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# Branzburg v. Hayes: A Need for Statutory Protection of News Sources

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# Comments

## BRANZBURG V. HAYES: A NEED FOR STATUTORY PROTECTION OF NEWS SOURCES

On October 4, 1972, Peter J. Bridge began serving an indeterminate sentence in the Essex County Jail, New Jersey.<sup>1</sup> Mr. Bridge, once a reporter for the now defunct Newark News, was sent to jail because he refused to answer questions asked him by a grand jury investigating corruption within the Newark Housing Authority. Peter J. Bridge is not alone in declining, as a journalist, to testify before a grand jury. Paul Branzburg, a newspaperman for the *Louisville Courier-Journal*,<sup>2</sup> would not disclose the source of his information before a Franklin County, Kentucky Grand Jury which was convened to investigate drug abuse. Mr. Branzburg was subpoenaed before the grand jury because of a newspaper article he had written which included an interview with persons making hashish in Franklin County. The legal battle between newsmen claiming a privilege,<sup>3</sup> and courts, grand juries, and legislative investigators seeking information has been a long struggle, taking different forms along the way. This comment will focus upon the forms that this conflict has taken and the possible restraints that newsmen now face in light of the recent Supreme Court decision in *Branzburg v. Hayes*.<sup>4</sup>

### COMMON LAW APPROACH

Initially, reporters claimed a privilege against testifying regarding the source of their information on common law principles. However, this claim has been consistently rejected by the courts, generally on

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<sup>1</sup> NEWSWEEK, October 16, 1972, at 60.

<sup>2</sup> Mr. Branzburg is now employed by the Detroit Free Press.

<sup>3</sup> The issue of the newsmen's privilege usually arises in four situations:

(1) where a newsmen has written and his paper has published a story exposing illegal activity and the district attorney or attorney general calls him before a grand jury to divulge names or information so that the government can prosecute the criminal violation or at least investigate the activity; (2) where the statements used by a newsmen are relevant to a civil case and he is subpoenaed to testify at the request of one of the litigants; (3) where either the prosecutor or the defendant seeks the newsmen's testimony in a criminal trial of a third person (other than the informant); and (4) where the subject matter relates to government activity and the newsmen is questioned by a legislative committee.

See Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. REV. 18, 20 (1969) [hereinafter cited as Guest & Stanzler].

<sup>4</sup> 408 U.S. 665 (1972).

the basis that it does not satisfy Wigmore's prerequisites to establishing a privilege against compulsory testimony.<sup>5</sup> The following are Wigmore's conditions:

1. The communications must originate in a confidence that they will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered;
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.<sup>6</sup>

Adjudication under the common law required a reporter to testify concerning information received in confidence and to disclose the identity of his informants. In 1911, a Georgia reporter refused to reveal the basis of his information on the premise that it would cause him to forfeit an estate, *i.e.*, it would cause him to lose his means of earning a living.<sup>7</sup> In rejecting the reporter's contention, the Georgia Supreme Court stated:

If the views sought to be maintained in this case were permitted to prevail the power to ascertain truth in judicial investigation, and to administer justice accordingly would depend not upon the law of the land, but upon the private promises of secrecy on the part of witnesses, or upon the wishes or orders of their employers.<sup>8</sup>

Thus, in the opinion of this court, the argument for a newsman's privilege failed to satisfy Wigmore's four requirements noted above.

Judges operating under the common law approach have placed the same duty upon reporters as has been placed upon all citizens.<sup>9</sup> Judicial notice of this duty was taken in *Clein v. State*,<sup>10</sup> where the Florida Supreme Court held that members of the press do not have a privilege of communication with informants and may be held in contempt for refusing to reveal their source of information.

The common law thus required a reporter to testify concerning information received in confidence and to reveal the identity of

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<sup>5</sup> Note, *The Newsman's Privilege and the Constitution*, 23 S.C.L. REV. 436, 445 (1971).

<sup>6</sup> 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

<sup>7</sup> *Plunkett v. Hamilton*, 70 S.E. 731 (Ga. 1911).

<sup>8</sup> *Id.* at 786.

<sup>9</sup> See *Blackmer v. United States*, 284 U.S. 421, 438 (1931), where the Court stated that it is "beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever properly summoned."

<sup>10</sup> 52 So.2d 117 (Fla. 1950).

informants because of the priority of the legal considerations involved. Undaunted by this failure to establish a privilege on common law principles, the press began to seek other legal principles on which to base their claim.

