

First Amendment Rights of Newsmen Protected (Baker v. F. & F. Investment)

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1973) "First Amendment Rights of Newsmen Protected (Baker v. F. & F. Investment)," *St. John's Law Review*: Vol. 48 : No. 2 , Article 14.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss2/14>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

sons.⁴² Unfortunately, its holding may prove a source of abuse. Since many of our cities are faced with critical housing shortages and the on-going problem of whites fleeing to the suburbs, leaving central cities to become segregated ghettos, local municipalities are confronted with the challenge of reversing this trend and thwarting further neighborhood deterioration. An increasing burden will be placed on the courts to insure that individual rights are not sacrificed to achieve this goal.

FIRST AMENDMENT RIGHTS OF NEWSMEN PROTECTED

Baker v. F. & F. Investment

The extent of a news reporter's right to refuse to reveal a confidential news source has been the subject of much recent discussion and judicial consideration. In the much publicized case of *Branzburg v. Hayes*¹ the Supreme Court ruled that the constitutional protections of the first amendment cannot be invoked by a newsman seeking to protect his confidential source from the inquiry of a grand jury.² The rationale in *Branzburg* was that the public's interest in having the grand jury receive everyman's evidence outweighs the newsman's right to withhold his confidential source.³ Thus, absent an effective statutory

⁴² A decision for the plaintiffs would have invalidated 171 leases, whereas a reversal may mean the judicially-sanctioned breach of a lawful promise made to some 322 tenants.

¹ 408 U.S. 665 (1972).

² The three cases consolidated for argument in *Branzburg* are summarized as follows:

- (1) *Branzburg v. Hayes*, 461 S.W.2d 345 (Ky. Ct. App. 1970): Paul Branzburg, an investigative reporter for the *Louisville (Ky.) Courier-Journal* was subpoenaed before a grand jury, but refused to reveal the identity of his confidential sources who had supplied information about local drug abuse practices. The Kentucky High Court declined to quash the subpoenas; the Supreme Court affirmed.
- (2) *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970): Earl Caldwell, a *New York Times* reporter, brought an action to quash subpoenas ordering him to appear and testify before a grand jury investigating local activities of the Black Panther Party. The Court of Appeals for the Ninth Circuit quashed the subpoenas; the Supreme Court reversed.
- (3) *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971): Paul Pappas, a reporter for WTEV-TV (New Bedford, Mass.), appeared before a grand jury, but refused to answer questions concerning his attendance at a local Black Panther Party meeting. The Supreme Judicial Court of Massachusetts declined to quash the subpoena and ruled: "We adhere to the view that there exists no constitutional newsmen's privilege either qualified or absolute, to refuse to appear and testify before a court or grand jury." 266 N.E.2d at 302-33. The Supreme Court refused to disturb the holding.

³ This broad statement, however, belied the reasoning used in *Branzburg*. Mr. Justice Powell, whose concurring opinion represented the crucial swing vote, wrote, in the strongest terms, that the balancing test approach has not lost its vitality:

[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or 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 protective order may be entered. The

shield,⁴ a newsman would be required to comply with a grand jury request for the identity of his confidential source.

Great concern over the chilling effect on investigative reporting

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. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

408 U.S. at 710.

Indeed, it was a *Branzburg*-type balancing test that was utilized by the District of Columbia Circuit Court of Appeals when it determined that a claim of absolute executive privilege by President Nixon would not defeat a grand jury's right to have access to all relevant evidence. As the en banc court noted:

[T]he President asserts that the tapes should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties But we think that this presumption of privileged premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury . . . is not only to indict persons when there is probable cause to believe they have committed crimes, but also to protect persons from prosecution when probable cause does not exist [*citing* *Branzburg v. Hayes*, 408 U.S. at 687-88] The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority.

Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973).

⁴ Shield laws—analogueous to the attorney-client privilege—have been proposed in both houses of Congress, *see, e.g.*, the proposed amendment to the Free Flow of Information Act, 119 CONG. REC. 1 (daily ed. March 8, 1973).

