Volume 24 | Issue 4 Article 6

1979

Constitutional Law - First Amendment - Release of Toll Call Billing Records Disclosing Journalists' Confidential Sources Held Not Violate of Freedom of the Press and Not to Require Prior Judicial Review

Arthur B. Axelson

CONSTITUTIONAL LAW—FIRST AMENDMENT—RELEASE OF TOLL CALL BILLING RECORDS DISCLOSING JOURNALISTS' CONFIDENTIAL SOURCES HELD NOT VIOLATIVE OF FREEDOM OF THE PRESS AND NOT TO REQUIRE PRIOR JUDICIAL REVIEW.

Reporters' Committee for Freedom of the Press v. American Telephone & Telegraph Co. (D.C. Cir. 1978)

In order to prevent telephone companies[1] from disclosing long distance telephone billing records to government officials[2] without judicial supervision, twelve professional journalists,[3] two newspaper publishing corporations,[4] and the Reporters' Committee for Freedom of the Press[5] brought suit for declaratory and injunctive relief in the United States District Court for the District of Columbia.[6] Specifically, plaintiffs asserted that the first[7] and fourth[8] amendments require prior notice of any governmental request for such information in order that plaintiffs may have the opportunity to institute proceedings to challenge the subpoenas.[9] The district court re-

---

1. Reporters' Comm. for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 1431 (1979). The defendant telephone companies were the American Telephone & Telegraph Co. (AT&T) and the Chesapeake & Potomac Telephone Co. 593 F.2d at 1036. The United States intervened as a party defendant. *Id.*

2. *Id.* at 1079 (Wright, C.J., dissenting). The government has used toll call records as an investigative tool in tracking down contacts between the subscriber and third parties. *Id.* at 1036. In the journalist context, this has resulted in the disclosure of the names of various confidential sources. *Id.* at 1090-91 (Wright, C.J., dissenting).

3. *Id.* at 1036. The journalists were Jack Anderson, Marquis W. Childs, Emmett Dedmon, Richard Dudman, Morton Mintz, Bruce Morton, John Pierson, James R. Polk, David E. Rosenbaum, Richard Salant, Daniel Schorr, and Frederick Taylor. *Id.*

4. *Id.* The corporations were Dow Jones & Co., Inc., and The Knight Newspaper Group of Knight-Ridder Newspapers, Inc., *Id.*

5. *Id.* The Reporters' Committee for Freedom of the Press is a legal research and defense fund organization established to protect the interests of the press. *Id.*

6. Reporters' Comm. for Freedom of the Press v. American Tel. & Tel. Co., No. 74-1889 (D.D.C. Aug. 17, 1976). The plaintiffs instituted this action upon the defendants' refusal to comply with their request that the journalists be notified prior to the release of the toll call records. 593 F.2d at 1038.

7. U.S. CONST. amend. I. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*

8. *Id.* amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Id. The plaintiffs did not pursue their fourth amendment claim on appeal. 593 F.2d at 1082, n.12 (Wright, C.J., dissenting).

9. *Id.* at 1036. Prior to 1974, the Bell System had no uniform policy regarding the release of company billing records to government officials. *Id.* at 1038. In 1974, AT&T adopted a formal policy governing such releases which includes three provisions: 1) the policy prohibits the release of toll call billing records in the absence of a subpoena or summons, valid on its face, issued under the authority of a statute, court, or legislative body; 2) the policy requires that subscribers whose telephone billing records have been subpoenaed in civil suits, noncriminal investigations, and nonfelony criminal investigations be immediately notified upon receipt of the subpoena—the same day by telephone and, in addition, by letter within 24 hours; and 3) the

jected these constitutional claims and granted defendants' motion for summary judgment.[10]

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part,[11] *holding* that toll call record subpoenas do not violate the first amendment unless they are issued in bad faith or the plaintiff establishes that there is a clear and imminent threat of future misconduct by the government. *Reporters' Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 1431 (1979).

It is axiomatic that the rights conferred by the first amendment occupy a "preferred position" among those individual liberties vested by the Constitution,[12] and any government action which may infringe upon them must be closely scrutinized.[13] Although the official activity may be within the proper scope of authority, the United States Supreme Court has maintained that where the effective exercise of a first amendment right has allegedly been abridged, the judiciary is obligated to "determine the permissibility of the challenged actions."[14] The Court, in a series of decisions, established various prerequisites which had to be met by the government in order to overcome the broad[15] presumptive protection[16] of the first amendment.[17]

---

policy requires that subscribers whose toll call records have been subpoenaed in felony investigations be similarly notified, unless the subpoena is accompanied by a written certification stating (a) that the subpoena or summons was issued pursuant to an official investigation of a suspected felony or an official legislative investigation, and (b) that notification to the subscriber could impede the investigation. *Id.* Such certification is effective for 90 days, but may be renewed by further certifications, in writing, for successive 90-day periods. Notification of the subpoena to the subscriber may be effected upon expiration of these periods. *Id.* In practice, however, AT&T's adoption of the new policy did not produce any substantial change in its procedures. During the period from March 1, 1974 through June 30, 1975, government investigators sought and received 32,000 toll call records. In 90% of these cases no notice was ever given to subscribers. *Id.* at 1082 (Wright, C.J., dissenting).

10. *Id.* at 1041.

11. *Id.* at 1036. The court reversed and remanded with respect to the five jounalists who had presented evidence indicating possible governmental abuse of subpoena power. *Id.* at 1036, 1066. These five plaintiffs were Jack Anderson, Richard Dudman, James R. Polk, David E. Rosenbaum, and Knight Newspapers. *Id.* at 1036. *See* note 65 *infra*.

