2d at 864, 333 N.Y.S.2d at 301. The court dealt with the claim that the editing process was protected by noting that the publisher had failed to demonstrate that the article as published was different from the manuscript. *Id.*; cf. *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (1972). *Bridge*, a reporter for the *Newark Evening News*, had been told by a Housing Authority Commissioner that she had been offered a bribe by a certain individual. *Bridge* wrote a story, but omitted the name of the alleged briber. The court held that the New Jersey statute did not protect the reporter and rejected balancing: "We do not read the majority opinion in *Branzburg* as requiring a balancing of the interests test to determine when a reporter should be compelled to testify. Quite to the contrary, Justice White in the [*Branzburg*] majority opinion rejects such a contention . . ." 120 N.J. Super. at 468, 295 A.2d at 6.

80. 354 F. Supp. 208 (D.D.C. 1972).

poena which appears to be overbroad. It is submitted that a proper articulation of the balancing test as suggested by this article will lead courts to a clearer view of the nature of the First Amendment issues involved in these cases, so that a newsman's testimony or his production of evidence in such situations will be required only where there is a demonstrated need for it.

Subpoenas In Other Criminal Cases

There have been several other cases since *Branzburg* involving the issuance of a subpoena to a newsman to testify in a criminal case, frequently in a context where details of the crime have been published before the trial has begun.⁸¹ Two such decisions are *State v. St. Peter*⁸² and *Brown v. Commonwealth*.⁸³ Both cases involved stories covering alleged criminal acts which were later the subjects of indictments, and both courts adopted a qualified privilege.

In the *St. Peter* case, a reporter for a Burlington television station, John Gladding, had been informed in advance of a drug raid by the state police. He covered the raid and reported on it over the air. An indictment was handed down and, as part of the pretrial discovery permitted under Vermont procedure, Gladding was asked who had told him about the drug raid, and what he had seen during it. He testified as to what he had seen, since he had already broadcast an account of that, but refused to disclose his source.

When the defendants pressed for an answer, the trial court required that Gladding respond to the question upon penalty of contempt. Gladding refused, and the matter was referred to the Supreme Court of Vermont with the approval of the lower court before it had rendered a final judgment.⁸⁴ The appellate tribunal held that *Branzburg* required a balancing test,⁸⁵ and that the questions posed did not meet that test. The court concluded:

[W]e hold that, when a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer ap-

81. This was also the fact pattern in *Liddy*, since the defendant subpoenaed the tapes under Federal Rule of Criminal Procedure section 17(a) for the purpose of preparing for cross-examination.

82. 315 A.2d 254 (Vt. 1974) (certified question).

83. 204 S.E.2d 429 (Va. 1974).

84. 315 A.2d at 254-55.

85. *Id.* at 255.

pealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence. If such a showing cannot be made to a measure consistent with the overriding of any First Amendment concern, the deponent cannot properly be compelled to answer the question.⁸⁶

Thus, while the Vermont court adopts the balancing test, it deals only with the relevancy of the information sought and the unavailability of alternate sources; it does not deal with compelling national interest as such.

In the *Brown* case, the Supreme Court of Virginia explicitly followed the *St. Peter* decision. A reporter for the *Free Lance Star*, a newspaper in Stafford County, Virginia, had written a story on a local murder. Her account quoted a source in the sheriff's office to the effect that a witness and the victim had surprised two men prowling in a junkyard at night, whereupon "[t]he unknown men said 'Hey', in a friendly manner and then fired two shots, one of which struck [the victim]."⁸⁷ At the trial, the prosecution witness testified substantially as the story reported, but stated that the *victim* had said "Hey," not the defendant.

The defendant then subpoenaed the reporter to testify. Much as Gladding had, she authenticated the account but refused to disclose her source. The trial court upheld her refusal, and the Supreme Court of Virginia affirmed. Speaking for a unanimous court, Justice Poff cited *Branzburg* as authority in holding:

[A] newsman's privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment. Unknown at common law, it is a *privilege* related to the First Amendment and not a First Amendment *right*, absolute, universal, and paramount to all other rights.⁸⁸

He then went on to say:

We are of the opinion that when there are reasonable grounds to believe that information in the possession of a newsman is material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a mitigation of the penalty attached, the defendant's need to acquire such information is essential to a fair trial; when such information is not otherwise available, the defendant has a due process *right* to compel disclosure of such information and the identity of the source; and any

86. *Id.* at 256.

