Constitutional Law - Requiring Newsmen to Appear and Testify Before Federal and State Grand Juries Does Not Abridge Freedom of Speech or Freedom of Press Guaranteed by First Amendment

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On June 29, 1972, the Supreme Court announced that neither freedom of speech nor freedom of press guaranteed by the first amendment is abridged by requiring newsmen to appear and testify before state and federal grand juries. For the purpose of its decision, the Supreme Court joined three cases involving two newspaper reporters and one news photographer who were asked to testify before grand juries concerning information they had acquired during the course of their employment as news gatherers. All three refused to answer the questions asked them on the grounds that testifying would deny them their first amendment rights.

LOWER COURT DECISIONS

The first case involved Paul Branzburg, a staff reporter for the Louisville Courier-Journal, who wrote an article describing the conversion of marijuana into hashish by two persons who permitted him to observe them in return for his promise not to divulge their identities. Ten days after Branzburg's article appeared in the newspaper he was subpoenaed before a county grand jury and he refused to answer questions concerning the hashish producers' identities. The trial court ordered him to answer. On his refusal he was held in contempt, and the Kentucky Court of Appeals denied his petition for prohibition and mandamus and his petition for rehearing. The court of appeals held that Branzburg had abandoned his first amendment claim of privilege and therefore limited itself to the construction of the relevant Ken-

1. "Congress shall make no law ... abridging the freedom ... of the press ... ." U.S. CONST. amend. 1.
3. One reporter's refusal to testify was also based on Ky. REV. STAT. § 421.100 (1969), which creates a reporter's privilege not to divulge his sources of information. See infra note 6.
5. The court of appeals believed Branzburg had elected to rely only on a Kentucky statute because of a supplemental memo he wrote which referred to the statute alone. Id. at 346 n.1.
Branzburg wrote a later article about the "drug scene" in Frankfort, Kentucky, in which he stated that he had interviewed many drug users and had seen some of them smoking marijuana. He was subpoenaed before another county grand jury to testify about drug statute violations. His motion to quash the subpoena was denied, as was his petition for mandamus and prohibition denied by the Kentucky Court of Appeals, which reaffirmed its earlier construction of the statute and rejected Branzburg's claim of a first amendment privilege.\(^7\)

Kentucky's newsmen's privilege is thus a statutory privilege, in derogation of the common law. Although the rule that statutes in derogation of the common law should be strictly construed is not applicable in Kentucky\(^8\) the court nevertheless construed the statute narrowly because

it is elementary that a privilege which did not exist at common law cannot be asserted under statute unless it is clear that the statute was intended to grant the privilege.\(^9\)

The court interpreted "source of any information" to include the identity of an informant, but held the statute did not apply where the newsman observed the commission of a crime personally, because in that event his source was his own observation, not the informant.\(^10\)

The dissenting Chief Justice pointed out that the legislature in passing the act had made no such exception; hence it was the court's obligation to interpret the statute broadly in order to safeguard the legislatively created privilege.\(^11\)

The second case consolidated on appeal concerned Paul Pappas, a newsman-photographer, who was permitted to enter a boarded-up store which served as a Black Panther headquarters in New Bedford,
Massachusetts, on the condition that he report nothing he witnessed except an expected police raid. The raid did not occur, so Pappas made no report. This event took place during civil disorders in New Bedford which involved street barricades, fires, and "similar turmoil." A grand jury was convened to discover and indict those responsible for criminal acts during the disorders, and Pappas was subpoenaed. He refused to disclose what he saw and heard inside Panther headquarters or the identity of persons there in response to grand jury questioning. Pappas filed a motion to quash the outstanding subpoena, which motion was denied by the Superior and Supreme Judicial Courts of Massachusetts.

Pappas claimed a privilege not to divulge the information acquired at the headquarters because he would be unable to get information in the future after having broken his promise not to report what he witnessed, thereby impairing his means of livelihood, and because revealing the information would violate his first and fifth amendment rights.

Unlike Kentucky, Massachusetts has no statutory newsmen's privilege, and the Massachusetts Supreme Judicial Court emphasized that this state recognizes very few privileges concerning confidential communications. According to the Massachusetts court, "Any effect on the free dissemination of news is indirect, theoretical and uncertain." Thus there is no constitutional privilege, and the newsman, just like every other citizen, has the obligation to answer the relevant and reasonable inquiries of a grand jury.

The final case consolidated on appeal concerned Earl Caldwell, a staff reporter for The New York Times, who specialized in reporting on the Black Panthers and other Black militant groups. He was served with a subpoena duces tecum ordering him to appear before a federal grand jury which was conducting a general investigation of the Black Panthers and examining the possibility of Panther involvement in criminal activities in violation of federal law. When Caldwell objected to the scope of the subpoena a continuance was granted, and a sec-

13. Id. at 298.
14. Indeed a priest-penitent privilege was not created until 1962, and there is still no general physician-patient privilege. Id. at 299, n.4.
15. Id.
16. Id. at 303.
17. Caldwell v. United States, 434 F.2d 1081, 1082 (9th Cir. 1970).
18. The subpoena ordered Caldwell to produce "[n]otes and tape recordings of interviews covering the period from January 1, 1969 to date [February 20, 1970] reflecting statements made for publication by officers and spokesmen for the Black Panther
ond subpoena was later served on him. Caldwell and *The New York Times*\textsuperscript{19} moved to quash the subpoena on the grounds that its unlimited breadth and the requirement that Caldwell testify in secret would destroy the relationship of trust and confidence which he had developed with the Black Panther Party and suppress first amendment freedoms. The district court\textsuperscript{20} ordered that:

> Earl Caldwell shall respond to the subpoena and appear before the grand jury when directed to do so, but that he need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news for dissemination to the public through the press or other recognized media until such time as a compelling and overriding national interest which cannot be alternately served has been established to the satisfaction of the Court.\textsuperscript{21}

Caldwell appealed the district court order because he thought his mere appearance before the grand jury would accomplish the same harmful effects on first amendment freedoms as would testifying. That is, the Black Panthers would interpret Caldwell's appearance as a possible disclosure of confidences and they would refuse to trust him in the future, thereby destroying his effectiveness as a reporter. On the other hand, the government argued that allowing Caldwell to refuse to appear would amount to capitulation to Black Panther extortion.\textsuperscript{22}

The court of appeals discussed the urgent need for an untrammeled press in times of dissent, and it showed how the Supreme Court has required the sacrifice of first amendment freedoms only where a compelling need for particular testimony is demonstrated.\textsuperscript{23} The court stated that the very concept of a free press requires that the news media be given autonomy, and it feared that the media would censor themselves in the future rather than risk grand jury interrogation. Therefore the court of appeals agreed with Caldwell that "... the privilege the district court granted would fail in its very purpose"\textsuperscript{24} if Caldwell were required to appear. The court pointed out the danger

\textsuperscript{19} *The New York Times*, as Caldwell's employer, moved with Caldwell to quash the subpoena. The district court held that the newspaper had standing because of its stake in Caldwell's work product and in the knowledge Caldwell gained as a reporter for it. Application of Caldwell, 311 F. Supp. 358, 359-60 (N.D. Calif. 1970). *The New York Times* did not join Caldwell's appeal of the district court's decision.