12. This phrase was first used by Chief Justice Stone in Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting), *rev'd per curiam*, 319 U.S. 103 (1943). Since then, the Court has repeatedly maintained this position in its first amendment decisions. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Speiser v. Randall, 357 U.S. 513 (1958).

13. *See* NAACP v. Alabama, 357 U.S. 449 (1958); Watkins v. United States, 354 U.S. 178 (1957). *See also* cases cited note 12 *supra*.

14. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 545 (1963), *citing* Watkins v. United States, 354 U.S. 178, 198-99 (1957); *See* Freedom v. Maryland, 380 U.S. 51 (1965); Barenblatt v. United States, 360 U.S. 109 (1959).

15. The Court has stated that the first amendment "must be taken as a command of the broadest scope." Bridges v. California, 314 U.S. 252, 263 (1941). *See* Lamont v. Postmaster Gen., 381 U.S. 301, 306-07 (1965); Grosjean v. American Press Co., 297 U.S. 233, 248-50 (1936).

16. *See* Gooding v. Wilson, 405 U.S. 518, 520-21 (1972); Cohen v. California, 403 U.S. 15, 24 (1971).

17. *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544-46 (1963); NAACP v. Button, 371 U.S. 415, 439 (1963); Bates v. City of Little Rock, 361 U.S. 516, 523-24

The test for constitutionality promulgated by early Supreme Court decisions required the balancing of the respective interests involved in each particular case,[18] and governmental interference was justified only upon a showing of an immediate, substantial, and compelling state interest.[19] In the subpoena context, the Court additionally demanded that the government demonstrate a substantial nexus between the information sought and the overriding government interest.[20] Once a compelling state interest was established, the government then had to demonstrate that it had exercised the "least drastic means" to accomplish that legitimate state interest.[21] Furthermore, these criteria had been applied to direct encroachments on first amendment rights as well as to the "chilling effects"[22] of indirect infringements.[23]

(1960); Barenblatt v. United States, 360 U.S. 109, 126-27 (1959); Speiser v. Randall, 357 U.S. 513, 520-21 (1958).

18. Barenblatt v. United States, 360 U.S. 109, 126 (1959). *See* Speiser v. Randall, 357 U.S. 513, 520 (1958).

19. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

20. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963). The *Gibson* Court maintained "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 a subject of overriding and compelling state interest." *Id.*

21. *See* Shelton v. Tucker, 364 U.S. 479 (1960). In *Shelton*, the Court stated that "[i]n a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488 (footnote omitted). *See In re* Stolar, 401 U.S. 23 (1971); United States v. O'Brien, 391 U.S. 367 (1968).

22. The "chilling effect" concept, referring to the probable deterrence or self-censorship which would result from certain government action, has been given legal significance in a series of first amendment decisions. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965) (invalidating a licensing scheme for motion pictures because the procedural hurdles imposed upon potential licensees might deter them from showing protected films); Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating a statute requiring teachers to list their organizational affiliations so that officials could determine their competence); Bates v. City of Little Rock, 361 U.S. 516 (1960) (refusing to permit tax officials to compel disclosure of NAACP membership lists).

The Court has not, however, specified the standard of proof it requires before it will acknowledge an indirect violation of a first amendment right—that is, an impermissible chilling effect. For cases where it has recognized a chilling effect based on inference in the absence of direct supporting evidence, *see, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (invalidation of a state libel law which deterred persons from speaking through the press and dissuaded the press from publishing their statements); Talley v. California, 362 U.S. 60 (1960) (reversal of a conviction for violation of a law prohibiting the distribution of anonymous handbills); Smith v. California, 361 U.S. 147 (1959) (invalidation of an ordinance making a book seller criminally liable for possession of obscene books, even if he had no knowledge of the contents of the books, as the threat of such strict liability would cause him to sell only those books which he has inspected); Speiser v. Randall, 357 U.S. 513 (1958) (invalidation of a state tax law requiring the taxpayer to submit an affidavit of noncommunist affiliation prior to receiving an exemption; the Court held that such procedural hurdles would cause taxpayers to curtail their political activity). The Court has at times recognized a chilling effect based on testimony in the record. *See* Bates v. City of Little Rock, 361 U.S. 516 (1960) (invalidation of an ordinance requiring the filing of an NAACP membership list for public inspection; the Court based its decision on testimony given at trial that some NAACP members had not renewed their memberships because they feared community hostility and economic reprisals). However, the Court has also dismissed such testimony as being speculative and self-serving. *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (refusal of a testimonial privilege for journalists in a grand jury context).

Recently, the Court's application of these tests has been affected by an emerging theory of freedom of the press[24] which apparently offers institutional first amendment protection to members of the news media.[25] The two principles underlying this development are an independence of the press from government and a distinction between freedom of speech and freedom of the press.[26] Specifically, the first principle dictates a rule of neutrality whereby government action which confers special benefits or burdens on the press is disfavored,[27] while the latter concept recognizes a press interest in the gathering of information.[28] Although this approach seems to

---

In the news gathering context, the "chilling" or deterence argument is relevant in two related areas. First, journalists contend that if they are compelled to identify their sources, informants will no longer furnish information. Second, it is argued that journalists may practice self-censorship by not reporting all the news for fear of being compelled to identify their sources. Note, *The Right of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1530 (1974). *See* Branzburg v. Hayes, 408 U.S. 665, 679-80 (1972).