87. 204 S.E.2d at 430.

88. *Id.* at 431.

privilege of confidentiality claimed by the newsman must, upon pain of contempt, yield to that right.⁸⁹

The court noted the defendant's desire to obtain the subpoenaed information in order to exercise his right to cross-examine the prosecuting witness on the inconsistent statements. Observing that a defendant generally has such a right, the court went on to explain that "under the rule we adopt, when such a right collides with the newsman's privilege of confidentiality, the privilege prevails unless the inconsistent statements are material within the definition of the rule."⁹⁰ The court distinguished the *Liddy* case by implying that denial of due process was involved there, but not in the case at bar.⁹¹ In short, the Virginia Court followed the Vermont Court in adopting the rule that unless there is a showing that the material is relevant and that alternate sources are not available, no disclosure should be required.

In another case involving pretrial publicity, *United States v. Calvert*,⁹² a grand jury was investigating mail fraud, and a local CBS newscast in St. Louis predicted the return of an indictment. The potential defendants in the case subpoenaed the reporter for the source of the statements in the newscast. The station delivered a transcript of the broadcast, but refused to disclose the source. The reporter argued that he had a constitutional privilege, granted by *Branzburg*, not to reveal it. He pointed out that the defendants were seeking to eliminate pretrial prejudice on the part of the grand jury, a situation not covered by *Branzburg*. The court granted the reporter's motion to quash the subpoena without opinion.

It may be that *St. Peter*, *Brown*, *Liddy* and *Calvert* are all "fair trial-free press" cases.⁹³ All four involved pretrial publicity, that is,

89. *Id.* (citation omitted).

90. *Id.*

91. "Nor are society's demands that the privilege yield to the legitimate needs of law enforcement superior to the demands of due process that the privilege yield to the legitimate needs of the accused to defend himself. See *United States v. Liddy* [citation omitted]." *Id.* It appears doubtful that the cases are different, and a cross-examination seems equally relevant and important in each.

92. No. 74-107 (E.D. Mo. April 26, 1974).

93. "Fair trial-free press" is the shorthand term used to denote the conflict between the right of the defendant to an impartial trial and the right of the press to report criminal proceedings. The issue frequently arises in pretrial publicity cases. See ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASSOCIATION, FAIR TRIAL AND FREE PRESS (Approved draft, 1968) (Reardon Report); SPECIAL COMMITTEE ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL (Final report, 1967) (Medina Report); Committee on the Operation of the Jury System, Judicial Conference of the United States, *The Report of the Committee on the Operation of the Jury*

statements made to the press concerning criminal investigations, criminal behavior later resulting in prosecution, or pending criminal trials. Although the courts involved did not address themselves to the point, it can be argued that if every pretrial story is to be the subject of a subpoena, pretrial reporting will dry up. Some courts might feel more comfortable in such an atmosphere, but the history of American jurisprudence—as distinct from the British or common law experience⁹⁴—is to the contrary.

To date, the most noted fair trial-free press case involving subpoenas is *Farr v. Superior Court*.⁹⁵ Farr, a reporter for the *Los Angeles Times*, had independently obtained a statement about one of the defendants in the Manson murder case. He confirmed the statement by talking to two of the defense lawyers, whom he promised confidentiality. The jury was sequestered and Farr printed his story.

Following the trial, the trial judge required Farr to disclose his source. Upon his refusal, which occurred before the date of the Supreme Court's decision in *Branzburg*, Farr was held in contempt.⁹⁶ This ruling was upheld by the California Court of Appeal. The Supreme Court of California denied Farr's petition for a hearing, and the United States Supreme Court denied certiorari.⁹⁷ He thereupon brought habeas corpus proceedings in the federal district court without success.⁹⁸

Pending an appeal to the Court of Appeals for the Ninth Circuit from the district court's denial of habeas corpus, Farr was released from jail by Justice Douglas, who stated that:

System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1969) (Kaufman Report). See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). Also relevant on this point are the motion papers filed October 10, 1973, in *In re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil No. 73-965 (D. Md. 1973), especially the memorandum of law in support of a motion by Nicholas Gage, an investigative reporter for *The New York Times*, seeking to quash a subpoena issued on behalf of Vice President Spiro T. Agnew for the purpose of investigating grand jury leaks. The court never ruled on the matter, since the grand jury proceedings were terminated upon Agnew's nolo contendere plea.

