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The Supreme Court and the Not-So-Privileged Press

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THE SUPREME COURT AND THE NOT-SO-PRIVILEGED PRESS

I. INTRODUCTION

The first amendment mandates freedom of the press,[1] but the extent of that freedom has been the issue in scores of Supreme Court opinions. Whether press freedom is above and beyond that provided the general public by the first amendment has been a fertile question for debate.[2] The question is more than academic, however; its answer has determined, for example, that reporters must be jailed for refusing to comply with subpoenas and that newsrooms can be searched for evidence of criminal activities.

This article will discuss three areas in which the Supreme Court has recently dealt with this question in the face of claims by the press that the first amendment affords the press privileges in excess of those enjoyed by everyone else. The three asserted privileges are: (1) the press may refuse to divulge confidential information or sources' identities to a court or grand jury; (2) newsrooms are not generally subject to search warrants issued in connection with criminal investigations; and (3) reporters should be given special access to newsmakers and news events, most specifically to prisons and prisoners.

Although these claims are based on the first amendment, only in reference to the first claim has the Court even arguably recognized any burden on rights substantial enough to trigger its first amendment balancing analysis.[3] In the other two areas, both represented by 1978 Court decisions, the

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

2. *See, e.g.*, Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L. J. 639 (1975); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Speech and Press: A Brief Reply*, 23 U.C.L.A. L. REV. 120 (1975).

3. First amendment rights are considered by the Supreme Court to be preferred or fundamental rights, and have been since Murdock v. Pennsylvania, 319 U.S. 105 (1943). When such fundamental rights are burdened by some government action, the Court increases the intensity of judicial review and determines whether the state has a compelling or overriding interest and if the particular action is necessary to promote those interests. The following is an articulation of this scrutiny:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

Burger Court has avoided a case-by-case balancing of interests by flatly rejecting the existence of a constitutional infringement.

II. Discussion

Reporters' claims of privilege emerged against a backdrop of Supreme Court decisions which had encouraged the notion that the press is afforded extraordinary protection and that government must walk a narrow line when it in any way regulates or inhibits the press. The Court had struck down state laws imposing special taxes on newspapers,[4] authorizing prior restraint of newspapers considered defamatory or lewd,[5] and had broadened the press' immunities by making it impossible for public figures to collect for defamation or libel in the absence of malice.[6] But attempts by reporters to translate these decisions into a doctrine of special privilege have had little success, with the Burger Court consistently refusing to place media members on a higher constitutional plane than the public.

A. *Sources*

Although reporters have for many years claimed the right to keep confidential the identity of their news sources, it was not until 1958 that a reporter cited the first amendment for support.[7] The first case was *Garland v. Torre,*[8] a libel action in which actress-singer Judy Garland sought to force a television columnist to disclose the name of a CBS official who was quoted in her column as making derogatory remarks against Miss Garland. The action was against CBS and the reporter had refused to reveal the source while being deposed. The Second Circuit, in an opinion by Judge Potter Stewart (now Justice Stewart), upheld the conviction for contempt. His opinion recognized that forcing disclosure would abridge first amendment rights,[9] but since the information sought "went to the heart"[10] of Miss

4. Grosjean v. American Press Co., 297 U.S. 233 (1936).

5. Near v. Minnesota, 283 U.S. 697 (1931) (unconstitutional prior restraint on publication).

6. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In a recent article, a commentator said New York Times Co. v. Sullivan "established that representatives of the press, like officials of the federal government, are substantially 'immune' to charges of defamation arising from reports which further 'the public's business.'" Lange, *The Speech and Press Clauses,* 23 U.C.L.A. L. Rev. 77, 79-80 (1975).

7. The courts have consistently refused to recognize any common law privilege, nor have they found one to exist under the fifth amendment. State statutes have been of only slight assistance since many of the statutes are limited and the courts have shown a predilection towards interpreting them narrowly. *See* Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law,* 24 U.C.L.A. L. Rev. 160, 165-76 (1976).

8. 259 F.2d 545 (2d Cir. 1958).

9. "As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalists's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news." *Id.* at 548.

Garland's case, the "fair administration of justice"[11] on balance was determined to outweigh the damage to the first amendment. The court did, however, approve the notion of a qualified privilege and hinted that in cases in which the disclosure would be of less relevance, the reporter would succeed in claiming a privilege.[12] Several courts subsequently adopted *Garland's* balancing approach[13] although others refused to accept any qualified privilege.[14]

Garland v. Torre remained the leading case on the point until 1972, when the Burger Court decided *Branzburg v. Hayes.*[15] This case held that newsmen have no privilege to refuse to testify before grand juries, despite the fact that such testimony might implicate confidential sources.[16] *Branzburg,* like *Garland* before it, ordered the reporters to testify, but Justice White's majority opinion appeared to deny the existence of any qualified or absolute privilege.[17] The opinion however, is unclear because Justice White added that under certain circumstances first amendment interests could justify denying disclosure.

> Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harrassment of the press under-

10. *Id.* at 550.

11. *Id.* at 549.

12. Judge Stewart emphasized that no wholesale disclosure of sources was being sought and the information was of obvious relevance. *Id.* at 549-50.

13. *See, e.g.,* Bursey v. United States, 466 F.2d 1059, 1083-84 (9th Cir. 1972) (holding that the government must show its interest in obtaining the information is substantial, the information sought is material, and that there is no less drastic alternative method of obtaining the information); State v. Knops, 49 Wis.2d 647, 183 N.W.2d 93 (1971) (recognizing the balancing test but weighing in favor of disclosure); In re Goodfader, 45 Haw. 317, 367 P.2d 472 (1961) (forcing the reporter, as a non-party deponent in a civil action, to disclose his source while paying lip service to a balancing test).

14. *See, e.g.,* State v. Buchanan, 250 Or. 244, 436 P.2d 729 (1968) (rejecting any constitutional privilege and ordering the reporter to disclose information to a grand jury); In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963) (rejecting any constitutional claims but barring disclosure on statutory grounds).

15. 408 U.S. 665 (1972).

16. *Branzburg* involved four cases, all of which presented the issue of whether reporters had to appear and testify before grand juries and whether reporters could withhold confidential information from grand juries. The four cases, consolidated by the Supreme Court, were Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1970); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); and In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971).

17. Such a privilege would require judicial balancing, and Justice White wrote that the Court was "unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination." Branzburg v. Hayes, 408 U.S. 665, 703 (1972).

> taken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.[18]

The Court did not accompany this generalized language with any specific guidelines. Also, Justice Powell's pivotal concurring opinion,[19] created more confusion by arguably recognizing the existence of a qualified privilege.

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.[20]

Since *Branzburg*, all but a few courts faced with the issue of whether to order a reporter to testify and reveal either confidential information or sources have cited Justice Powell's opinion to justify applying a case-by-case balancing analysis. The Supreme Court's failure to provide concrete guidelines has resulted in the application of differing tests which defy neat categorizing, although some general observations are possible.

Those courts that have interpreted *Branzburg* to recognize a qualified newsman's privilege have often applied some or all of a three-pronged test: (1) whether probable cause exists to believe the reporter has relevant information; (2) whether alternative sources are available; and (3) if a compelling or important interest exists in ordering the testimony.[21]

In criminal cases, which have involved both grand jury and trial subpoenas, reporters' interests have usually been outweighed by the states' interest in obtaining the information.[22] These courts generally have held

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18. *Id.* at 707-08.

19. The Court's opinion represented the views of only Justices White, Rehnquist, and Blackmun and Chief Justice Burger. Justices Stewart, Douglas, Brennan, and Marshall dissented. Justice Powell provided the key vote for the majority.

20. Branzburg v. Hayes, 408 U.S. 665, 710 (1972).

21. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L. J. 709 (1975).

22. *See, e.g.*, Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (recognizing a limited privilege but affirming a contempt conviction for refusing to disclose a source of information); In re Tierney, 328 So.2d 40 (Fla. Ct. App. 1976) (ordering a reporter to reveal the source of a grand jury leak); Rosato v. Superior Ct., 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976) (holding that sixth amendment right to fair trial outweighed any possible infringement of first amendment rights); Fischer v. Dan, 41 App. Div.2d 687, 342 N.Y.S.2d 731 (1973) (permitting a reporter to keep the identity of a source confidential, but ordering testimony regarding events observed by the reporter includ-

that the states' interest in investigating and prosecuting crime is more important than any qualified privilege.[23] Some courts have denied the existence of any privilege, and thus refused to balance.[24] A recent example of this is the New Jersey Supreme Court, which in its decision dealing with New York Times reporter Myron Farber,[25] interpreted *Branzburg* as denying any privilege, qualified or otherwise.[26] Moreover, the state court refused to apply a strong state shield law,[27] and held that the shield law is subordinated by a defendant's sixth amendment right to have compulsory process for his defense.[28]

Not all courts have ordered reporters to yield their sources in criminal and grand jury cases. If it is apparent that the information sought is not relevant and there has been no showing that alternative sources have been

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ing the identities of those people the reporter observed); In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972) (rejecting any balancing tests and ordering testimony before the grand jury).

