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## Constitutional Law: Freedom of the Press and A Reporter's Ability to Gather News

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# CONSTITUTIONAL LAW—FREEDOM OF THE PRESS AND A REPORTER'S ABILITY TO GATHER NEWS

In four contests before the United States Supreme Court in 1978 involving newsmen's first amendment freedoms,<sup>1</sup> the journalists prevailed only once.<sup>2</sup> The victory came when the Court overturned a state criminal conviction of a newspaper for printing, in violation of state law, the name of a judge under investigation.<sup>3</sup> The reporters' three losses involved the newsgathering phase of reporting. The Supreme Court upheld the issuance of a search warrant for a newsroom,<sup>4</sup> declined to review a state court decision requiring a newsmen to deliver his notes for in camera inspection,<sup>5</sup> and held that the news media has no right of access to information beyond that of the general public.<sup>6</sup>

This note will analyze the meaning and extent of first amendment freedom of the press in light of these four decisions. The note will also consider the practical effect that the decisions may have on the news media. The discussion will begin with an historical introduction to the circumstances surrounding the adoption of the first amendment right of a free press and a review of previous interpretations of and limitations on this right. The 1978 decisions will then be evaluated in light of this history, the goal being an elucidation of the current scope of the words "freedom of the press".

Beginning with the Magna Carta in 1215, through the American revolutionary period, there was an increasingly intensified struggle in England for recognition by the crown of the fundamental freedoms of speech and of the press.<sup>7</sup> The direct suppression of the press in England can be traced back to the enactment of the statute *De Scandalis Magnatum*<sup>8</sup> in 1275 which provided for the imprisonment of anyone disseminating false "tales" resulting in discord between the king and the people.<sup>9</sup> The object of the statute was the preservation of the British realm.<sup>10</sup> The statute was rewritten several times through the sixteenth century, with each reenactment broadening the scope of

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1. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S.Ct. 598 (1978); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

2. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

3. *Id.*

4. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

5. *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S.Ct. 598 (1978).

6. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

7. H. DRINKER, *SOME OBSERVATIONS ON THE FOUR FREEDOMS OF THE FIRST AMENDMENT* 3 (1957).

8. 3 Edward I, c.34 (1274).

9. E. HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* 8-9 (1963).

10. *Id.* 9.

the offense.<sup>11</sup> From its introduction in the 1400's, printing fell under the statute and any published statement against the king or queen was followed by severe punishment and not uncommonly by execution.<sup>12</sup>

The Court of Star Chamber administered the statute *De Scandalis Magnatum*. Star Chamber was a royal court and as such enjoyed the royal privilege of being unhampered by rules of evidence. It sat only when it wished and heard testimony only of its own counsel.<sup>13</sup> The court viewed censorship as essential to protect the security of the crown.<sup>14</sup> From the decisions of Star Chamber evolved the law of censorship and seditious libel.<sup>15</sup> The court undertook to suppress defamation that was likely to disrupt order and endanger the government's safety.<sup>16</sup> The Star Chamber began to exercise its powers in tyrannical fashion and resultingly was abolished in 1641,<sup>17</sup> after which Parliament enacted a series of licensing statutes.<sup>18</sup> Under these acts it was a crime to publish any news of a public nature without first obtaining a license.<sup>19</sup> When the last licensing statute expired in 1695, newspapers flourished as spokesmen for the commoners.<sup>20</sup> As a result, the governing classes developed a strong opposition to the press.<sup>21</sup> Thus, in 1711, a Stamp Act was enacted, levying a duty on all newspapers.<sup>22</sup> The objectives of this act were to place a restraint upon the press and to eliminate small newspapers.<sup>23</sup> During this period, any unfavorable criticism of the crown or public officials was absolutely forbidden:<sup>24</sup> libel was a crime, even if the libelous statement was true.<sup>25</sup> It was not until 1843, with the enactment of Lord Campbell's Act, that truth became a defense to libel.<sup>26</sup> The Stamp Act was not rejected until 1855.<sup>27</sup>

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11. For example, in 1378 the statute was broadened to include peers, prelates, and justices. In 1554 "seditious words" were added to the statute. *Id.*

12. H. DRINKER, *supra* note 7, at 4.

13. E. HUDON, *supra* note 9, at 9.

14. *Id.* 10.

15. *Id.* 9.

16. *Id.*

17. T. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 183 (2d ed. 1880).

18. E. HUDON, *supra* note 9, at 11.

19. *Id.*

20. *Id.*

21. *Id.*

22. 10 Anne, c.19 (1711).

23. E. HUDON, *supra* note 9, at 11.

24. *Id.* 13.

25. *Id.* 13-14. It was the judges who laid down the absolute principle that falsehood, although always alleged, was not essential to the guilt of libel. 3 H. HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 165-66 (1861). In libel actions, a jury's only function was to consider whether the publication was intentional. The court then decided, as a matter of law, whether the statement was libelous. HUDON, *supra* note 9, at 12. *See, e.g.*, Trial of John Udall, 1 Howell's State Trials 1271 (1590); Bushell's Case, Vaughn 135 (1670); Trial of Richard Francklin, 17 Howell's State Trials 625 (1731).

26. E. HUDON, *supra* note 9, at 14.

27. *Id.*

In the American Colonies, the press faced the same censorship and licensing requirements that it had experienced in England.<sup>28</sup> In spite of the British experience, protection for a free press was omitted from the Articles of Confederation which left to the states the entire subject of individual rights.<sup>29</sup> When the Federal Constitution was drafted, it, similarly, did not contain a specific guarantee of freedom of the press.<sup>30</sup> One later explanation for this omission was that the Framers were more concerned with giving the new federal government the powers necessary to govern effectively.<sup>31</sup>

The concentration of power in the federal government, however, led to an increasing concern for the protection of individual rights.<sup>32</sup> Almost immediately upon publication of the proposed Constitution, a drive for a federal bill of rights was launched.<sup>33</sup> By 1787 most of the states had adopted their own bills of rights which included guarantees of freedom of the press.<sup>34</sup> The American colonists believed, however, that because federal law was paramount to that of the individual states, any declaration of individual rights was insufficient security from the imposition of restrictive rules similar to those experienced under English law.<sup>35</sup> New York, Rhode Island and Virginia included a declaration of the the right of a free press in their ratifications of the Constitution.<sup>36</sup> At the first session of the United States Congress, a bill of individual rights was introduced by Madison<sup>37</sup> and became a part of the Constitution on December 15, 1791.<sup>38</sup>

The first amendment states, in pertinent part, that "Congress shall make no law . . . abridging the freedom . . . of the press."<sup>39</sup> Although the words seem clear, the scope and limitations on the first amendment freedom of the press have been the subject of continuing interpretation by the courts.