94. Under British law, prior restraints on pretrial publications are permitted. See, e.g., Cowen, *The Law: British and American*, in *FAIR TRIAL v. A FREE PRESS* 9 (1965) (an Occasional Paper on the Free Society for the Center for the Study of Democratic Institutions).

95. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971).

96. *Id.* at 63, 99 Cal. Rptr. at 343.

97. See *id.*

98. See *In re Farr*, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974); *Farr v. Pitchess*, 409 U.S. 1243, 1244 (Douglas, Circuit Justice, 1973).

[o]ur *Branzburg* decision plainly does not cover [this case].

The question, so far as I can tell, is not covered by any of our prior decisions. The case is a recurring one where the interests of a fair trial sometimes collide with the requirements of a free press.⁹⁹

Following Douglas's decision, the California Court of Appeal denied Farr's state petition for habeas corpus, but ordered a hearing to determine whether "disobedience of the order is based upon an established articulated moral principle."¹⁰⁰ After such a hearing, Los Angeles County Superior Court Judge William H. Levit released Farr, holding that since there was no substantial likelihood that Farr would comply with the court's order to disclose his sources,¹⁰¹ there was no reason to continue to hold him in contempt.

For two reasons, the *Farr* case appears to have been decided upon incorrect grounds. First, it seems to indicate a misunderstanding by the trial and appellate judges of rulings in the fair trial-free press area, and particularly of the ruling in *Sheppard v. Maxwell*.¹⁰² That case is quite clear in its holding that the court can impose restrictions on the release of information to the press only upon those within its jurisdiction, namely, officers of the court.¹⁰³ There is no authority in the decision for direct restraints by the court on the press. Three studies dealing with the fair trial-free press dilemma—the Reardon, Kaufman, and Medina Reports¹⁰⁴—appear to recognize this, as we have many cases decided on fair trial-free press guidelines, including the recent decision by Justice Powell in *Times-Picayune Publishing Corp. v. Schulingkamp*.¹⁰⁵

99. *Farr v. Pitchess*, 409 U.S. 1243, 1245-46 (Douglas, Circuit Justice, 1973).

100. *In re Farr*, 36 Cal. App. 3d 577, 584, 111 Cal. Rptr. 649, 653 (1974).

101. "By reason of his commitment to the principle of confidentiality and to the promises he has made, there is no substantial likelihood that further incarceration of Farr will result in his compliance with the court's order to reveal the identities of his sources or otherwise serve the purposes of said order." *In re Farr*, No. A 253 1561 (Los Angeles County, Cal. Super. Ct., June 20, 1974).

102. 384 U.S. 333 (1966).

103. *See id.* at 363.

104. *See note 93 supra.*

105. 43 U.S.L.W. 2046 (U.S. July 29, 1974). A state court conducting a murder trial had entered an order directing the press to avoid interviewing witnesses, publishing the defendants' prior criminal records or possible confessions, reporting testimony stricken by the court, publishing leaks, and making editorial comments. Justice Powell stayed the order saying, "On the record before me, and certainly in the absence of any showing of an imminent threat to fair trial, I cannot say that the order of the state court would withstand the limitations that this Court has applied in determining the propriety of prior restraints on publication." *Id.* *But see* *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). In *Dickinson*, the New Orleans District Court entered an order

If, as this article maintains, *Branzburg* requires courts to apply a balancing test, then *Farr* would also appear to be incorrectly decided because no consideration whatsoever was given to such a test. Even if only a test of compelling state interest is to be applied, it is very difficult to perceive what the state interest in the disclosure was once the trial was over—especially since the jury was sequestered when the story was printed.

Fair trial-free press issues when litigated are very difficult ones for the press, since courts are often being asked, in effect, to rule against their own self-interest. While the demands made by the press on the process of fair trial administration are admittedly burdensome, it does not seem that the appropriate method of accommodation is to force disclosure of sources by newsmen.¹⁰⁶

Civil Cases

Many of the civil cases since *Branzburg* involving subpoenas to newsmen have been libel actions. But there have been at least three

enjoining publication of accounts of a pretrial hearing. Several local reporters disobeyed the ban. The order was held unconstitutional, but the Fifth Circuit Court of Appeals ruled that disobedience to it, until its reversal, was nonetheless contumacious and remanded the case for a determination of whether the judgment would still be appropriate even though the order was unconstitutional. *See id.* at 513-14. *But cf.* *State v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608 (1971).