23. *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Louisiana v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960).

24. *See* Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977). According to Professor Bezanson, this theory "departs significantly from the principles of decision that have applied under the free speech clause. The concept is derived from explicit statements of the Supreme Court and from implicit premises underlying the recent Court decisions in this area." *Id.* at 785. For a discussion of the effect of these recent decisions on the Court's application of the first amendment tests, *see* note 29 *infra*.

25. *See* Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975). Justice Stewart stated:

> It seems to me that the Court's approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution . . . . [T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

Id. at 633 (emphasis in original). *See also* Comment, *The Right of the Press to Gather Information After* Branzburg *and* Pell, 124 U. PA. L. REV. 166 (1975), wherein the author explained that "[t]he special role of the press is to provide citizens with the information necessary to make decisions about public policies and public officials. . . . Its role as collector, as well as disseminator, of the information necessary for effective self-government qualifies the press, as an institution, for first amendment protection." *Id*, at 175. *See also* Bezanson, *supra* note 24, at 752-53.

26. *See* Bezanson, *supra* note 24, at 732. *See generally* notes 27 & 28 *infra*.

27. *See* Bezanson, *supra* note 24, at 733-34. An independent press requires neutrality since any privileges or burdens directed solely toward the press would constitute special treatment, thereby undermining the press' institutional independence guaranteed by the first amendment's freedom of the press clause. *Id.* at 753. The conferral of special benefits on the press could serve to compromise its independence since its members, fearful of a withdrawal of such privileges or out of a sense of obligation, might begin to act symbiotically by performing less than full investigative and reporting functions relating to government activity. *Id.* at 755, 761. *See also* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974). The Court in *Saxbe*, finding the case "constitutionally indistinguishable from *Pell v. Procunier*," validated a policy prohibiting personal interviews between newsmen and individually designated inmates. Saxbe v. Washington Post Co., 417 U.S. at 850. The Court held that "[t]he proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court.' " *Id.*, *quoting* Pell v. Procunier, 417 U.S. 817, 834-35 (1974).

28. *See* Bezanson, *supra* note 24, at 733. A review of Supreme Court cases in the first amendment area reveals that the Court has in the past seldom distinguished between freedom of speech and freedom of the press. *See* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 840-41 (1971). Although most of the rights recognized by the Court as

provide guidelines for the equitable resolution of disputes, conflicts have arisen when the Supreme Court has inflexibly applied one of these principles, particularly when it has been reviewing the purported right to gather news.[29]

---

extending to the press under the Constitution can be derived from the first amendment guarantees of freedom of speech and association—for example, the right to publish without prior restraint corresponds to the right to be free from restrictions on speech; press anonymity is the written counterpart of associational privacy; and the rights of circulation, distribution and reception of information appear to be equivalent to notions of freedom of assembly—the interpretation of "freedom of the press as a particularized version of free speech omits an information-gathering element." Comment, *supra* note 25, at 173-75.

Yet, the Court has suggested that there may exist an as yet undefined "right" to gather information, offering news gathering some degree of first amendment protection. *See* Pell v. Procunier, 417 U.S. 817, 833-34 (1974) (news gathering has some first amendment protection; journalists are free to seek out sources of information not available to members of the general public) (dictum); Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972) (news gathering is entitled to first amendment protection, for without such safeguards freedom of the press would be eviscerated) (dictum). Having never determined the scope of the purported right to gather news, however, the Court has apparently limited any such privilege by denying journalists a special right of access to government controlled information not available to the general public. *See* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (the Court never intimated a first amendment guarantee of a right of access to all sources of information within government control); Pell v. Procunier, 417 U.S. 817, 834 (1974) (the Constitution does not require the government to accord the press special access to information not shared by members of the general public); Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (the first amendment does not guarantee the press a constitutional right of access to information not available to the public generally).

For general discussions of the nature and scope of the media's right to gather news, *see* Note, *supra* note 22; Comment, *Newsgathering: Second Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440 (1975); Comment, *supra* note 25.

29. *See* Saxbe v. Washington Post Co., 417 U.S. 843 (1974). In his dissenting opinion in *Saxbe*, Justice Powell noted the conflict arising from the recognition of a separate freedom of the press—which necessitates the recognition of distinct press rights—and the simultaneous application of a blanket rule of neutrality, which appears to preclude such special privileges. *Id.* at 857 (Powell, J., dissenting). In addition, it has been recognized that the application of a blanket rule of neutrality precludes any balancing of interests in regard to press claims of first amendment protection. *See* Comment, *supra* note 28, at 1450-51.

Looking towards the resolution of such a conflict, Justice Stewart, the advocate of the press' "Fourth Estate" function—where the media is to monitor governmental activity and thereby protect against governmental abuses—recently recommended a practical and more flexible application of the neutrality principle in order to promote doctrinal harmony. *See* Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring). Justice Stewart maintained that rights recognized as extending to journalists under the freedom of the press clause are not necessarily special privileges, but rather are necessary accommodations. He stated:

> I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.
>
> . . . .
>
> That the first amendment speaks separately of freedom of the press is no constitutional accident, but an acknowledgement of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.
>
> . . . In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Id. For a general discussion concerning the nonneutral accommodation of the press, *see* Bezanson, *supra* note 24, at 765-71.

