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The Newsman's Privilege: Protection of Confidential Associations and Private Communications

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THE NEWSMAN'S PRIVILEGE: PROTECTION OF CONFIDENTIAL ASSOCIATIONS AND PRIVATE COMMUNICATIONS

I. THE PROBLEM: ACCESS TO INFORMATION, NEWSMEN'S ETHICS, AND THE LEGISLATIVE AND JUDICIAL PROCESSES

A newsman deals in information. He must assent to certain conditions imposed by his suppliers in order to obtain that information which becomes the "news." One condition frequently imposed is that the newsman maintain the anonymity of his confidant.¹ Another is that the information provided be used only by the newsman and not be published itself.² As a matter of professional ethics the newsman is required to respect his confidant's wishes and protect the information and the identity of its source. Generally this is not a significant problem.

Today, however, the newsman is more and more frequently being called upon to testify in either a legislative or judicial proceeding, and is compelled to disclose confidential information and sources under threat of citation for contempt. The newsman then faces a dilemma: betray his confidences and breach his ethics by disclosure, or defy the court or legislative body and be punished.³ The result is that the newsman, in providing a needed and valuable public service, must personally pay a high price—fine or imprisonment by the court, or evaporation of his news sources by betrayal. The problem is that

most news is communicated to reporters out of friendship for the reporter or because of a vague feeling that the publication of news is a good thing. The reporter knows that, since he performs no service for the source, he must at least do all he can to avoid causing him injury. It is a matter of professional survival.⁴

¹ A survey conducted by authors Guest & Stanzler shows that a substantial number of stories, excluding short gossip items, based on confidential information are published by daily newspapers throughout the United States. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 57-61 (1969).

² Appendix I illustrates the practice of politicians and government officials of supplying information for the newsman's use only, and not for publication or attribution.

³ For a shocking example of the newsman's dilemma, and the potential consequences of the absence of a newsman's privilege, see Guest & Stanzler, *supra* note 1, at 45-46, relating an experience of Eugene Patterson, editor of the Atlanta Constitution.

⁴ Note, *Compulsory Disclosure of a Newsmen's Source: A Compromise Proposal*, 54 NW. L. REV. 243, 247-48 (1959).

The purpose of this comment is to determine whether the confidential associations and-or private communications of a newsman are privileged.

II. THE PUBLIC'S NEED FOR A NEWSMAN'S PRIVILEGE

The newsman's claim that forced disclosure of confidential relationships would dry up his news sources has never been challenged.⁵ Analysis of the effects of such forced disclosures indicates that society pays a heavy price when testimonial compulsion is attempted.⁶ For example, the appearance of the *New York Times* Denver correspondent before the House Internal Security Committee last year has had a "severely detrimental effect" on his ability, and the ability of other reporters, to cover S.D.S. and other radical student groups.⁷ Furthermore, the recent compulsory grand jury appearance of *New York Times* reporter Earl Caldwell has already had an inhibiting effect on the ability of the other reporters to cover the Black Panthers.⁸ CBS newsman Walter Cronkite, has said that "[w]ithout such materials, I would be able to do little more than broadcast press releases and public statements."⁹ In citing some of his common sources and the information which they provide, Cronkite listed a Senate staff member (concerning the senator's decision not to seek re-election), a Pentagon officer (Administration pressures on military cut-back in Viet-Nam), and a noted scientist (criticism of the AEC).¹⁰ Mr. Cronkite's reliance on public officials for much of what he considers vital information is significant because government officials, perhaps more so than any other class of confidential news source, are adamant that their request for anonymity be respected.¹¹ The frequency with which newsmen publish materials obtained in "off-the-record" or "background" briefings or statements is evidenced by the recurring attribution of news to "high administration sources" or "extremely reliable sources." The embarrassment and chilling effect that forced disclosure would have on confidential sources such as high level civil servants, military officers, and cabinet-level officials is obvious. Cur-

⁵ The claim was not challenged by the *Garland* court, *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958). The Pennsylvania Supreme Court took judicial notice of this fact. See *In re Taylor*, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963).

⁶ *Supra* note 1.

⁷ See Brief of the New York Times Company, as amicus curiae, In Support of Appellant, *In re Grand Jury Witness Earl Caldwell*, U.S.C.A., 9th Cir., No. 26025, at 6-7.

⁸ *Id.*

⁹ N.Y. Times, Apr. 5, 1970, at 28, col. 1.

¹⁰ *Id.*

¹¹ See Adelson, *Subpoena Siege-Have the News Media Become too Big to Fight?*, 53 SAT. REV., Mar. 14, 1970, at 107.

tailment of the newsman's relationship with these sources could reduce vital information about government activity to a mere trickle.¹² Moreover, since the immediate concern for the Framers in drafting the First Amendment guarantee of freedom of the press was the establishment of a press that would be free to investigate and expose all instances of government corruption or misconduct,¹³ the need for a newsman's privilege in this context is particularly compelling.

However, the need for the privilege is not confined solely to the dealings of newsmen with confidential government news sources. The past decade was a period of rapid social change—a time during which many people first began seriously to question and challenge “accepted” values and roles. The Kerner Commission observed in 1968 that, “Our Nation is moving toward two societies, one black, one white—separate and unequal.”¹⁴ Of particular importance here is the Commission's concern over the failure of the news media to report adequately on race relations and ghetto problems. As the Report states, the news media “. . . have not communicated to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of life in the ghetto.”¹⁵ The Report reveals that ghetto blacks distrust and dislike the media, which they frequently refer to as the “white press.”¹⁶ Recognizing the obvious danger inherent in shutting off alienated groups from a communication forum through which they can effectively express their grievances, the Commission recommended that the news media expand their coverage of the black community, integrate black activities into all aspects of coverage and content, and establish more and better links with the black community.¹⁷ These goals can never be attained in an atmosphere of distrust of the newsman's promises of confidentiality.

¹² The Freedom of Information Act, 5 U.S.C. § 552, was strongly supported by the press as a means of reducing the need to rely on confidential sources in gaining access to pertinent news concerning government activity. However, Professor Davis, in an exhaustive analysis of the act, has concluded that the press will benefit little from it. See Davis, *The Information Act: A Preliminary Analysis*, 34 CHI. L. REV. 761 (1967).

¹³ See Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960), quoting Madison: “The liberty of the press is expressly declared to be beyond the reach of this government.” 1 Annals of Congress 738 (1789).

¹⁴ REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS I (1968).

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 206.

¹⁷ *Id.* at 10. In a survey by the Commission of the attitudes of 5,000 blacks and whites in 15 major American cities, one question asked for ways in which a disturbance like the one in Detroit in 1967 could be avoided. The reply showing the highest correlation between the answers of blacks and whites cited the need for improving communications between the two groups. SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, Table V-d at 48 (1968).

The belief that disobedience to law is justified when a good cause cannot be furthered without violence is a view widely held by many students, blacks and other groups pressing for social change in America today.¹⁸ Increasingly, protesters speak of revolution as a necessary instrument for effecting needed improvements, charging that the established channels for change are inadequate to the task.¹⁹ Any act which limits or stills these demands may lead to increased alienation of these groups. Limitations on freedom of speech and press must be justified by a compelling need, since the test of society's commitment to free expression is not whether it can tolerate minor deviations, but whether it will allow uninhibited criticism of its fundamental beliefs and practices. But when such criticisms are voiced, the drive to repress or silence them may become overwhelming.²⁰ In the words of Dean Goldstein, "[t]he paranoid tendencies latent in a mass society are running unusually strong these days and make all the more essential a clear standard which strikes the proper balance between the demands of confidentiality and those of the public interest."²¹

In view of the great interest currently focused on "political" prosecutions involving such groups as the Black Panthers and Weathermen, no court today can casually conclude that forced disclosure of a newsman's confidential sources will have a negligible effect on the free flow of news. Moreover, in view of the increasing tendency of the government to rely on the news media to gather evidence,²² news sources might reasonably conclude that the media are merely an investigative arm of government, a conclusion which would further corrode the vital newsman-source relationship.

Any disruption of the tenuous channels of communication between alienated segments and the mainstream of our society is a loss which the public cannot afford. Testimonial compulsion in this context destroys the vital—and weakest—line in the chain of public communication, the relationship between the newsman and his confidential source. The public's need to maintain a free flow

¹⁸ FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (Eisenhower Commission) 92 (1969).

¹⁹ *Id.* at 95.