The predominant influence on the drafters of the first amendment

28. *Id.* 16-19.

29. B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 100 (1977).

30. *Id.* 101; W. HACHTEN, *THE SUPREME COURT ON FREEDOM OF THE PRESS* 4 (1968).

31. B. SCHWARTZ, *supra* note 29, at 103.

32. *Id.* 101.

33. E. HUDON, *supra* note 9, at 2.

34. B. SCHWARTZ, *supra* note 29, at 103.

35. C. READ, *THE CONSTITUTION RECONSIDERED* 4 (rev. ed. 1968).

The supporters of the constitution as it was proposed argued, in contrast, that a bill of rights had no place in a constitution that recognized sovereignty of the people. Because the people surrendered nothing to the government, it was argued that they need not reserve anything to themselves. HUDON, *supra* note 9, at 3.

36. W. HACHTEN, *supra* note 30, at 4.

37. B. SCHWARTZ, *supra* note 29, at 163. Madison's proposed bill stated, in pertinent part: "(4) [T]he people shall not be deprived of their right to speak, write, or publish their sentiments and freedom of the press shall be inviolable . . . ;

(5) No state shall violate the equal rights of conscience, or freedom of the press." *Id.*

38. W. HACHTEN, *supra* note 30, at 4.

39. U.S. CONST. amend. I.

was the experience with English censorship and licensing of the press. The Supreme Court has continually stated that a major purpose behind the first amendment freedom of the press is to guarantee immunity from prior restraints and censorship.<sup>40</sup> Thus, in *Grosjean v. American Press Co.*,<sup>41</sup> when publishers challenged a tax imposed by Louisiana on newspapers with a circulation of over 20,000, the Court reviewed the English struggle for a free press. The Court emphasized the "persistent effort"<sup>42</sup> on the part of English government to suppress free expression of opinions apparently critical of that government.<sup>43</sup> From this historical awareness the Court determined that for the drafters of the first amendment a principal meaning of "freedom of the press" was immunity from prior restraints and censorship.<sup>44</sup>

Similarly, the Supreme Court in *Bridges v. California*<sup>45</sup> examined the history of the first amendment in determining whether a newspaper could be restricted from publishing comments on pending litigation. The Court held that one purpose of the Bill of Rights was to secure a greater freedom of expression than that which had been enjoyed in England<sup>46</sup> and that the mere likelihood of interference with pending litigation was insufficient to justify a restriction on freedom of the press.<sup>47</sup>

In *Cox Broadcasting Corp. v. Cohn*,<sup>48</sup> the father of a deceased rape victim brought a civil suit against a broadcaster for reporting the name of his daughter as a rape victim. The father claimed invasion of privacy and relied upon a Georgia statute which made it a misdemeanor to broadcast a rape victim's name. The Court noted that the names of such victims were in the public record and as such were matters of public concern.<sup>49</sup> The Court pointed out that the general public, being limited in both time and ability to observe governmental operations first hand, relies upon the news media to report information concerning governmental operations. It is only with the aid of the press in gathering information that many members of the general public are able to vote intelligently and to develop opinions on government administration.<sup>50</sup> Stating that the freedom of the press to publish such information is of "critical importance" to our democratic form of

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40. *E.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936). *See also* *Bridges v. California*, 314 U.S. 252, 265 (1941).

41. 297 U.S. 233 (1936).

42. *Id.* 245.

43. *Id.*

44. *Id.* 248-49.

45. 314 U.S. 252 (1941).

46. *Id.* 265.

47. *Id.* 262.

48. 420 U.S. 469 (1975).

49. *Id.* 495.

50. *Id.* 491-92.

government,<sup>51</sup> the Court concluded that a state may not, consistent with the first and fourteenth amendments, impose sanctions for the accurate publication of the names of rape victims when such names are a matter of public record.<sup>52</sup>

Unrestrained dissemination of news is in contrast to the English experience in which the publication of certain information was prohibited.<sup>53</sup> The Supreme Court has recognized that the purpose of immunity from prior restraints on publication is to protect a free discussion of governmental affairs.<sup>54</sup> Such discussion was recognized by the Framers as essential to a democratic form of government.<sup>55</sup> The Court has consistently asserted the importance of a free press in disseminating news to the people, believing that an informed citizenry is essential in a society in which government ultimately rests with the people.<sup>56</sup>

During the 1940's, two views of the first amendment emerged. The first and ultimately unsuccessful interpretation may be referred to as the preferred right approach. This view would have made the first amendment freedoms absolute and superior to all other provisions of the Constitution.<sup>57</sup> The arguments in favor of this preferred position were based upon a belief that the language of the first amendment is unequivocal, placing the freedoms enumerated therein wholly beyond the power of the courts or legislatures to abridge.<sup>58</sup>

51. *Id.* 495.

52. The Court stated:

The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments commend nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

*Id.* 495.

53. See text at note 12 *supra*.

54. *E.g.*, *Mills v. Alabama*, 384 U.S. 214 (1966).

55. G.J. PATTERSON, *FREE SPEECH & A FREE PRESS* 129 (1939); *accord*, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

56. *E.g.*, *Red Lion Broadcasting Co. v. F.C.C.* 395 U.S. 367 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Id.* 390); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) ("Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Id.* 389); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) ("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* 250). See also *Bridges v. California*, 314 U.S. 252 (1941).