106. *See also* the two cases involving reporter Lucy Ware Morgan, *State v. Morgan*, Civil No. 73-741 (Pasco County Cir. 1973) at the trial level. The *Morgan* cases are another recent example of a subpoena being issued to a reporter in a fair trial-free press context. In these cases, a reporter for a regional newspaper published by the *St. Petersburg Times* reported that a grand jury had assailed "Dade City" in its presentment to the local judge. The presentment had not been released to the public, and the local district attorney, under a district attorney's subpoena, asked reporter Morgan to state the source of her information. She refused and was held in contempt. Order of Contempt, *State v. Morgan*, Civil No. 73-741 (Pasco County, Fla. Jud. Cir. Nov. 2, 1973) (*Lucy Morgan I*). Subsequently, she refused to divulge her sources before a grand jury. She was adjudged in contempt a second time. Order of Contempt, *State v. Morgan*, Civil No. 73-741 (Pasco County, Fla. Jud. Cir. Mar. 29, 1974) (*Lucy Morgan II*). Whether or not *Morgan* technically is a fair trial case, in view of the fact that there may never be a trial (since the jury refused to indict), it is similar to many of the fair trial cases, especially *Calvert*. The *Morgan* court apparently did not apply a balancing test, but decided the case as a matter of state law. In its brief, the state relied on *Clein v. State*, 52 So. 2d 117 (Fla. 1950). *Clein* involved a newspaper publisher who was convicted for refusing to tell a grand jury where he had gotten his information on previous grand jury testimony. On appeal, the conviction of *Clein* was upheld. In *Lucy Morgan I*, involving the state attorney's subpoena, an appeal is pending. Civil No. 73-931 (2d Dist. Fla. Ct. App. 1974). *Lucy Morgan II*, which involved the refusal to answer the same questions before a grand jury, is under appeal. Civil No. 74-619 (2d Dist. Fla. Ct. App. 1974).

cases in which newsmen have been subpoenaed to testify as witnesses in general civil litigation.

Of particular significance is *Democratic National Committee v. McCord*,¹⁰⁷ an action brought by the Democratic Party for damages resulting from the Watergate break-in. A subpoena sought documents, papers, letters, photographs, audio and video tapes, manuscripts, notes, tape recordings, drafts, and copies of news materials relating to the Watergate break-in from *The New York Times*, *The Washington Post*, *The Washington Star-News*, and *Time Magazine*. *The New York Times*, as owner of the work product of its reporter, part of the material subpoenaed, intervened on behalf of its reporter, John Crewdson.¹⁰⁸

The district court quashed the subpoena, stating that "*The Unique Circumstances and Great Public Importance of These Cases Compel a Finding by the Court That Movants Are Entitled to At Least a Qualified Privilege Under the First Amendment . . .*"¹⁰⁹ The court expressly required that (1) alternate sources be exhausted, and (2) a showing of materiality be made. It said:

[T]here has been no showing by the parties that alternative sources of evidence have been exhausted or even approached as to the possible gleaning of facts alternatively available from the Movants herein. Nor has there been any positive showing of the materiality of the documents and other materials sought by the subpoenas.¹¹⁰

The court noted that the Republican Party was seeking to subpoena sources of information relating to the Watergate scandal. To allow enforcement of the subpoena, the court said, might well inhibit reporting about the very party seeking to enforce the subpoena. There was no compelling state interest in moving the litigation forward at that particular time by producing the evidence requested. Indeed, the court concluded that the state interest involved would be best served by quashing the subpoena so that investigative reporting about Watergate could continue.¹¹¹

107. 356 F. Supp. 1394 (D.C. Cir. 1973).

108. *The New York Times* had similarly intervened as owner of the work product of its reporter in the district court proceedings in *Caldwell*. In permitting intervention, that court stated: "The New York Times Company has such an interest in the work product of Mr. Caldwell and the knowledge he has acquired in the course of his employment as a full-time reporter for it." Application of Caldwell, 311 F. Supp. 358, 359-60 (N.D. Cal. 1970). In *McCord*, the court permitted the intervention without comment. Cf. *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972).