²⁰ EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 16 (1966).

²¹ Goldstein, *Newsmen and Their Confidential Sources*, 162 NEW REPUBLIC, Mar. 21, 1970, at 13-14.

²² Letter from James C. Goodale, General Counsel, the New York Times, to author, August 6, 1970. In the recent case of *Illinois v. Dohrn*, No. 60-3808 (Cir. Ct. of Cook Cty.-Crim. Div., May 20, 1970), the court considered this possibility also in granting a motion to quash subpoenas issued to several newspapers. The decision is reprinted in N.Y. Times Brief, *supra* note 3, Appendix D, at 8.

of news concerning both these disaffected groups and all sectors of government activity, arguably outweighs the claims of judicial administrative efficiency put forth to justify testimonial compulsion in the case of newsmen.

III. THE NEWSMAN'S PRIVILEGE UNDER STATE LAW

An understanding of the principles underlying the traditional privileges and their application to the newsman's privilege is important. Wigmore defined these principles as fundamental conditions required for the granting of a privilege:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This 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 litigation.²³

Although a privilege for a newsman's confidential associations and private communications would no doubt meet Wigmore's criteria, no court thus far has applied the standard to the newsman-source relationship.

A. The Newsman's Privilege At Common Law

There simply is no common law privilege which protects the confidential associations and private communications of newsmen from compulsory disclosure in legislative and judicial proceedings.²⁴ "Neither in England nor in the United States does the common law give a newsman the privilege to conceal confidential sources,"²⁵ and courts having an opportunity to rule on the question have uniformly denied the existence of a common law newsman's privilege.²⁶ Despite the absence of a common law news-

²³ 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

²⁴ *Id.* at § 2286.

²⁵ Guest & Stanzler, *supra* note 1, at 20.

²⁶ 1. U.S. Court of Appeals, Second Circuit. *Garland v. Torre*, 259 F.2d 545 (2d. Cir.), *cert. denied*, 358 U.S. 910 (1958).

2. U.S. District Court, Hawaii. In the Matter of Wayne, 4 U.S.D.C. Hawaii 475 (1914).

3. U.S. District Court, New York. *Rosenberg v. Carroll*, 99 F.Supp. 62 (S.D.N.Y. 1951).

4. U.S. District Court, Massachusetts. *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957).

man's privilege, attempts have been made to create such protection. Newsmen have claimed a privilege on the basis of the public's interest in the free flow of news and by analogizing the reporter-source relationship to traditional relationships such as attorney-client.²⁷ However, the courts have clearly been loathe to create a common law privilege for newsmen, and have universally rejected such claims. In *Garland v. Torre*,²⁸ Judge Stewart (now Mr. Justice Stewart), refusing to extend the privilege to a news columnist called as a witness by Judy Garland in a libel action, stated:

The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify . . . the tendency should be 'not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege . . .' to recognize the privilege asserted here, assuming our power to do so, would poorly serve the cause of justice.²⁹

A similarly unfavorable judicial attitude towards the newsman's privilege is found *In re Goodfader's Appeal*, a case involving the failure of a newsman to disclose his source of information concerning an attempt to fire a civil service employee. The court, noting the lack of both a state privilege statute and common law support for such protection for newsmen, refused to grant the reporter a privilege. Rejecting the newsman's arguments that the rationale underlying established privileges, *i.e.*, source relationship, justified protection of the newsman, the court, quoting from

5. California Supreme Court. *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897); *Ex parte Lawrence*, 116 Cal. 298, 48 p. 124 (1897).

6. Colorado Supreme Court. *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919); *Murphy v. Colorado*, unreported, *cert. denied*, 365 U.S. 843 (1961).

7. Florida Supreme Court. *Clein v. State*, 52 So.2d 117 (Fla. 1950).

8. Georgia Supreme Court. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911).

9. Hawaii Supreme Court. *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961).

10. New Jersey Supreme Court. *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913).

11. New York. *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. S.Ct. 1874); *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (Ct. App. 1936).

12. Oregon Supreme Court. *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729 (en banc), *cert. denied*, 392 U.S. 905 (1968).

13. Application of Caldwell, 311 F.Supp. 358 (N.D.Cal. 1970). This decision held that confidential associations of a newsman are privileged on federal constitutional grounds, rather than common law grounds. See also *Air Transport Assn. v. PATCO*, No. 70-C-400, T. at 18-23 (E.D.N.Y. April 6, 1970).

²⁷ Guest & Stanzler, *supra* note 1, at 18.

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

²⁹ 259 F.2d at 550, quoting *People v. County Sheriff of N.Y.*, 269 N.Y. at 295, 199 N.E. at 416.

³⁰ 45 Hawaii 317, 367 P.2d 472 (1961).

the New York case of *People ex rel. Mooney v. Sheriff of New York County*,³¹ said:

The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure . . . as it now exists often, in particular cases, works a hardship.³²

The court found the tendency was to restrict granting of privileges rather than to enlarge the classes of protected relationships and stated that if a news press privilege should be created, "it should be done by the Legislature which has thus far refused to enact such legislation."³³ Thus, the courts have been concerned more with the needs of the judicial process in requiring witnesses to testify and general notions of fairness and justice than with possible analogies between the newsman's privilege and other privileges.

Nevertheless it is useful to consider how the newsman's privilege compares with other specific privileges. The husband-wife and juror privileges are clearly not analogous because the very relationships from which those privileges arise are created, and recognized, by the law. In contrast, the newsman-source relationship is not established by law.

While there is a close analogy between the newsman's privilege and the attorney-client, doctor-patient, and penitent-priest privileges, the analogy is imperfect. First, each of these traditional privileges results from a *direct personal right* belonging to the confiding party, *i.e.*, certain inalienable human rights, which are constitutionally recognized.³⁴ The person who confides in a newsman, however, has no such right, and, indeed, may often be violating a confidence he owes to someone else.

Second, the client who confides in his attorney, the patient who confides in his doctor and the penitent who confides in his priest all receive *direct personal benefit* from the relationship. However, the confidential source who provides information to newsmen receives only a vague, indirect satisfaction from his communication.

This aspect of the traditionally privileged relationships has been relied on by courts, often implicitly, in granting the privilege. Upholding the attorney-client privilege, the court in *Comercio E*

³¹ 269 N.Y. 291, 199 N.E. 415 (Ct. App. 1936).

³² 367 P.2d at 482-483.

³³ 367 P.2d at 483, quoting *People ex rel. Mooney v. Sheriff of New York Co.*, 199 N.E. at 416.

³⁴ Guest & Stanzler, *supra* note 1, at 26.

Industria Continental, S.A. v. Dresser Industries, Inc., said that although confidential information might be relevant evidence, its "revelation will impair the social good derived from the proper performance of the functions of lawyers for their clients."³⁵ A similar justification was expressed by the court in *Hammonds v. Aetna Cas. & Sur. Co.*,³⁶ with respect to the doctor-patient privilege. In this case, a patient sued his doctor's malpractice insurer for inducing the doctor to disclose confidential information gained through the doctor-patient relationship. Here the court reasoned that confidentiality of communication was necessary to insure the complete frankness on the patient's part necessary for diagnosis. Speaking for the court, Judge Connell explained:

To encourage the desired candor, men of law have formulated a strong policy of confidentiality to assure patients that only they themselves may unlock the doctor's silence in regard to those private disclosures.³⁷

Third, although the attorney-client, doctor-patient, and penitent-priest privileges protect only the private communications of the parties, and not the confidential relationship itself,³⁸ advocates of the newsman privilege require protection for both the confidential information, and the fact of the newsman-source association. Only *confidences* made to an attorney, doctor, or priest are protected from disclosure whereas the newsman must protect the identity of his confidant, as well as the private communications made to him, in order to assure the freeflow of news.

Fourth, the doctor-patient and priest-penitent privileges are statutory privileges not recognized at common law.³⁹ Only the attorney-client privilege originated in the common law, although today it is frequently codified.⁴⁰

On the other hand, the courts have also recognized that public policy may well be as important a factor as common law tradition in deciding whether to grant a privilege against compulsory disclosure of confidential associations and private communications. In *Hammonds*, the court found that the *public interest* was the underlying justification for the doctor-patient privilege, rather than common law formulations for precedents. The court defined pub-

³⁵ 19 F.R.D. 513, 514. (S.D.N.Y. 1956).