23. In light of the preeminent importance of the fair trial guarantee to criminal defendants. . .which is certainly entitled to equal, if not greater, protection than criminal investigations by grand juries, it seems to us that the right to require such testimony in an investigation [of who leaked inadmissable evidence to a reporter] . . . which goes to the right of a criminal defendant to a fair trial is irrefutable.

Rosato v. Superior Ct., 51 Cal. App. 3d 190, 213, 124 Cal. Rptr. 427, 444 (1975), *cert. denied*, 427 U.S. 912 (1976).

24. *See* In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972); In re Farber, [1978] 4 MED. L. RPTR. (BNA) 1360 (N.J. Sept. 21, 1978).

25. In re Farber, [1978] 4 MED. L. RPTR. (BNA) 1360 (N.J. Sept. 21, 1978).

26. The important and conclusive point is that five members of the [Supreme] Court have all reached the conclusion that the First Amendment affords no privilege to a newsman to refuse to appear before a grand jury and testify as to relevant information he possesses, even though in so doing he may divulge confidential sources. . . .

Thus we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court.

Id. at 11.

27. N.J. STAT. ANN. § 2A: 84A-21 (Supp. 1978-79) reads in part:

[A] person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered . . . has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury. . .

a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

28. U.S. CONST. amend. VI reads: "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." N.J. CONST. art. 1, ¶ 10 contains a similar provision.

investigated, a privilege has been upheld.[29] In one case, even the tradition of secrecy of the grand jury was found not to be enough to outweigh first amendment interests.[30]

In civil cases, the scales apparently more easily tip in favor of the journalist, especially if the reporter is not a party to the action, there are other available sources, or the information sought is not sufficiently material.[31] But, reporters have been ordered to disclose sources or information when it was clearly relevant and material.[32] The Supreme Judicial Court of Massachussetts even refused to balance interests at all, declaring flatly that no privilege of any kind exists for reporters in either criminal or civil cases.[33]

As in any area of the law where a balancing of interests approach is adopted, the resulting lack of uniformity creates uncertainty in the law. It is difficult — as the cited decisions demonstrate — for a reporter to determine what his substantive rights are when called upon to reveal a source, until an interlocutory appeal has run its course. Often the reporter must spend at least some of this time in jail for contempt.[34] Furthermore, such proceedings delay the trial of a defendant or the investigation of a grand jury. It has been speculated that Justice Powell's balancing approach in *Branzburg* may have been prompted by a desire for more case law on the subject before the Supreme Court provided more helpful guidelines.[35]

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29. *See, e.g.*, Zelenka v. State, 83 Wis.2d 601, 266 N.W.2d 279 (1978); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974); Brown v. Commonwealth, 215 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974); Comment, *The Newsman's Privilege After Branzburg: The Case For a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 178 (1976).

30. Morgan v. State, 337 So.2d 951 (Fla. 1976).

31. *See, e.g.*, Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (where the party seeking the information had not demonstrated adequate relevance); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (where other sources were available and the information did not go to the heart of the case); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (where no compelling interest was shown to justify disclosure); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973)(quashing subpoenas issued to newspapers in a civil case which grew out of the Watergate burglary).

32. *See, e.g.*, Carey v. Hume, 492 F.2d 631 (D.C. Cir.) *cert. dismissed*, 417 U.S. 938 (1974)(libel action which would probably fail without the information sought); Forest Hills Util. Co. v. City of Heath, 66 Ohio Op.2d 66, 302 N.E.2d 593 (1973)(reporter ordered to comply with a subpoena duces tecum).

33. "We intend no implication by what we have just said that, in some future case, it would be within the trial judge's 'discretion' to determine that a qualified newsman's privilege exists. . . . We have this day reaffirmed that no such privilege exists." Dow Jones Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847, 850 (1973).

34. Since *Branzburg* at least 15 reporters have spent some time in jail for refusing to disclose confidential information or the identity of a confidential source, according to statistics provided by The Reporters' Committee for Freedom of the Press.

There *is* more case law now, but many decisions are in direct conflict. Subsequent Supreme Court decisions concerning a newsman's testimonial privilege should provide more instructive guidelines. However, in light of the recent Burger Court's decisions on newsman's privilege claims in other areas to be discussed, a new case regarding confidential sources might very well put an end to any qualified privileges reporters in some states now enjoy.

B. *Searches*

The Court's vagueness in *Branzburg* left room for reporters to argue for a qualified privilege to withhold confidential sources and information. There is far less room for debate on the question of whether the first amendment protects journalists from newsroom searches. The argument in favor of the protection is much the same: searches of newsrooms for criminal evidence run the risk of disclosing confidential information and sources, thereby drying up such sources and abridging press freedom. If a search warrant is issued the risk is far greater; there is no hearing on a motion to quash the warrant before the search has been conducted and a search warrant may disclose confidential information unconnected with the object of the search.