Another bill, entitled the "Newsmen's Privilege Act of 1971," was introduced by Rep. Charles V. Whalen, Jr. (R., Ohio). In pertinent part, H.R. 4271 92d Cong., 1st Sess. (1971) created a "privilege" for any person not to:

disclose any confidential information received or obtained by him in his capacity as a reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.

The bill specifically applied to all proceedings before federal courts, grand juries, federal agencies, departments, commissions, and to congressional committees. Sen. James B. Pearson (R., Kansas) introduced an identical bill on March 23, 1971, S. 1311, 92d Cong., 1st Sess. (1971) Mr. Justice White, in *Branzburg v. Hayes*, noted this congressional activity. 408 U.S. at 689 n.28.

Similarly the Court noted that 17 states have provided some type of statutory privilege. 408 U.S. at 689 n.27. These state laws vary greatly in the privilege granted to withhold sources and information. For example, Indiana, Montana, Nevada, and Pennsylvania laws protect print and electronic media from divulging the source of information *obtained in the course of employment*. Michigan and Ohio shield laws modify the privilege, but limit it to communications between *reporters of newspapers* or other *publications* and their informers. Other state shield laws circumscribe the privilege by protecting the source of information actually published or broadcast. *See generally* Comment, *Branzburg v. Hayes: A Need for Statutory Protection of News Sources*, 61 KY. L.J. 551, 556 n.27 (1973).

It is instructive to note that when the first shield law was enacted by Maryland in 1898, Professor John Henry Wigmore predicted that the statute, "as detestable in substance as it is crude in form, will probably remain unique." 8 J. WIGMORE, EVIDENCE § 2285-86 (McNaughton rev. 1961).

was expressed by the press.⁵ The press argued that the first amendment protects the freedom to gather news as well as to print it.⁶ After *Branzburg*, the question became to what extent, if any, does the first amendment protect the confidentiality of a reporter's source?

The Second Circuit answered this question by strictly limiting the applicability of *Branzburg* to sources pertaining to criminal activity under consideration by the grand jury. In *Baker v. F. & F. Investment*⁷ a unanimous panel affirmed a district court decision denying a motion seeking to compel a journalist to reveal his confidential source during an oral deposition.

The controversy in *Baker* stemmed from a class action brought in the Northern District of Illinois on behalf of all blacks who had acquired houses in the Chicago area between 1952 and 1969.⁸ The complaint alleged violations of federal civil rights laws in that the defendant real estate brokers had engaged in discriminatory practices such as blockbusting. In the course of pre-trial discovery, one Alfred

⁵ See, e.g., Statement of Joel M. Gora and Victor S. Navasky, *Hearings on H.R. 837, 1084, 15891, 15972, 16527, 16713, 16542 before Subcomm., No. 3 of the House Comm. on the Judiciary*, 92nd Cong., 2nd Sess., Ser. 37 (1972). See also Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 25 VAND. L. REV. 667 (1971), wherein the author, the Director of the School of Journalism at the University of Wisconsin, lauded *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), as the first case to deal with and validate the reporter's right to silence. The article was published before *Branzburg v. Hayes*, 408 U.S. 665 (1972), struck down the *Caldwell* decision. See also Note, 46 N.Y.U.L. REV. 617 (1971).

⁶ Supreme Court cases predating *Branzburg v. Hayes*, 408 U.S. 665 (1972), did not deal with a reporter's right to *gather* news, but were limited to government and state interferences with publication and distribution where the deleterious effect on the proliferation of ideas was self-evident. See *Winters v. New York*, 333 U.S. 507 (1948) (restraints on circulation and distribution voided); *Bridges v. California*, 314 U.S. 252 (1941) (restricting reporting of trial); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (voiding a privilege tax on the selling of advertisements); *Near v. Minnesota*, 283 U.S. 697 (1931) (voiding a state law permitting prior restraint by injunction).

⁷ 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), *discussed in Note, Newsmen's Privilege: A Challenge to Branzburg*, 53 B.U.L. REV. 497 (1973).