³⁶ 243 F.Supp. 793 (N.D. Ohio 1965). See *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) (penitent-priest privilege).

³⁷ 243 F.Supp. at 797.

³⁸ Attorney-Client Privilege: *United States v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964); 8 J. WIGMORE, EVIDENCE §§ 2306-2309 (McNaughton rev. 1961).

³⁹ 8 J. WIGMORE, EVIDENCE, §§ 2380, 2394 (McNaughton rev. 1961).

⁴⁰ *Id.* at §§ 2290, 2292.

lic policy in terms of "the community common sense and commor. conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like."⁴¹ The court found that although public policy considerations would occasionally be established constitutionally, statutorily or by case precedent, the most general method of discerning the public interest is through "the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man."⁴² A similar attitude was expressed by Chief Judge Fahy in *Mullen v. United States*.⁴³

When reason and experience call for recognition of a privilege which has the effect of restricting evidence the dead hand of the common law will not restrain such recognition.⁴⁴

However, most closely analogous to the newsman privilege is the informer privilege which protects both the source and information disclosed to a law enforcement official.⁴⁵ First, neither the disclosure made by an informer nor that of a news source directly involve a personal right of the one making the disclosure. Rather, with respect to an informer, the privilege has been said to be the Government's privilege to withhold the identity of persons providing information concerning a violation of the law.⁴⁶

Second, the informer generally receives no direct personal benefit from his disclosure, although informers are occasionally paid, and in any event, has no inherent right to such benefits. Instead, the benefit is to the public at large, and it is for this reason that the privilege is granted. As Mr. Justice Burton stated in upholding the informer's privilege: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement."⁴⁷ The Second Circuit more fully explained this purpose in *United States v. Tucker*,⁴⁸ where defendant, convicted of narcotics possession, sought to appeal on

⁴¹ 243 F. Supp. at 796.

⁴² 243 F. Supp. at 796-797.

⁴³ 263 F.2d 275 (D.C. Cir. 1958).

⁴⁴ 263 F. 2d at 279.

⁴⁵ Guest & Stanzler, *supra* note 1, at 36.

⁴⁶ *Roviaro v. U.S.*, 353 U.S. 53, 59 (1957).

⁴⁷ 353 U.S. at 59. However, in this case it was found that disclosure of their identities was necessary. The informer's privilege was reaffirmed by the Supreme Court in *Rugendorf v. United States*, 376 U.S. 528 (1964). The public interest rationale for upholding the informer's privilege was similarly used in *Westinghouse Elec. Corp. v. Burlington*, 351 F.2d 762, 768 (D.C. Cir. 1965), where the court stated that the purpose of the privilege was to guarantee government receipt of information, not to protect the informer. "The privilege is maintained to encourage possible informers in the future by giving them some assurance of anonymity."

⁴⁸ 380 F.2d 206 (2d Cir. 1967).

grounds that there was no probable cause for his arrest. In order to establish this defense, the defendant sought the identity of a government informer. In upholding the anonymity of the informer, the court balanced the defendant's need for disclosure against

the strong public interest in encouraging the freeflow of information to law enforcement officers. An informant may volunteer information to government agents for a variety of reasons . . . , but it has been the experience of law enforcement officers that the prospective informer will usually condition his cooperation on an assurance of anonymity, fearing that if disclosure is made, physical harm or other undesirable consequences may be visited upon him or his family.⁴⁹

The third similarity between the informer's privilege and the proposed newsman privilege is that the informer privilege applies both to the confidential relationship and to the private communications which result therefrom.⁵⁰ Fourth, since the informer's privilege apparently was recognized at common law,⁵¹ it provides a more appropriate analogy for a judicially created privilege than do those statutory privileges existing solely as a matter of legislative grace.

The only possible limitation on the validity of the informer's privilege analogy is that the Supreme Court recognized the informer privilege as a qualified privilege which must give way, "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ." ⁵² Thus, the informer's privilege must be determined by weighing society's interest in free flow of information against the defendant's need for disclosures.⁵³ This balancing approach, however, may merely be a transitional court rule, for as the court said in the *Westinghouse* case: "To the extent that the *Roviaro* balancing test becomes known to potential informers, it will adversely affect the policy for which the privilege exists."⁵⁴ Indeed, restrictions may have already been placed on the type of balancing that will be done. "Mere speculation"⁵⁵ that disclosure of the informer might help the defendant's case is not enough to outweigh society's interest in preserving the informant's anonymity.

Arguably, a qualified newsman's privilege might be sufficient,

⁴⁹ 380 F.2d at 213.

⁵⁰ 353 U.S. at 61.

⁵¹ 8 J. WIGMORE, EVIDENCE, § 2285 (McNaughton rev. 1961); *U.S. v. Tucker*, 380 F.2d at 211.

⁵² 353 U.S. at 60-61.

⁵³ 353 U.S. at 62.

⁵⁴ 351 F.2d at 769.

⁵⁵ 351 F.2d at 769.

although authorities disagree.⁵⁶ Nevertheless, a qualified privilege would be an acceptable starting point, and might be easier for a court to accept.

In the final analysis it is doubtful whether any court will accept an analogy to another privilege as the sole basis for creating a newsman's privilege. A court's willingness to uphold the newsman's privilege will not turn upon a close analogy, but will require the marshalling of a more commanding legal theory.

B. The Statutory Newsman's Privilege

Fourteen states have enacted statutes which provide a newsman's privilege.⁵⁷ The table on pages 96-97 indicates the nature of each newsman's privilege statute.⁵⁸

Generally the statutory newsman's privilege is not as extensive as seems desirable. While most of the statutes grant an absolute privilege, the privilege protects only the source, and not private communications and documents. Only the Pennsylvania statute extends the privilege to the relationship, communications, and documents.⁵⁹ However, the recently enacted New York statute protects both confidential associations and private communications, although it does not mention documents.

To date, only one case has tested the constitutionality of the newsman's privilege statutes. In a very brief opinion in *Ex parte Sparrow*,⁶⁰ the court held only that the claim that the Alabama newsman's privilege statute violated the Fourteenth Amendment of the United States Constitution was without merit.

In conclusion, the newsman's privilege statutes provide only limited protection. Although a few statutes provide only a qualified privilege, most statutes provide an absolute privilege for the newsman's confidential associations, and some statutes extend their protection to private communications and documents. Only the recent New York statute affords complete protection on its face.

⁵⁶ Guest & Stanzler, *supra* note 1, at 50-55; Note, *Compulsory Disclosure of a Newsman's Source: A Compromise Proposal*, 54 NW. L. REV. 243 (1959).

⁵⁷ ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1969); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.00 (1962); LA. REV. STAT. §§ 45: 1451-54 (Cum. Supp. 1969); MD. ANN. CODE art. 35, § 2 (1965); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODE ANN. tit. 93, ch. 601-2 (1964); N.J. REV. STAT. § 2A: 84A-21,-29 (Supp. 1969); Ch. 615, § 1 [1970] N.Y. SESS. LAWS 1357; OHIO REV. CODE ANN. § 2739. 12 (1964); PA. STAT. ANN. tit. 28, § 330 (1958).

⁵⁸ The analysis is based upon a literal interpretation of the statutes on their faces, except where a judicial interpretation is cited.

⁵⁹ The protection of communications and documents was created by judicial fiat. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

⁶⁰ 14 F.R.D. 351 (N.D. Ala. 1953).

TABLE I
TABULAR ANALYSIS OF NEWSMAN'S PRIVILEGE STATUTES

<i>State</i>	<i>Absolute Privilege</i>	<i>Qualified Privilege</i>	<i>Confidential Associations</i>	<i>Private Communications</i>	<i>Documents</i>
Alabama	Yes		Yes	No	No
Arizona	Yes		Yes	No	No
Arkansas	No	Malice, bad faith, and lack of public interest defeat.	Yes	No	No
California	Yes		Yes	No	No
Indiana	Yes		Yes	No	No
Kentucky	Yes		Yes	No	No
Louisiana	No	Defamation and court ruling dis-closure in public interest defeat.	Yes	No	No
Maryland	Yes		Yes	No	No

Also decision inter-
preting statute:
State v. Sheridan,
248 Md. 271, 220
A.2d 18 (1967).

TABLE I (Cont.)