109. 356 F. Supp. at 1396.

110. *Id.* at 1398.

111. "This Court cannot blind itself to the possible 'chilling effect' the enforcement

McCord was followed in *Spiva v. Francouer*,¹¹² decided by a Florida state court. A subpoena duces tecum was served on the *Miami News* requesting all the background material, notes, and memoranda concerning an editorial the *News* had written which had attacked the defendants in a civil trial. The court cited *McCord* in quashing the subpoena, stating:

[T]he court is convinced that if the *Miami News* is required to attend the taking of its deposition, to answer questions about its sources, and to produce any or all of the information set forth in the subpoena duces tecum, that would have a chilling effect upon freedom of the press and would tend to "dry up" the sources of information which are available in a free society.¹¹³

The United States Court of Appeals for the Second Circuit issued a similar ruling in *Baker v. F & F Investment*,¹¹⁴ holding that Alfred Balk, then a freelance writer for the *Saturday Evening Post*, did not have to disclose the source of an article he had written describing block-busting in Chicago. An action charging racial discrimination in housing violating federal and state laws as well as the Thirteenth and Fourteenth Amendments had been filed,¹¹⁵ and Balk had been subpoenaed to disclose his source for the article. The court concluded (incorrectly, I think) that *Branzburg* did not recognize an absolute or conditional testimonial privilege for journalists.¹¹⁶ Despite this conclusion, it approved the district court's finding below "that there were other available sources of information . . . which appellants had not exhausted."¹¹⁷

of these broad subpoenas would have on the flow of information to the press, and so to the public. This Court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government no amount of legal theorizing could allay the public suspicions engendered by its action and by the matter alleged in these lawsuits." *Id.* at 1397.

112. 39 Fla. Supp. 49 (Dade County Jud. Cir. 1973).

113. *Id.* at 51.

114. 470 F.2d 778 (2d Cir. 1972).

115. See *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (1969).

116. See *Baker v. F. & F. Investment*, 470 F.2d 778, 781 (2d Cir. 1972). In considering *Branzburg*, the *Baker* court limited the holding in that case to a decision that a newsman-witness was obliged to give relevant testimony to a grand jury conducting a criminal investigation. It pointed out that all the Supreme Court had done in *Branzburg* was to apply the compelling state interest test in a situation where "the state had met its burden." "The Court in *Branzburg*, as the Court of Appeals had done in *Garland*, applied traditional First Amendment doctrine, which teaches that constitutional rights secured by the First Amendment cannot be infringed absent a 'compelling' or 'paramount' state interest . . . and found such an overriding interest in the investigation of crime by the grand jury . . ." *Id.* at 784. The court noted Powell's separate concurring opinion in *Branzburg*, which urges a balance of interests test on a case by case basis. *Id.*

117. *Id.* at 783.

The district court had held "that disclosure by Balk of his source was not essential to protect the public interest in the orderly administration of justice in the courts. The [information sought] simply did not go to the heart of appellants' case" ¹¹⁸

In short, the court of appeals agreed with the district court that (1) the plaintiff had not exhausted alternate sources, (2) he had made no showing of relevance, and (3) his claim did not go to the heart of the matter. Hence, there was no state interest in forcing disclosure. As phrased by Judge Kaufman:

While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony. ¹¹⁹

Libel Cases

At least four libel cases dealing with subpoenas of newsmen have been decided since *Branzburg*, and all but one have applied a qualified privilege to the production of testimony. These cases must be discussed in the context of the 1958 decision in *Garland v. Torre*,¹²⁰ an opinion written by then Circuit Judge Potter Stewart, sitting by designation in the Second Circuit. Most courts deciding libel cases since *Branzburg* have looked to this case, as well as to *Branzburg*, as a source of authority.

In the *Garland* case, actress Judy Garland had been described by Marie Torre in her *Herald Tribune* column as overweight. The statement was attributed to unnamed CBS executives. Garland sued CBS, and sought the identity of the people who had made the statements. After having deposed other possible sources of information and having found nothing useful, Garland sought to depose defendant Torre. The latter refused to disclose her source. The court, speaking through Judge Stewart, writing for the majority, required that she do so. The test applied by the court in *Garland* is very similar to the one Justice Stewart later articulated in his *Branzburg* dissent. The *Garland* test

118. *Id.* (citation omitted).