⁸ *Baker v. F.&F. Inv.*, 300 F. Supp. 310 (N.D. Ill. 1969), *aff'd*, 420 F.2d 1191 (7th Cir. 1970) (denying defendant's motion to dismiss the complaint). The civil rights action, with some 3500 class plaintiffs alleging discriminatory practices of the 60 named defendant real estate brokers, was brought under 42 U.S.C. § 1982 (1970) which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." The central allegation of the plaintiffs' complaint was that some of the defendants engaged in what is popularly known as 'blockbusting', that some of the defendants stimulated and preyed on racial bigotry and fear by initiating and encouraging rumors that negroes were about to move into a given area, that all non-negroes would leave, and that the market values of properties would descend to 'panic prices' with residence in the area becoming undesirable and unsafe for non-negroes.

300 F. Supp. 210, 214 (N.D. Ill. 1969).

The Illinois litigation is commented on in Note, *Discriminatory Housing Markets, Racial Unconscionability and Section 1982: The Contract Buyers League Case*, 80 YALE L.J. 516 (1971).

Balk, the author of an exposé on blockbusting in Chicago, was subpoenaed by the plaintiffs for the purpose of obtaining his oral deposition in New York City.⁹ At the examination before trial, Mr. Balk was cooperative and expressed sympathy with the plaintiffs' cause of action. However, when questioned as to the identity of his source, Mr. Balk refused to disclose the name of the Chicago real estate broker who had revealed the practices of local blockbusters. He stated that the information had been given to him under a promise of strict confidentiality and that he was protected from compulsory disclosure by the first amendment, whereupon the plaintiff sought an order in the Southern District of New York requiring Mr. Balk to respond.¹⁰ District Judge Bonsal denied this motion and an interlocutory appeal¹¹ was taken to the Second Circuit.

Although the appellants rejected the balancing approach¹² ap-

⁹ Mr. Balk had moved to New York City after publication of the exposé on blockbusting. 339 F. Supp. 942 (1972). The article, "Confessions of a Blockbuster," in *Saturday Evening Post*, July 14, 1962, caused widespread animosity. Mr. Balk reported receiving many threatening telephone calls and letters; he changed his home telephone number to an unlisted one, and finally obtained police protection for his home and family. Brief for Appellee at 9.

At present, Mr. Balk is Editor of the *Columbia Journalism Review* and a lecturer at the Columbia University Graduate School of Journalism. 470 F.2d 778, 780.

¹⁰ 339 F. Supp. 942 (1972).

¹¹ That this interlocutory appeal procedure is "unusual" was raised and disposed of by the court of appeals:

Although neither party has questioned the appealability of this order, it is appropriate that we state that ordinarily, orders denying or directing discovery are non-appealable interlocutory decisions, *see, e.g.*, *Alexander v. United States*, 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686 (1906); *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969); *United States v. Fried*, 386 F.2d 691 (2d Cir. 1967); *cf.*, *Republic Gear Company v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967). Special circumstances, however, attend motions for discovery made in a district other than the district in which the main action is brought. Although an order compelling disclosure in an "outside" jurisdiction is generally not reviewable, *see, e.g.*, *National Nut Co. of California v. Kelling Nut Co.*, 134 F.2d 532 (7th Cir. 1943); *cf.*, *Honig v. E.I. du Pont de Nemours & Co.*, 404 F.2d 410 (5th Cir. 1968), an order denying disclosure in a jurisdiction beyond that of the main proceeding is immediately reviewable, to give the party seeking discovery an effective remedy. *Republic Gear Company v. Borg-Warner Corp.*, *supra*, 381 F.2d at 554. In that case Judge Waterman stated the underlying policy justification for this rule as follows:

[E]ven if the appellate court in the jurisdiction in which discovery is sought awaited a final decision in the main proceeding before acting at all it would be necessary to return to the ancillary, appellate court to argue the discovery issue. And if, upon appeal, the party were successful in reversing the lower court's order and thus obtained discovery, he would be required to go back to the court where the main case had already been tried, and there, with the discovered evidence now admissible on the merits, move to retry the case. The impracticality of this cumbersome procedure compels us to grant immediate appellate review of an order which, in another context, we might properly hold to have been an interlocutory order.