\textsuperscript{21} *Id.* at 360.

\textsuperscript{22} Caldwell v. United States, 434 F.2d 1081, 1087, n.7.

\textsuperscript{23} *Id.* at 1084-86.

\textsuperscript{24} *Id.* at 1089.
of conflict with basic rights which is implicit in the secret interrogations of a grand jury. Caldwell asserted and the government did not dispute that he had no unpublished information which was not protected by the district court order, so his appearance before the grand jury would have no useful purpose. The court reasoned that there was therefore "... no public interest of real substance in competition with the First Amendment freedoms that are jeopardized." The government must thus show a compelling need for the witness' presence (accepting the district court's above-quoted test) before a subpoena can issue to require attendance. The court viewed its holding as a narrow one because of the uniqueness of Caldwell's close relationship with the Black Panthers and the latter's unusual sensitivity to the "establishment" press.

**LEGAL BACKGROUND OF THE SUPREME COURT DECISION**

There are three possible authorities on which one can base a newsman's privilege: common law, statute, and the first amendment of the Constitution. According to common law rules of evidence, privileges are exceptions to the general rule that the public has a right to every man's evidence. In other words, every citizen has the duty to give whatever testimony he is able to unless there are strong policy reasons justifying a privilege, as in the case of attorney-client, priest-penitent, and husband-wife privileges. This duty is particularly applicable in a grand jury investigation because of the breadth of its powers. The grand jury is "a grand inquest," and appearing and testifying before it "... are public duties which every person within the jurisdiction of the Government is bound to perform. ... The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public."

The grand jury's powers are so broad that in any given investigation its purpose and scope may not be fully defined until its close, and the restrictions on testimony are few: self-incrimination, and very relaxed standards of materiality and reasonableness. Thus the common law includes no newsman's privilege not to testify.

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25. *Id.*
26. Another alternative, not discussed in this comment, would be a privilege based on a state constitution.
27. 8 WIGMORE, ON EVIDENCE, §§ 2192, 2285 (McNaughton rev. 1961).
In 1896, the states began to intrude on the common law position by passing statutes granting newsmen at least a qualified privilege from disclosing confidential news sources. Today seventeen states have passed such statutes and the number is increasing. Most of the statutes allow newsmen to refuse to reveal the sources of their information, but the information itself is not privileged. An exception is New York's statute which grants an absolute privilege to withhold any information whether obtained in confidence or not at any judicial, legislative, or administrative hearing without fear of a contempt citation.

The first attempt at constitutional protection for a newsmen's privilege came in 1958 in Garland v. Torre. Judy Garland filed a civil suit for breach of contract and defamation against CBS. During pretrial proceedings she asked the deponent, a gossip columnist, to reveal the name of the network executive who had made the alleged defamatory statements which the deponent reproduced in her column. The columnist refused to give the informant's name and was held in criminal contempt of court. Circuit Judge (now Justice) Stewart wrote the opinion affirming the contempt order.

As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news. Since the court assumed that freedom of the press is not absolute, it considered the issue to be whether the interest served by compelling the columnist's testimony justified some impairment of freedom of press.

34. 259 F.2d 545 (2d Cir. 1958), cert. denied 358 U.S. 910 (1958). There was one previous case, Burdick v. United States, 236 U.S. 79 (1914), in which an editor's right to refuse to reveal his source of information was at issue, but that right was based on the fifth and not the first amendment.
35. 259 F.2d at 548.
The court concluded that freedom of press "... must give place under the Constitution to a paramount public interest in the fair administration of justice" because the question asked the columnist "... went to the heart of the plaintiff's claim." Thus the interest at stake in the libel prosecution was thought to be the fair administration of justice. It was weighed against the freedom of the press; the administration of justice prevailing, the columnist was ordered to testify.

Not until Caldwell v. United States did any major court using the balancing approach hold that a newsman need not testify absent compelling need for his testimony, although some did hold that reporters are protected by the first amendment during grand jury investigations.

**SUPREME COURT DECISION**

The Supreme Court affirmed the holdings in favor of the government in Branzburg v. Hayes and In re Pappas and reversed the court of appeals decision for the reporter in Caldwell v. United States. The majority opinion written by Mr. Justice White, and in which Justices Burger, Blackmun, Powell, and Rehnquist joined, begins with a broad statement of the issue and holding: does "... requiring newsman to appear and testify before State or federal grand juries [abridge] the freedom of speech and press guaranteed by the First Amendment [?] We hold that it does not." The Court accepts at the outset the proposition that news gathering is protected by the first amendment, but the first amendment "... does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." The Court emphasizes that a reporter is just like any other citizen; hence in this case an incidental burdening of the press is justified by a reporter's doing the normal duty of testifying when called before a grand jury.

36. *Id.* at 549-550.
37. *In re Goodfader's Appeal*, 367 P.2d 472 (Ha. 1961), held that there was no constitutional privilege in the instant case, but implied in dicta that such a privilege might be found in other circumstances not present. *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N.D. Calif. 1970), held that there is a constitutional privilege, but using the balancing approach the court also held that in the case presented the witnesses had to testify. *People v. Dohn*, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970), held that the constitutional privilege protects reporters from testifying unless manifest injustice would result.
38. 408 U.S. at 667.
39. *Id.* at 682.
The Court then discusses the traditionally broad investigative powers of the grand jury, and states that there is no common law testimonial privilege, most courts having applied "the presumption against the existence of an asserted testimonial privilege."\textsuperscript{41}

On the question of constitutional privilege, the Court refuses to create another privilege\textsuperscript{42} by interpreting the first amendment to grant a testimonial privilege exclusively to newsmen:

This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.\textsuperscript{43}

The Court thus applies a balancing test in which an uncertain burden on newsgathering must give way to the public interest in fair and effective law enforcement.