119. *Id.* at 783.

120. 259 F.2d 545 (2d Cir. 1958).

demands: (1) relevancy, (2) exhaustion of alternate sources, and (3) that the question asked go to the heart of the matter.¹²¹

As to the first point, Stewart's opinion in *Garland* specifically required that the question be of more than "doubtful relevance."¹²² As to the second, Stewart pointed out that Garland had exhausted alternate sources, and that if the source of the story were not disclosed, Garland would be unable to pursue her action.¹²³ Finally, he ruled, the question must go to the heart of the matter.¹²⁴ The testimony must bear directly on the major thrust of the plaintiff's claim. Otherwise, there will be no compelling state interest in using legal process to force the testimony.¹²⁵

In *Buchanan v. Cronkite*,¹²⁶ Henry Buchanan, the brother of White House speechwriter Pat Buchanan, brought a libel action against CBS for broadcasting that he had used his accounting firm to "launder" money from the Committee to Re-Elect the President. The statement had turned out to be erroneous, and CBS had broadcast a correction. During the course of pretrial proceedings, Buchanan sought testimony from Herbert Lewis, the author of an article in the *Columbia Journalism Review* on coverage of Watergate by the electronic and print press. The article reported the background of the broadcast, and that CBS had run the correction, but it did not give the source of Lewis's information. The article did note, however, that CBS had declined to comment. Lewis was deposed and answered all questions except as to sources.

The plaintiff moved to require Lewis to disclose his CBS sources and the substance of his interview with a CBS newswoman, but the court denied the motion, noting that (a) no showing of relevance had been made,¹²⁷ (b) CBS personnel had declined to comment on the broadcast, and hence it was likely Lewis received no information since, if received, it would have been pertinent to his article,¹²⁸ and (c) no

121. See *id.* at 549, 551.

122. *Id.* at 549-50.

123. *Id.* at 551.

124. *Id.* at 550.

125. See *Branzburg v. Hayes*, 408 U.S. 665, 743 n.33 (1972) (Stewart, Brennan & Marshall, JJ., dissenting).

126. Civil No. 1087-73 (D.D.C. 1974).

127. Order Denying Motion to Compel Answer at 3, *Buchanan v. Cronkite*, Civil No. 1087-73 (D.D.C. Mar. 15, 1973) (order filed July 18, 1974). "These assertions by plaintiffs . . . are mere speculation, far short of the degree of relevance necessary to overcome a newsman's qualified privilege to protect the confidentiality of his sources." *Id.*

128. *Id.* at 1.

attempt to exhaust alternate sources had been made.¹²⁹

On the other hand, in *Carey v. Hume*¹³⁰ the Court of Appeals for the District of Columbia required disclosure of a source. Jack Anderson had written a column stating that United Mine Workers general counsel Edward L. Carey and UMW President Tony Boyle had been seen improperly taking records from Boyle's office. Carey sued for libel and deposed Britt Hume, Anderson's colleague, who had supplied information for the article. Hume stated that a UMW employee was the source for the statement but declined to identify him.

The court of appeals first noted that *Branzburg* had not "disturb[ed] the basic balancing approach set forth in *Garland*."¹³¹ Insofar as civil litigation was concerned, the method remained one of "look[ing] to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claim of the newsman that the public's right to know is impaired."¹³²

The court in *Carey* went on to find that the information sought went to the heart of the matter: "the identity of the appellant's sources is critical to appellee's claim."¹³³ While the plaintiff had made no effort to discover the source of Hume's statement, the court noted that—in contrast to *Baker v. F & F Investment*¹³⁴—it was unreasonable to have the plaintiff interview all employees of the UMW to discover the source of Hume's statement.¹³⁵

The *Carey* court also distinguished *Cervantes v. Time, Inc.*,¹³⁶ in

129. "A party should seek a newsman's sources only as a last resort." *Id.* at 3.

130. 492 F.2d 631 (D.C. Cir. 1974).

131. *Id.* at 636. "[I]t appears to us that *Branzburg*, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach taken in *Garland*." *Id.*

132. *Id.*

133. *Id.* at 637.

134. 470 F.2d 778 (2d Cir. 1972).