The Supreme Court, however, has rejected these arguments. In *Zurcher v. Stanford Daily*[36] the Court insisted that the first amendment affords no additional protection to reporters beyond the safeguards provided generally by the fourth amendment.[37] The language of the Court's opinion is clear: "Properly administered, the preconditions for a warrant — probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness — should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."[38]

1. Background

When the framers of the United States Constitution drafted the fourth amendment, it was based upon the historical perspective of struggle be-

35. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L. J. 709, 717 (1975).

36. 436 U.S. 547 (1978).

37. U.S. CONST. amend. IV provides:

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

38. Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978).

tween the English monarch's bureaucracy and the press.[39] The amendment itself has been subject to various interpretations, its recent history indicating a narrow reading.[40]

Despite the many cases interpreting the first amendment, a federal district court was faced with a scarcity of precedent to resolve the issues presented by *Zurcher*. A brief recital of the facts is thus warranted. After a clash between demonstrators and police in which nine officers were injured, The Stanford Daily published a special edition chronicling the fight, including photographs. Since police photographers had failed to take any useful pictures, a search warrant was obtained in an attempt to locate other photographs or negatives which might help identify the demonstrators who attacked the officers. The search took place but no further evidence was found.[41] The newspaper sought declaratory and injunctive relief in a federal court under 42 U.S.C. § 1983, claiming the search had deprived the paper of first, fourth, and fourteenth amendment rights under color of state law.[42]

The major issues the district court faced concerned the rights of third parties against whom warrants are issued in criminal investigations, but who are not suspected of criminal activity,[43] and whether the first amendment provides the press with any special protection against searches. The

39. *See* Marcus v. Search Warrant, 367 U.S. 717, 724-9 (1961); Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 337-44 (1978).

40. Although there is neither the time nor space to cite exhaustive authority on this point, a few examples should be cited. In Couch v. United States, 409 U.S. 322 (1973), the Court held that there existed no fourth amendment right to privacy in private papers turned over to an accountant. And United States v. Santana, 427 U.S. 38 (1976), held that a suspect had given up any expectation of privacy when standing in the doorway to her house. For an exhaustive account of the retreat of fourth amendment rights, see Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335 (1978). He writes, "I believe that the Burger Court is well advanced on a campaign to curtail the protections for individual liberty offered by the provisions of the Constitution pertaining to search and seizure. . . ." *Id.* at 336.

41. 436 U.S. 547, 551-52 (1978).

42. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution. . .shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

43. *The Stanford Daily* apparently cited only four cases which dealt with searches of third parties and three of those cases dealt with warrantless searches of third parties. The fourth dealt with an arrest warrant for a material witness. The district court judge speculated that the scarcity of cases was due to the fact that a subpoena duces tacum is the normal device for obtaining evidence from an unsuspected third party. Stanford Daily v. Zurcher, 353 F. Supp. 124, 127-29 (N.D. Cal. 1972).

district court granted declaratory relief,[44] holding that a magistrate could issue a warrant to conduct a third party search only if there was probable cause to believe a subpoena duces tecum was impractical.[45] Furthermore, holding the first amendment modifies the fourth, the court added two more conditions that must be met before a warrant to search a newspaper could be issued. There must be a clear showing that 1) important materials would be destroyed or removed from the jurisdiction, and 2) a restraining order would be ineffective.[46] The Circuit Court of Appeals affirmed.[47]

2. The Supreme Court's Opinion

In reversing, Justice White's opinion for the Supreme Court labelled the lower courts' rulings a "sweeping revision of the Fourth Amendment,"[48] and held that there is no constitutional reason why innocent third parties should not be subject to search warrants. Moreover, warrants are issued to search property and not people, and as long as the property or evidence seized is sufficiently described, there need be no special precautions taken.[49]

Taking a liberal view of the Constitution, Justice White concluded that since the Constitution does not explicitly provide the press with any privilege in regard to searches, there are none.

> [The framers of the Constitution]. . .did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated.[50]

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44. *Id.*

45. *Id.* at 132.

46. *Id.* at 135. Almost all of the cases which support this modifying theory have dealt with seizures of obscene material. For instance, in A Quantity of Books v. Kansas, 378 U.S. 205 (1964), the Court held that search and seizure of allegedly obscene books without a prior hearing was unconstitutional. And in Marcus v. Search Warrant, 367 U.S. 717 (1961), the Court held that a state is not without restrictions in seizing materials, since some could possibly be determined to be not obscene. For a general discussion of this modifying concept, see Comment, *Search Warrants and Journalists' Confidential Information,* 25 AM. UNIV. L. REV. 938, 954-6 (1976).

47. Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977).

48. Zurcher v. Stanford Daily, 436 U.S. 547, 554 (1978).

49. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Id.* at 556.

50. *Id.* at 1981-2. Justice White did note, however, that the requirements for a search warrant should be applied with "particular exactitude when First Amendment interests would be endangered by the search." *Id.*

The Court also was unconvinced that there would be any "chilling effect" on the dissemination of news.[51] Furthermore, since there were very few recorded incidents of search warrants against press facilities, there had been no apparent abuse, but "if abuse occurs, there will be time enough to deal with it."[52]

The danger in the Court's decision is that it leaves room for, and encourages, an increase in such incidents.[53] Prosecutors and police would no doubt prefer to search a newspaper than issue subpoenas duces tecum, since search warrants may not be quashed *before* the search — exactly the reason the press prefers subpoenas duces tecum. A search warrant is an immediate weapon and usually by the time the occupant of the property can seek relief from the courts, the search is complete.[54] If police have uncovered confidential sources or information, the damage is done. Since reporters have shown a preference for jail rather than compliance with subpoenas,[55] an official seeking documents for an investigation will have substantially more success with a search warrant.[56]

Zurcher has already had at least two reactions, one judicial and one legislative. The judicial reaction came in the District of Columbia Circuit

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

Id. at 566 (citations omitted).

52. *Id.*

53. Since The Stanford Daily was searched in 1971, more than a dozen searches of news organizations have been conducted, mostly in California, and mostly in reference to investigations involving the Symbionese Liberation Army. HOUSE COMM. ON GOV'T. OPERATIONS, SEARCH WARRANTS AND THE EFFECTS OF THE STANFORD DAILY DECISION, H.R. REP. No. 95-1521, 95th Cong., 2d Sess. 4 (1978) [hereinafter referred to as HOUSE REPORT].

54. I say "usually" the search is complete because it is possible to convince the police to delay the search until an emergency motion can be made to the court. This was the case when a warrant was presented at the Associated Press office in Helena, Mont. on April 10, 1978. The police delayed and lawyers for the Associated Press succeeded in getting an order to delay the search. The next day the warrant was quashed in court. *Id.* at 4-5.

55. *See* footnote 34 *supra.*

56. Justice Stewart addressed this point directly in his dissent in which the Court held that a prior adversary judicial hearing is called for to determine the extent of any first amendment infringement. He also disputed the Court's premise that the press should not receive a special protection against this type of search.

> Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine, or the business of banking from all abridgement by government. It does explicitly protect the freedom of the press.

Zurcher v. Stanford Daily, 98 S. Ct. 1970, 1984-87 (1978)(Stewart, J., dissenting).

Court of Appeals decision which upheld the power of investigators to subpoena the long distance telephone records of reports without informing the reporters in advance.[57] These toll records provide the date a call was made and to what telephone number. Using such information, an investigator can discover links between two people, criminal in nature or otherwise, and, reporters claim, can uncover the identity of confidential sources, thus discouraging their use. Citing *Branzburg* and *Zurcher,* the majority held that before any judicial restraint will be placed on investigators desiring such subpoenas, each reporter desiring protection will have to make an individual showing that, through past abuse, the reporter personally faces an imminent threat of irreparable harm and that his remedy at law is inadequate.[58] In short, there is no first amendment privilege provided by the press clause to maintain the secrecy of sources in a good faith criminal investigation.[59]

The majority also dismissed the reporter's fourth amendment claims, reasoning that the toll records were business records of a third party and the reporters had no reasonable expectation of privacy.[60] Chief Judge Skelley Wright dissented, on the ground that there was prior judicial screening before the reporter testified in *Branzburg,* and before the warrant was issued in *Zurcher.*[61]

The legislative reaction to *Zurcher* was in the form of a recommendation from the House of Representatives' Committee on Government Operations, urging legislation designed to curtail the effects of the case.[62] The

57. Reporters Comm. for Freedom of the Press v. A.T.&T., [1978] 4 MEDIA L. REP. (BNA) 1177 (D.C. Cir. Aug. 11, 1978).

58. *Id.* at 1202.

59. *Id.* at 1189. The majority makes a distinction between good and bad faith investigations. Only if bad faith on the part of the government is shown will the reporter be eligible for judicial screening of such warrants. *Id.* at 1199.