State	Absolute Privilege	Qualified Privilege	Confidential Associations	Private Communications	Documents
Michigan	Yes		?	Yes	?
Montana	Yes		Yes	No	No
New Jersey	Yes		Yes	No	No
New York	Yes		Yes	Yes	?
Ohio	Yes		Yes	No	No
Pennsylvania	Yes		Yes	Yes:	Yes:
				<i>In re Taylor</i> ,	<i>In re Taylor</i> ,
				412 Pa. 32,	412 Pa. 32,
				193 A.2d 181,	193 A.2d 181,
				185-86 (1963).	184-85 (1963).

IV. THE FEDERAL CONSTITUTIONAL LAW ISSUE

A. *What Is Freedom Of The Press?*

The First Amendment to the United States Constitution provides that there shall be no abridgment of the freedom of the press.⁶¹ To date, however, the Supreme Court, which defines the nature and scope of the First Amendment's protection,⁶² has chosen not to review any decision regarding the newsman's privilege.⁶³ While the denial of certiorari is not to be regarded as an indication of the Court's opinion on the issue involved,⁶⁴ it is noteworthy that in all of the cases denied certiorari the lower courts had held that the First Amendment freedom of the press did not include the newsman's privilege. Thus, the current status of the newsman's privilege is uncertain:

Though commonly regarded as somewhat generally protected by freedom of the press, with particular restraints thereon as reasonable to protect weightier public interests, the existence and extent of judicial recognition of a constitutionally-protected right of the press to *gather* news remains unsettled.⁶⁵

The decisions of state supreme courts and inferior federal courts have, with one recent exception, held that the First Amendment freedom of the press does not include news gathering in general or the right of newsmen to protect their confidential associations and private communications in particular.⁶⁶ The only authority upholding news gathering and the newsman's privilege as a constitutional right protected by the First Amendment is the recent case of *Application of Caldwell*.⁶⁷ However, in order to evaluate both sides of the question, it is necessary to examine the rationale of each case. Often courts have committed the fallacy of assuming "as an axiom the interest in compulsory testimony with-

⁶¹ U.S. CONST. amend. I.

⁶² *Pennekamp v. Florida*, 328 U.S. 331 (1946).

⁶³ The Court has been presented several opportunities to determine the issue. *In re Mack*, 386 Pa. 251, 126 A.2d 679, *cert. denied*, 352 U.S. 1002 (1956); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Murphy v. Colorado*, unreported, *cert. denied*, 365 U.S. 843 (1961); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

⁶⁴ C. WRIGHT, *FEDERAL COURTS* 495 (1970).

⁶⁵ Recent Decisions, *Right of News Media Personnel to Refuse to Disclose Confidential Sources of Information*, 61 MICH. L. REV. 184, 188-89 (1962).

⁶⁶ *In re Mack*, 386 Pa. 251, 126 A.2d 679, *cert. denied*, 356 U.S. 1002 (1956); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

⁶⁷ 311 F.Supp. 358 (N.D. Cal. 1970).

out analyzing whether forced disclosure in particular cases would serve the underlying policy of effective judicial administration."⁶⁸ It has been argued that the First Amendment does not give newsmen any greater right to gather news than that possessed by the general public. The Pennsylvania Supreme Court used this reasoning in the case of *In re Mack*,⁶⁹ in which the court affirmed the criminal contempt convictions of photographers who had taken photographs of a convicted murderer in violation of a county court rule. The court did not give an extended discussion of the constitutional principles involved, but relied instead upon its right to maintain order and preserve its dignity and the convicted murderer's right of privacy.⁷⁰ As a result, the case is of questionable value in determining the vital constitutional law issue of the scope of the freedom of the press. Courts have also maintained that the phrase "freedom of the press" could not be expanded to encompass a newsman's refusal to divulge his sources. In the case of *In re Taylor*,⁷¹ the Pennsylvania Supreme Court held that a newsman has no constitutional right to refuse to disclose sources of information under either the Pennsylvania or the United States Constitution. In *Taylor*, the president and city editor of a newspaper had been found in contempt for refusing to answer questions about the source of their information before a grand jury investigating criminal conduct and corruption in government. Despite their denial of constitutional practice for newsmen, the court did recognize that disclosure could destroy the newsman-source relationship upon which the public depends for its information:

[I]nformation, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of the information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.⁷²

Another court's conclusion that the First Amendment does not

⁶⁸ Guest & Stanzler, *supra* note 1, at 19.

⁶⁹ 386 Pa. 251, 126 A.2d 679, *cert. denied*, 352 U.S. 1002 (1956).

⁷⁰ 126 A.2d at 682-683.

⁷¹ 412 Pa. 32, 193 A.2d 181 (1963).

⁷² 193 A.2d at 184. Since the court held that newsmen were fully protected by the Pennsylvania newsmen's privilege statute, the Pennsylvania Supreme Court's decision on the First Amendment question was unnecessary and unfortunate. Therefore, it should be accorded little weight as a precedent for similar situations.

give a newsman a constitutional right to protect his sources is also based on the ground that a newsman cannot have a right to gather information superior to that of the general public, because to allow such special privilege would violate the Equal Protection Clause of the Fourteenth Amendment.⁷³ For example, in *State v. Buchanan*,⁷⁴ the editor of a college newspaper was convicted of contempt of court for refusing to disclose the identity of her sources of information regarding the use of marijuana on campus. There was no common law or statutory newsman's privilege under state law. The Oregon Supreme Court, sitting en banc, held that the First Amendment freedom of the press does not give a newsman a constitutional right to protect the anonymity of his confidential informants in the face of a court order requiring disclosure, since such a right would amount to a special privilege in violation of the Equal Protection Clause. This proposition was stated *ipse dixit*, the court's only authority being a case note in the Oregon Law Review. The court further held that newsmen have no constitutional right to information which is not available to the public generally.⁷⁵ Since the court's authority was merely a group of cases involving the use of stolen documents by journalists cited in a footnote without a discussion of their applicability to the significantly different situation at hand,⁷⁶ *Buchanan* provides an insufficient foundation for a full dress argument of the scope of the First Amendment.

Denial of constitutional protection to the newsman-source relationship is also approached through the balance test in which courts weigh freedom of the press against the needs of effective administration of justice. Thus in *Garland v. Torre*,⁷⁷ Judge Stewart (now Mr. Justice Stewart) held that compelling the newswoman to disclose her confidential associations did not violate the First Amendment. The Judge recognized that forced disclosure of the newswoman's confidential sources of information might infringe freedom of the press by curtailing the free flow of news, but observed that freedom of the press, though crucial to a free society, was not an absolute right.⁷⁸ The test applicable in weighing these conflicting interest was

⁷³ *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968) (en banc).

⁷⁴ 250 Ore. 244, 436 P.2d 732.

⁷⁵ 436 P.2d at 736.

⁷⁶ 436 P.2d at 736.

⁷⁷ 259 F.2d 545. In this case, a newswoman had been convicted of criminal contempt for refusing to identify a CBS executive who had made defamatory statements about Judge Garland.

⁷⁸ 259 F.2d at 548.

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.⁷⁹

The court noted that both a free press and courts empowered to discover the truth were fundamental to a free society, and the duty of a witness to testify occasionally required an invasion of the witness' First Amendment rights to privacy and to remain silent. The Judge concluded that "[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public."⁸⁰ Thus, even if freedom of the press were involved, "it too must give place under the Constitution to a paramount public interest in the fair administration of justice."⁸¹ The court valued the administration of justice more highly than the First Amendment rights involved since the judiciary's capacity to function is crucial to society's existence: judicial administration serves "an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures."⁸² In concluding that the First Amendment did not protect the appellant's refusal to testify, Judge Stewart noted that the appellant's situation was distinguishable from a case involving "a wholesale disclosure of a newspaper's confidential sources [or]. . . a case where the identity of the news source is of doubtful relevance or materiality."⁸³ This analysis, however, fails to consider whether compulsory disclosure is always crucial to effective judicial administration, or whether other alternatives to forced testimony of newsmen might be available. Thus the *Garland* opinion also seems unsatisfactory since it gives but cursory consideration to the important constitutional issue involved.

A corollary of the balance test argument is that since no First Amendment right is absolute, lack of freedom must be balanced against competing rights which might be denied should the First Amendment freedom be upheld. "The private or individual interest involved must, in each case, be weighed in balance against the public interest affected."⁸⁴ Such weighing of conflicting in-

⁷⁹ 259 F.2d at 548.

⁸⁰ 259 F.2d at 549, quoting *Blair v. U.S.*, 250 U.S. at 281.