135. 492 F.2d at 638-39. However, it can reasonably be argued that it would have been equally burdensome for the plaintiff in *Baker* to interview every real estate agent in Chicago in order to determine Balk's source. See notes 114-19 & accompanying text *supra*.

136. 464 F.2d 986 (8th Cir. 1972). *Life Magazine* had published an article about the Mayor of St. Louis entitled "The Mayor, The Mob and The Lawyer." Mayor Cervantes sued *Life* for libel. The pretrial depositions in the case showed that *Life* had been very careful in preparing the article, with one researcher, four editors and three lawyers spending a great deal of time corroborating the material which the article's chief reporter had collected. See *id.* at 994. Cervantes sought to depose that reporter to discover his sources. The defendant moved for summary judgment, arguing that it was not necessary to disclose the sources in view of the plaintiff's burden of proof of actual malice as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See note 137 *infra*. The court granted the motion.

which the Eighth Circuit had affirmed the grant of a summary judgment for a libel defendant, and had refused to force disclosure of his sources. In view of the plaintiff's burden under *New York Times Co. v. Sullivan*,¹³⁷ the *Cervantes* court found that there was no reasonable probability that plaintiff would succeed in his libel suit. The court stated that "to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."¹³⁸ In short, *Cervantes* holds that there must be a substantial state interest present before the court will require the disclosure of a newsman's source. If there is no probability of the plaintiff's success in the action, no disclosure is required. In disposing of *Cervantes*, the *Carey* court noted that it was not "unlikely" that *Carey* would succeed in his libel case.¹³⁹

While all of the foregoing libel cases explicitly or implicitly adopted the qualified privilege for newsmen, one such case—*Dow Jones & Co. v. Superior Court*¹⁴⁰—most assuredly does not. *The Wall Street Journal* had reported that a local real-estate developer had a bad reputation in Stoneham, Massachusetts, because he wanted to build apartment houses in an area zoned residential. It turned out that the developer actually wanted to build a nursing home, and the *Journal* corrected the article. The builder sued and the paper refused to reveal its source.

The Supreme Judicial Court of Massachusetts rejected the arguments advanced for a qualified privilege and concluded, "The obligation of newsmen, we think, is that of every citizen, viz. to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries."¹⁴¹ The court did not require exhaustion of alternate sources, or a compelling interest in the

137. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the cases following it, require that as a prerequisite to recovery in libel actions public-figure plaintiffs demonstrate that the statements complained of were made with actual malice, that is, knowing them to be false or with reckless disregard of whether they were false or not.

138. 464 F.2d at 993 n.10. See also *Cerrito v. Time, Inc.*, 302 F. Supp. 1071 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971) (holding that there should be no disclosure of sources because of the improbability of success under *New York Times*). The rule in *Cervantes* is designed to prevent the initiation of libel suits merely for the purpose of requiring disclosure of sources. Cf. *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964), requiring disclosure of sources because alternate sources had been exhausted.

139. 492 F.2d at 638.

140. 1973 Mass. Adv. Sheets 1469, 303 N.E.2d 847 (1973).

141. *Id.*, 303 N.E.2d at 849.

reporter's testimony. It relied on its earlier decision in *In re Pappas*¹⁴² as authority for the view that there was no First Amendment interest involved in requiring disclosure of sources.¹⁴³

Apart from the *Dow Jones* case, however, the newsman's privilege in civil libel cases seems to be developing on the familiar basis of (1) relevancy, (2) exhaustion of alternate sources, and (3) a compelling interest in the testimony, that is, that it goes to the heart of the matter (*Garland, Carey, Buchanan*) and is not for the purpose of forcing disclosure of sources (*Cervantes*).¹⁴⁴

Conclusions

It seems clear that five of the nine justices in *Branzburg* would not require a reporter's testimony in every instance; thus they granted a "qualified newsman's privilege." The standard varies from Justice Powell's apparent minimal requirement to the absolute position expressed by Justice Douglas.

Articulation of a qualified newsman's privilege is a very difficult task. As of mid-1974, Congress had not passed a shield bill, because, *inter alia*, of the complexity of expressing exactly what the nature of the privilege should be. Since *Branzburg* was handed down, some of the courts have also wrestled with this question; others have avoided the issue, concluding—incorrectly, in my view—that a qualified newsman's privilege does not exist.

142. *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971).

