Reporters' Privilege and the First Amendment

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REPORTER’S PRIVILEGE AND THE FIRST AMENDMENT*

INTRODUCTION

The right of a reporter to refuse to disclose the source and substance of confidential information obtained in the course of gathering news recently has been the subject of heated debate. Proponents have identified the three avenues available for the establishment of a reporter’s privilege: common law recognition, legislative action, and constitutional recognition. Militating against acceptance of a common law privilege, however, is the well-established principle that “the public . . . has a right to every man’s evidence.” Deviations from this rule are “distinctly exceptional” and do not include a reporter’s privilege. Thus, no jurisdiction has ever acknowledged a common law reporter’s privilege. Due to the absence of a

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* This article is a student work prepared by Angela M. DeMeo, a member of the St. John’s Law Review and the St. Thomas More Institute for Legal Research.


2 See Note, Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen, 11 TULSA L.J. 258 (1975) [hereinafter cited as Branzburg Revisited].

3 8 J. Wigmore, EVIDENCE § 2192 (rev. ed. McNaughton 1961) [hereinafter cited as Wigmore].

4 Id. See United States v. Nixon, 418 U.S. 683 (1974), wherein the Supreme Court stated that “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” Id. at 710 (footnote omitted).

5 According to Wigmore, there are four elements that must be present for a communication to be recognized as privileged under the common law: First, the communication must be confidential. Second, confidentiality must be necessary to the relationship between the parties to the communication. Third, the relationship between these parties must be one which the community deems worthy of protection. Fourth, the possible adverse impact that nonrecognition of a privilege would have upon the relationship must outweigh the potential benefit to be derived from disclosure. Wigmore, supra note 3, § 2285. Wigmore expressly concluded that the reporter-confidential informant situation does not satisfy these four requirements. Id. § 2286.

6 The New York Court of Appeals decision in People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936), is illustrative of the approach of the state courts to the question of a reporter’s common law privilege. In Mooney, a reporter had refused to testify before a grand jury investigating gambling offenses. In refusing to recognize a common law privilege for reporters, the court reasoned that the general policy of the law is to require disclosure by all witnesses. As an exception to this rule, in certain situations a privilege from
common law privilege, several states have enacted statutes providing some degree of protection for a newsman's confidential information. Unfortunately, these statutes lack uniformity in scope and type of qualifications imposed. Since most press communications involve contacts with more
disclosure exists. Since these privileges often interfere with the administration of justice, the court found, the trend is to restrict rather than expand the classes of individuals to whom a privilege is granted. The Court of Appeals concluded that if a reporter's privilege is to be recognized, the legislature is the proper body to create it. *Id.* at 294, 199 N.E. at 416. Courts in other jurisdictions have reached similar results. See *Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913).

In addition to not extending a common law evidentiary privilege to reporters, courts have rejected other arguments against compelled disclosure of confidential information. Thus, although it might violate a code of ethics, or office rules, or result in the loss of employment, disclosure may be ordered. See, e.g., *In re* Wayne, 4 Haw. Dist. Ct. 475 (1914); Clein v. State, 52 So. 2d 117, 120 (Fla. 1950) (en banc); People *ex rel* Phelps v. Fancher, 2 Hun. 226 (N.Y. Gen. T. 1st Dep't 1874); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911). See generally Comment, *Compulsory Disclosure of a Newsman's Source: A Compromise Proposal*, 54 Nw. U.L. Rev. 243, 247-48 (1959).


* Under some statutes, a reporter is afforded an absolute privilege. See, e.g., ALA. Code tit. 7, § 370 (1958); CAL. EVID. CODE § 1070 (Deering Supp. 1977); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1976); NEV. REV. STAT. § 49.275 (1975); TENN. CODE ANN. § 24-113 (Supp. 1976). Other states place a limitation upon the exercise of the privilege. See, e.g., ALASKA STAT. § 09.25.150 (1973) (privilege yields if a miscarriage of justice would result or if contrary to public interest); ARK. STAT. ANN. § 43-917 (1964) (no privilege if bad faith with malice shown and publication not in the interest of public welfare); LA. REV. STAT. ANN. §§ 45.1451-1454 (West Supp. 1977) (disclosure permitted when essential to public interest); N.M. STAT. ANN. §20-1-12.1 (Supp. 1975) (privacy available unless disclosure essential to prevent injustice); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976) (privacy available unless general or specific law to the contrary exists); N.D. CENT. CODE § 31-01-06.2 (1976) (no privilege if failure to disclose would cause a miscarriage of justice); OKLA. STAT. ANN. tit. 12, §§ 385.1-3 (West Supp. 1976-1977) (privileges available unless relevant to significant issue in action and no alternate source exists). Moreover, in some states only the source of the reporter's information is privileged. See, e.g., ILL. STAT. ANN. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1977); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1976); KY. REV. STAT. § 421.100 (1970); LA. REV. STAT. ANN. §§ 45.1451-1454 (West Supp. 1977); N.J. STAT. ANN. § 2A:84A-21 (West 1976); PA. STAT. ANN. tit. 28, § 330 (Purdon Supp. 1977-1978), while in other jurisdictions the information
than one state, it is difficult for a newsman to rely on a state's statutory privilege.9