⁸¹ 259 F.2d at 549.

⁸² 259 F.2d at 549, quoting Justice Frankfurter in *Bridges v. California*, 314 U.S. 252, at 291 (1941) (dissenting opinion). See *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462-463 (1907).

⁸³ 259 F.2d at 549-50. Cf. *National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 464-465 (1958).

⁸⁴ *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472, 478 (1961).

terests was the basis for the decision in *In re Goodfader's Appeal*,⁸⁵ where a civil servant ousted from her job as personnel director of the Civil Service Commission of Honolulu sought reinstatement to her former position. The appellant, a reporter, had refused to disclose his confidential source of information regarding attempts by the members of the Commission to fire the employee, arguing that since freedom to gather news was a necessary antecedent to freedom to publish news, *both* were constitutionally protected components of freedom of the press. Thus the reporter concluded that compulsory disclosure of his sources would violate his constitutionally guaranteed right to gather news. The court rejected this argument on two grounds: no case had ever conferred such constitutional protection on newsmen, and such protection would interfere with the effective and fair administration of justice.

The court, noting that the public interest in judicial administration includes the individual's due process right to compel the presence and testimony of witnesses in a court of law, stated: "Correlatively, every person, promptly summoned, is required to attend court and give his testimony unless specifically exempted or privileged."⁸⁶

The dissenting opinion of Judge Mizuha provides a strong and compelling argument that a newsman does have a constitutional right to protect his confidential associations under the First Amendment. First, the dissent points out that the popular notion that English common law evidentiary rules favored compulsory testimony and disfavored special privileges is an erroneous assumption. On the contrary, Madison expressly stated that English common law regarding press testimony "cannot . . . be the standard of its freedom in the United States."⁸⁷ In view of the broad and expansive scope which had been given to the First Amendment freedoms, particularly freedom of the press, under the decisions of the United States Supreme Court,⁸⁸ the likely effect of compulsory disclosure on press freedom has to be weighed against a procedural rule requiring discovery of the newsman's information. Since newsworthy information, especially concerning politics, was often confided to newsmen *only* on condition that the source be kept secret, the dissent concluded:

[R]efusal of this condition [of non-disclosure] means refusal

⁸⁵ 45 Hawaii 317, 367 P.2d 472.

⁸⁶ 367 P.2d at 478.

⁸⁷ 367 P.2d at 491 (VI Writings of James Madison 1790-1802, 387). Madison's opinion was confirmed by the Supreme Court in the case of *Bridges v. California*, 314 U.S. 252, 256 (1941).

of the information. To the extent that judicial compulsion under a procedural rule which sanctions a 'fishing expedition' renders such assurance to informants unavailable or precarious, the flow of news to the public is pinched off at its source and, *pro tanto* the public's right to know is diminished.⁸⁹

Compulsory disclosure amounts to censorship of confidential news sources, since the free flow of news to reporters is curtailed. Thus a litigant's right to compel testimony which might lead to admissible evidence is "too meager an interest" to outweigh "the public interest in a free press which 'stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.'"⁹⁰ Earlier cases which had ordered disclosure of confidential sources were distinguishable, since the public's interest in the subject matter (civil and criminal libel) of those cases, and in disclosure of information to the grand jury, court and disbarment proceeding involved, had outweighed the public's need to protect the confidential source.⁹¹ In contrast with cases such as *Garland* which dealt with news of the affairs of private persons, the present case concerned the administration of the state's Civil Service Commission. Whereas information regarding private citizens might not be so critical as to outweigh a litigant's need for compulsory testimony

the gathering of news relating to the administration of government is sufficiently important to require judicial protection in order to preserve the right of the people to full information regarding the acts or omissions of public servants in order to guard against maladministration or oppression of the government.⁹²

Therefore the public's need to be informed regarding social and political developments was far more crucial than a private litigant's desire for compulsory testimony.

Constitutional protection of the newsman-source relationship was granted in a recent case of *Application of Caldwell* (hereinafter, *Caldwell*)⁹³ on the rationale that testimonial compulsions would infringe First Amendment rights of free speech, press and association. Such infringement was held impermissible *unless* there is "a clear showing of a compelling and overriding national

⁸⁸ 367 P.2d at 498-99.

⁸⁹ 367 P.2d at 495.

⁹⁰ 367 P.2d at 496-497, quoting from *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

⁹¹ 367 P.2d at 498.

⁹² 367 P.2d at 496-497.

⁹³ 311 F. Supp. 358 (N.D.Cal. 1970).

interest that cannot be served by alternative means.”⁹⁴ The court found that there was a constitutionally protected right of newsmen to refuse to disclose the identities of their confidential associations. In *Caldwell*, a *New York Times* reporter was subpoenaed to give testimony relating to interviews he had conducted with officers and spokesmen of the Black Panther Party who were testifying before a Federal Grand Jury. The court granted Caldwell a protective order allowing him to conceal his sources from disclosure, since forced revelation of his contacts would violate his constitutional rights of free speech, press and association. Although the outcome of the case certainly supports the privilege, the opinion is quite inadequate since it does not thoughtfully discuss the constitutional law grounds on which it rests.

*B. The Argument for the Newsman's Privilege
as a Matter of Federal Constitutional Law*

The crucial constitutional issue is whether the First Amendment protects the freedom of the press to gather news as well as the freedom of the press to disseminate news. Inherent in the reporter's ability to gather news is the newsman's privilege not to disclose his confidential associations in judicial proceedings, since a promise of nondisclosure is the operant condition for the newsman's access to information. The importance of this issue was poignantly stated by Dorothy Thompson:

The suggestion that freedom of reporting can exclude access to facts is extremely dangerous doctrine. The gleaning of facts is essential to knowledge, without which the right to publish is empty-and its exercise irresponsible.⁹⁵

Although the Supreme Court has held that a witness' personal sacrifice does not excuse him from testifying,⁹⁶ this principle is not as compelling in the case of a newsman in view of the unqualified constitutional mandate of "freedom of the press." Instead, as Guest and Stanzler have asserted:

Rather than starting with the common law presumption against any privilege and trying to justify an exception because of a constitutional interest, a proper analysis should start with the constitutional presumption of a privilege and try to justify its denial because of a common law interest in compulsory testimony.⁹⁷

⁹⁴ 311 F.Supp. at 360.

⁹⁵ W. DOUGLAS, *THE RIGHT OF THE PEOPLE* 81 (1958).

⁹⁶ *Blair v. United States*, 250 U.S. 273, 281 (1919).

⁹⁷ Guest & Stanzler, *supra* note 1, at 28.

The First Amendment is broad enough to protect newsgathering as an essential component of freedom of the press, and newsgathering by its nature requires the newsman's right to refuse to disclose his confidential associations and private communications. Although the scope of the First Amendment freedom of the press is as yet incompletely defined, the "Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."⁹⁸ This view was more fully detailed in the concurring opinion of Mr. Justice Frankfurter in *Pennekamp v. Florida*:

Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of speech [press] must be viewed in that light and in that light applied.⁹⁹

An examination of the relevant Supreme Court decisions clearly indicates that the First Amendment freedom of the press is to be given an expansive interpretation. In *Bridges v. California*,¹⁰⁰ the Supreme Court reversed the petitioners' contempt convictions for comments they published pertaining to pending litigation, holding that there must be *a clear and present danger* of interference with justice before the contempt power can be used to limit freedom of speech and press. Speaking for the majority, Mr. Justice Black noted that the First Amendment's purpose was to guarantee Americans the greatest possible latitude in freedom of religion, speech, assembly and petition. Since freedom of the press was included in the same unrestricted grant of freedom, "[t]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."¹⁰¹ The principle announced in *Bridges* was reaffirmed in *Craig v. Harney*,¹⁰² where the Court reversed the contempt convictions of a publisher, an editorial writer, and a news reporter who had printed editorials and news stories regarding actions taken by a judge in trials held before his court. In his concurring opinion, Mr. Justice Murphy stated:

A free press lies at the heart of our democracy and its pre-

⁹⁸ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁹⁹ 328 U.S. 331, 354-55 (1946).

¹⁰⁰ 314 U.S. 252 (1941).

¹⁰¹ 314 U.S. at 265.