The Court divides informants into two categories: those involved in criminal conduct, and those not engaged in such conduct but who have information suggesting criminal activity of others. Regarding the former, the Court states that they desire anonymity because they want to escape criminal prosecution. The Court’s response is adamant:

We cannot seriously entertain the notion that the First Amendment protects a newsmen’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.\textsuperscript{44}

The Court cites as an example that neither a reporter nor a source is immune from testifying or from conviction for stealing documents which could nevertheless provide newsworthy information.

Concerning the class of informants who are not themselves engaged in criminal conduct, the Court states that it is “unclear” about the ex-
tent of the deterrent effect on the flow of news which would result if
newsmen were required to reveal these sources. The inhibiting effect
is "to a great extent speculative," and the Court doubts if an in-
former wanting anonymity "will always or very often" be deterred.45

Neither are we now convinced that a virtually impenetrable
constitutional shield beyond legislative or judicial control, should
be forged to protect a private system of informers operated by the
press to report on criminal conduct, a system that would be un-
accountable to the public . . . and would equally protect well-
intentioned informants and those who for pay or otherwise betray
their trust to their employer or associates.46

Furthermore the Court argues that historically in our country there
has never been a "constitutional protection for press informants" and
the press has nevertheless flourished. The secrecy of the grand jury
protects the newsman because his source may never know that his
identity has been revealed.

The Court shows that various tests to determine if the first amend-
ment is abridged are met here: the state's interest is "compelling" or
"paramount," thereby justifying an indirect burden on the first amend-
ment; calling newsmen to testify "... bears a reasonable relationship
to the achievement of the governmental purpose asserted as its justifica-
tion;" the government has shown a "substantial relation between the in-
formation sought and a subject of overriding and compelling state inter-
est."47 The government's interests in the three cases are described as
stopping illegal drug traffic (Branzburg), preventing community dis-
ruption by violent disorders (Pappas), and forestalling assassination
attempts on the President (Caldwell).48

Justice White next details some of the problems which would result
if the Court did grant newsmen a constitutional privilege. If a quali-
fied privilege were granted, then newsmen would not have to appear
before a grand jury until there was a preliminary showing of a com-
pelling need for the reporter's testimony. Much would be left to the
judge's discretion, and "... the prospect of being unmasked whenever a
judge determines the situation justifies it is hardly a satisfactory solu-

45. Id. at 693-94.
46. Id. at 697.
47. Id. at 700.
48. The government stated in the Caldwell case that a Black Panther Party officer,
David Hilliard, had declared, "We will kill Richard Nixon," a threat which was re-
peated in the Party newspaper. However, Justice Stewart points out in his dissent that
Hilliard had already been indicted for this offense before Caldwell was subpoenaed.
Id. at 677 and 747, n.69 (Stewart, J., dissenting).
fice, but the Court is "... unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination."49 Another problem in granting a privilege is determining who would qualify for it. Any author could claim the privilege, and one could set up a newspaper in order to engage in criminal activities and therefore be insulated from grand jury questioning despite fifth amendment grants of immunity.

The Court states that newsmen need not be concerned about “harassment” or “substantial harm” because if the newsmen are correct in their belief that law enforcement will suffer, not gain, by subpoenaing them, then “... prosecutors will be loath to risk so much for so little."50 In addition, the Attorney General has issued guidelines which recognize that subpoenaing newsmen poses first amendment problems, and he directs all United States attorneys to try to obtain information from non-press sources before subpoenaing newsmen.51 The Court thinks these guidelines may be sufficient to protect newsmen.

Finally, the Court states that “... news gathering is not without its First Amendment protections,"52 and courts will not permit official harassment of the press undertaken not for law enforcement purposes but for the disruption of a reporter’s relationship with his news sources.

Justice Powell wrote a brief concurring opinion in order to emphasize “the limited nature of the Court’s holding.”53 If a newsmen believes either that the information sought has only a remote relationship to the grand jury investigation or that he would revealing confidential news sources without there being a legitimate need of law enforcement, his remedy is a motion to quash the subpoena. The courts will enter protective orders on a case-by-case basis by reaching a balance between the freedom of press and the obligation of all citizens to testify about criminal conduct. “In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."54

Justice Douglas wrote a dissenting opinion directed primarily towards Caldwell v. United States in which he stated the issue as “the extent to which the First Amendment ... must yield to the Govern-

49. Id. at 702, 703.
50. Id. at 706.
52. 408 U.S. at 707.
53. Id. at 709.
54. Id. at 710.
ment's asserted need to know a reporter's unprinted information."\textsuperscript{55} His view is that the first amendment need not yield at all, since those who wrote the Bill of Rights cast the first amendment in absolute terms. Thus it was not meant to be balanced. Douglas goes further than the Caldwell court of appeals and indeed any court which has considered the question, for in his view reporters have an absolute and complete privilege.

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity is therefore quite complete, for absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier.\textsuperscript{56}

Douglas argues that two first amendment principles are at stake: the people's absolute freedom and privacy of their individual beliefs, and the necessity in a democracy for an uncensored flow of opinion and reporting. Under this theory, Caldwell's first amendment rights are infringed by the grand jury investigation because its questions, though couched in terms of eliciting factual information, necessarily extract his personal beliefs. His own questions to the Black Panthers and their respective answers reflect his intellectual viewpoint and his preconceptions. While one's freedom to act may be controlled by the government, one's freedom to believe is absolute. Once one's personal beliefs can be extracted by the government where there is "compelling need," the freedom to believe is destroyed. "Sooner or later any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all."\textsuperscript{57} Thus the compelling need test should be used only to control the time, place, or manner of exercising first amendment rights, but not to dilute the rights themselves.