57. W. HACHTEN, *supra* note 30, at 13. See G. J. PATTERSON, *supra* note 55, at 145-52.

58. See, *e.g.*, *Smith v. California*, 361 U.S. 147 (1959), where Justice Black stated the preferred position in a concurring opinion as follows:

Certainly the First Amendment's language leaves no room for inference that abridgements of speech and press can be made just because they are slight. . . . The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms

The second concept of the first amendment may be termed the balancing approach. This view was in opposition to the preferred right view and held that in a conflict between the right of a free press and the right of impartial justice, a balancing of interests was called for<sup>59</sup> with the first amendment right giving way when a clear and present danger to the fair administration of justice existed.<sup>50</sup> In *Bridges v. California*,<sup>61</sup> a reporter was held in contempt for publishing his comments on pending litigation. The lower court held that the public interest in a free press must be subordinated to the societal interest in judicial impartiality.<sup>62</sup> The Supreme Court stated that freedom of speech and fair trials are "two of the most cherished policies of our civilization."<sup>63</sup> The Court considered to what extent the contempt citations would affect liberty of expression. It determined that the restrictions fell at the most crucial time when public interest in the pending litigation was at its height.<sup>64</sup> Thus, the Court asserted that the contempt citations resulted in a curtailment of expression that could not be dismissed as insignificant.<sup>65</sup> The only possible justification for such curtailment, according to the Court, would be that the contempt citations were designed to avert "some serious substantive evil."<sup>66</sup> The only "evil" which the Court found worthy of consideration was an unfair and disorderly administration of justice.<sup>67</sup> The Court then balanced the two interests of freedom of the press and the fair administration of justice, considering to what extent the particular utterances in question were likely to effect the substantive evil of an unfair trial.<sup>68</sup> The Court stated that the mere likelihood, however great, that a substantive evil would result was not sufficient to justify placing restrictions upon freedom of the press,<sup>69</sup> and reversed the contempt citation.

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wholly "beyond the reach" of *federal* power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment.

*Id.* 157-58 (footnote omitted). See also *Jones v. Opelika*, 316 U.S. 584 (1942), in which Justice Stone wrote in a dissenting opinion:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put these freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack.

*Id.* 608.

59. W. HACHTEN, *supra* note 30, at 13-14.

60. See, e.g., *Pennekamp v. Florida*, 328 U.S. 331 (1946)

61. 314 U.S. 252 (1941).

62. *Id.* 259.

63. *Id.* 260.

64. *Id.* 268.

65. *Id.* 270.

66. *Id.*

67. *Id.* 270-71.

68. *Id.* 271.

69. *Id.* 262.

Eventually, the preferred position became meshed with the balancing approach and thus, even when it approved a somewhat preferred position for the freedom of the press, the Supreme Court insisted on balancing this freedom against other societal interests.<sup>70</sup> It became clear that freedom of the press is not an absolute right.<sup>71</sup>

In 1978, the Supreme Court reasserted that a major purpose of the first amendment freedom of the press was to protect free public discussion of government affairs.<sup>72</sup> *Landmark Communications, Inc. v. Virginia*<sup>73</sup> involved the challenge by a publisher of his criminal conviction under a Virginia statute that prohibited the publication of information regarding a pending inquiry before a state judicial review commission. The published article stated the name of a judge under investigation while accurately reporting that no formal complaint had been filed. At the trial, the managing editor of the local newspaper which had published the story testified that the decision to publish the article was based upon a belief that the subject was one of public importance that should be brought to the attention of the newspaper's readers.<sup>74</sup> *Landmark* argued that the first amendment protected it from criminal prosecution for publishing truthful information about the proceedings.<sup>75</sup>

The Court stated that matters of judicial conduct and the operation of the courts are of the "utmost public concern."<sup>76</sup> The Court found that the *Landmark* article published factual information which served the societal interests of public scrutiny and discussion of the affairs of the government that the first amendment was adopted to protect.<sup>77</sup> Limiting its decision to the facts of the case, the Court held that the first amendment did not permit criminal punishment of *Landmark* for publishing truthful information concerning matters of public concern. The Court held that a showing of imminent danger to the fair administration of justice was required to impose a contempt citation on the press for out-of-court statements regarding pending litigation.<sup>78</sup> The decision reaffirmed that freedom of the press, although given great weight, must nevertheless be balanced against other societal concerns.

Although the Court has consistently recognized that a primary purpose of the first amendment freedom of the press is a limitation on

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70. See FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT (H. Nelson ed. 1967).

71. Siebert, *Toward a Theory of Freedom of the Press* in FREEDOM OF THE PRESS, *supra* note 70, at 34.

72. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

73. 435 U.S. 829 (1978).

74. *Id.* 832.

75. *Id.* 838.

76. *Id.* 839.

77. *Id.*

78. *Id.* 845.



ensorship, the Court additionally has pointed out that freedom of the press is not limited to a freedom to publish.<sup>79</sup> In *Grosjean v. American Press Co.*,<sup>80</sup> the Court was faced with a challenge to a tax on publishers not unlike the Stamp Acts of England. While the Court placed major emphasis on the historical setting in which the first amendment was written and the similarity of the English suppression to the tax under consideration, the Court nevertheless asserted that freedom of the press was not exclusively freedom from prior restraints and censorship.<sup>81</sup> The Court found it inconceivable that the framers, influenced by the British experience, intended to limit the words "freedom of the press" to the narrow view that such a freedom consisted solely of immunity from prior censorship.<sup>82</sup>

In *Bridges v. California*,<sup>83</sup> the Court, in considering restraints on the publication of comments on pending litigation, reviewed the historical perspective of the first amendment<sup>84</sup> and determined that a major purpose of freedom of the press was to secure greater freedom of expression for the people of the United States than was experienced in England.<sup>85</sup> The Court stated that the first amendment must be given the broadest interpretation that "could be countenanced in an orderly society."<sup>86</sup>

Notwithstanding such assertions of a broad reading of the first amendment, the Court has not indicated clearly what, in addition to freedom to publish, is encompassed by the first amendment. Therefore, in addition to claiming a privilege based on direct prior restraints on the press, newspaper reporters began to assert a privilege in connection with indirect restraints and the safeguarding of their news sources.<sup>87</sup>

The assertion of a preferred position in regard to newsgathering based upon the first amendment guarantee of freedom of the press was first made in *Garland v. Torre*.<sup>88</sup> In *Garland*, a reporter was held in criminal contempt for refusing to reveal a confidential source who allegedly had defamed Judy Garland. In upholding the conviction, the Second Circuit stated that although freedom of the press is "precious

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79. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

80. 297 U.S. 233 (1936).