Id. See also, 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13[2], at 157.

470 F.2d 778, 780 n.3.

¹² Brief for Appellant at 13-14.

pellees¹³ claimed was delineated in *Branzburg*, they contended nevertheless that the public interest in the orderly administration of justice outweighed the newsman's first amendment protections.¹⁴ They noted that *Branzburg* had rejected the existence of an absolute privilege in constitutional terms and that no federal shield law had been enacted.¹⁵ Thus, the appellants argued that in cases of federal-question jurisdiction, especially those involving civil rights actions, newsmen should be required to disclose their confidential sources.¹⁶ Judge Kaufman found no justification for picking and choosing among federal statutes and rejected their position totally.¹⁷ The court acknowledged the eminence of the first amendment in the "pantheon of freedoms"¹⁸ and posited that at least in civil litigation there are instances where "the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony."¹⁹

Having enunciated these principles of law, Judge Kaufman proceeded to apply them to the case at bar. Since Mr. Balk was not a party to the original action and there was no evidence that the available channels of information had been exhausted, the court concluded that appellants had failed to establish that the identity of Mr. Balk's source went to the heart of their claim.²⁰

Support for the court's decision was found in another Second Circuit case, *Garland v. Torre*.²¹ In *Garland*, an action for libel, the

¹³ Brief for Appellee at 25.

¹⁴ 470 F.2d at 784-85.

¹⁵ *Branzburg v. Hayes*, 408 U.S. 665, 689 (1972). See notes 2-5 *supra*.

¹⁶ 470 F.2d at 783. Arguing against the use of any balancing test in the first instance, the appellants further argued that "[e]ven if such a balancing test were appropriate, plaintiffs submit the overriding federal policy behind an effective guarantee of civil rights far outweighs any state interest reflected in a statutory journalist's privilege." Brief for Appellant at 21.

¹⁷ 470 F.2d at 783.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* Judge Bonsal, in the court below, had grounded his determination on similar analysis, and went so far as to suggest ways for the plaintiffs' to get the information withheld from them by Mr. Balk:

The facts related in Mr. Balk's article and the pictures therein certainly provide leads to the plaintiffs in obtaining discovery. Further relevant information could be obtained by a search of the title records and the mortgage records in the county in which plaintiffs claim the unlawful activities took place.

339 F. Supp. 942, 945.

That such "leads" could facilitate discovery was, however, bitterly disputed by the plaintiffs:

The leads alluded to . . . indicate only that blockbusting took place in black-white boundary areas in the West, South, and Southwest sides of Chicago. Those sections cover all of the black-white boundary areas in Chicago, with a population of 3,367,000, 32% of which is black.

Appellant's Reply Brief at 10.

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

Second Circuit upheld a lower court order citing a journalist for contempt for refusing to reveal a confidential source. There, the identity of the confidential source which had caused her to be defamed was crucial to the plaintiff's case and she had independently endeavored to discover the identity of the source. The *Garland* court held that the right to a day in court is fundamental and outweighs a reporter's first amendment protections.²²

The appellants further contended that *Branzburg* was applicable on the merits. Judge Kaufman skillfully dismissed this contention by interpreting narrowly the mandate of *Branzburg*.²³ The court emphasized that in *Branzburg* the public interest in the viability of the grand jury necessitated the disclosure by the journalist, while in *Baker*, no

²² The *Garland* opinion was written by Mr. Justice Stewart, then a Sixth Circuit Judge, sitting by designation on the Second Circuit. *Garland*, the first federal case to consider (and deny) the right of a journalist to maintain a first amendment privilege of confidentiality has been the wellspring of comment and criticism. Changes wrought since *Garland* may have weakened the vitality of that holding. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Supreme Court indicated that an unfettered free press will be favored, notwithstanding resultant harm to private litigants. Furthermore, *Garland*, a diversity case, was decided before New York's shield law, N.Y. CIVIL RIGHTS LAW § 79-A (McKinney 1971), was enacted, and New York case law had refused to recognize a journalist's privilege. See, e.g., *People ex rel. Mooney v. Sheriff of N.Y. County*, 269 N.Y. 291, 199 N.E.2d 415 (1936).