¹⁰² 331 U.S. 367 (1947).

servation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth.¹⁰³

Clearly, the obstruction of justice required to permit a restriction of the freedom of the press must be "extremely serious and the degree of imminence extremely high."¹⁰⁴ A constitutionally guaranteed newsman's privilege would not result in the severe obstruction of justice specified by the Court, since the evidence sought is generally otherwise available through discovery and other investigative efforts of counsel. However, attorneys often prefer the easier method of obtaining evidence vicariously through the forced testimony of the newsmen whose own efforts produced it.

The Court's expansive interpretation of the First Amendment is found in other decisions involving comparable and interrelated freedoms. In *Thornhill v. Alabama*,¹⁰⁵ the Court reversed a conviction under a statute prohibiting picketing near any place of business, when the picketers' purpose was to influence persons to boycott that business. In the majority opinion, Mr. Justice Murphy expressed the Court's belief that restrictions on the freedoms of speech and press limit the "opportunities for public education" requisite for enlightened and informed public decision-making.¹⁰⁶ In discussing the scope of freedom of speech and press, he further stated:

The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern *without previous restraint or fear of subsequent punishment*.¹⁰⁷ [Emphasis added].

The only justification for limiting First Amendment freedoms is a "clear public interest" in forestalling a "clear and present danger:"

[W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition

¹⁰³ 331 U.S. at 383.

¹⁰⁴ 314 U.S. at 263.

¹⁰⁵ 310 U.S. 88 (1940).

¹⁰⁶ 310 U.S. at 95.

¹⁰⁷ 310 U.S. at 101-102.

to allow the widest room for discussion, the narrowest range for its restriction. . . .¹⁰⁸

The Court further enunciated this constitutional principle in *Thomas v. Collins*,¹⁰⁹ in which the appellant, a labor union president, had been found in contempt and sentenced to a fine and imprisonment for violating a court restraining order by speaking before an assembly of workers without registering or obtaining a union organizer's card as required by state statute. His conviction was reversed on the ground that the statute was a prior restraint upon the appellant's First Amendment rights. The limitation placed on the appellant—a limitation similar to that placed on a newsman by the threat of compulsory disclosure of his confidential associations and private communications—was succinctly characterized by the Court: "The threat of the restraining order backed by the power of contempt, and of arrest for crime, hung over every word."¹¹⁰

In the opinion, Mr. Justice Rutledge noted the "preferred place" given to the First Amendment freedoms when balanced against competing interests. He then stated that in weighing these freedoms against any proposed restrictions, "it is the character of the right, not of the limitation, which determines what standard governs the choice."¹¹¹ The Court recognized the restrictive and chilling effect which a restraining order or a contempt citation could have upon the exercise of First Amendment freedoms, a result equally likely when a newsman is threatened with a contempt conviction:

When [the appellant was] served with the order he had three choices: (1) to stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty. He chose the first alternative. We think he was within his rights in doing so.¹¹²

Since the practical effect of the restraining order was to forbid both solicitation of union membership and speech in favor of unionism, the Court concluded that this restriction was not negligible in view of the rights thus inhibited. A more limited restriction on the freedoms of speech and association might appear more acceptable, but "[i]f the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can

¹⁰⁸ *Thomas v. Collins*, 323 U.S. 516, 530 (1944).

¹⁰⁹ 323 U.S. 516 (1944).

¹¹⁰ 323 U.S. at 534.

¹¹¹ 323 U.S. at 529-30.

¹¹² 323 U.S. at 536.

be no more plain than when they are imposed on the most basic rights of all."¹¹³

The case's final important principle, one clearly applicable to the newsman's privilege situation, is that although the First Amendment freedom is exercised in conjunction with economic activity, this fact alone does not limit the protection accorded to that freedom:

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so.¹¹⁴

There is a constitutional basis for the proposition that freedom of the press includes newsgathering as well as the publication and dissemination of news, since the First Amendment's scope is not limited by a narrow, literal definition of the broad, general freedoms specifically enumerated, but encompasses the particularized components and accessories which give those freedoms life.¹¹⁵ In *Lamont v. Postmaster General*, a federal statute authorizing the Post Office to detain communist political propaganda sent through the mails until the addressee had requested its delivery was held an unconstitutional impairment of the addressee's First Amendment rights, since an affirmative obligation was imposed on him as a prior condition to the exercise of those freedoms.¹¹⁶ Mr. Justice Douglas, speaking for the majority, did not specify the particular First Amendment right which had been abridged, and a right to receive political literature is clearly not within the traditional scope of freedom of speech, press, religion, or assembly. However, the Court was interpreting the First Amendment as a fortress which has the freedoms of speech, press, religion, and assembly as its major structures.¹¹⁷ This conception was more fully elaborated by Mr. Justice Brennan in his concurring opinion where he argued that although the First Amendment does not explicitly ensure access to publications,

¹¹³ 323 U.S. at 543.

¹¹⁴ 323 U.S. at 531. The principle announced in *Thomas* was reaffirmed by the Court in *Time, Inc. v. Hill*, 385 U.S. 374, 396-397 (1967).

¹¹⁵ *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

¹¹⁶ 381 U.S. at 305.

¹¹⁷ The Court has so interpreted the First Amendment on other occasions. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.¹¹⁸

It is through this rationale that newsgathering becomes constitutionally protected. Although there is no indication that the Framers intended freedom of the press to encompass newsgathering,¹¹⁹ it is such an essential element of news publication and dissemination that it is, a fortiori, constitutionally protected. Newsgathering is one of those implicit rights "necessary to make the express guarantees fully meaningful."¹²⁰ "Moreover, the exclusion of newsgathering from the First Amendment coverage is unresponsive to the policy of the amendment."¹²¹

Although *Zemel v. Rusk*¹²² and *Estes v. Texas*¹²³ contain dicta to the effect that the First Amendment freedoms of speech and press do not provide an unrestrained right to gather information¹²⁴ they are readily distinguishable since that precise constitutional question was not determinative in either case. In *Zemel*, the Court held that the government's refusal to validate the appellant's passport for travel to Cuba did not abridge any constitutional right.¹²⁵ One of the appellant's arguments was that the First Amendment protected travel abroad where the purpose was to gather information about government policies and their effects. The Court emphasized the fact that it was the physical act of travelling which was at issue,¹²⁶ not the gathering of information itself, since "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."¹²⁷ Speaking through Mr. Chief Justice Warren, the Court refused to "accept the contention of appellant that it is a First Amendment right which is involved."¹²⁸ Furthermore, the Court was concerned with the potentiality that such travel would pro-

¹¹⁸ 381 U.S. at 308.

¹¹⁹ Guest & Stanzler, *supra* note 1, at 31.

¹²⁰ 381 U.S. at 308.

¹²¹ Guest & Stanzler, *supra* note 1, at 31.

¹²² 381 U.S. 1 (1965).

¹²³ 381 U.S. 352 (1965).

¹²⁴ 381 U.S. at 17; 381 U.S. at 539.

¹²⁵ 381 U.S. at 15-20.

¹²⁶ 381 U.S. at 16-17; 381 U.S. at 26 (Douglas, dissenting).

¹²⁷ 381 U.S. at 17.

¹²⁸ 381 U.S. at 16.

mote "dangerous international incidents."¹²⁹ Accordingly, this case should be limited to its narrow holding that there is no constitutional right to travel abroad, at least where a substantial national security interest is concerned. *Estes* found that the televising of a criminal trial over the defendant's objections had resulted in the confusion and domination of the trial by the ubiquitous presence and activities of the television technicians and equipment. The Court held this to be an inherent denial of due process which violated the fundamental right to a fair trial.¹³⁰ While no First Amendment claims were made in the case,¹³¹ the Court did acknowledge the possibility that its holding could abridge freedom of the press to gather news. However, it concluded that by allowing television reporters to attend the trial and report on the proceedings without their equipment no constitutional right was abridged¹³² since the restriction was imposed only on the use of equipment in a way which jeopardized a fair trial.¹³³ Consequently, this case may only support a conclusion that where the act of newsgathering prejudices the trial proceedings there will be grounds for reversal. In any event, the Court's holdings in these cases are not inconsistent with the conclusion supported by *Lamont* that newsgathering is a protected component of freedom of the press.

Furthermore, the Supreme Court has announced a constitutional principle favoring freedom of the press over the rights of litigants in order to assure the free flow of news to the public.¹³⁴ Two celebrated cases involving the First Amendment's guarantee of a free press, *New York Times v. Sullivan*,¹³⁵ and *Time, Inc. v. Hill*,¹³⁶ have firmly established that freedom of the press must override the rights of private litigants when the public interest in the free flow of news is jeopardized as a result of the private proceedings. In the *New York Times* case, the Court held that the First and Fourteenth Amendments prohibited awarding damages in actions brought by public officials for libellous criticism of their official conduct, except where actual malice had been proved as an element of the libel.¹³⁷ In so holding, the Court made

¹²⁹ 381 U.S. at 15.