Concerning the second principle involved—that open dissemination of opinion and counterthought is essential to intelligent self-govern-ment—Douglas sees two harmful results of the Supreme Court decision. "Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens."\textsuperscript{58}

\textsuperscript{55} Id. at 713.
\textsuperscript{56} Id. at 712.
\textsuperscript{57} Id. at 720.
\textsuperscript{58} Id. at 721.
According to Douglas, the government and the press have historically played antagonistic roles. The government's interest is in law and order and, of course, self-perpetuation or self-preservation. On the other hand, the press is concerned with exploring and exposing the harmful as well as the beneficial aspects of society, both without and within government. The government becomes anxious about such criticism and as a result tries to bring its weight against a newspaper or a newsman. Douglas feels that the majority opinion encourages that result. In contrast, he concludes:

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.59

Justice Stewart wrote a dissenting opinion joined by Justices Brennan and Marshall. It begins with a strong criticism of the majority opinion:

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. . . . The Court . . . invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair the performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice.60

Stewart states that the basis of a reporter's constitutional right to a confidential relationship with his source is society's interest in the full and free flow of information to the public. The right to publish is central to the first amendment, and corollary to that right is the right to gather news. The right to gather news implies a right to a confidential relationship between reporter and source after three propositions are accepted: (1) Newsmen require informants in order to gather news; (2) The promise of confidentiality is essential to the news gatherer's relationship with informants; (3) An "unbridled subpoena power—the absence of a constitutional right protecting in any way a confidential relationship from compulsory process"—will deter sources

59. Id. at 722.
60. Id. at 725.
from giving information or deter reporters from gathering and publishing information.\textsuperscript{61}

A potential informant cannot be sure that his information will not be divulged by a reporter's compelled testimony. For example, someone working within the government who has information of graft or corruption must either risk exposure by giving the information or avoid any risk by keeping silent. Likewise a reporter must choose between being held in contempt of court for refusing to testify, and violating the ethics of his profession.\textsuperscript{62}

Stewart states that the impairment of the flow of news which will result from the lack of a newsmen's privilege is a matter of common sense and empirical record. He criticizes the majority for its unprecedented demand for scientifically precise proof of this. According to Stewart, never before has the Court insisted upon empirical studies showing deterrent effects beyond a doubt before it holds that the first amendment is abridged. Instead, he states that the Court traditionally has asked, based on common sense and available information, whether there is a rational relationship between governmental action and deterrence and whether the deterrent effect would occur with some regularity. In making this determination, the Court has shown a "special solicitude" toward those freedoms protected by the first amendment.\textsuperscript{63} This is the essence of the balancing test.

Stewart cites \textit{N.A.A.C.P. v. Alabama}\textsuperscript{64} as an example of this approach. The Alabama N.A.A.C.P. could not be compelled to disclose its members' names because disclosure might cause members to withdraw and dissuade others from joining the organization, thus adversely affecting the members' ability to pursue their beliefs. The deterrent effect is no less "speculative" in \textit{N.A.A.C.P.} than in the present case.\textsuperscript{65}

\textsuperscript{61} \textit{Id.} at 728.
\textsuperscript{62} The Newsmen's Code of Ethics, adopted by the American Newspaper Guild in 1934, states, "Newspaper men shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies." \textit{Bird and Mervin, The Newspaper and Society} 567 (1942).
\textit{Caldwell v. United States}, 434 F.2d 1081 (9th Cir. 1970), the following newsmen submitted affidavits to the effect that confidential relationships were essential to their functioning as newsmen: Gerald Frasner, Thomas Johnson, John Kifner, Tim-
The Court must strike "the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information," remembering that "... First Amendment rights require special safeguards." It is not the private interest of a newsman or an informant but the public's interest in the free flow of information which Stewart weighs.

Although this is a case of first impression, Stewart argues, the Court has dealt with the issue of investigative powers versus first amendment rights, and has traditionally placed "a heavy burden of justification" on the government when first amendment rights are abridged. Stewart proposes a three-pronged test which must be met before newsmen must reveal confidential sources before a grand jury, based on previous tests applied by the Supreme Court in cases involving governmental investigations. Thus Stewart would hold that before a reporter must testify, the government must (1) show that there is probable cause to believe that the newsmen has information which is clearly relevant to a specific probable violation of law; . . . (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Stewart includes the first requirement because of the grand jury's extraordinarily broad investigative powers. Without this requirement, newsmen will be asked to testify about informants who neither committed a crime nor have information about crime, contrary to the Court's observation, since grand juries have such "weak standards of relevancy and materiality." Stewart includes the first requirement because of the grand jury's extraordinarily broad investigative powers. Without this requirement, newsmen will be asked to testify about informants who neither committed a crime nor have information about crime, contrary to the Court's observation, since grand juries have such "weak standards of relevancy and materiality."
The purpose of the second and third requisites is to ensure that a confidential relationship is not disrupted, thereby impairing the flow of information to the public, unless the administration of justice is at the same time aided. If the government can get an indictment or obtain the necessary data through non-press sources then the reporter should not have to testify, for there is no compelling or overriding interest in the information.

Stewart concludes that it is better for courts in the future to make delicate judgments in accommodating the competing interests involved than to deny any force to the first amendment by the "simplistic and stultifying absolutism" adopted by the Court. 7

The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. . . . [I]n my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space." 73

**Analysis**

The Supreme Court's decision may be criticized on many grounds, but the most serious is the overbreadth of its holding and its dicta. The Court’s holding, 74 that requiring newsmen to appear and testify before grand juries does not violate the first amendment, is so broad that it leaves little, if any, basis for later courts to grant any privilege by distinguishing the Branzburg, Pappas, and Caldwell cases from the one at hand. Nor can the Court’s statement that reporters need worry about subpoenas only where their sources are implicated in crime or have information “relevant to the grand jury’s task” 75 give comfort to newsmen since the quoted phrase will likely include most every confidential source. Because the grand jury has such broad powers, it

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72. *Id.* at 746.
73. *Id.*
74. This comment refers to Justice White's “Opinion of the Court” as the Court's holding. While it is possible to interpret Justice Powell's concurring opinion as a limitation on or modification of White's opinion, this writer believes Justice Powell's brief concurrence is no more than an explanation that the majority view is not so extreme a position as the dissent paints it. Justice Powell's joining in the majority opinion means that he does not merely concur in the Court's result but that he also agrees with the Court's reasoning. Furthermore, Justice Powell explicitly states in his concurring opinion at 709 that he is referring to the Court's holding which he believes the dissent has misinterpreted.
75. 408 U.S. at 691.
often does not know its full task until the investigation is complete. As a result, it may be impossible for a reporter to move successfully for a subpoena to be quashed during the grand jury proceedings, because until all possible information is divulged, the grand jury does not necessarily even know if a crime has been committed.\footnote{176. See Friendly, Beyond the Caldwell Decision: 3, vol. 11, n. 3 Col. Journ. Rev. 31, 35 (1972); The trouble with the cases against Caldwell and his fellow journalists Branzburg and Pappas is that in each subpoena, prosecutors were trying to "catch a thief" in crimes that may never have happened, with evidence that may have never existed. (Actually this is not true of Branzburg because he reported having seen offenses committed in his presence.)} \footnote{177. 18 U.S.C. §§ 2101, 1341, 231 (1970).} \footnote{178. 49 Wis. 2d 647, 183 N.W. 2d 93 (1971).} \footnote{179. \textit{Id.} at 98.} \footnote{180. 259 F.2d 545 (2d Cir. 1958). The case is discussed supra note 34 and accompanying text.} \footnote{181. \textit{Id.} at 549-50.}