An illustration of such a conflict appeared in *Branzburg v. Hayes*,[30] where the Supreme Court suggested in dictum that there may exist a qualified privilege to gather news,[31] yet declined to recognize a constitutional right allowing newsmen to refuse to identify their confidential sources before a grand jury.[32] By asserting that the only issue presented was "the obligation of reporters to respond to grand jury subpoenas as other citizens do,"[33] the plurality[34] reformulated the issue to remove any substantial first amendment question.[35] The plurality thereby acknowledged the broad scope of grand jury investigations[36] while seemingly disregarding established principles of first amendment adjudication.[37]

---

30. 408 U.S. 665 (1972). The *Branzburg* decision involved three separate cases in which journalists refused to identify their sources to grand juries. *Id.* at 667-79. Specifically, newsman Branzburg had written an article describing the operations of a Kentucky hashish factory, reporter Pappas was present at a Massachusetts Black Panthers headquarters as the group was preparing for a police raid, and newsman Caldwell had gained the confidence of California Black Panther leaders. *Id.* at 667-79.

31. *Id.* at 681.

32. *Id.* at 690-91. Arguing that news gathering is protected by the first amendment, the reporters claimed that forced disclosure would inhibit news gathering by deterring sources from furnishing information to newsmen. *Id.* at 679-80.

33. *Id.* at 681-82.

34. Justice White wrote the opinion of the Court and was joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Justice Powell wrote a separate concurring opinion in which he agreed with the reasoning of the majority only insofar as it applied to the particular factual situations presented. Justices Douglas and Stewart each filed dissenting opinions. Justices Brennan and Marshall joined in Justice Stewart's dissent.

35. *Id.* at 681-82. Justice White explained that

> these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold . . . . The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.
>
> . . . Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other consitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.

Id. (footnote omitted). The Court apparently emphasized the neutrality principle at the expense of the journalists' press freedoms.

36. *Id.* at 687-88. Although the Court recognized that the powers of a grand jury are not unlimited, it emphasized the public's "right to every man's evidence." *Id.*, *quoting* United States v. Bryan, 339 U.S. 323, 331 (1950).

37. 408 U.S. at 690-91. Appearing to acknowledge first amendment interests, the Court stated: "Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment . . . ." *Id.* at 708. In thus resolving the issue, the *Branzburg* Court balanced the general public interest in law enforcement and effective grand jury proceedings against the public interest in news reporting. *Id.* at 690-91. The plurality, however, rejected the stringent safeguards previously required before infringements on first amendment rights were to be permitted. *Id.* *See* notes 19-21 and accompanying text *supra*.

Justice Stewart, in his dissenting opinion, criticized the Court for its application of a simplistic balancing test and for its rejection of the first amendment interests in the case. 408 U.S. at 745-46 (Stewart, J., dissenting). Repudiating what he perceived as the Court's underlying rationales, Justice Stewart stated:

> No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the

Since *Branzburg*, the Court has continued to emphasize the neutrality principle at the expense of an unrestricted guarantee of freedom of the press.[38] With regard to the claimed right of access,[39] the Court has maintained its position in *Branzburg* that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[40] Moreover, in *Zurcher v. Stanford Daily*,[41] the Court recently determined that there was no constitutional violation in allowing police to search newspaper offices for information relevant to a crime, even if the information was related to the criminal activity of a third party.[42] Nevertheless, in these decisions, the Court has emphasized the availability of judicial review as a safeguard against the violation of first amendment guarantees.[43] The Court, however, has established a confusing precedent which has resulted in a number of divergent opinions in the lower courts.[44]

> Court in denying any force to the First Amendment in these cases. . . . [T]he interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space."

Id. at 746 (Stewart, J., dissenting) (footnotes and citations omitted). Acknowledging the previously established first amendment safeguards, Justice Stewart set out a tripartite test which he believed incorporated those protections in the grand jury context. He explained:

> [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the 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.

Id. at 743 (Stewart, J., dissenting) (footnotes omitted).

38. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 675-76 n.5 (1978).

39. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 7-8 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 829-31 (1974). In *Pell*, the Court maintained that the press enjoyed no greater right to acquire information about prison conditions than does the general public. Pell v. Procunier, 417 U.S. at 833-34.

40. Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978), *quoting* Branzburg v. Hayes, 408 U.S. 665, 684 (1972).

41. 436 U.S. 547 (1978).

42. *Id.* at 565-66. Specifically, the Court stated:

> Nor are we convinced anymore than we were in *Branzburg v. Hayes* . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

Id. at 566 (citation omitted).

43. *Id.* at 565-66. As the Court explained in *Stanford Daily*:

> [T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. . . . Properly, administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

Id. For a discussion of judicial intervention as a safeguard against the violation of first amendment guarantees in the grand jury context, *see* note 37 *supra*.