¹³⁰ 381 U.S. at 536-52.

¹³¹ 381 U.S. at 614-15 (Stewart, dissenting). See 381 U.S. 539-40.

¹³² 381 U.S. at 541-42.

¹³³ 381 U.S. at 539-40.

¹³⁴ *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Time v. Hill*, 385 U.S. 374 (1967).

¹³⁵ 376 U.S. 254 (1964).

¹³⁶ 385 U.S. 374 (1967).

¹³⁷ 376 U.S. 254. *New York Times* arose from a libel action brought by the respondent, an elected public official responsible for supervision of the police department, for false and misleading statements made in a political advertisement published in the *New York Times*,

it extremely difficult, if not practically impossible, for a public official to recover in such cases. This seemingly harsh result was deemed necessary in light of the goal of the First Amendment "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹³⁸

The *New York Times* principle was extended in *Time v. Hill*¹³⁹ to bar recovery by private individuals who had become newsworthy. The First Amendment was held to protect free expression concerning newsworthy matters from tort actions in the absence of proof of knowledge on the part of the publisher that the reports were false or that they were published in reckless disregard of the truth.¹⁴⁰ It thus becomes apparent that the personal interests of private litigants are subordinated to the public interest in the freedom of the press, if that freedom would otherwise be inhibited as a consequence of the legal proceeding.

The broad principle announced in *New York Times* and *Time, Inc.* was elaborated by Mr. Justice Harlan in his opinion in *Curtis Publishing Company v. Butts*,¹⁴¹ which extended the protection of freedom of the press to statements made about "public figures." According to Mr. Justice Harlan:

The guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . .'¹⁴²

Justice Harlan explained further:

Our touchstones are that acceptable limitations must neither affect 'the impartial distribution of news' and ideas . . . , nor because of their history of impact constitute a special burden on the press . . . , nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.¹⁴³

If the First Amendment freedom of the press prevents private

which criticized police actions taken against students and Martin Luther King in a civil rights demonstration.

¹³⁸ 376 U.S. at 269, quoting from *Roth v. U.S.*, 354 U.S. 476, 484 (1957).

¹³⁹ 385 U.S. 374.(1967). Here, LIFE magazine had published a review of a play based on the experiences of a family—represented by LIFE to be the Hill family—held hostage by some escaped convicts. Some of the incidents portrayed in the play did not take place in the Hill family's experience, although the article so implied.

¹⁴⁰ 385 U.S. 374.

¹⁴¹ 388 U.S. 130 (1967).

¹⁴² 388 U.S. at 150, quoting from 2 COOLEY CONSTITUTIONAL LIMITATIONS 886 (8th ed.).

¹⁴³ 388 U.S. at 150-151.

litigants from recovering money damages in tort actions, it follows that the Amendment also bars use of the judicial process and powers to compel newsmen to disclose their confidential associations and private communications in order to provide such litigants with evidence. When balanced against the First Amendment freedom of the press, a litigant's interest in obtaining evidence certainly has no greater weight than the right to recovery for private wrongs.

In several instances, the First Amendment has been held to prohibit compulsory disclosure of confidential associations and private communications in contexts analogous to the newsman situation. In *Watkins v. United States*,¹⁴⁴ the Supreme Court stated that

[a]buses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify against his will, about his beliefs, expressions or associations is a measure of government interference.¹⁴⁵

In this case, the Court held a conviction for refusal to answer questions of a subcommittee of the House Committee on Un-American Activities invalid, stating, "[c]learly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly."¹⁴⁶ In *Sweezy v. New Hampshire*,¹⁴⁷ the Court ruled that the First Amendment freedoms were also protected against compulsory disclosure in investigations conducted under state legislative authority when the questions asked transgressed the petitioner's First Amendment freedoms, concluding that while legislative investigating bodies may have a need for information, they may not abridge First Amendment freedoms in order to obtain it.¹⁴⁸ This holding is directly applicable to newsmen since their compulsory testimony abridges both freedom of the press and other First Amendment rights.

¹⁴⁴ 354 U.S. 178 (1957).

¹⁴⁵ 354 U.S. at 197.

¹⁴⁶ 354 U.S. at 197.

¹⁴⁷ 354 U.S. 234 (1957). Here, the petitioner had been summoned to testify before a New Hampshire legislative investigating committee. He refused to answer questions regarding his knowledge of the Progressive Party in New Hampshire and a lecture he had given to a humanities class at the University of New Hampshire.

¹⁴⁸ 354 U.S. at 234. The rule of *Watkins* and *Sweezy* was more recently reaffirmed in *DeGregory v. Attorney General*, 383 U.S. 825 (1966), where the appellant had been convicted of criminal contempt for refusing to answer questions about his past communist activities. The Court held that the First Amendment protects political and associational privacy where there is no overriding and compelling state interest. Since there was no present demonstrable threat from the Communist Party in the state, the Court concluded that the legislative investigation lacked the "compelling state interest" required to justify abridgment of appellant's First Amendment rights.

The First Amendment's protection of confidential associations from compulsory disclosure in judicial proceedings was established in the well-known case of *N.A.A.C.P. v. Alabama*,¹⁴⁹ where the State of Alabama sought to require the N.A.A.C.P. to disclose its membership lists and records. Upon its refusal to reveal its membership, the N.A.A.C.P. was found in contempt and fined \$100,000. On appeal, the Supreme Court first held that the N.A.A.C.P. had standing to assert its members' privilege not to disclose their association, since to require individual members to assert their rights personally would effectively deny those rights. The Court then held that compulsory disclosure of membership lists would be an unconstitutional restraint on the First Amendment freedom of association, unless the state could show a compelling need to force disclosure. These principles are particularly important with respect to the newsman's privilege. First, under *N.A.A.C.P.*, the newsman has standing to assert the privilege against compulsory disclosure of his confidential associations and private communications, on behalf of both the public's interest, and his own interest, in the free flow of news. Second, under the *N.A.A.C.P.* case's reasoning, it is obvious that a litigant may not use a sham need for evidence as a justification for trammeling the First Amendment freedom of the press.

The principle that compulsory disclosure would result in unjustified interference with freedoms protected by the First Amendment was affirmed in *Bates v. Little Rock*,¹⁵⁰ which involved a fact situation identical to that in *N.A.A.C.P.*, with the additional feature that evidence at trial showed that a significant number of persons did not renew their memberships in the N.A.A.C.P. because they feared disclosure.¹⁵¹ Mr. Justice Stewart, speaking for the majority, held that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."¹⁵² Both cases demonstrate that a litigant's mere assertion of a need for evidence, without more, is not a sufficiently compelling interest to subordinate more important First Amendment freedoms.

In another case involving the N.A.A.C.P., *Gibson v. Florida Legislative Investigative Committee*,¹⁵³ disclosure of membership

¹⁴⁹ 357 U.S. 449 (1958). Alabama claimed that such disclosure was necessary to prove that the N.A.A.C.P. was doing a substantial business in the state without complying with the relevant statute. The N.A.A.C.P. admitted its failure to comply with the statute, but disclaimed the statute's applicability to the N.A.A.C.P. and refused to produce its records and membership lists.

¹⁵⁰ 361 U.S. 516 (1960).

¹⁵¹ 361 U.S. at 521.

¹⁵² 361 U.S. at 524.

¹⁵³ 372 U.S. 539 (1963).

lists was sought by a committee investigating the N.A.A.C.P. Gibson, custodian of the lists, refused to produce them, and therefore was cited for contempt. The Supreme Court held that the contempt conviction violated the First Amendment rights of free speech and free association because there was no compelling governmental interest to justify the abridgment of constitutional rights which would result from disclosure. In his concurring opinion, Mr. Justice Douglas said that "the associational rights protected by the First Amendment are in my view much broader and cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion."¹⁵⁴ He then concluded: "One man's privacy may not be invaded because of another's perversity."¹⁵⁵

Moreover, in *Talley v. California*¹⁵⁶ the First Amendment freedoms of speech and press were held to protect anonymity of sources and confidential associations,¹⁵⁷ and the reasoning of this decision provides a close analogy to the newsman's privilege. The Court reversed the petitioner's conviction and \$10 fine for distributing handbills in violation of an ordinance requiring disclosure on the handbills of the identity of those persons printing and distributing them. The ordinance was held void on its face because it violated the First Amendment freedoms of speech and press. As the Court recognized; "[e]ven the Federalist Papers, written in favor of adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."¹⁵⁸ Mr. Justice Black, speaking for the Court, then summarized the concepts involved:

We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance.¹⁵⁹

Clearly, members of unpopular groups who are news sources also require anonymity in order to have their views reach the rest of society through the news media.