81. *Id.* 249.

82. *Id.*

83. 314 U.S. 252 (1941).

84. *Id.* 264-65.

85. *Id.* 265.

86. *Id.*; *accord*, *Martin v. City of Struthers*, 319 U.S. 141 (1943); *see* *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (concurring opinion) ("However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful." *Id.* 308).

87. *See generally* C. WHALEN, JR., *YOUR RIGHT TO KNOW* (1973).

88. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

and vital" to a free society, it is not an absolute right and must yield to the fair administration of justice.<sup>89</sup> The court employed a balancing approach, weighing the interest to be served by compelling the reporter to reveal her source against impairment of the first amendment freedom of the press.<sup>90</sup> The court examined the relevance of the information sought, pointing out that it went to the central issue of Garland's claim and that Garland had no other way of obtaining the information.<sup>91</sup> Because the information sought was of primary importance to the issue on trial, the court held that in this instance the reporter had no first amendment right to remain silent.<sup>92</sup>

In 1972 the Supreme Court decided the landmark case of *Branzburg v. Hayes*.<sup>93</sup> In *Branzburg*, the issue before the Court was whether the guarantee of freedom of the press exempted journalists from testifying before state and federal grand juries regarding their confidential sources.<sup>94</sup> In confronting this indirect restraint on the press, the Court balanced the public interest in law enforcement and effective grand jury proceedings against the burden on newsgathering which might result from requiring reporters to respond to a valid grand jury investigation.<sup>95</sup> The Court stressed that it was concerned with a journalist's obligation to answer questions relevant to an investigation of a crime.<sup>96</sup> It determined that the information sought from the newsmen

89. *Id.* 548.

90. *Id.*

91. *Id.* 549-50.

92. *Id.* 550.

93. 408 U.S. 665 (1972).

This was a consolidation of three lower court decisions. Petitioner Branzburg had written two news stories in which he described his observations of the synthesizing of marijuana and in which he described in detail the use of drugs in a community in Kentucky. Branzburg was summoned by a county grand jury and although a protective order was issued protecting him from revealing his confidential sources, he was required to answer questions concerning any crime actually committed in his presence. Branzburg argued that he had a First Amendment privilege not to respond to the grand jury summons. *Id.* 667-71.

Petitioner Pappas was a television newsman who had gained entrance to a Black Panther headquarters upon the condition that he would not disclose anything he saw or heard within the headquarters. Pappas did not write a story on his observations. He was later summoned by a county grand jury and claimed a First Amendment right not to answer questions regarding what he had seen within the Panther headquarters. This claim was denied by the lower court which noted that the judge could, in his discretion, consider the newsman's argument that his use as a witness would result in an unnecessary use of his work product. *Id.* 672-75.

Caldwell, a reporter for the New York Times, was served with a subpoena duces tecum to appear before a federal grand jury with notes and tape recordings of interviews with members of the Black Panthers which had been given to him for publication. Caldwell objected to the scope of the subpoena. A protective order was issued that required Caldwell to divulge information that had been given to him for publication but protected him from revealing his confidential sources. *Id.* 675-79.

94. *Id.* 667, 679-80.

95. *Id.* 690.

96. *Id.* 682.

was central to the issue of whether a crime had been committed,<sup>97</sup> and thus held that the reporters must respond to the grand jury subpoenas.

The *Branzburg* opinion acknowledged the existence of a first amendment protection for newsgathering<sup>98</sup> but stated that it was not absolute: upon showing of compelling need, a reporter could be required to testify.<sup>99</sup> The Court noted that its holding did not threaten the majority of confidential relationships between newsmen and their sources.<sup>100</sup> The Court clearly stated that a reporter only need be concerned about grand jury summonses when the news source itself is implicated in a crime or possesses information relevant to the grand jury's task.<sup>101</sup>

In a concurring opinion, Justice Powell emphasized the limited nature of the *Branzburg* holding by stressing that each case involving a journalist's constitutional right to gather news would necessitate a balancing of opposing interests.<sup>102</sup> He indicated that if the information requested had only a remote relationship to the subject under investigation, a reporter would have a legitimate argument for a motion to quash the subpoena.<sup>103</sup>

Writing in a dissenting opinion, Justice Stewart expressed fear that the majority holding would undermine freedom of the press by denying to journalists a first amendment right to protect news sources when called before a grand jury, thus making the media an investigative arm of the government.<sup>104</sup> This result, according to Justice Stewart, would destroy the historic independence of the press.<sup>105</sup> The dissent further pointed out that without the freedom to acquire information, the right to publish would be seriously compromised.<sup>106</sup> Justice Stewart cited the concurring opinion of Justice Powell as giving some hope for a flexible approach to the journalist's privilege to gather news,<sup>107</sup> and further stressed that the test for requiring a newsmen to reveal his confidential sources should include both a showing of "compelling importance" and a demonstration that the inquiry has a substantial relationship to the information sought.<sup>108</sup>

When faced with a conflict between a reporter's assertion of a newsgathering privilege and a defendant's right to a fair trial, the lower courts have cited *Branzburg* in support of the existence of a con-

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97. *Id.* 701.

98. *Id.* 681.

99. *Id.* 702.

100. *Id.* 691.

101. *Id.*

102. *Id.* 709-10 (Powell, J., concurring).

103. *Id.* 710.

104. *Id.* 725 (Stewart, J., dissenting).

105. *Id.*

106. *Id.* 728.

107. *Id.* 725.

108. *Id.* 739-40.

ditional privilege. They have then employed a case-by-case balancing approach as was suggested by Justice Powell in *Branzburg*.<sup>109</sup> Generally, the balance has not been struck against reporters when confidential information sought was not central to the issue being litigated<sup>110</sup> or when the information could be obtained from other sources.<sup>111</sup> The lower courts have recognized that requiring a reporter to turn over his confidential sources would have a chilling effect on the newsgathering phase of reporting and on the free flow of information to the public.<sup>112</sup>

Thus, a reporter's privilege to gather information, at least as it related to the protection of confidential news sources, was firmly established as conditional, not absolute. The privilege would yield only when the failure to require a reporter to reveal his sources would inhibit the constitutional right to a fair trial.