The three cases joined by the Court involve different factual situations, and Earl Caldwell seems to be the most serious victim of the Court's gloss. Branzburg and Pappas were merely asked what they saw during a limited period of time; Caldwell was subpoenaed to testify relative to interviews he had been given with officers and spokesmen of the Black Panther Party in order to aid the Government's investigation of possible violations of criminal statutes, such as interstate travel to incite a riot, mail fraud, and civil disorders.\footnote{177.} \footnote{178.} \footnote{179.} It must be remembered that Caldwell worked for a year in gradually gaining the confidence of the Panthers in order to write in-depth articles about them. In \textit{State v. Knops}\footnote{178.} the Supreme Court of Wisconsin denied a reporter a first amendment privilege but distinguished the case from Caldwell's. “Unlike Caldwell, the appellant here does not face an unstructured fishing expedition composed of questions which will meander in and out of his private affairs without apparent purpose or direction.”\footnote{179.} In \textit{Garland v. Torre}\footnote{180.} the first case to deal with the constitutional question of a newsmen’s privilege, Justice (then Circuit Judge) Stewart, in denying the privilege in the circumstances there presented, stated “... we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper’s confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality.”\footnote{181.} The point is that there are many different situations where reporters are asked to testify, from \textit{Garland} in which the plaintiff in a libel suit wanted to know who made the defamatory remark, to \textit{Knops} in which a reporter was asked five specific questions regarding the identity of the
bombers of a university building, to *Caldwell* in which the government tried to find out what Caldwell knew about the Panthers. The Supreme Court does not differentiate among these when it holds absolutely that requiring newsmen to testify does not abridge the first amendment.

Not only does the Court broaden its holding as much as possible, but also in dicta it states its opinion on a variety of topics which are irrelevant to the cases at hand. For example, the Court asserts, "Although stealing documents or private wiretapping could provide news-worthy information, neither reporter nor source is immune from conviction for such conduct." 82 It is clear that in none of the cases is the issue of wiretapping or document-stealing present, nor is any reporter seeking immunity from conviction for himself or his news source. Even an absolute privilege not to testify does not grant immunity from conviction; it merely means that the information a reporter gains through a confidential relationship will not be used to *indict* anyone during grand jury proceedings. In a criminal trial, additional interests are present, for example, the defendant's constitutional right to subpoena witnesses, 83 which create a much stronger case for requiring a reporter to testify, but none of the instant cases deal with a criminal trial. It seems unnecessary if not an obfuscation of the issue for the Court to introduce situations not present and then criticize them.

**Balancing Test**

In reaching its decision, the Supreme Court apparently applies a balancing test in which the two competing interests are law enforcement and news gathering. "We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering . . ." 84 But since law enforcement under this test always prevails, the result is an absolute and not a balancing position, the only exception being the case of a bad faith investigation involving official harassment of a reporter. As Stewart noted in his dissent, "I do not, however, believe, as the Court does, that all grand jury investigations automatically would override the newsmen's

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82. 408 U.S. at 690.
83. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. Const. amend. VI. In a criminal trial there are also greater protections for a reporter provided by the stricter rules of evidence.
84. 408 U.S. at 690. (Full quote is in text accompanying *supra* note 43.)
testimonial privilege." As the Court states in *Watkins v. United States*:

[We cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the Judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.]

The result of *Branzburg* is the abdication of that role to the government—that is, the prosecutor—since in almost all cases the "overbalancing" interest in law enforcement may be shown simply by the fact of the prosecutor's subpoenaing the reporter.

One advantage of the balancing test method of decision is that it is based on an ad hoc determination of the competing interests involved in one particular case; but the Supreme Court rejects the ad hoc approach in lumping all "privilege" cases together and deciding that law enforcement is always more important than news gathering. It is submitted that the Court takes no less an absolute position than does Justice Douglas. While Douglas believes that the first amendment always takes priority over law enforcement, the majority apparently believes the latter prevails over the former.

It may be that the Court's difficulty in applying a balancing test is caused by inherent problems of the balancing test method. Its most serious defect is that it does not really solve anything: a judge's original formulation of what competing interests are to be balanced predetermines the result of the so-called balancing. For example, in *Barenblatt v. United States*, in which the petitioner was required to answer the questions of the House Un-American Activities Committee concerning his Communist Party affiliation, the Supreme Court states:

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.

By deciding that petitioner's first amendment right is only a private and not a public interest, the Court precludes the possibility of the first amendment's outweighing the governmental ("public") interest involved.

85. 408 U.S. at 745, n.35.
87. *See State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93, 99 (1971).*
89. *Id.* at 126.
The courts and writers that have dealt with the issue of a newsmen's privilege have also by their different choices of phrasing the competing interests predetermined the result of the balancing. For example, the district court in In re Grand Jury Witnesses,⁹⁰ in denying the privilege, weighs the governmental or national interest of the grand jury investigation against the individual constitutional right of the witness. The dissenting judge of In re Goodfader's Appeal⁹¹ who favors the privilege weighs the effects of denying a privilege on the freedom of the press against the "procedural rule" of requiring the newsman to answer questions during a deposition. One writer discussing the issue in civil cases weighs the litigant's private interest against the public's interest in the free flow of news.⁹²

In denying the privilege in Branzburg the Supreme Court applies such a hazy balancing test that it is difficult to determine precisely what interests are at stake, other than the public interest in law enforcement and the uncertain burden on news gathering.⁹³ Yet the purpose of granting a constitutional privilege is not to protect the personal, private interests of any particular news gatherer, but rather to protect the public's right to the free flow of information. The Court could even accept the idea that the latter interest is at stake and yet deny the privilege because of a view that in the instant cases the public interest in the fair administration of justice outweighs the public interest in the free flow of news. But in any event the Court ought to state clearly what the interests are and it ought to discuss them openly, instead of evading them by reference to a "constitutional protection for press informants"⁹⁴ which no one advocates, or by presenting false dilemmas such as the statement that a first amendment privilege would be based on "the theory that it is better to write about crime than to do something about it."⁹⁵ Again no advocate of the privilege would base his argument on such false reasoning. For reporters, writing about crime is their way of doing something about it. But after revealing information to the public, reporters are saying that the government must do its own investigating instead of using them as investigators by appropriating their unpublished work.