143. See 1973 Mass. Adv. Sheets 1469, 303 N.E.2d at 849. "[W]e are asked to rule that journalists have a qualified privilege to refuse to reveal confidential information which is admittedly relevant to a court proceeding. We adhere to our prior holding that the First Amendment imports no such privilege, qualified or absolute." *Id.*

144. See also *Linsey v. Kelman*, Civil No. 15,396 (D. Conn. Mar. 15, 1973). A Wallingford, Connecticut, paper stated that a dog track developer who wished to build a track in Wallingford consorted with criminals. The article also quoted a Brandeis University official as saying that the developer was "both a benefactor and scoundrel . . ." The story went on to quote a Jewish Philanthropies executive as saying: "We have a way of dry cleaning Joe Linsey's money." See *N.Y. Times*, March 21, 1972, at 19, col. 1. The developer sued for libel and moved for disclosure of the sources of the two statements. The court denied the motion without opinion, citing *Baker* and *Cervantes*. See Motion for Order Compelling Discovery, denied Mar. 9, 1973. Several analogous cases were decided before *Branzburg*. See *SEC v. North American Research & Dev. Corp.*, 67 Civ. 3724 (S.D.N.Y. May 27, 1968) (unreported case in which a special master found that *The New York Times* columnist Robert Metz need not disclose the source of a story about the North American Research company since the testimony was not relevant and did "not go to the heart of the case"). See Special Master's Report at 7 (June 4, 1968). See also *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951). *But cf.* *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957).

The four *Branzburg* dissenters would protect a newsman unless there was a showing of (1) relevance, (2) exhaustion of alternate sources, and (3) compelling state interest. We know that Justice Powell would adopt the first test, and this article has suggested that the process of balancing individual rights under the First Amendment with the state's interest in testimony invariably results in an articulation similar to parts 2 and 3 of the dissenters' test. It is submitted that there is nothing in Justice Powell's opinion that is inconsistent with the minority view, except that he would apparently shift the burden of proof to the newsman.

An examination of the surprising number of cases decided in the two-year period since *Branzburg* provides an insight into the practicality and viability of a qualified newsman's privilege. Although counting noses is not persuasive, a majority recognize a qualified privilege—correctly, in my view. In the cases adopting a qualified privilege, reference is usually made to all or part of the three-part test suggested by the minority in *Branzburg*. It can be said that, as a rule, when it comes to witnessing a crime, the courts have required testimony of newsmen without contemplating at great length the relevance Justice Powell would require, or the notion that the newsman should be a last resort for testimony. The courts seem to rely on an *a priori* compelling need of the state to require such testimony.

The cases have also generally treated tapes containing evidence of criminal behavior in the same fashion. While one can appreciate the obvious state interest in obtaining from a tape details of a crime, wholesale subpoenas of newsmen's tapes will inevitably impinge upon the editing process, particularly as this is reflected in the electronic newsman's outtakes and the print reporter's notes.

The remaining criminal cases involving subpoenas to newsmen seem to arise in situations where defendants, or courts on their behalf, are seeking information from the press to protect defendants' rights at trial. In several instances the cases have involved pretrial publicity. In many cases, the courts have protected such information (although *Farr* is a notable exception). This has been the result of the application of a balancing test roughly comparable to Justice Stewart's. It is submitted that this determination is the correct one, since investigative reporting frequently depends on the ability of a reporter to obtain information before or during trials, and—as the Watergate cases prove—often after trials have been finished and apparently closed.

Many of the civil cases decided since *Branzburg* deal with libel,

Substantially all of them adopt the test suggested by Justice Stewart in *Garland v. Torre*, a test which is roughly comparable to the one he suggested in his *Branzburg* dissent. The cases cannot all be rationalized; indeed, it would be foolish to try to do so. But they do seem to be developing a qualified newsman's privilege similar to the one newsmen themselves proposed to the Supreme Court in *Branzburg*, a test substantially adopted by Stewart in his dissent. While Justice Powell declined to adopt this test, analysis indicates that his position is not far from Stewart's.

Perhaps we will know more when the Supreme Court hears another newsman's privilege case. When it does, the Court will be able to refer to a body of case law—large already, and no doubt larger then—which hopefully will provide a foundation of reasoning upon which the Supreme Court can rely in articulating with clarity a qualified newsman's privilege.