In 1974, newsmen asserted a constitutional right to gather information in another context. *Pell v. Procunier*<sup>113</sup> and *Saxbe v. Washington Post Co.*<sup>114</sup> involved first amendment challenges to regulations that prevented reporters from conducting interviews with individually selected inmates of a prison. In both cases the Supreme Court noted that except for the limitation on personal interviews with specific inmates, the press, as well as the general public, was given a substantial opportunity to observe prison conditions.<sup>115</sup> The Court held that the restriction on a journalist's newsgathering ability was constitutional in both cases and that news reporters have no right of access to prison inmates beyond that of the general public.<sup>116</sup> In reaching these decisions, the Court noted that the regulations under attack were not an attempt on the part of the state to conceal prison conditions and that both the press and the public had substantial access to the prisons.<sup>117</sup> The *Pell* Court cited *Branzburg* in support of its

109. *E.g.*, *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) ("The application of . . . *Branzburg* . . . require[s] that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Id.* 468); *Brown v. Virginia*, 214 Va. 755, 204 S.E.2d 429 (1974) ("But we think the privilege of confidentiality should yield only when the defendant's need is essential to a fair trial." *Id.* 431). *See generally* Annot., 7 A.L.R.3d 591 (1966).

110. *E.g.*, *United States v. Orsini*, 424 F.Supp. 229 (E.D.N.Y. 1976), *aff'd* 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Brown v. Virginia*, 214 Va. 755, 204 S.E.2d 429 (1974).

111. *E.g.*, *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975).

112. *E.g.*, *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975).

113. 417 U.S. 817 (1974).

114. 417 U.S. 843 (1974).

115. *Pell*, 417 U.S. at 830; *Saxbe*, 417 U.S. at 847. For example, in both cases there was unlimited correspondence between inmates and the press; the press was allowed to tour the prisons and to photograph any facilities.

116. *Pell*, 417 U.S. at 834; *Saxbe*, 417 U.S. at 849.

117. *Pell*, 417 U.S. at 830; *Saxbe*, 417 U.S. at 849.

decision, reading that case as limiting the reporters' privilege to immunity from direct restraints on publication and giving the press no immunity from the general application of the law.<sup>118</sup>

The dissent in *Saxbe* pointed out that the *Branzburg* opinion did not hold that the government is entirely free to restrict the newsgathering activities of the press.<sup>119</sup> It emphasized that an accurate reading of *Branzburg* would limit the restrictions set forth in that case to situations involving a conflict between freedom of the press and the right to a fair trial.<sup>120</sup> The dissent also noted that *Branzburg* explicitly recognized that freedom of the press extends to antecedent activities which make the right to publish meaningful.<sup>121</sup>

In 1978 the Supreme Court, in *Landmark*, reaffirmed that freedom of the press is a broad, though not absolute, freedom to publish information.<sup>122</sup> During the same year the Court additionally faced assertions of a reporter's constitutional privilege to gather news. The press claimed the rights of protection of confidential sources and of privileged access to information.

In *In re Farber*,<sup>123</sup> Myron Farber, a reporter for the New York Times, had investigated certain activity which allegedly contributed to the indictment and prosecution of one Dr. Jascavevich for murder. Jascavevich's attorney served Farber with a subpoena duces tecum requiring Farber to reveal confidential sources. Farber refused to produce his notes, arguing that he was entitled to a hearing on the issues of relevance, materiality and overbreadth of the subpoena.<sup>124</sup> The trial judge ordered production of the documents for in camera inspection.<sup>125</sup> The New Jersey supreme court held that a reporter had no first amendment privilege to refrain from submitting subpoenaed documents for in camera inspection, regardless of the fact that confidential sources might be involved, and ordered Farber to produce the notes.<sup>126</sup> The court interpreted *Branzburg* as declaring that journalists have no constitutional privilege to protect confidential sources when properly subpoenaed to appear before a grand jury.<sup>127</sup> The court stated that appearing at a trial on behalf of a criminal defen-

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118. Pell, 417 U.S. at 833-34.

119. *Saxbe*, 417 U.S. at 859 (Powell, J., dissenting).

120. *Id.* 859-60.

121. *Id.* 859.

122. See text *supra* at notes 73-78.

123. 78 N.J. 259, 394 A.2d 330 (1978).

124. *Id.*

125. *Id.* at \_\_\_\_\_, 394 A.2d at 332. The New Jersey supreme court refused to stay the lower court order. Farber then applied to two individual Justices of the United States Supreme Court. Both Justice White and Justice Marshall refused the stay based on a belief that four justices of the Court would not vote to grant a writ of certiorari in the case. *N.Y. Times v. Jascavevich*, 99 S.Ct. 6, 11 (1978).

126. 78 N.J. at \_\_\_\_\_, 394 A.2d at 338, 341.

127. *Id.* at \_\_\_\_\_, 394 A.2d at 334.

dant enforcing his sixth amendment rights was "at least as compelling as the duty to appear before a grand jury."<sup>128</sup> The New Jersey court saw no need to apply a balancing test since its interpretation included no privilege to be balanced.

Justice Stewart granted a stay of the lower court order pending the disposition of the petition for certiorari, but this was vacated by the Supreme Court ten days later.<sup>129</sup> Justice Marshall dissented, reiterating his earlier opinion that some threshold showing of relevance, necessity and materiality should be required even for in camera review.<sup>130</sup> Marshall reasoned that without such a showing a reporter's ability to gather news would be inhibited<sup>131</sup> because, as he had earlier noted, many potential informants might refuse to come forward with information if they knew that, upon request of a defendant, a judge could inspect a reporter's notes.<sup>132</sup> Justice Marshall's views notwithstanding, the Court denied Farber's petition for certiorari.<sup>133</sup>

*Zurcher v. Stanford Daily*<sup>134</sup> involved the issuance of a warrant to search the offices of the Stanford Daily, a student newspaper. The warrant was issued upon a judge's finding of probable cause to believe that the newspaper possessed photographs which would aid in identifying individuals who had assaulted two police officers.<sup>135</sup> The search was conducted by four police officers who had the opportunity to read confidential notes and correspondence belonging to the newspaper's reporters during the course of the search. The Stanford Daily brought a civil suit in which it alleged that the search had deprived it of its first amendment right to gather, analyze and disseminate news.<sup>136</sup>

The lower court declared that the right of freedom of the press protected a newspaper from the issuance of a search warrant except in the rare circumstances where there was a clear showing that a subpoena duces tecum would be impractical.<sup>137</sup> The Supreme Court

128. *Id.*

129. 99 S.Ct. 241 (1978).