The claim to a constitutional reporter's privilege is based on the first amendment's guarantee of freedom of the press. To safeguard the public's right to know, the newsgathering process has been afforded protection under the first amendment. Advocates of a privilege for reporters contend that this protection should be extended to ensure the confidentiality of a reporter's information and sources. Since fear of exposure deters sources from revealing their information to reporters, it is argued, the failure to recognize a reporter's privilege significantly impairs the ability of the press to keep the public informed.10 Opponents of the privilege counter this

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9 See Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953), involving a libel action commenced in a federal court in New York prior to the enactment of that state's shield law. Sparrow, a reporter, had refused to disclose the source of his information during pretrial examination in Alabama, a shield law state. The allegedly libelous article concerned activities which occurred in Alabama, but the article was published in New York. The court applied the Alabama shield statute since the deposition had been sought in that state. In a later case, Cepeda v. Cohane, 233 F. Supp. 485 (S.D.N.Y. 1964), it was held that in pretrial examinations the privilege rule of the forum state governs. Cf. Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956) (rule of the forum state applied to quash subpoena and suppress a deposition taken in forum state for exclusive use in litigation in second state).

10 U.S. CONST. amend. I provides that "Congress shall make no law ... abridging the freedom of speech, or of the press ... ."


12 See Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1397 (D.D.C. 1973) (mem.). But see Caldero v. Tribune Publishing, 45 U.S.L.W. 2429 (Idaho Mar. 4, 1977), wherein the court held a reporter in contempt of court for refusing to reveal his informant's identity during pretrial discovery. The newsman had argued that "disclosure of information acquired by a reporter from confidential sources would have a 'chilling effect' on the ability of reporters to utilize such sources, and would therefore inhibit the ability of the press to gather news and
argument by pointing out that there is scant evidence indicating that news sources actually are silenced due to fear of disclosure. Additionally, it is urged that a privilege would be abused by newsmen and result in injury to the judicial process. Nonetheless, some courts recently have evinced a marked tendency to recognize, in certain instances, a qualified constitutional privilege for reporters. The purposes of this Note are to trace the historical development of the concept of a constitutional privilege for reporters and to ascertain its current status.

**HISTORICAL DEVELOPMENT**

*Garland v. Torre*

A significant case in the development of a constitutional privilege for reporters is *Garland v. Torre.* There, Judy Garland commenced an action against CBS, asserting that a CBS executive had been the source of a libelous newspaper column. The author of the column was called to testify, but she refused to reveal the source of her information. On appeal from a conviction for criminal contempt, the reporter argued that the identity of her source was privileged under the first amendment.

The Court of Appeals for the Second Circuit sustained the conviction, holding that a reporter may be compelled to disclose his sources when such information is material, relevant, and goes to the "heart" of the plaintiff's claim. In reaching this result, the court balanced "the ... public interest in the fair administration of justice" against the possible impairment of the free flow of news that might be occasioned by compelled disclosure and concluded that the former should prevail in this instance. The Second Circuit did suggest, however, that if the "identity of the news source is of doubtful relevance or materiality," it may be constitutionally protected.

In the years following *Garland,* few cases addressed the constitutional issue. The courts that reached the question often applied a balancing

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4\259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).
5\259 F.2d at 547-48.
6\Id. at 550.
7\Id. at 548-49.
8\Id. at 549-50. The *Garland* court also indicated that disclosure might not be ordered in a situation where "the judicial process [is being used] to force a wholesale disclosure of a newspaper's confidential sources of news . . . ." Id. at 549.
approach similar to the Second Circuit's and concluded that the need for testimony outweighed any resulting encroachment upon newsgathering. Consequently, the claim to a constitutional reporter's privilege usually was rejected. At this time, however, the demand for a reporter's privilege had not reached its peak. In the late 1960's, the United States Department of Justice, in what appears to be a departure from its past practices, issued a large number of press subpoenas. As a result, the issue of a newsmen's privilege became a topic of intense media discussion and public concern. It was in this setting that a case concerning the reporter's privilege controversy, Branzburg v. Hayes, reached the Supreme Court.