60. *Id.* at 1186. The majority cited United States v. Miller, 425 U.S. 435 (1976) (holding that a bank depositor has no reasonable expectation of privacy of bank records held by the bank); Hoffa v. United States, 385 U.S. 293 (1966) (holding that the use of a government informant is not a violation of fourth amendment rights); Lewis v. United States, 385 U.S. 206 (1966) (holding that the fourth amendment is not violated when an undercover agent misrepresents his identity and is invited to the defendant's home where an unlawful drug sale is transacted).

61. Both [*Branzburg* and *Zurcher*], however, far from holding that the First Amendment rights involved were deserving of no procedural protections, turned explicitly on the determination that the prior judicial scrutiny on a case-by-case basis which *was* afforded was sufficient to protect the First Amendment rights at stake. In the instant case, however, no form of judicial scrutiny at all is provided. [emphasis of Chief Judge Wright].

Reporters Comm. for Freedom of the Press v. A.T.&T., [1978] 4 MED. L. RPTR. (BNA) 1177, 1214 (D.C. Cir. Aug. 11, 1978) (dissenting opinion).

62. HOUSE REPORT, *supra,* at 9.

committee report concluded that *Zurcher* "infringes on news organizations' first amendment rights, could subject news offices to harrassment by law enforcers, and could threaten the confidentiality of news sources."[63] While approving a Justice Department policy of restraint in regard to issuing subpoenas to newsmen[64] and the Department's stated goal of determining whether a similar policy regarding search warrants is necessary,[65] the committee recommended congressional legislation which would protect third parties unsuspected of criminal activity unless it were to be reasonably shown that the evidence might be lost. This protection would extend to all persons, not just the press. The committee expessed a desire that such a law apply to the states.[66]

The two reactions are at odds. In light of the Supreme Court's fairly clear attitude on searches and seizures and the rights of the press, the legislative reaction obviously is the more promising for reporters who fear interference with their newsgathering freedom.

C. *Access*

The Supreme Court's recent cases involving press claims of a right of access to prisons and prisoners do not directly deal with the problem of disclosing confidential sources and information, but they do specifically address the question of whether special press privileges exist under the first amendment. As it did in *Zurcher,* the Court has decided no special privilege exists.[67]

Before 1974, various lower courts were in conflict on whether prison regulations forbidding personal interviews with specific inmates must yield to reporters' claims that such regulations inhibited the free flow of vital information about prisons, contrary to the mandate of the first amendment.[68] To reach their decisions, the courts applied different tests to deter-

63. *Id.* at 2.

64. The Justice Department's policy requires that before serving subpoenas on newsmen, the material sought should be determined essential to an investigation, that alternative sources be tried first, that negotiations with the press be conducted in advance, and that the Attorney General personally approve the issuance of the subpoena. 28 C.F.R. §50.10 (1977).

65. HOUSE REPORT, *supra* note 53, at 6.

66. *Id.* at 10.

67. *See* Houchins v. KQED, Inc., 98 S. Ct. 2588 (1978); Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

68. *See, e.g.,* Washington Post Co. v. Kleindeinst, 494 F.2d 994 (D.C. Cir.), *rev'd sub nom,* Saxbe v. Washington Post, 417 U.S. 843 (1974) (holding that the "right of access by the press to newsworthy events is necessarily antecedent to its First Amendment right to publish." *Id.* at 99. The Court said in an absolute ban on prisoner interviews violated the press's rights and ordered the federal prison authorities to make case-by-case decisions on the importance of the interviews sought.); McMillan v. Carlson, 493 F.2d 1217 (1st Cir. 1974) (*per curium*)

mine the constitutional questions.[69] Most courts agreed that the cases presented a first amendment issue.

The Supreme Court disagreed, however, holding in the companion cases of *Pell v. Procunier*[70] and *Saxbe v. Washington Post Co.*[71] that there was no first amendment right of access beyond that given the general public. The Court thereby avoided the traditional first amendment case-by-case analysis.

Pell and *Saxbe* involved press challenges to state and federal prison policies forbidding interviews with individual inmates, but allowing interviews with randomly selected prisoners encountered while on general tours of the facilities.[72] Reporters claimed that only face-to-face interviews with selected individual prisoners provided the candid give-and-take required for accurate, factual stories on prison conditions.[73] Justice Stewart's opinion for the Court in both cases emphasized that the prison policies did not completely forbid communication between reporters and selected prisoners because written correspondence was permitted. His opinion also emphasized that at any given time a large percentage of recently released inmates were available to be interviewed about prison conditions.[74] Relying on past rulings that the first amendment right to gather news[75] does not provide

(The prison policy was ordered to yield to an established author seeking an interview for a book about James Earl Ray, the convicted murderer of Dr. Martin Luther King. The order of the court was set aside after the Supreme Court handed down *Pell* and *Saxbe*.); Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973) (interview bans upheld); Globe Newspaper Co. v. Bork, 370 F. Supp. 1135 (D. Mass. 1974) (holding the policy invalid); Houston Chronicle Publishing Co. v. Kleindeinst, 364 F. Supp. 719 (S.D. Tex. 1973) (holding the government had not demonstrated a compelling state interest in its policy).