#### CONSTITUTIONAL APPROACH

The theory of the constitutional approach is that the breadth of the first amendment<sup>11</sup> protects the newsgathering process of the press and that the policy of the free flow of news outweighs the policy of compulsory testimony.<sup>12</sup> Essentially, the argument is made that news reporting consists of a succession of events and that the gathering process is the indispensable first step which should be protected by the first amendment.<sup>13</sup> Most courts which have considered the first amendment argument have rejected it, holding that the freedom of the press is not absolute and that the administration of justice requires that newsmen be compelled to testify.

Two cases, *Garland v. Torre*<sup>14</sup> and *In re Goodfader's Appeal*,<sup>15</sup> illustrate the attitude the courts have generally taken when confronted with this constitutional argument. In *Garland*, columnist Marie Torre attributed to a CBS "network executive" several statements about the plaintiff, Judy Garland, which were alleged to be false, defamatory and damaging to the plaintiff's professional career. CBS denied making the alleged statements or causing them to be published. Miss Torre was held in criminal contempt for refusing to divulge the identity of the network executive who allegedly made the defamatory statements. The court held that there was neither a constitutional nor an evidentiary privilege to refuse to answer the question. In so holding, the court stated the manner in which the problem is to be approached:

What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this first amendment freedom.<sup>16</sup>

Finally, the court determined that, in balancing the impairment of the freedom of the press and the need for sufficient evidence to reach a just decision, the need of the court outweighed the restriction placed on the freedom of the press.

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<sup>11</sup> U.S. CONST. amend. I.

<sup>12</sup> Guest & Stanzler, *supra* note 3, at 29.

<sup>13</sup> See Note, *Constitutional Protection for the Newsmen's Work Product*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 119 (1971).

<sup>14</sup> 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>15</sup> 367 P.2d 471 (Hawaii 1961).

<sup>16</sup> *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958).

The second illustration, *In re Goodfader's Appeal*,<sup>17</sup> involved the refusal of a reporter on cross examination to disclose where, or from whom, he had obtained information of a possible attempt by the Civil Service Commission of the City and County of Honolulu to fire the personnel director of the Commission. Although the Hawaii Supreme Court noted that first amendment freedoms should be protected from any possible infringement, it stated that they are not absolute. This court, like the court of *Garland*, asserted that the approach should be a balancing one based upon the circumstances involved in the case:

[D]espite the broad scope and protective status of the first amendment freedoms and privileges, it is clear that none of them is absolute, and that whether, in any given case an asserted right under that amendment will prevail or not depends upon the particular circumstances involved and the weighing and balancing of the protection afforded by the right asserted against the purposes that would be defeated or denied by recognition or the freedom or privilege. The private or individual interest involved must in each case be weighed in balance against the public interest affected.<sup>18</sup>

Contrary to the above examples and to the decisions rendered by a majority of courts which have considered the question of a newsman's privilege under the first amendment was the decision reached by the United States Court of Appeals for the Ninth Circuit in *Caldwell v. United States*.<sup>19</sup> As a black reporter for the *New York Times*, defendant Caldwell was able to gain the confidence of certain Black Panther party members. Through his articles he gave the public an insight into the party which had not been previously presented.<sup>20</sup> Caldwell was subpoenaed to appear before the grand jury and was held in contempt for disregarding the subpoena.<sup>21</sup> On appeal, the Ninth Circuit Court of Appeals held that there was nothing to which the journalist could testify beyond that which he had already made public.<sup>22</sup> The court further noted that Caldwell's mere appearance would destroy his capacity as a news reporter. In the *Caldwell* case the contention was not that the first amendment afforded an absolute

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<sup>17</sup> 367 P.2d 472 (Hawaii 1961).

<sup>18</sup> *Id.* at 478.

<sup>19</sup> 434 F.2d 1081 (9th Cir. 1970), *rev'd*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>20</sup> *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 1080 (1972).

<sup>21</sup> *Application of Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970). See note 19 *supra*, and accompanying text.

<sup>22</sup> *United States v. Caldwell*, 434 F.2d 1081 (9th Cir. 1970).

privilege but rather, as the court concluded, that the first amendment provided protection when a compelling need was not demonstrated.<sup>23</sup>

To resolve the controversy between the different approaches developed by the lower courts the Supreme Court granted certiorari in *Branzburg v. Hayes*.<sup>24</sup> As noted earlier, Branzburg was being questioned about his reporting of drug abuse in Franklin County, Kentucky, when he refused to identify the people he had interviewed. In a five-four decision the Supreme Court held that the freedoms of speech and press guaranteed by the first amendment are not abridged when newsmen are required to appear and testify before state or federal grand juries. Speaking for the majority, Justice White noted that neither is there constitutional immunity from grand jury subpoenas nor first amendment protection from disclosing, to a grand jury, information received in confidence:

It is clear that the first amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.<sup>25</sup>

Justice White determined that evidence that the "flow of news" would be restricted was unclear as was evidence of the extent to which informers would be deterred from furnishing information to reporters if no immunity were granted. No longer the activist Warren Court, the Supreme Court may have decided as it did in order to leave such matters to the legislative branch of government.<sup>26</sup> After the Supreme Court's decision in *Branzburg* the statutory solution remains the only source of protection for the newsman's privilege.