3 See note 22 supra.

4 See, e.g., United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (newspapers, television stations and magazines served with subpoenas covering all items in their possession connected with the Democratic National Convention); Note, Beyond Branzburg: The Continuing Quest For a Reporter's Privilege, 24 SYRACUSE L. REV. 731, 739-40 (1973); Comment, The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law, 24 U.C.L.A. L. REV. 160 (1976) wherein it is noted that in the first few years of the Nixon administration

124 subpoenas were served on either CBS or NBC . . . . The Chicago Sun-Times and the Chicago Daily News received a total of 30 subpoenas — two thirds of them by government officials — and one reporter, Duane Hall of the Sun-Times was served in 11 separate proceedings within 18 months. . . . In addition, the Chicago Tribune estimated that from 1967 through 1972, approximately 75 to 100 “dragnet subpoenas” were served on the newspaper or its employees.

Id. at 162 n.13 (citations omitted).


6 408 U.S. 665 (1972). The Branzburg decision involved three cases consolidated on appeal. In Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), reved sub nom. Branzburg v. Hayes, 408 U.S. 665 (1972), the Court of Appeals for the Ninth Circuit had held that a reporter is entitled to a privilege unless it is established that the state has a compelling and overriding interest in the reporter's information:

"When the exercise of the grand jury power of testimonial compulsion so necessary to the effective functioning of the court may impinge upon or repress First Amendment rights . . . which centuries of experience have found to be indispensable to the survival of a free society, such power shall not be exercised . . . until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means."

434 F.2d at 1086, (quoting In re Caldwell, 311 F. Supp. 358, 360 (N.D. Cal. 1970)).

In Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), aff'd sub nom. Branzburg v. Hayes, 408 U.S. 665 (1972), a reporter for the Louisville Courier Journal had refused to disclose the identity of his source to a grand jury investigating drug activity in Kentucky. The Kentucky court held that since the reporter was a witness to the criminal conduct being investigated,
Branzburg v. Hayes

In *Branzburg*, the Supreme Court, in a five to four decision, held that the first amendment does not relieve a newspaper reporter of the obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation.\(^27\) Reasoning that "the First Amendment does not invalidate every incidental burdening of the press,"\(^28\) the Court concluded that the public interest in fair and effective law enforcement overrides the consequential, but uncertain, burden on newsgathering that results from compelled disclosure.\(^29\) The *Branzburg* Court indicated, however, that since "news gathering is not without its First Amendment protection,"\(^3\) a different result might be reached if the grand jury investigation was instituted or conducted in bad faith: "Official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."\(^31\) Moreover, the majority pointed out that its decision does not preclude the enactment of shield legislation by Congress and state legislatures nor prevent state courts from recognizing a newsman's privilege under their own constitutions.\(^32\)

the first amendment did not require that the reporter be exempted from testifying. 461 S.W.2d at 347-48.

Finally, *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972), involved a photographer who had refused to relate observations made in a Black Panther headquarters to a grand jury investigating civil disorders. 358 Mass. at 605, 266 N.E.2d at 298. The court held that the reporter was not entitled to a constitutional privilege, reasoning that this result would only have an "indirect, theoretical, and uncertain" influence on newsgathering. *Id.* at 612, 266 N.E.2d at 302.\(^{29}\)\(^{33}\)\(^{34}\)

\(^{27}\) 408 U.S. at 690.

\(^{28}\) *Id.* at 682.

\(^{29}\) *Id.* at 690. In addition, the Court stated that disclosure would not necessarily lead to a complete unavailability of news sources, but conceded that it would impede the flow of news by deterring some individuals from furnishing information to newsmen. *See id.* at 693-94.

\(^{30}\) *Id.* at 707. In the course of its opinion, the Court emphasized the preeminent position of first amendment freedoms:

> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly

*Id.* at 681.

\(^{31}\) *Id.* at 707-08.

\(^{32}\) At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and constru-
REPORTER’S PRIVILEGE

Justice Powell, in a brief but significant concurring opinion, emphasized the limited nature of the holding. Declaring that “the courts will be available to newsmen . . . [when] legitimate First Amendment interests require protection,” he stressed that the Court had not abrogated the constitutional rights of newsmen with respect to newsgathering. Instead, Justice Powell suggested, the Branzburg decision indicates that a claim of privilege should be judged on a case-by-case basis “by . . . striking . . . a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” This proposed balancing approach has proven to be extremely influential in subsequent decisions.