69. For example, in ordering the prisons to alter the interview ban, the court in Houston Chronicle Publishing Co. v. Kleindeinst, 364 F. Supp. 719 (S.D. Tex. 1973), said the government was required to demonstrate a compelling interest. But, in upholding the interview ban involved in Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973), the court held the government only to a standard of reasonableness. For a general discussion of these pre-*Pell* and *Saxbe* cases *see* 60 CORNELL L. REV. 446, 462 (1975).

70. 417 U.S. 817 (1974).

71. 417 U.S. 843 (1974).

72. Prison authorities object to interviews with specific inmates because they claim it increases disciplinary problems in the prisons by making some inmates "public figures" with a disruptive influence on the rest of the prison population. Saxbe v. Washington Post, 417 U.S. 843, 848-9 (1974).

73. [T]he media plaintiffs assert that, despite the substantial access to California prisons and their inmates accorded representatives of the press — access broader than is accorded members of the public generally — face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press.

Pell v. Procunier, 417 U.S. 817, 833 (1974).

74. Saxbe v. Washington Post, 417 U.S. 843, 848 (1974).

75. "Nor is it suggested that news gathering does not qualify for First Amendment protec-

the press with unrestrained access to all newsmaking events,[76] Justice Stewart wrote that no first amendment interests were abridged by the prison interview policies: "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."[77] Since no first amendment infringements were involved, there was no need for the Court "to engage in any delicate balancing."[78]

The message appeared clear: although news gathering was protected, the government was in no way obligated to lend a helping hand to the press in that gathering process.[79] Some courts applied the rule in subsequent cases,[80] but the ninth circuit went against this trend. It affirmed a district judge's preliminary injunction forbidding the Alameda County, California sheriff from enforcing his strict bar on interviews and his rule forbidding any access to one section of the jail previously off-limits to all members of the public.[81] That particular section of the jail had been labelled "cruel and unusual punishment for man or beast as a matter of law,"[82] had been the scene of a reported suicide, and, according to one psychiatrist, was responsible for his patients' illnesses.[83] The injunction required that the media be given access to the jail and the off-limits sections, and that the sheriff allow reporters to use photographic and sound equipment.[84] The order did not instruct the sheriff to allow access to the general public.

The ninth circuit acknowledged the holdings in *Pell* and *Saxbe* that "the

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tion; without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

76. Branzburg v. Hayes, 408 U.S. 665 (1972); Zemel v. Rusk, 381 U.S. 1 (1965).

77. Pell v. Procunier, 417 U.S. 817, 834 (1974).

78. Saxbe v. Washington Post, 417 U.S. 843, 849 (1974).

79. It is interesting to note that Justice Stewart wrote the Court's opinion in both *Pell* and *Saxbe*. He has been outspoken in his belief that the press enjoys a constitutionally protected position, but that the only way to protect its freedom is for government to maintain absolute neutrality towards the press. Justice Stewart wrote: "The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither Freedom of Information Act nor an Official Secrets Act. The Constitution, in other words, establishes the contest, not its resolution." Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (excerpted from an address given on Nov. 2, 1974, at the Yale Law School).

Justice Stewart's neutrality theory is examined at length in Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 752-54 (1977).

80. *See, e.g.*, Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977); Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975).

81. KQED, Inc. v. Houchins, 546 F.2d 284 (9th Cir. 1976).

82. Brennan v. Madigan, 343 F. Supp. 128, 133 (N.D.Cal. 1972).

83. Houchins v. KQED, Inc., 98 S. Ct. 2588, 2591 (1978).

84. KQED, Inc. v. Houchins, 546 F.2d 284, 285 (9th Cir. 1976).

news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right."[85] But the court held that the sheriff's restrictive policy constituted a violation of both the public and the media's rights, and, applying a traditional first amendment balancing test, determined that the governmental policy did not further "an important or substantial governmental interest" and was not the "least drastic" means of protecting that interest.[86] The court further held that while the press and the public shared the same constitutional rights, those rights could be accomodated in different ways, thus justifying the order permitting cameras and sound equipment.[87]