130. *Id.*

131. *Id.*

132. 99 S.Ct. 38 (1978).

133. 99 S.Ct. 598 (1978).

134. 436 U.S. 547 (1978).

135. *Id.* 551.

136. *Id.* 563. The press put forth five arguments as follows:

First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of information will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use. . . . Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

*Id.* 563-64.

137. *Id.* 552 (The Ninth Circuit affirmed, *per curiam*).

reversed, stating that the fourth amendment allows the issuance of a warrant to search *any* property when there is probable cause to believe that the thing searched for will be found there.<sup>138</sup> The Court noted that the important requirement in determining whether a search warrant was properly issued is "probable cause" and not the status of the owner of the property being searched.<sup>139</sup> The only indication that the press might stand in a preferred position was the Court's statement that when the press is involved, the probable cause requirement must be applied with "scrupulous exactitude."<sup>140</sup> The Court rejected the argument that allowing searches of newspaper offices when there was no indication that a subpoena duces tecum would not suffice would seriously threaten the freedom of the press,<sup>141</sup> stating that the prerequisites for obtaining a warrant were sufficient protection against the harms alleged by the journalists.<sup>142</sup>

The constitutional right of access to information was asserted in 1978 in *Houchins v. KQED, Inc.*<sup>143</sup> In *KQED*, a radio and television broadcaster had requested and been denied permission to inspect and photograph a particular portion of a jail in which alleged prisoner abuses occurred and in which an inmate had committed suicide.<sup>144</sup> Access of both the public and the press to the section of the jail in question was severely limited.<sup>145</sup> *KQED* filed suit, contending that these restrictions on access to the jail violated the station's constitutional privilege to gather news. The broadcaster based its assertion of this privilege on *Pell v. Procunier* and *Branzburg*. *KQED*, citing dicta in *Grosjean* on the importance of an informed public, argued that the denial of press access to the prison denied the public its right to become informed so as to discuss and criticize the administration of the penal system.<sup>146</sup>

138. *Id.* 554.

139. *Id.* 558-59.

140. *Id.* 564. "As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper." *Id.* 565.

141. See the press' arguments enumerated at note 136 *supra*.

142. 436 U.S. 565.

143. 438 U.S. 1 (1978).

144. *Id.* 3-4.

145. As the dissent of Justice Stevens stated:

Except for a carefully supervised tour in 1972, the news media were completely excluded from the inner portions of the Santa Rita jail until after this action was commenced. Moreover, the prison rules provided that all outgoing mail, except letters to judges and lawyers, would be inspected; the rules also prohibited any mention in outgoing correspondence of the names or actions of any correctional officers. *Id.* 20.

Shortly after *KQED* filed its lawsuit, a series of six monthly tours of the jail were opened to the public. The tours gave only limited access to the jail and did not include the Greystone portion, the area in which conditions were allegedly deplorable. Inmates generally were removed from the view of those on the tour, and cameras and tape recorders were not permitted. *Id.* 4.

146. *Id.* 7-8.

The Supreme Court held that the first amendment did not guarantee access to information within the government's control. The Court stated that the role of the press in informing the public includes only a freedom to communicate information after it has been obtained.<sup>147</sup> The Court stated that *Branzburg* implied no right of access to news sources<sup>148</sup> and cited *Pell* and *Saxbe* for the general proposition that the press may not, on any occasion, have a right of access beyond that of the general public.<sup>149</sup>

In a dissenting opinion, Justice Stevens distinguished the factual setting of *Pell* and *Saxbe* in which there was substantial prison access afforded to both the press and the public.<sup>150</sup> He argued that those cases should not apply to a situation such as that faced by KQED in which public as well as press access was highly limited.<sup>151</sup> Justice Stevens stressed the importance of a constitutional protection for newsgathering in order to protect the underlying public right of a free flow of information.<sup>152</sup>

The United States Supreme Court consistently has recognized that freedom of the press encompasses a broad although conditional right to publish information without fear of prior restraints and censorship.<sup>153</sup> The Court has acknowledged that underlying this right is the privilege and necessity of a free people to be informed.<sup>154</sup> The position of the Court on the newsgathering phase of reporting is less clear. The Court has considered whether the right to publish includes a privilege to gather news.<sup>155</sup> Although it has not denied the existence of such a privilege, the current trend appears to be one of placing broad restrictions on any such privilege, if in fact one does exist.

Conflicts between first amendment freedom of the press and some other asserted right may be separated into two basic categories. The first is when a direct restraint on publication is sought to be imposed upon the press. The second is when a restriction indirectly affects the ability to publish. In both instances there is some interference with the interests served by a free press. Those interests are both individual and societal. Individually, a free press guarantees freedom of expression. Societally, a free press guarantees freedom of expression. Societally, a free press allows the general public to become informed on matters of public concern and governmental administration so as to be able to formulate opinions about the operation of the government.<sup>156</sup>

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147. *Id.* 9.

148. *Id.* 10-11.

149. *Id.* 11.

150. *Id.* 27-30 (Stevens, J., dissenting).

151. *Id.*

152. *Id.* 30-34.

153. See text at note 56 *supra*.

154. *Id.*

155. See *e.g.*, *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

156. See text at note 54 *supra*.



Cases in which a direct restraint is imposed on publication mirror the British experience of suppression by the Crown; an experience which the first amendment sought to avoid. The belief of our nation's founders that a press free from censorship and prior restraints is a cornerstone of a free society has been restated throughout American legal history.<sup>157</sup> Underlying this belief is a recognition that the freedom to publish without censorship is really a right of the public to information, the press being the tool for the dissemination of information.<sup>158</sup> Clearly, in a society whose very essence is a popular voice in government, a means of informing the public of governmental affairs is a basic and essential tool. The Court has not been willing to lightly restrict publication, but rather has guarded this aspect of the first amendment with a jealous eye.