44. The *Branzburg* opinion has been interpreted, applied, and distinguished in a variety of ways and in many divergent factual situations, with several courts focusing on the criminal/civil

Confronted with these emerging limitations upon the freedom of the press, the D.C. Circuit distinguished two first amendment claims in order to resolve the questions presented in *Reporters' Committee*.[45] Specifically, the court bifurcated its analysis between good faith subpoenas and bad faith subpoenas[46] and dealt with each issue separately.[47]

Initially, although the court acknowledged the journalists' "so-called" right to gather information,[48] Judge Wilkey relied on *Branzburg* to determine that news reporters had no special first amendment right to maintain the secrecy of their sources when confronted with a *good faith* felony inves-

---

or grand jury/nongrand jury dichotomies. Many courts subsequent to *Branzburg* have denied testimonial privileges to reporters in criminal proceedings. *See, e.g.*, United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972) (requiring a newspaper to produce confidential evidentiary material in its possession relevant to a criminal trial); Lightman v. State, 15 Md. App. 713, 294 A2d 149, *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973) (requiring reporter's disclosure to a grand jury of the name of a criminal he had observed). In contrast, other courts have recognized a testimonial protection in criminal contexts. *See, e.g.*, Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (holding that grand jury questions were only vaguely related to conduct that might have criminal consequences); Vermont v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) (noting failure of interrogator in a criminal deposition proceeding to show need for information and lack of alternative sources). Most courts have been more protective of confidential source relationships in regard to civil matters. *See, e.g.*, Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (court concluded that in civil cases the public interest in nondisclosure will be greater than the private interest in compelled disclosure); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (public interest in nondisclosure of journalist's confidential sources outweighs the public and private interest in compelled disclosure). *Cf.* Carey v. Hume, 492 F.2d 631 (D.D.C. 1974) (reporter required to disclose sources in libel suit since plaintiff's claim did not appear frivolous, knowledge of the confidential sources appeared to go to the heart of the claim, and alternatives to compelled disclosure would impose an onerous burden on the plaintiff).

Additionally, the tendency of post-*Branzburg* decisions has been to adopt a case-by-case balancing approach. *See, e.g.*, Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1206 (2d Cir. 1977); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975). This approach has often been supplemented by the tripartite test suggested by Justice Stewart in his dissent in *Branzburg*. *See* Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 715-18 (1975); note 37 *supra*. *See also* Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (grand jury questions only vaguely related to criminal conduct); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (failure of parties in a civil action to demonstrate relevance of testimony); Vermont v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) (failure of interrogator in a criminal deposition proceeding to show need for information and lack of alternative sources).

45. 593 F.2d at 1046.

46. *Id.* at 1046-47. The majority interpreted the good faith claim to require judicial *balancing* before such records are released to government officials in order to allow for a determination of whether the claimed first amendment infringement was justifiable. *Id.* It construed the bad faith claim to necessitate judicial *screening* prior to the release of the records so that journalists would be protected from such blatant first amendment infringements in the future. *Id.* at 1047. According to the *Reporters' Committee* majority, this distinction was compelled by the Supreme Court's decision in *Branzburg*, in which the Court recognized that challenges to good faith subpoenas and bad faith subpoenas "pose wholly different issues for resolution." *Id.*, *quoting* Branzburg v. Hayes, 408 U.S. 665, 707 (1972). In addition, the majority rebuked both the plaintiffs and the dissent for not grasping the significance of this bifurcated analysis. 593 F.2d at 1047-48.

47. *Id.* at 1047.

48. *Id.* at 1051.

tigation.[49] Accordingly, the majority maintained that *Branzburg* affirmed the proposition that the right to gather information was *"subject to* the general and incidental burdens" that arise from good faith enforcement of laws not expressly aimed at curtailing the free flow of information.[50] Furthermore, while some laws may produce unconstitutional indirect restraints,[51] Judge Wilkey required proof of the "present or future exercise, or threatened exercise, of coercive power"[52] to establish that the indirect restraint created an impermissible "chilling effect" upon journalists.[53] Without such a demonstration, the *Reporters' Committee* court concluded that the inspection of toll call records did not impermissibly abridge news gathering activities.[54]

In addition, the majority rejected plaintiffs' contention that a case-by-case balancing test was required whenever the government sought access to toll call records during the course of a good faith felony investigation.[55] Relying again on *Branzburg*,[56] the D.C. Circuit noted that the Supreme Court

---

49. *Id.* at 1050. The majority construed the plaintiffs' claim as contending that "journalists have the unprecedented privilege of suppressing the records and testimony of third parties to whom they and their sources have carelessly revealed incriminating information." *Id.* at 1049.

Furthermore, the D.C. Circuit reasoned that since *Branzburg* disallowed resistance to good faith subpoenas *ad testificandum* directed to the journalists, it was "logically inescapable" that the journalists lacked the right to resist good faith subpoenas *duces tecum* directed at a third party's business records. *Id.* at 1050. The court also noted an irony in the plaintiffs' reliance on *Branzburg*—that decision held that third party sources of evidence should be sought prior to compelling the testimony of the particular journalists. *Id.*

50. *Id.* at 1051 (emphasis supplied by the court). Judge Wilkey emphasized the importance of government investigation to the security of *all* liberties, and thus deemed the toll record subpoenas to be a permissible burden on news gathering activity. *Id.* at 1051. Accordingly, the court reasoned that since the first amendment does not guarantee freedom from such investigation, the inspection of the records did not constitute an infringement of that provision. *Id.* at 1051-52.

51. *Id.* at 1052, *citing* Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (prohibiting a state bar committee from inquiring into political beliefs and affiliations of applicants to the state bar since such activities were not relevant to professional competency); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (requisite teacher loyalty oaths declared violative of first amendment since mere knowing membership is not a constitutionally adequate basis for imposing sanctions); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (statute requiring addressee of foreign communist political literature to notify post office if delivery was desired held to be an unconstitutional infringement of first amendment rights).

52. 593 F.2d at 1052 (footnote omitted).

53. *Id.* For a discussion of the "chilling effect" argument and cases in which the Supreme Court has relied on this theory to invalidate state action, *see* note 22 and accompanying text *supra*.