The Court implicitly makes a policy decision—as indeed it often

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⁹³. See full quote in text accompanying supra note 43.
⁹⁴. 408 U.S. at 698-99.
⁹⁵. Id. at 692.
must—but it does not openly state those values which underlie its policy. Instead, the Court hides behind intimations that newsmen are trying to hoodwink the Court in their quest for a testimonial privilege which supposedly would allow them to engage in "reprehensible conduct forbidden to others."96

In State v. Knops97 the Supreme Court of Wisconsin openly makes the value judgments that are implicit in the Branzburg decision. In answering the reporter's claim that disclosing the identity of his informants would result in a "diminution of the free flow of news" to the public, the court states:

What the public is entitled to read is no doubt a much broader category than what the public is interested in reading. In this case the public was treated . . . to a long polemic on how property destruction and murder were simply necessary steps en route to a higher goal—the restructuring of society.98

In reply to the reporter's assertion that the framers of the Constitution intended the press to have the greatest freedom possible in an orderly society,99 the Wisconsin court states:

That may very well have been the intention of the framers. However, in a disorderly society such as we are currently experiencing it may well be appropriate to curtail in a very minor way the free flow of information, if such curtailment will serve the purpose of restoring an atmosphere in which all of our fundamental freedoms can flourish.100

The Wisconsin court is saying that the content of the article written by the appellant is of so little value to the public that the court may curtail the future flow of this type of information to the public.

All of the cases in the Branzburg decision involve counter-culture or underground groups—marijuana users and Black Panthers—and the Supreme Court is implicitly saying that any deterrent effects on the public's information about these aspects of society are not worth guarding against. When the Court states, "Nothing before us indicates that a large number or percentage of all confidential news sources . . . would in any way be deterred by our holding . . . ,"101 it

96. Id.
97. 49 Wis. 2d 647, 183 N.W.2d 93 (1971). In an underground newspaper, Knops wrote an article entitled The Bombers Tell Why and What Next, after having interviewed the bombers of a university building and promising not to divulge their identity. The grand jury asked Knops questions concerning their identity, and Knops refused to answer on first amendment grounds.
98. 183 N.W.2d at 98.
99. The reporter's assertion was based on a quotation from Bridges v. California, 314 U.S. 252, 265 (1941), which is reproduced infra in text accompanying note 118.
100. 183 N.W.2d at 98.
101. 408 U.S. at 691.
implies that it is not concerned about the deterrent effects on the flow of the kind of information presented in the three cases, and that it does not know what the deterrent effects on the more socially acceptable types of news stories would be. Thus inherent in the Court's balancing test is the Court's view that the public could well do without the kinds of stories which Branzburg, Pappas, and Caldwell write.

Newsmen's Privilege As a Denial of Equal Protection

Another issue which the Court does not discuss explicitly is the question of equal protection. Some courts and writers have argued that to grant a "special" privilege to newsmen would deny equal protection of the laws to all non-newsmen citizens.102 The majority opinion never states that granting a privilege would have this effect but its constant emphasis on the reporter's duty to testify being just like that of every other citizen implies that the Court had the equal protection argument in mind. For example, the Court states that the sole issue is the obligation of reporters to respond to grand jury subpoenas "as other citizens do,"103 that there is no "First Amendment exemption from the ordinary duty of all other citizens" to give information to grand juries,104 that the grand juries called newsmen Branzburg, Pappas, and Caldwell "as they would others."105 The Court is fearful of reporters and sources "invading the rights of their citizens" through "reprehensible conduct forbidden to all other citizens,"106 and is skeptical of the "uncertain burden on news gathering which is said to result from insisting that reporters like other citizens" respond to relevant grand jury questions. The Court refuses to create a privilege for newsmen which "other citizens do not enjoy."107 Finally, the Court asserts that the press has no "constitutional right of special access to information not available to the public generally."108

There are three main answers to the equal protection argument. The first is that reporters are in a special class, as also are attorneys and priests; since the Court has never held that the attorney-client, priest-penitent, or other testimonial privileges deny equal protection, the Court should not hold such with regard to newsmen, for there are equally strong policy reasons for a newsmen's privilege.

102. See material cited supra note 40.
103. 408 U.S. at 682.
104. Id. at 697.
105. Id. at 700.
106. Id. at 692.
107. Id. at 690.
108. Id. at 684.
Secondly, the privilege is not really for reporters, but for the public. News gathering is protected by the first amendment because it is a necessary part of maintaining a free press. The news gatherers therefore would be "privileged" from testifying not because of their own private interests but because of their role as guardians of a free press. The Supreme Court confuses the question of who would be granted a privilege by arguing against "constitutional protection for press informants" and "a virtually impenetrable constitutional shield . . . to protect a private system of informers operated by the press." That informers would personally benefit from a privilege is irrelevant. It is only incidental to the privilege of reporters, which itself is only incidental to the true beneficiaries of such a privilege: the public.

Thirdly, even if it is granted that the privilege is for the benefit of news gatherers, there is still no denial of equal protection, because news gatherers are protected by the first amendment. In referring to State v. Buchanan, in which the Supreme Court of Oregon uses the argument that giving newsmen a testimonial privilege is a denial of equal protection, Guest and Stanzler write:

The court's invocation of the equal protection argument in this case is unusual and inapposite since presumably the requisite state action would consist of judicial enforcement of a constitutional privilege. The Supreme Court has never invoked equal protection where the supposed discriminatory act was protected by another clause of the constitution [i.e., the first amendment]. Denying to newsmen a first amendment privilege because the privilege would violate the Equal Protection Clause would be like denying a defendant his fifth amendment right against self-incrimination because not all citizens take advantage of the fifth amendment. Equal protection is no more denied by invoking the first than the fifth amendment.

Granting a Privilege

The first obstacle to surmount in granting a newsmen's testimonial privilege is the common law presumption against such privileges as "so many derogations from [the] positive general rule" that "there is a general duty to give what testimony one is capable of giving." This obstacle can be overcome by remembering that the presumption is only

109. Id. at 698-99.
110. Id. at 697.
111. 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968).
112. Guest and Stanzler, supra note 40.
113. 8 Wigmore, ON EVIDENCE § 2192 (McNaughton rev. 1961). See 408 U.S. at 686.
an evidentiary rule which should not take priority over the first amendment. For example, the fifth amendment privilege against self-incrimination takes priority over the evidentiary rule that one must tell all he knows.