In *Russell v. United States*,¹⁶⁰ the Court reversed the petition-

¹⁵⁴ 372 U.S. at 565.

¹⁵⁵ 372 U.S. at 572.

¹⁵⁶ 362 U.S. 60 (1960).

¹⁵⁷ 362 U.S. at 65.

¹⁵⁸ 362 U.S. at 65.

¹⁵⁹ 362 U.S. at 65.

¹⁶⁰ 369 U.S. 749 (1962).

ers' convictions for refusal to answer pertinent questions of a Congressional committee investigating communist infiltration of the press. Although the reversals were based on technical grounds relating to defects in the indictments, Mr. Justice Douglas in his concurring opinion discussed the broader First Amendment principles at stake. In his view,

the editorials written and the news printed and the policies advocated by the press are none of the Government's business. I see no justification for the Government investigating the capacities, leanings, ideology, qualifications, prejudices or politics of those who collect or write the news.¹⁶¹

Although two Supreme Court cases have held that a compelling governmental interest has outweighed the First Amendment prohibition against compulsory disclosure of confidential associations and private communications, and examination of these cases' reasoning shows that they do not undermine the basic constitutional validity of the newsman's privilege. In *United States v. Harriss*,¹⁶² the appellees had been charged with violation of the federal Lobbying Act which required persons lobbying in Congress to register and provide information as to the source of their contributions and the nature of their expenditures. The District Court dismissed the charge on the grounds that the Act was an unconstitutional interference with the appellees' First Amendment rights. This decision was reversed by the Supreme Court on the ground that the Lobbying Act did not violate the First Amendment, since there was an overriding Congressional need to have sufficient knowledge to properly evaluate the information Congressmen received and the pressure which they felt, a need which could not be fulfilled by alternative means.¹⁶³ Here, the Court was faced with a legislative requirement basic to the effective functioning of the American system of democracy founded upon representative government.¹⁶⁴ However, in contrast with the legislature's requirement to be fully informed, recognition of the newsman's privilege in the context of the judicial system would not have such a grave effect, since the most serious consequence would be that a particular litigant might be left without remedy. But as already discussed in relation to *New York Times and Time, Inc., supra*, this consequence is not a sufficient reason for abridging First Amendment freedoms.

In *Barenblatt v. United States*,¹⁶⁵ the Court also found a com-

¹⁶¹ 369 U.S. at 776-777.

¹⁶² 347 U.S. 612 (1954).

¹⁶³ 347 U.S. at 625-626.

¹⁶⁴ 347 U.S. at 625-626.

¹⁶⁵ 360 U.S. 109 (1959).

elling governmental interest of sufficient weight to subordinate the protection that the First Amendment provides for confidential associations. Here, the petitioner, a former graduate student and teaching fellow at the University of Michigan, refused to testify before a subcommittee of the House Committee on Un-American Activities which was investigating Communist infiltration of education and was convicted of contempt of Congress. The Court affirmed the conviction:

Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.¹⁶⁶

The case's authority may properly be questioned in light of the more recent court decisions involving the same issue discussed above. Furthermore, the fact that the Court applied a balancing test does not deny the First Amendment's protection of confidential associations; instead, it only demonstrates that there are circumstances in which that protection must give way. But the serious import of the balancing test and its questionable results were pointedly criticized by Mr. Justice Black in his dissenting opinion:

To apply the Court's balancing test under such circumstances is to read the First Amendment to say 'Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.'¹⁶⁷

Thus, whatever test is eventually applied, the general proposition that the First Amendment freedom of the press protects the confidential associations and private communications of newsmen from compulsory disclosure seems an inescapable conclusion.

¹⁶⁶ 360 U.S. at 126.

¹⁶⁷ 360 U.S. at 143.

Accordingly, the constitutional newsman's privilege mandates an absolute privilege which protects not only the identity of the source, but also the information, whether published or not, which result from the newsman-source relationship. While no limitation on this constitutional privilege seems proper or reasonable, it is at least arguable that some limitation may be permissible. In that event, the only constitutionally acceptable limitation should be that announced by the court in *Caldwell*: "A clear showing of a compelling and overriding national interest that cannot be served by alternative means."¹⁶⁸

V. CONCLUSION

A free and robust press is critical today when the American people are seeking to understand the numerous and diverse currents running through their complex society. If freedom of the press is to meet this demand, newsgathering must be brought within the protection of the First Amendment. The confidential associations and private communications of newsmen, which are the foundations of newsgathering, must be constitutionally protected or meaningful news will become unavailable to the public.

The newsman's privilege was never recognized at common law—which emphasized the litigant's right to all available evidence. Furthermore, all attempts to create a newsman's privilege by analogy to other recognized privileges, such as attorney-client, doctor-patient, and penitent-priest, have been rejected by the courts who disfavor any expansion of the privilege doctrine. As a result, the creation of a newsman's privilege has become the province of the legislatures. While some states have enacted statutes providing substantial protection for this fragile relationship, they do not achieve the full protection which seems necessary. With a few exceptions, they protect only the confidential associations and not the private communications or documents obtained from them.

The First Amendment guarantee of freedom of the press suggests a constitutional basis for a newsman's privilege. The decisions of the United States Supreme Court under that amendment make the conclusion that the confidential associations and private communications of newsmen are constitutionally protected inescapable. However, the Court has never decided the precise question, and the lower federal courts and state supreme courts which have considered it have, with one notable recent exception,

¹⁶⁸ 311 F.Supp. at 360.

held that there is no newsman's privilege as a matter of federal constitutional law. Nevertheless, their cases should be accorded little weight when the question is again presented as the reasoning behind their decisions is generally questionable and always unsatisfactory.

– *Wayne C. Dabb, Jr.*
and
Peter A. Kelly

APPENDIX I
INFORMATION NOT FOR PUBLICATION OR ATTRIBUTION

Both Presidents Theodore Roosevelt and Franklin D. Roosevelt imposed restrictions on the use which newsmen could make of information provided for them. W. RIVERS, *THE OPINION-MAKERS* 133-34 (1967). Thus, Mr. Rivers makes the following observations:

These were background-only conferences, which allowed [Theodore] Roosevelt a maximum range of comment and no responsibility for anything that was printed. TR was also interviewed endlessly, but he made it clear that he was not to be quoted on the disclosures that might damage him. Anyone who abused his freely given confidences was assigned to the Ananias Club [Ananias, a biblical personage, was a liar who dropped dead when Peter rebuked him. Acts 5:1-6] and cut off from all White House news.

* * *

What [Franklin D.] Roosevelt did in that first press conference was essentially simple: Even with a press corps of more than three hundred correspondents, he was promising the same intimate view of the Presidency that his cousin Theodore had afforded the few dozen reporters who had covered Washington a decade earlier. He said:

I am told that what I am about to do will become impossible, but I am going to try it. We are not going to have any more written questions; and, of course, while I cannot answer seventy-five or a hundred questions simply because I haven't got the time, I see no reason why I should not talk to you ladies and gentlemen off the record in just the way I used to do in the Navy Department down here There will be a great many questions, of course, that I won't answer, either because they are "if" questions—and I never answer them And the others, of course, are the questions which for various reasons I do not want to discuss, or I am not ready to discuss, or I do not know anything about. There will be a great many questions you will ask that I do not know enough about to answer.

Then, in regard to news announcements, Steve [Press Secretary Stephen Early] and I thought it would be best that straight news for use from this office should always be without direct quotation. In other words, I do not want to be directly quoted unless direct quotations are

given out by Steve in writing. That makes that perfectly clear.

Then there are two other matters we will talk about: The first is "background information," which means material which can be used by all of you on your own authority and responsibility, not to be attributed to the White House, because I do not want to have to revive the Ananias Club.

Then the second thing is off-the-record information, which means, of course, confidential information which is given only to those who attend the conference