54. 593 F.2d at 1052. The majority did not limit its holding to the toll call records specifically at issue in *Reporters' Committee*, but rather indicated that its reasoning applied generally to the subpoenaing of records in the hands of third parties. *Id.* at 1048. Although the plaintiffs had not framed their objection to the subpoenas this broadly, the court nevertheless expanded the scope of the inquiry to include other documents. *Id.* at 1053.

55. *Id.* at 1063. *See also id.* at 1060, *citing* Brief for Appellants at 28-33, Reporters' Comm. for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

56. 593 F.2d at 1062. The majority framed the issue as being "whether the public interest in ensuring the effectiveness of good faith felony investigations is sufficient to override the burden on newsgathering which is said to result from permitting Government inspection of toll-call records which might disclose the identity of journalists' secret sources." *Id.* The D.C. Circuit concluded that the resolution of this issue was controlled by *Branzburg*, which it perceived as balancing "virtually identical" interest. *Id.*

had balanced the relevant competing interests just once, indicating that the constitutionality of good faith subpoenas could definitively be decided, and, more significantly, had concluded that the government's interests in good faith criminal investigations always overrode the journalist's interests in preserving the confidentiality of his sources.[57] Moreover, the court determined that the burden placed upon the journalists in the present case was less onerous than that in *Branzburg*.[58] Since *Branzburg* indicated a conclusive balance in favor of law enforcement interests[59] which, according to the D.C. Circuit, obviated the need for case-by-case balancing,[60] Judge Wilkey concluded that prior notice to journalists of good faith subpoenas was unnecessary.[61]

With regard to subpoenas issued in bad faith, the majority recognized that investigations conducted to harass journalists in their professional activities would violate the journalists' first amendment rights.[62] The court, however, refused to grant the relief requested by the plaintiffs, which would require judicial screening of all toll call record subpoenas before the records are released.[63] The majority reasoned that "[i]t is fundamental that in order to obtain the kind of equitable relief sought in this case, plaintiff 'must show not only that there is an *imminent threat of harm* but also that the threatened harm is *irreparable*.' "[64] Absent this showing of a clear and imminent threat of future governmental misconduct, the court was unable to exercise its equitable powers on behalf of plaintiffs.[65]

---

57. *Id.* at 1061-62.

58. *Id.* at 1062. The majority reasoned that despite the fact that a journalist took every "secrecy precaution" and was "as discrete as possible," he could still be "*directly compelled* to disclose" his confidential sources at a grand jury proceeding. *Id.* (emphasis supplied by the court). In contrast, in regard to toll call record inspections, the use of these precautions would enable the journalist, with only slight inconvenience, to avoid detection. *Id.*

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

60. 593 F.2d at 1063.

61. *Id.* The majority maintained that prior notice was merely a procedural device the sole function of which was to enable the journalist to trigger judicial supervision and balancing before the release of the subpoenaed records. *Id.* at 1048. Accordingly, the determination that future balancing was unnecessary within the context of a good faith felony investigation undermined the plaintiffs' claimed need for prior notice. *See* note 50 *supra*.

62. 593 F.2d at 1064. The court reasoned that the first amendment protects information gathering activities from governmental harassment and noted that such abusive action was particularly burdensome to news gatherers because it obstructed a reporter's ability to investigate newsworthy activity. *Id.* The majority concluded that *Branzburg* specifically recognized first amendment protection from such abusive conduct. *Id.*, *citing* Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972).

63. 593 F.2d at 1064. Characterizing the plaintiffs' request for relief as an "ongoing judicial audit of future government investigations," the court viewed the claim as "extraordinary" in light of the improbability of abuse. *Id.*

64. *Id.* at 1065, *citing* O. FISS, INJUNCTIONS 9 (1972) (emphasis supplied by the court) (footnote omitted). The court announced a three-prong test for when anticipatory relief would be justified, requiring *each individual* plaintiff to show "(1) that there is an *imminent threat* that the Government will subpoena his toll records in bad faith, (2) that such subpoena will cause him substantial and *irreparable harm*, and (3) that his remedy at law is inadequate." 593 F.2d at 1065 (emphasis supplied by the court).

65. *Id.* at 1066. The court affirmed the district court's granting of the defendants' motion for summary judgment with respect to 10 of the plaintiffs since it was unable to grant prospective

In a dissenting opinion Chief Judge Wright rejected the majority's expansive treatment of plaintiff's claim[66] and vehemently criticized its superficial analysis of *Branzburg* and *Stanford Daily*.[67] After noting that *Branzburg* "explicitly recognized" the first amendment protection for news gathering,[68] Chief Judge Wright argued that the source disclosure required in *Branzburg* was of limited application.[69] The dissent contended that prior judicial scrutiny on a case-by-case basis has long been recognized as a fun-

---

relief to those who had failed to adduce any evidence from which it could be inferred that their toll call records had ever been subpoenaed in bad faith in the past. *Id.* Viewing the evidence in the light most favorable to the remaining plaintiffs—Jack Anderson, Richard Dudman, James R. Polk, David E. Rosenbaum, and Knight Newspapers—the court determined that the inference of possible abuse of subpoena power by the government was sufficient to withstand the defendants' motion for summary judgment. *Id.* Consequently, the court reversed the district court's decision with respect to these journalists and remanded the case to the district court for further proceedings. *Id.* The court instructed that

> [i]f on remand the District Court finds no record of past abuse, and no other basis to anticipate impending future misconduct, then plaintiffs will have failed on their claim for equitable relief. If, however, the District Court finds that there has been a pattern of abuse in the past, then the appropriate judicial response must be determined at that time.