In 1978, consistent with its past decisions, and underscored by a unanimous decision, the Supreme Court recognized the importance of the first amendment guarantee as it relates to censorship of the press. *Landmark* reaffirmed the notion that freedom of the press is most certainly the freedom to publish information and that although the guarantee is not absolute, it should be interpreted broadly.<sup>159</sup>

In spite of this broad directive, the *Landmark* decision is not a strong one for the newspaper reporter. The Court in *Landmark* limited its holding to the facts before it while explicitly refusing to address the broader question of whether there is a general privilege for publication of truthful information which is by law withheld from the public.<sup>160</sup> Following *Landmark*, it is clear that a reporter is free to publish the name of a judge under investigation, notwithstanding state law to the contrary. The decision, however, leaves the reporter without any guidelines concerning at what point he is no longer free to publish what he chooses. Such uncertainty has the potential of inhibiting a reporter's decision to publish newsworthy information.

157. See *Palko v. Connecticut*, 302 U.S. 319 (1937), in which Justice Cardozo wrote "of freedom of thought, and speech . . . one may say that it is the matrix, the indispensable condition, for nearly every other form of freedom." *Id.* 326-27; G. HURST, WRITINGS OF JAMES MADISON 103 (1910); Cooper, *On the Propriety and Expediency of Unlimited Enquiry*, in FREEDOM OF THE PRESS, *supra* note 70, at 13; Comm'n on Freedom of the Press, *The Problem & the Principles of Freedom & Responsibility*, *Id.* 387. The Commission wrote:

Freedom of the press is essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure. Where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present. Free expression is therefore unique among liberties: it promotes and protects all the rest. *Id.* 392.

A free press provides an individual with information with which to form beliefs and thus promotes discussion of the government. The traditional theory is that such an open discussion eliminates arbitrary control and allows for a government by the people. Thus freedom to publish may be viewed as a social as well as an individual good. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5-9 (1966).

158. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495-96 (1975).

159. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

160. *Id.* 840.

When the conflict with the press' first amendment right involves restrictions which indirectly affect journalists' ability to publish information, the Court has been less than zealous in its protection of the press. In the very same opinions that have reasserted the freedom to publish, the Court has progressively limited a reporter's ability to gather information for publication. Gathering information is an essential prerequisite to the publication of information. Thus, the proposition can be advanced that the Court's recent decisions have abridged the freedom of the press.

Prior to the assertion in *Garland v. Torre* of a constitutional privilege to gather news, the Court had regularly indicated that freedom of the press included more than mere freedom from prior restraints.<sup>161</sup> The Court had not, however, indicated what else the guarantee might encompass, but had emphasized that the principles of democracy required the broadest reading possible.<sup>162</sup> When the Second Circuit was first faced with the assertion of a constitutional right to gather news in *Garland*, by limiting its decision to the facts of the case and by balancing the interests involved, the court implied that, at least with respect to the protection of confidential sources, a qualified privilege existed.

*Branzburg* clearly stated that a newsperson's privilege to gather news was not absolute and that a reporter would be required to reveal confidential sources to a grand jury when the information was directly related to the crime under investigation. Following *Branzburg*, the lower courts have broadened the application of the *Branzburg* tests of relevance and necessity by requiring a balancing of interests not only when a grand jury summons is involved, but also when the information is sought for use at trial.<sup>163</sup> This is a significant development when one considers that any confidential information revealed at trial becomes a matter of public record. Because of the adverse effect this might have on potential news sources, the courts gave great weight to the newspersons' privilege to gather news when weighing it against the right to a fair trial. Against the background of *Branzburg* and its progeny, a reporter could be fairly certain in assuring his confidential sources that they would not be revealed except in the most extreme circumstances.

*Farber*, however, takes the *Branzburg* restrictions on the reporter's privilege one step further. After *Farber*, no showing of relevance or necessity need be made if the documents are being produced for in

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161. See, e.g., *Bridges v. California*, 314 U.S. 252 (1941); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

162. E.g., *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

163. 51 WASH. L. REV. 1005, 1011 (1976).

camera inspection. Although such an inspection does not become a matter of public record, the adverse effect of the ruling may seriously hinder a reporter's ability to gather news. Sources who, for whatever reason, desire to remain confidential, might withhold information when presented with the possibility that a judge could be made aware of their names merely upon the request of a defendant even when they or their information is only tangentially related to the issue being litigated.<sup>164</sup>

News sources like to be assured that there is little likelihood that their identities will be revealed before they will divulge their information.<sup>165</sup> Following *Farber*, it would seem difficult for a reporter to give such assurance, especially when the information concerns a criminal matter. It is questionable whether this potential elimination of sources of information helps rather than hinders the fair administration of justice. If information gathered from confidential sources is published it may lead law enforcement agencies toward criminal activity that would not otherwise have come to their attention. *Farber* could easily result in such information not being published due to the decision's potential chilling effect on confidential sources.

If the *Farber* case has a chilling effect on the gathering of news, the *Zurcher* decision has the potential of freezing it entirely. As pointed out in the dissenting opinion of Justice Stewart, a search of a newsroom may quite conceivably lead to a needless disclosure of confidential sources<sup>166</sup> which have no relation whatsoever to the matter under investigation. Notes and names of sources, as well as other confidential information which a reporter keeps in his or her files in the newsroom, may be read during the course of the search for the information which is the subject of the warrant. Although a search warrant will not be issued without a showing of probable cause, this test gives no protection to the notes and documents that might be inspected during the course of the search. In the usual case, a subpoena duces tecum would be an adequate method for obtaining the documents sought and in fact would probably be more effective.<sup>167</sup> Nevertheless, the *Zurcher* decision would seem to allow a choice on the part of the party requesting information between a warrant and a subpoena.

Currently, the issuance of subpoenas to news organizations is a common occurrence.<sup>168</sup> If search warrants, rather than subpoenas,

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164. *In re Farber*, 78 N.J. 259, 394 A.2d 330, 333 (argument of Appellants).

165. Interview with Neal Shine, Managing Editor, The Detroit Free Press (February 7, 1979).

166. *Zurcher v. Stanford Daily*, 436 U.S. 547, 571-73 (dissenting opinion).

167. Interview with Neal Shine, Managing Editor, The Detroit Free Press (February 7, 1979). Newsroom personnel can collect requested information quickly and efficiently. The manner of storing information in a newsroom may appear to be one of complete disorder to an outsider. Thus the actual search under a warrant is likely to be inefficient and perhaps even futile.