#### STATUTORY APPROACH

Presently eighteen states have recognized the newsman's privilege

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<sup>23</sup> See Comment, 46 N.Y.U.L. REV. 617, 628 (1971).

<sup>24</sup> 408 U.S. 665 (1972).

<sup>25</sup> *Id.* at 682.

<sup>26</sup> At the federal level Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. *Id.* at 706.

by statute.<sup>27</sup> These statutes offer varying degrees of protection, from the seemingly absolute privilege in Alabama<sup>28</sup> to the limited protection in Illinois, where the court may deny the privilege to a newsman if other available sources of evidence have been exhausted and the information is essential to the protection of the public interest.<sup>29</sup> Before the privilege granted by the Indiana statute may be invoked the reporter must be employed by a newspaper which has been published for five consecutive years in the same city and has a circulation of two percent of the population of the county in which it is published.<sup>30</sup> Another example of limitation of the privilege extended to a newsman's testimony is the New Mexico statute which allows the testimonial privilege to be denied if disclosure of the information is deemed essential to prevent an injustice.<sup>31</sup>

No statutory privilege for newsmen exists on the federal level at the present time. However, in a 1970 address by John Mitchell, then Attorney General, federal guidelines were announced for issuing subpoenas. These guidelines limit the conditions under which a subpoena should be issued. A final caveat, however, that situations are foreseeable where the guidelines would not be applicable, could operate to render the enumerated guidelines useless.<sup>32</sup>

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<sup>27</sup> ALA. CODE tit. 7, § 370 (1960); ALASKA COMP. LAWS ANN. §§ 09.25.150-.220 (Supp. 1971); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1971); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1968); ILL. ANN. STAT. ch. 51, §§ 111-119 (Supp. 1972); IND. STAT. ANN. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1972); LA. REV. STAT. tit. 45, §§ 1451-53 (Supp. 1972); MD. ANN. CODE art. 35, § 2 (1965); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. tit. 93, §§ 601-1-602-2 (1964); NEV. REV. STAT. tit. 4, § 49.275 (1971); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1971); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (1954); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971).

<sup>28</sup> ALA. CODE tit. 7, § 370 (1960) provides:

No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed.

<sup>29</sup> ILL. ANN. STAT. ch. 51, § 117 (Supp. 1972).

<sup>30</sup> IND. STAT. ANN. § 2-1733 (1968).

<sup>31</sup> N.M. STAT. ANN. § 20-1-12.1 (1970).

<sup>32</sup> A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a springboard for investigations.

B. There should be sufficient reason to believe that the informa-

(Continued on next page)

In interpreting the statutory privileges and applying them to a given fact situation, the courts have taken two routes: liberal construction or narrow application, resulting in privileges of illusory value. The Pennsylvania Supreme Court in the case of *In re Taylor*<sup>33</sup> held that the statutory exemption for the testimony of reporters must be given a broad interpretation in favor of the news media. The court gave the statute a liberal construction because "independent newspapers are today the principal watch dogs and protectors of honest as well as good government."<sup>34</sup> On the other hand, the New Jersey Supreme Court narrowly construed a statutory privilege when it upheld an order to compel the editor of a newspaper to reveal his source of information.<sup>35</sup> The court ruled under the facts presented that the question did not go to the source of the information but rather to the determination of who physically transported the statement to the editor. If the court had interpreted the statute in favor of the news media, it perhaps could have justifiably expanded the definition of the term "source" to include not only those making the initial statements but also those who relay them to the press.

The Kentucky Court of Appeals gave an extremely narrow construction to the Kentucky statute<sup>36</sup> when it interpreted the phrase

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(Footnote continued from preceding page)

tion sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

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

D. Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicity disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

It must always be remembered that emergencies and other unusual situations may develop where a subpoena may be submitted which does not exactly conform to these guidelines. 7 CRIM. L. REPORTER 2461 (1970).

<sup>33</sup> 193 A.2d 181 (Pa. 1963).

<sup>34</sup> *Id.* at 185.

<sup>35</sup> *State v. Donovan*, 30 A.2d 421 (N.J. 1943).