The balancing test asserted in *Garland* has been widely cited. See generally *Beaver, The Newman's Code, the Claim of Privilege and Everyman's Right to Evidence*, 40 ORE. L. REV. 243 (1968) (positing that it would be unwise to grant any testimonial privilege to journalists, as journalism is an unpoliced, unlicensed profession); *Guest & Sample, The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969) (suggesting an absolute privilege in all but national security cases, and noting that when Miss *Garland* finally learned the journalist's source after he voluntarily came forward, she lost the libel suit anyway); Note, *The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1188 (1970) (suggesting that an absolute privilege might be appropriate in civil litigation, where the newsman is guilty of no misconduct); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971) (preferring balancing test to any absolute privilege).

The disparate results in post-*Garland* cases are indicative of the inconsistency in results as courts either used, or rejected, the *Garland* balancing test.

In *Cervantes v. Time, Inc.*, 464 F.2d 936 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the court, using a balancing of interest test refused to order the defendant to disclose confidential sources. Plaintiff, the mayor of St. Louis, argued that he needed disclosure to prove the requisite reckless disregard of the facts and malice to sustain his libel action. See also *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968); *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir.), *cert. denied*, 385 U.S. 1011 (1966).

In *Staté v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968), the court refused to recognize any privilege, and upheld the contempt citation. To the same result see *State v. Knops*, 49 Wis. 2d 647, 783 N.W. 2d 943 (1971); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961).

²³ "*Branzburg v. Hayes* . . . involving as it did the right of a journalist to withhold disclosure of confidential sources from a grand jury investigating criminal activities, is only of tangential importance to this case." 470 F.2d at 784. The court further cited Mr. Justice Powell's concurrence in *Branzburg*, set forth in part in note 3 *supra*.

such interest was present.²⁴ Recognizing the necessity for a case-by-case approach, Judge Kaufman weighed the litigants' weakly asserted interest with the

paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.²⁵

He concluded that the appellants had failed to establish such a compelling need as to override the precious rights embodied in the first amendment.²⁶

Since the Supreme Court's decision in *Branzburg v. Hayes*, concern over future encroachments on the freedom of the press has been widespread.²⁷ However, the *Baker* decision by the Second Circuit will

²⁴ 470 F.2d at 784. Recently, the Ninth Circuit Court of Appeals, in *United States v. Bursley*, 466 F.2d 1059 (1972), declined to apply the *Branzburg* holding to a situation wherein the defendants appeared before a grand jury, but refused to divulge the names of fellow journalists who worked on their Black Panther Party newsletter. The court ruled that the question violated the defendants' rights to freely associate with others, and had a chilling effect on freedom of the press, since the Government failed to show how the questions related to the investigation of the grand jury. The court noted Mr. Justice Powell's concurring opinion in *Branzburg v. Hayes*. See note 3 *supra*.

²⁵ 470 F.2d at 782.

²⁶ The *Baker* courts—both district and appellate—cited both federal case law and state statutes to support their reasoning that a balancing test would be the proper way to determine newsmen privilege cases. *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964), was cited as indicative of the federal interest in guaranteeing a robust press, 470 F.2d at 782, and the shield laws of New York and Illinois, the forum state of the deposition and the underlying civil rights action, were cited, although the court was careful to note that they were not conclusive on this action. *Id.*

The Illinois statute, ILL. REV. STAT., ch. 51, § 111 *et seq.* (1971), sets forth a qualified privilege, and embodies a balancing test:

The court, under the Illinois scheme, is directed to consider the nature of the proceeding, and the possibility of getting the information through other means. The court may order disclosure only if "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved.