168. *Id.*

were to become the norm, it is difficult to perceive how a reporter could offer any assurance to his sources that they will remain confidential. With no such assurance, the flow of confidential news would have a high probability of drying up, the result being a limitation on the journalists' ability to gather news and subsequently report it to the public.<sup>169</sup>

Confidential sources are but one aspect of the news gathering phase of reporting. *KQED* addresses a reporter's access to information under governmental control and the indirect effect of limiting access on the freedom to publish information. In *KQED*, like in *Pell* and *Saxbe*, the media were allowed no access beyond that of the general public.<sup>170</sup> Unlike the circumstances in *Pell* and *Saxbe*, however, public access to the Santa Rita jail was extremely limited and there was in fact no access to the Greystone portion of the jail, the very portion in which prisoner abuses were allegedly occurring. The Santa Rita jail is a government institution, supported by public funds and controlled by public officials. This would seem to be the sort of government activity about which free public comment was seen by the Framers as essential to a government by the people. Yet it is difficult to see how the public can discuss something about which it has no method of obtaining information.

Clearly, totally free access to a penal institution would have a potential of disrupting order and discipline within the jail. It would seem, however, that supervised tours of the *entire* jail, at times selected by those in control, could be arranged so as to have a minimal disruptive effect. In fact, the regulations attacked in *Pell* and *Saxbe* afforded even greater access than this to the entire public without adverse effect.<sup>171</sup>

Modern Americans rely on the news media to provide them with information about public affairs. In fact, the underlying right of a free press "is the right of the public generally."<sup>172</sup> It is by this rationale that *Pell* and *Saxbe* could justify granting no special access to the press. Those decisions, however, involved a situation in which there was adequate public disclosure. In *KQED*, the public disclosure was definitely inadequate.

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169. *Id.* It should be noted that frequent requests for questionably relevant confidential information and the issuance of search warrants are not very real threats for a large newspaper because of the political clout that such a newspaper carries on its editorial pages. The small newspaper, in contrast, is more vulnerable. Thus, it is possible that the choice of a search warrant instead of a subpoena could be used by law enforcement agencies to harrass small publications with unpopular views. The effect of such action would be a limitation of free expression. The ultimate effect of such a limitation is an undermining of the underlying right the first amendment was intended to protect: the right of the public to be informed.

170. See text at note 150 *supra*.

171. See text at note 117 *supra*.

172. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 864 (Powell, J., dissenting).

There is no constitutional mandate that the government must provide public access to sources of information within its control.<sup>173</sup> Under the holding of *KQED*, the government by restricting public access could thereby restrict press access as well. In so doing, the government could severely limit the free discussion of political affairs which has been considered so essential to a democratic form of government.<sup>174</sup>

The concept of a free press is merely a means to an end; that end being a government controlled by the people. The news media acts as an arm of the public, providing the public with the information it needs to formulate its views and to participate in the decision-making that shapes the government.<sup>175</sup> For this reason, freedom to publish was the main concern of the men who drafted the first amendment. The Supreme Court clearly supports the primary intent of the drafters of establishing a press that is free to publish what it chooses. Inherent in this freedom, however, is the assumption that one will have information to publish. If a newsperson cannot gather information then he cannot perform the function of informing the people. The possible implications of the Court's recent decisions bode ill, for without freedom to gather information, freedom to publish becomes an empty phrase. If the Supreme Court continues its trend of increasing the restrictions upon the press, it has the potential of severely undermining the freedom of expression that was so cherished by this nation's founders.<sup>176</sup>

The Framers wrote "Congress shall make no law . . . abridging the freedom . . . of the press."<sup>177</sup> As it has evolved, this freedom is not absolute. Clearly, as exemplified by *Landmark*, a direct abridgement is not allowed except in the most extreme circumstances. Thus, prior restraints and censorship of the press will rarely be tolerated.<sup>178</sup> A question arises, however, when there is an indirect effect on the freedom to publish caused by restraints placed on the newsgathering phase of reporting. Journalists have continually argued that without a privilege to gather news they are seriously hampered in their ability to perform their task of informing the public.<sup>179</sup> The recent decisions of the Supreme Court, while not explicitly denying the existence of a privilege, have placed extensive restraints upon a reporter's access to

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173. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978).

The government could easily find justification for limiting general public access to governmental institutions based on such reasons as crowd control or security.

174. *See id.* 32 (Stevens, J., dissenting); *EMERSON, supra* note 156, at 5-6.

175. *EMERSON, supra* note 156, at 5-9.

176. *Id.* 59.

177. U.S. CONST., amend. I.

178. *See text at note 56 supra.*

179. *See, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547; *WHALEN, supra* note 87, at 111-34.

information. The decisions indicate that rarely, if ever, will a secondary effect on the freedom to publish be found to be an abridgement of freedom of the press. Thus, the scope of the first amendment freedom of the press has been eroded since the early directives requiring a broad reading of its words. The balancing approach which was applied to assertions of a constitutional privilege to gather information has been all but abandoned, being replaced by absolute denials of access. The Court appears to have begun a reinterpretation of the words "freedom of the press" to mean freedom to publish. If there is no protection for gathering information and if the government may restrict a reporter's ability to acquire news, however, freedom to publish is an empty freedom.

Freedom of the press is a right of the people, a fundamental right of a free society. This right must be protected by guarding *all* phases of the publishing process. Without a reporter's privilege to gather information, freedom of the press becomes meaningless. With the weakening and eventual destruction of this freedom, the many other freedoms which it supports must begin to topple.

At its next opportunity the Supreme Court should re-evaluate its statements regarding a newsperson's right to gather news. By clearly defining the existence of a privilege to acquire information, the Court could reverse the current trend of its decisions which bode ill for freedom of the press and all the societal rights that those words support. Clearly, any such privilege may not be absolute. This writer would recommend a return to a balancing approach when *any* phase of the publishing process is in conflict with another asserted right. By according great weight to a reporter's necessary task of gathering information, the press will have the tools necessary to make publishing meaningful. The Court's assertions that free expression is a cornerstone of democracy mandate a reversal of the current trend of restricting the first amendment freedom of the press.

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