Id. at 1066-67.

66. *Id.* at 1082-83. (Wright, C.J., dissenting). The dissent stated:

> In evaluating this claim I must begin by pointing out what is not involved here. First, this is not a case in which we are called upon to hold that journalists enjoy protection against certain forms of governmental action above and beyond other citizens. . . . Nor is this a case which requires us to establish new standards for balancing individual and governmental interests or to decide whether disclosure of toll billing records is justified in any particular case.
>
> . . . The issues which this case does present are twofold: whether appellants possess any First Amendment interest which is threatened by disclosure of their toll billing records to the Government and, if so, whether they are entitled to an opportunity for prior judicial supervision on a case-by-case basis to safeguard that interest.

Id. (footnote omitted). Similarly, Judge Robinson submitted a concurring opinion which was limited to a discussion of what he considered to be the "decisive elements in the case." *Id.* at 1071 (Robinson, J., concurring).

67. *Id.* at 1079-80, 1085 n.17, 1094-96 (Wright, C.J., dissenting).

68. *Id.* at 1083. (Wright, C.J., dissenting).

69. *Id.* at 1083-84. (Wright, C.J., dissenting), *citing* Branzburg v. Hayes, 408 U.S. 665, 699-700, 707-08 (1972). Chief Judge Wright noted Justice White's express limitation of the Court's holding in *Branzburg* to grand jury subpoenas. 593 F.2d at 1083-84 (Wright, C.J., dissenting). Furthermore, the dissent quoted Justice Powell's reiteration of this limitation in *Branzburg*, noting that Justice Powell stated: "[T]he 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." *Id.* at 1084 (Wright, C.J., dissenting), *quoting* Branzburg v. Hayes, 408 U.S. 665, 709 (Powell, J., concurring).

Chief Judge Wright noted several distinctions between the situation presented in *Reporters' Committee* and that presented in *Branzburg*. First, release of toll call records causes the "wholesale disclosure of names" of those relevant to the investigation as well as those not relevant, whereas grand jury questions tend to be narrow and restricted to a particular crime. 593 F.2d at 1085 (Wright, C.J., dissenting), *quoting* Branzburg v. Hayes, 408 U.S. 665, 700 (1972). In addition, in the toll record situation, the journalist has no opportunity to quash the subpoena since government summonses are issued without any form of judicial participation and without prior notice to the journalist. 593 F.2d at 1087 (Wright, C.J., dissenting). In contrast, in a grand jury situation, Chief Judge Wright noted that a journalist is afforded an opportunity to challenge the disclosure before the court since, in that context, the journalist is subpoenaed to testify directly or to produce records in his possession. *Id.*

damental element of first amendment freedoms,[70] and had been substantiated by both *Branzburg* and *Stanford Daily*.[71] The dissent thus asserted that the absence of judicial participation in the issuance of government subpoenas,[72] combined with defendants' failure to notify plaintiffs of the government's request[73] deprived the journalists of an opportunity to protest in a judicial forum.[74]

Moreover, in determining the requisite procedural protections, the dissent applied a balancing test[75] and concluded that judicial scrutiny was necessary.[76] While according substantial weight to the pertinent governmental interests,[77] Chief Judge Wright recognized the judicially imposed limitations on investigative techniques and reflected them in his balancing test.[78] In concluding that the majority had failed to provide adequate assurances against the unconstitutional issuance of subpoenas,[79] Chief Judge Wright contended that a case-by-case analysis was required in order to protect against bad faith and overbroad subpoenas.[80]

Although the majority attempted to examine and resolve the pertinent constitutional questions presented in *Reporters' Committee*, it is submitted that the D.C. Circuit inaccurately interpreted precedent, particularly the scope of the *Branzburg* decision. Considering the obscure nature of that decision,[81] it is still difficult to support the majority's construction of

---

70. 593 F.2d at 1088 (Wright, C.J., dissenting). *See* notes 18 & 19 and accompanying text *supra*.

71. 593 F.2d at 1079-80 (Wright, C.J., dissenting), *construing* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Branzburg v. Hayes, 408 U.S. 665 (1972).

72. 593 F.2d at 1087 (Wright, C.J., dissenting). To highlight the extent to which this problem might proceed, Chief Judge Wright listed 47 governmental agencies which possess the authority to request and obtain toll call records without any form of judicial control. *Id.* at 1086 n.18 (Wright, C.J., dissenting).

73. *See* note 9 *supra*.

74. 593 F.2d at 1087 (Wright, C.J., dissenting).

75. *Id.* at 1089-93 (Wright, C.J., dissenting). Applying the traditional balancing test derived from prior Supreme Court opinions, the dissent specifically considered the scope of the intrusion on first amendment guarantees as well as the legitimate interests of government in avoiding the costs which might accompany the imposition of procedural safeguards. *Id.*

76. *Id.*

77. *Id.* at 1091 (Wright, C.J., dissenting). Chief Judge Wright, while arguing for prior judicial scrutiny in all cases where there would be a substantial infringement of first amendment rights, did not assert that governmental intrusions were never justified. Rather, he recognized the significant interest of the government, especially in the criminal context, when he stated:

> [I]n striking a First Amendment balance the legitimate needs and interests of Government investigators must clearly be accorded substantial weight. This is particularly true where, as in at least some of the cases of Government demands for toll records, the Government is conducting investigations of criminal felonies.

Id.