There is an additional factor in the case of a newsmen’s privilege because first amendment rights are involved. Instead of defining a newsmen’s privilege as an exception to the common law presumption, one should start with a constitutional presumption of a privilege based on the first amendment interest in the free flow of information, and the government must then try to justify an exception to the constitutional privilege based on the common law rule, noting the “preferred position” of freedom of press.

From the time of its inception the Constitution has gone further than the common law in protecting freedom of the press. In Bridges v. California the Supreme Court states that one purpose of the Bill of Rights was to enlarge the concept of freedom of press for American citizens:

The only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give liberty of the press... the broadest scope that could be countenanced in an orderly society.

Thus in answering the question of whether newsmen are to be privileged from testifying, it is the Constitution and not the common law which controls.

As Justice Stewart states, Branzburg is a case of first impression; yet those who would grant a privilege are not without precedent for their position. The Supreme Court has dealt with the issue of anonymity and has given first amendment protection to the right to publish and receive information anonymously. Not only has the Court protected anonymous relationships, but it has protected the government’s right not to disclose the identity of police informers. The most ef-

114. See Guest and Stanzler’s discussion of the constitutional and common law problem, supra note 40 at 26-29.
116. VI WRITINGS OF JAMES MADISON 1790-1802, 387.
117. 314 U.S. 252 (1941).
118. Id. at 265.
120. See, e.g., Roviaro v. United States, 353 U.S. 53 (1957); Aguilar v. Texas, 378 U.S. 108 (1964); McCray v. Illinois, 386 U.S. 300 (1967). These cases may be distinguished because the policy reason for the privilege is the government’s interest in
fective precedent, however, is found in those cases which deal with the basic principles of the first amendment—that is, those which emphasize the extreme importance of an "untrammeled" press in a free society. For example, in Associated Press v. United States\textsuperscript{121} the Supreme Court states that the first amendment

\ldots 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.\textsuperscript{122}

The reason for granting a newsmen's privilege is to protect the free flow of information to the public. The Court refuses to grant a privilege because it feels that any deterrent effect on the flow of news is too speculative.\textsuperscript{123} However, any consideration of the concept of deterrent or chilling effects necessitates a reference to future conduct, so of course any evaluation of such future effects must be uncertain and to some extent speculative. But the Court has all the evidence it needs in order to appreciate the harmful effects on news of requiring newsmen to reveal their sources. There are empirical studies,\textsuperscript{124} newsmen's affidavits,\textsuperscript{125} previous informer cases,\textsuperscript{126} previous cases which guard against deterrence of first amendment rights,\textsuperscript{127} and if all else fails, common sense.\textsuperscript{128} If an informer grounds the information he divulges on his remaining anonymous, and if the reporter cannot assure the informer that he will maintain that anonymity, there is a good chance the informer simply will not divulge the information.\textsuperscript{129}

Deciding that news gathering will be deterred or that there will be a chilling effect on the freedom of the press does not resolve the issue of whether to grant a privilege; it is at this point that the Court must

\begin{itemize}
  \item 326 U.S. 1 (1945).
  \item See discussion supra, at 234, 35.
  \item Guest and Stanzler, supra note 39 at 57.
  \item See supra note 65.
  \item McCray v. Illinois, 386 U.S. 300, 303 n.4, rehearing denied, 386 U.S. 1042 (1967).
  \item In his dissent Stewart states that the impairment of the news is a matter of common sense and empirical record, note 63 and accompanying text.
  \item Friendly, Beyond the Caldwell Decision: 3, vol. 11, no. 3 Col. Journ. Rev. 31, 35 (1972).
\end{itemize}
apply its balancing test\textsuperscript{130} by weighing the competing interests involved. But in weighing those interests the Court must first recognize that just as the grand jury's right to information is affected by granting a privilege,\textsuperscript{131} the public's right to information will be affected by not granting one.

If the balance does weigh in favor of the public's interest in the free flow of information, as discussed earlier,\textsuperscript{132} there is still the additional question of the limits of a privilege. That is, what tests should be applied to determine whether a newsman in any particular situation is privileged? The most extreme position of those who would grant a privilege is that of Justice Douglas, whose view is that a newsman is always protected.\textsuperscript{133} On the other end of the spectrum are those who would require newsmen to answer all questions which go to the heart of the claim\textsuperscript{134} or which are relevant to the subject of the grand jury's inquiry.\textsuperscript{135} The Attorney General's guidelines require sufficient reason to believe that the information sought is essential to the investigation and that the government has first unsuccessfully attempted to obtain the information from non-press sources before a newsman may be subpoenaed.\textsuperscript{136} The test recommended by Caldwell's employer, The New York Times, requires the government to show three elements before a reporter must testify: (1) there is probable cause to believe the reporter has information "specifically relevant to a specific probable violation of law," (2) the information cannot be obtained by alternative means, (3) there is a "compelling and overriding" interest in the information.\textsuperscript{137} The latter test is similar to the district court's test in Caldwell, which the circuit court of appeals affirmed,\textsuperscript{138} except that the court of appeals added that Caldwell need not even appear until the government showed compelling need for his presence, the sensitivity of the source being a relevant factor in this determination.\textsuperscript{139}

\textsuperscript{130} Unless the Court decides that any deterrence violates the first amendment. Contrary, 408 U.S. at 682: "It is clear that the First Amendment does not invalidate every incidental burdening of the press.

\textsuperscript{131} That the grand jury's right to information will be harmedly affected is not necessarily true. See supra note 129. A 1949 study of those states granting a statutory newsmen's privilege showed that the attorneys general and police chiefs interviewed stated unanimously that the privilege had not hampered law enforcement in their jurisdictions. The Newsmen's Privilege, supra note 92 at 1239, n.217.

\textsuperscript{132} See discussion of the balancing test, beginning supra at 243.

\textsuperscript{133} See note 61 and accompanying text.

\textsuperscript{134} Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 90 (1958).

\textsuperscript{135} In re Goodfader's Appeal, 367 P.2d 472 (Haw. 1961).

\textsuperscript{136} The Attorney General's Guidelines for Subpoenas to the News Media, supra note 51.

\textsuperscript{137} 408 U.S. at 713, n.1.

\textsuperscript{138} See text accompanying supra note 20.