<sup>36</sup> KY. REV. STAT. § 421.100 (1972).



"source of information."<sup>37</sup> The Court defined information "as the things or matters which a reporter learns,"<sup>38</sup> and source as "the method by which or the person from whom he learns them."<sup>39</sup> With these verbal gymnastics, the Kentucky Court of Appeals reached the conclusion that, in the case at bar, the reporter's personal observation was the source, and the identity of the persons making the hashish was part of the information that Branzburg obtained. The Court found that the statute protected only the source and not the information; therefore, the reporter could be compelled to name the person he interviewed in the process of making hashish. In his dissent, Justice Hill argued that the term "source of any information is a broad comprehensive one, certainly not a technical phrase."<sup>40</sup> He added:

[W]e have a situation requiring the balance of values and I believe as apparently did the Legislature, that the benefits to society from thoroughly and correctly reporting current events greater outweighs the probable and highly imaginary possibility of their abuse under the statute.<sup>41</sup>

One of the most reiterated arguments in favor of establishing a statutory exemption is that absent this exemption the free flow of news to the public would be impaired.<sup>42</sup> The unrestrained use of the subpoena power serves to frustrate the establishment of confidential relationships which are necessary if the reporter is to obtain his information.<sup>43</sup> The validity of this argument is reflected in the frequency with which reporters use confidential sources in the news-gathering process. For example, the *San Francisco Chronicle* uses such sources in approximately 350-1,000 stories each year.<sup>44</sup> In a recent empirical study of reliance on confidential relationships, it was shown that reporters depend on such sources for 22.2 to 34.4 percent of their

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<sup>37</sup> Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970).

<sup>38</sup> *Id.* at 347.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 348 (J. Hill, dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> See Guest & Stanzler, *supra* note 3, at 44; Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970) [hereinafter cited as *Reporters and Their Sources*]. Guest and Stanzler point out that the flow of news would be inhibited since the willingness of the informant to seek out or to communicate with the newsmen and the willingness of the newsmen to seek out informants and to transmit information received from informants for publication would be affected.

<sup>43</sup> Much discussion will be stifled concerning socially controversial activities, such as illegal abortion and drug usage, for individuals will avoid the possibility of public identification with illegal conduct. Some persons will be reluctant to voice their opinion without assurances of anonymity for fear of harassment and reprisal. *Reporters and Their Sources, supra* note 42, at 329.

<sup>44</sup> Guest & Stanzler, *supra* note 3, at 60.

stories,<sup>45</sup> with governmental reporters placing the heaviest emphasis on regular confidential sources.<sup>46</sup> This study indicates that any limitation on the use of confidential sources would restrict the flow of information to the public. The newsman-informant relationship is of sufficient societal value to warrant protection. In addition, it is rare that newsmen possess information that could be considered vital to the determination of specific litigation.<sup>47</sup>

#### CONCLUSION

Stripped of the possibility of constitutional protection by the Supreme Court's decision in *Branzburg*, the newsman must now rely on Congress and the state legislatures to provide him with the protection he needs to satisfactorily perform his role as the "guardian of the public interest."<sup>48</sup> The statutory privileges afforded newsmen should be absolute; if the reporter cannot consistently insure the anonymity of his sources, the fear of potential reprisals against informants would be sufficient to render any privilege less than absolute, valueless. A major premise of a democratic society is an informed citizenry; any inhibition on the dissemination of news decreases the information available to the public.<sup>49</sup> For example, a government scandal may be kept from the public because a source of information refuses to talk, fearing that his name will be revealed and that he will lose his patronage job. The electorate, without knowledge of the scandalous activity, will retain the incumbent officeholder whereas, with knowledge, the electorate could defeat him.<sup>50</sup> Newsmen desire only to keep the identity of the source confidential, not the information itself; such a desire must have statutory endorsement so that a free press may continue to be one of the foundations of democracy.

*Richard E. Anderson*

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<sup>45</sup> Blase, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 247 (1971).

<sup>46</sup> *Id.* at 251.

<sup>47</sup> *Id.* at 276.

<sup>48</sup> Desmond, *The Newsman's Privilege Bill*, 13 ALBANY L. REV. 1, 8 (1949) [hereinafter cited as Desmond].

<sup>49</sup> "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 6 *Writings of James Madison* 398 (Hunt. ed. 1906).

<sup>50</sup> "Anyone familiar with the history of our free press knows that newsmen have fought corrupt judges, bungling politicians, black marketeers, and the stealthy saboteurs of democracy through the antiseptic power of exposure." See Desmond, *supra* note 48, at 8.