Dissenting from the majority’s refusal to recognize a privilege, Justice Stewart contended that newsmen are entitled to a limited testimonial privilege under the first amendment. In Justice Stewart’s opinion, protection of the newsgathering process is necessary to guarantee freedom of the press. Utilizing a balancing approach, he formulated a three-pronged test under which a reporter is granted a privilege unless the interest in protecting first amendment freedoms is outweighed by the public interest in the administration of justice:

When a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsmen has information that 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.

Despite the willingness of the concurring and dissenting Justices to

Id. at 706.
Id. at 709 (Powell, J., concurring).
Id. at 710 (Powell, J., concurring).
Id. (Powell, J., concurring).
408 U.S. at 725 (Stewart, J., dissenting).
Id. at 727-28 (Stewart, J., dissenting).
Id. at 743 (Stewart, J., dissenting) (footnotes omitted). The majority rejected an approach similar to the one proposed by Justice Stewart. See id. at 701-02. The Court suggested that the adoption of such an approach would force the state to establish that a crime has been committed and that the reporter is the sole source of the relevant information—in effect perform the function of the grand jury—as a prerequisite to the effective operation of the grand jury. See id. at 702; Note, Reporter’s Privilege—Guardian of the People’s Right to Know?, 11 New England L. Rev. 405, 413 (1976).
Justice Douglas authored a separate dissenting opinion. 408 U.S. at 711 (Douglas, J.,
recognize a limited reporter's privilege in certain situations, post-
Branzburg decisions continually have compelled journalists to disclose in-
formation to a grand jury in the absence of bad faith on the part of the
government. In response to Branzburg, members of the media called for
the adoption of absolute shield laws, and many states did enact shield
statutes. Newsmen must still look to the judiciary, however, for the estab-
ishment of a uniform privilege.

dissenting). According to Mr. Justice Douglas, a reporter "has an absolute right not to appear
before a grand jury . . . ." Id. at 712. Reasoning that the interest in the free flow of information
outweighs the need for a reporter's testimony, Justice Douglas found that a first amend-
ment privilege would be unavailable only when the reporter himself is implicated in the crime
being investigated by the grand jury. Id. Since the journalist is entitled to a fifth amendment
privilege in the event that he is accused of criminal activity, the Justice concluded, the
newsmen's privilege to refuse to testify before a grand jury is absolute. Id. In the course of
his opinion, Justice Douglas criticized the use of a balancing approach when first amendment
rights are at issue, stating that "all of the 'balancing' was done by those who wrote the Bill
of Rights. . . . [They cast] the First Amendment in absolute terms . . . ." Id. at 713.

See, e.g., Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) (per curiam); Lightman v.
A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973); In re Bridge, 120 N.J. Super. 460, 295 A.2d
991 (1973).

If a reporter refuses to disclose confidential information to a grand jury, he may be
imprisoned until he relents or the grand jury term expires. See, e.g., 28 U.S.C. § 1826 (1970)
which provides:

(a) Whenever a witness . . . refuses without just cause . . . to testify . . . the court,

may summarily order his confinement at a suitable place until such time as the
witness is willing to give such testimony . . . . No period of such confinement shall
exceed the life of —

(2) the term of the grand jury, . . . but in no event shall such confinement

exceed eighteen months.

In fact, several journalists have been jailed for refusing to divulge their sources. See, e.g.,
denied, 427 U.S. 912 (1976) (four newsmen held in contempt and required to serve jail terms);

Immediately after Branzburg, the debate concerning a reporter's privilege intensified, as
is suggested by the large volume of articles which appeared. See, e.g., Humel, A Chilling Effect
on the Press, N.Y. Times, Dec. 17, 1972, §6 (Magazine), at 13; Isaacs, Beyond the Caldwell
Decision:—There May Be Worse to Come from This Court', Colum. Journalism Rev. 18
(Sept./Oct. 1972); Rosenthal, The Press Needs a Slogan — 'Save the First Amendment,' N.Y.
Times, Feb. 11, 1973, §6 (Magazine), at 16; Comment, Branzburg v. Hayes: A Need for
Statutory Protection of News Sources, 61 Ky. L.J. 551 (1973); Comment, Branzburg, Caldwell

See, e.g., Demand for Absolute Privilege Marks Final Hearings on News Protection, [1972]
12 Crim. L. Rep. (BNA) 2125. See generally Califano, Shielding the Press, New Republic, May
(1974); Comment, Newsmen's Privilege Against Compulsory Disclosure of Sources in Civil

REPORTER'S PRIVILEGE

THE CURRENT STATUS OF A CONSTITUTIONAL PRIVILEGE

Uncertainty exists concerning whether Branzburg completely precludes the recognition of a constitutional privilege for reporters. Since the opinion is subject to varying interpretations, privilege proponents have been successful in claiming a qualified privilege in both civil and criminal proceedings. An analysis of the decisions concerning the existence of a privilege in these different proceedings reveals, it is submitted, a developing trend on the part of courts to sustain a qualified constitutional reporter's privilege.