\textsuperscript{139} Caldwell v. United States, 434 F.2d 1081, 1090 (9th Cir. 1970).
Justice Stewart's proposed test is basically *The New York Times* test, with a clarification of element (2) that the alternative means should be "less destructive of First Amendment rights." Furthermore, Stewart accepts the sensitivity element which the court of appeals added, although this factor would be present only in rare circumstances. A Cook County, Illinois circuit court used a test that requires probable cause that the reporter has the information, no other methods of obtaining the information, and if the information were not provided a miscarriage of justice would result.

A common defect of the above tests is that the result of employing any of them would be precisely what their advocates are trying to prevent. Their use would result in a chilling or deterrent effect because the tests are either so vague or so complicated as to leave too much uncertainty. What reporter or source would be able to predict whether the information he is revealing might be relevant to a judicial inquiry, whether a miscarriage of justice could result, whether alternate means could be found, or whether a three-pronged test could be met? The inability to predict the results of one's publications or revelations would deter reporters and sources no less than the majority decision. For example, every reporter would say his source is "sensitive," while every prosecutor would deny it. Since newsman and source could not know ahead of time who would be right, many will simply decide that it is not worth the risk of finding out.

This does not mean that the only feasible alternative is Douglas' absolute privilege; it does mean, though, that the test of the privilege must be based on more objective criteria than prevention of manifest injustice and less complicated criteria than the three-pronged tests. One reasonable alternative would be a rule exempting a newsman from testifying before a grand jury unless he personally observed the commission of an offense or a part thereof. Branzburg would not be protected since he observed the commission of the offense, but at least the reporter's role as mirror and interpreter of events would be protected unless he stepped into the further role of witness which would give him the further obligation of the citizen to testify. An advantage of this test is its relative certainty and predictability. The only deterrent effect would be that criminals might be more careful about committing crimes in the presence of newsmen. Sources could still dis-

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140. See text accompanying *supra* note 69.
141. 408 U.S. at 731.
cuss their own or others' crimes with newsmen, so the public would be able to be informed about why and when and how such events occur. The newsmen would not become an investigative arm of the government, yet the government could use the reporter's published material as a spark to light its own investigation.

The majority opinion states some of the problems inherent in granting a privilege: determining who would qualify for it, and distinguishing between true journalists and those who might set up newspapers in order to engage in crime and avoid grand jury testifying. Certainly if the courts granted a newsmen's testimonial privilege they would have to define who a newsmen is for these purposes.\(^{143}\) The problem of sham always exists, however, and the privilege should not be denied simply because some might misuse it. That would be like abrogating the standard of "guilty beyond a reasonable doubt" in a criminal trial because some guilty persons may go free.

**STATUS TODAY**

The news media are presently in an uproar over the *Branzburg* decision. According to journalist Norman Isaacs, newsmen "... are in a period of libertarian and journalistic repression." Isaacs hopes journalism can "clean up the nest before 1984 comes," and he exhorts the newsmen not to become "an unwilling servant to 'Big Brother.'"\(^{144}\) The news media have made a hero out of Peter Bridge, the first reporter to be jailed for contempt for refusing to answer a grand jury's questions since the Supreme Court decision.\(^{145}\)

Even before *Branzburg* the government-newsmen conflict had intensified. On the one hand, the number of subpoenas to newsmen by the government has greatly increased in the last few years,\(^{146}\) and reporters have been harassed.\(^{147}\) On the other hand, the media have re-

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145. Much of the reporting of the *Bridge* case has been impassioned or slanted, depending on one's point of view. For example, the first New York Times articles on the case failed to mention that the decision was based on an interpretation (albeit an extremely narrow one) of a New Jersey statute, and that Bridge had named his source in his newspaper article, causing the court to hold that he had waived his privilege. N.Y. Times, Oct. 4, 1972, Oct. 5, 1972.

146. *Newsmen's Privilege*, supra note 92 at 1200-1203.

147. After CBS correspondent Mike Wallace interviewed Eldridge Cleaver in Algiers, United States Attorney General Mitchell "hounded" Wallace and urged him to discuss Cleaver and how and by whom the interview had been arranged. Friendly, *Beyond the Caldwell Decision: 3*, vol. 11, no. 3 Col. Journ. Rev. 31, 35-36 (1972).
sioned in kind. When the Manhattan District Attorney asked WBAI, a New York radio station, for some tapes it had played on the air, the station refused, despite its usual policy of making such tapes available at listeners’ requests.148

The chilling effect on first amendment rights feared by those who would grant a privilege may not be so serious as anticipated because of newsmen’s strong ethical tradition of not revealing sources149 and their strong reaction to the Branzburg decision. In almost no reported case has a newsmen after losing his subpoena challenge then revealed his source or the requested information.150 Another way of bucking the Court is the new policy of early destruction of unpublished material by newsmen.151

The majority opinion expressed the belief that the Attorney General’s guidelines might be sufficient to protect newsmen, but the guidelines are no great cause of comfort to the news media because they are merely guidelines, not law; they can be withdrawn at any time; and even within them there is an escape hatch which states that in an emergency or “unusual situation” the exact standards of the guidelines need not be met.152 However, these guidelines are being used by the Justice Department as a reason why Congress need not pass any law with respect to a newsmen’s privilege.153 Apart from the issue of federal protection, the guidelines do not even apply to the most frequent area of conflict, that between state and local officials and the news media.154

While it is unlikely that the Supreme Court will reconsider its decision in the near future, Justice Powell’s concurring opinion with its emphasis on balancing interests on a case-by-case basis does leave open the possibility of the Court in a future case finding a limited privilege for newsmen. However at the present time most of the activity will be in the legislative area,155 with states passing “shield” statutes to pro-

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148. N.Y. Times, Sept. 17, 1972, at 10 (magazine). The tapes recorded interviews with prisoners during an insurrection at the Tombs prison. WBAI feared that the D.A. would identify the interviewed prisoners by making voiceprints from the tapes. WBAI also refused to produce for the D.A. a manifesto published by the Weathermen which was acquired neither through WBAI’s investigation nor through a confidential relationship. Friendly, id. at 35.

149. The Newsman’s Code of Ethics is reproduced in supra note 62.


152. Supra note 51.


155. The majority opinion leaves open this option.
tect newsmen. The uproar over Peter Bridge has made the passage of a new liberalized New Jersey statute all but certain.

If the Supreme Court does not act and if state legislatures do not pass strong shield statutes, the current hostility between the government and the news media will not diminish. It is still possible that there may not be a deterrent effect on the free flow of information to the public. Yet it is unfortunate that this will be due either to the government's not enforcing its rights under the law, or to the belief of newsmen that they must disobey the law and go to jail in order to uphold a free press.

Susan Steiner Sher