78. *Id.* at 1091-92 (Wright, C.J., dissenting). *See* notes 19-21 and accompanying text *supra*.

79. 593 F.2d at 1096 (Wright, C.J., dissenting).

80. *Id.* (Wright, C.J., dissenting).

81. For a discussion of *Branzburg*, *see* notes 30-37 and accompanying text *supra*. *Branzburg* does not provide much guidance for the conclusive resolution of the difficult constitutional questions that arise in this area of the law. The lack of predictability can be attributed to the divergent opinions submitted by the various Justices in that case. *See* note 34 *supra*.

Justices Powell, Stewart, Brennan, and Marshall favored a qualified reporters' privilege for

Branzburg[82] as granting unquestioned authority to conduct good faith criminal investigations without any judicial supervision. Rather than approving such a result, the numerous opinions submitted in *Branzburg* suggest that some type of case-by-case balancing procedure is required to comply "with the tried and traditional way of adjudicating such questions."[83]

It is further submitted that the *Reporters' Committee* court assumed, without support, that a balancing of interests would be unnecessary and would therefore eliminate the need for prior notice of good faith subpoenas. In making such an assumption, the majority apparently accepted the notion that a valid justification for infringement of first amendment guarantees eliminates the need for judicial intervention.[84] Such a conclusion indicates a fundamental misconception of the role of judicial supervision and is clearly contrary to the Supreme Court mandate that a valid infringement of first amendment rights be the least drastic means available.[85]

The court's insensitivity to first amendment rights is further illustrated by its failure to discern that the wholesale release of toll call records is more onerous to the free press than are narrowly tailored grand jury questions.[86] The dissent aptly observed that *Branzburg* and *Stanford Daily* turned on the availability of judicial supervision in both the grand jury and search warrant contexts,[87] while in *Reporters' Committee* no such supervision was available.[88] Instead of recognizing this crucial distinction, the majority ig-

---

safeguarding confidential sources. 408 U.S. at 709-10 (Powell, J., concurring); *id.* at 743 (Stewart, J., dissenting). Moreover, Justice Douglas, while advocating an absolute reporter's privilege to withhold the identity of confidential sources, would have created a majority of five Justices who favored at least a qualified first amendment privilege for reporters. *Id.* at 713-14, 722 (Douglas, J., dissenting).

Although Justice Powell did not indicate the scope of the privilege which he would have accorded the journalists, one commentator has made the following observation:

> [T]he 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 harrassment, 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 alternative sources).

Goodale, *supra* note 44, at 718.

82. *See* notes 49-50 & 56-61 and accompanying text *supra*.

83. Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring). *See* note 81 *supra*.

84. 593 F.2d at 1070. *See* notes 57-61 and accompanying text *supra*.

85. *See* note 21 and accompanying text *supra*. The plaintiffs' position in *Reporters' Committee* was in accord with this mandate. The plaintiffs did not claim an absolute right to quash toll record subpoenas, as the majority would appear to suggest. Rather, the journalists claimed a right to obtain judicial supervision over the constitutional validity of these subpoenas through the three-part balancing, relevance, and narrowness test. 593 F.2d at 1079 (Wright, C.J., dissenting). *See* notes 18-23 and accompanying text *supra*.

86. *See* note 69 *supra*. *See also* note 72 *supra*. For the majority's position on this issue, *see* note 58 *supra*.

87. *See* notes 69-74 and accompanying text *supra*.

88. 593 F.2d at 1089 (Wright, C.J., dissenting).

nored Justice White's admonition that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment."[89]

By erroneously focusing on propitiously selected language contained in ambiguous decisions of the Supreme Court,[90] it is submitted that the D.C. Circuit has sustained that confusion in *Reporters' Committee*. Judge Wilkey's decision to extend the *Branzburg* analysis[91] into the toll call record situation can only serve to augment the uncertainty for later courts. Furthermore, the D.C. Circuit's adoption of the neutrality principle, coupled with its failure to provide substantive directives, suggests that established first amendment protections are only to be narrowly applied to the press.[92] More importantly, acceptance of the analysis adopted by the D.C. Circuit may result in the application by future courts of an inflexible rule of first amendment adjudication. Until the Supreme Court develops guidelines which clearly address this constitutional question, results similar to *Reporters' Committee* are inevitable.

Relying on the decision of the Supreme Court in *Branzburg*, the court in *Reporters' Committee* denied relief to journalists claiming certain qualified privileges from governmental investigation of their long distance telephone records.[93] In adopting a blanket rule of neutrality,[94] however, the court has unnecessarily restrained journalists in the exercise of their first amendment freedoms. Additionally, the court has ignored the safeguards that have traditionally been upheld as a protection of First Amendment rights.[95] Until the Supreme Court offers substantive clarifications in this area of the law, journalists may continue to be stripped of the freedoms which the first amendment confers.

Arthur B. Axelson

---

89. 408 U.S. at 708.

90. *See* notes 29 & 44 and accompanying text *supra*. An example of the inadequate guidance provided by the *Branzburg* Court may be found in its general statement: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681.

91. *See* 593 F.2d at 1049; notes 49 & 56-57 and accompanying text *supra*.

92. For a dicussion of the scope of protection accorded the press in earlier Supreme Court decisions, *see* notes 18-23 and accompanying text *supra*.

93. *See* notes 45-65 and accompanying text *supra*.

94. For a discussion of the neutrality principle, *see* notes 27 & 38-40 and accompanying text *supra*.

95. *See* notes 18-23 and accompanying text *supra*.