In an opinion which both strengthens and expands its previous statements in *Pell* and *Saxbe,* the Supreme Court reversed the ninth circuit in *Houchins v. KQED, Inc.*[88] Chief Justice Burger announced the Court's decision which rejected the assertion that either the public or the press has any right to information within the control of government: "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[89] Because the Court determined that the general public enjoyed no such right, the case fell squarely within the holdings of *Pell* and *Saxbe.* The Chief Justice wrote: "Under our holdings in *Pell v. Procunier* . . . and *Saxbe v. Washington Post* . . . until the political branches decree otherwise, as they are free to do, the media has no right, special of access [sic] to the Alameda County jail different from or greater than that accorded the public generally."[90]

Houchins, more strongly than either *Pell* or *Saxbe,* rejects the press' assumption that the Constitution recognizes its role as a specially protected investigative arm of the public.[91] This strict adherence to the doctrine of press and public being on the same constitutional footing — afford-

85. *Id.* at 285-6.
86. *Id.* at 286.
87. *Id.*
88. 98 S. Ct. 2588 (1978).
89. *Id.* at 2594.
90. *Id.* at 2597.
91. Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment.

Id. at 2596. In the passage immediately preceding the passage quoted, the Chief Justice wrote:

> [T]he choice as to the most effective and appropriate method [of dissemination of information] is a policy decision to be resolved by legislative decision. We must not confuse what is "good," "desirable" or "expedient" with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.

Id.

ing each identical treatment, no matter whether one group has special needs — might have far-reaching effects in areas where the press has traditionally been given special treatment.[92]

In his key concurrence, Justice Stewart[93] rejected this literal interpretation of the *Pell* and *Saxbe* doctrine. He wrote: "[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public that the visitors see."[94]

Dissenting, Justice Stevens stated that because in *Houchins* the policy involved was so restrictive, the Court was placing its imprimatur on a prison system which treated the public and the press alike by equally violating the rights of both.[95] He emphasized that the privilege claimed by the press is one that is not claimed for individuals but for an institution which exists to inform the public. This idea of the public's enjoyment of certain press privileges vicariously has appeared before in isolated opinions.[96] But, in *Houchins,* the Court has rejected it.

III. Conclusion

The objective of this article was to demonstrate the relative lack of success reporters have had with the Burger Court when claiming special first amendment constitutional privileges. Because of the dynamic nature of first amendment law, any article can only present the current state of the law. It could change tommorrow.[97]

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92. For instance, reporters enjoy a wide range of privileges, most of which have evolved by tradition and not legislation. Reporters are often provided with special tables or work rooms by governmental agencies — local, state and federal. It is unclear whether the Court would rule all of these unconstitutional if challenged by members of the public. The Court has, though, indicated that such privileges would be permissable if either passed legislatively or decreed executively. *Id.* at 2597.

93. Justice Stewart's vote was crucial for the judgment because the Chief Justice's opinion was joined only by Justices White and Rehnquist. Justices Stevens, Brennan and Powell dissented. Justices Marshall and Blackmun did not participate.

94. Houchins v. KQED, Inc., 98 S. Ct. 2588, 2598 (1978)(Justice Stewart concurring in the judgment).

95. "Petitioner's no-access policy, modified only in the wake of respondents' resort to the courts, could survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined. . . ." *Id.* at 2605 (Justice Stevens dissenting).

96. *See, e.g.,* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Justice Powell dissenting); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

97. In fact, the Supreme Court has granted certiorari to a privilege case which is scheduled for oral arguments in early November or late October. Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *cert. granted,* 435 U.S. 922 (1978), involves a defamation suit against CBS for a

But, it has become apparent that the Supreme Court is unwilling to interpret the press clause of the first amendment as providing constitutional privileges not already mandated by the speech clause. In neither *Zurcher* nor *Houchins* did the Court recognize first amendment infringements, and it is only arguable that it did recognize any burden on freedom of the press in *Branzburg*. Whether these decisions have had or will have a substantial "chilling effect" on dissemination of the news is impossible to tell. But the Court has shown its willingness to risk that chilling effect by refusing to recognize consitutional safeguards protecting confidentiality of reporters' sources and files, and access to news events, both of which help make up the lifeblood of good reporting.

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documentary shown on the program "60 Minutes." The plaintiff is asking that the reporters involved be made to answer certain questions in depositions regarding their conclusions and judgments during the editorial, pre-broadcast process. Although extraordinarily helpful throughout the discovery process, the defendants balked at these questions. The Circuit Court ruled in favor of the reporters. Although no confidential sources or information is involved, the defendants are claiming and the Circuit Court agreed, that forcing this discovery would not only chill the dissemination of news, but the very thought process involved in producing the news.