Id. § 117. The New York statute, N.Y. CIVIL RIGHTS LAW § 79-H (McKinney 1971), provides in pertinent part:

[N]o professional journalist . . . shall be adjudged in contempt by any court . . . for refusing or failing to disclose . . . the source of any such news coming into his possession in the course of gathering or obtaining news for publication . . . in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

For an analysis of the New York statute see *People v. Wolf*, 39 App. Div. 2d 864, 333 N.Y.S.2d 299 (1st Dep't 1972).

The appellants argued that the district court had erroneously considered the state shield laws in reaching its decision. Appellant's Brief at 17. The appellate court rejected this argument, stating that reference to state law was properly had to "inform [the] judgment" of the court "concerning the appropriate federal public policy in the area of a newsmen's privilege." 470 F.2d at 781.

²⁷ A difficult question was raised recently when District Judge Hoffman granted authority to former Vice President Agnew's lawyers "to conduct their own investigation, with full power of subpoena, into the alleged Justice Department leaks of information."

serve to calm those fears by limiting access to a reporter's sources in civil cases only to those whose disclosure goes to the heart of the underlying case and only in instances where independent effort to discover the desired information has been made. Moreover, the clarity with which *Baker* balanced the relevant interests will serve as an example for the method of inquiry to be utilized in future litigation involving the newsman's privilege.

JUSTICIABILITY OF PRESIDENTIAL WAR POWER

Holtzman v. Schlesinger

The constitutionality of United States military activity in Indochina pursuant to executive mandate¹ has been the subject of considerable discussion² and litigation in the federal courts.³ The extent of

N.Y. Times, Oct. 4, 1973, at 1, col. 4. This action was precipitated by leaks of information pertaining to the investigation of criminal activity allegedly attributed to Mr. Agnew. Eight subpoenas were served on various news organizations and reporters in a search for sources close to the investigation. N.Y. Times, Oct. 6, 1973, at 1, col. 6. Although the probable controversy was eventually mooted when the Vice President resigned, very serious questions were involved. In light of the *Baker* and *Branzburg* approach it is clear that a prospective criminal defendant's interest in securing an impartial jury may well outweigh the privilege accorded the media to protect their sources.

¹ Presidential war powers derive principally from article II, section 2 of the Constitution providing that "The President shall be Commander in Chief of the Army and Navy . . ." and the reservation of presidential war making power in the article I, section 8 grant to Congress of the power "to declare war." In the debate over whether Congress should be granted the power to "make" or "declare" war, the framers desired to allow some war making power to reside in the Executive, especially the power to repulse sudden attacks without first consulting Congress. 2 RECORDS OF THE FEDERAL CONVENTION OF 1789 at 318-19 (M. Farrand ed. 1911). See Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 5-8 (1972).

² See, e.g., Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 13232-33 (daily ed. June 22, 1966); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Van Alstyne, *Congress, the President and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); 116 CONG. REC. 7117-23 (daily ed. May 13, 1970) (Yale Paper, Pt. 1); 116 CONG. REC. 759-93 (daily ed. May 21, 1970) (Yale Paper, Pt. 2); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); (Special Issue) 50 B.U.L. REV. (1970).

³ *Massachusetts v. Laird*, 400 U.S. 886 (1970) (original jurisdiction); *Holtzman v. Schlesinger*, 484 F.2d 1307, rehearing en banc denied, — F.2d — (2d Cir. 1973); *Mitchell v. Laird*, — F.2d — (D.C. Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Mattola v. Nixon*, 464 F.2d 178 (9th Cir. 1972), rev'g 318 F. Supp. 538 (N.D. Cal. 1970); *Sarnoff v. Connally*, 457 F.2d 809 (9th Cir.) (per curiam), cert. denied, 409 U.S. 929 (1972); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971); *Pietsch v. President of the United States*, 434 F.2d 861 (2d Cir. 1970), cert. denied, 403 U.S. 920 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970);