The Controversy In Grand Jury Proceedings

After Branzburg, the possibility that a constitutional privilege would be established to protect a reporter's sources and information in the grand jury room became doubtful as courts in both New Jersey and Maryland summarily dismissed first amendment claims. The New Jersey Superior Court, in In re Bridge, held that Branzburg precludes the finding of such a privilege and therefore refused to balance the competing interests.

Although a number of bills providing for a reporter's privilege have been introduced, Congress has not created a statutory privilege. See Note, Reporter's Privilege — Guardian of the People's Right to Know?, 11 NEW ENGLAND L. REV. 405, 414-15 nn.47-50 (1976). Under the Federal Rules of Evidence, federal common law is determinative of all questions of evidentiary privilege except those arising in diversity cases:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.


4 In Bridge, a reporter was held in contempt and jailed for refusing to reveal his source of information to a grand jury. In addition to rejecting Bridge's claim to a constitutional privilege, the court held that the journalist had waived his statutory privilege under N.J. STAT.
Lightman v. State, a Maryland court reached a similar result, finding that neither the United States Constitution nor the Maryland Constitution creates a privilege in the grand jury situation. The federal courts also have found that there is no privilege in a grand jury proceeding absent a showing that the investigation is being utilized to harass the press. The Court of Appeals for the Ninth Circuit, in Lewis v. United States, restated the guidelines set down in Branzburg and found that since the proceeding was conducted in good faith, no qualified first amendment privilege existed. Significantly, these decisions concern grand jury investigations of criminal activity. Therefore, it appears that a reporter will not be afforded a constitutional privilege during a grand jury proceeding which involves the investigation of a criminal matter.

When the conduct under investigation by the grand jury is not criminal in nature, however, a privilege may be granted. Recently, in Morgan v. State, the Supreme Court of Florida determined that a qualified reporter's privilege exists in such a situation. In Morgan, a grand jury had been impaneled to investigate the alleged violation of a Florida statute that proscribes disclosure of grand jury proceedings. A reporter who had...
published a synopsis of a sealed grand jury presentment was called before the grand jury and asked questions concerning the source of her information. Upon refusing to answer these questions, the reporter was adjudged guilty of contempt. Reasoning that *Branzburg* did not preclude the invocation of a constitutional privilege before a grand jury that is probing non-criminal activity, the Supreme Court of Florida reversed the conviction. Notwithstanding this decision, it appears that a reporter will be compelled to testify in a criminal grand jury proceeding.

The Controversy In Criminal Proceedings

A limited first amendment privilege was recognized in a criminal action subsequent to *Branzburg* by the Supreme Court of Vermont. In *State v. St. Peter*, a journalist apparently had received information that a drug raid was about to occur and was present at police headquarters when the raid began. The persons arrested in the raid sought disclosure of the source of the reporter's information during a pretrial discovery proceeding. The reporter refused to reveal his source, claiming that the information was privileged, irrelevant, immaterial, and unnecessary. The Vermont Supreme Court, applying a balancing test, concluded that the reporter's testimony was constitutionally protected. Under the test formulated by the court, disclosure may be compelled in a discovery proceeding when there is "no other adequately available source for the information" and the information is "relevant and material on the issue of guilt or innocence."

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Since the court limited its holding to discovery proceedings, it is unclear whether the same result would be reached if a reporter invoked the privilege at a criminal trial.

The Supreme Court of Virginia, however, in Brown v. Commonwealth, sustained the assertion of a qualified privilege at a criminal trial. The Brown defendant had appealed his murder conviction, alleging that the trial court erred in refusing to compel a reporter to reveal the source of a published account of the crime. In sustaining the determination of the lower court, the supreme court noted:

As a news-gathering mechanism, a newsman's privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment. Unknown at common law, it is a privilege related to the First Amendment and not a First Amendment right, absolute, universal, and paramount to all other rights.

This privilege is defeated, the Brown court stated, only when it conflicts with the defendant's right to a fair trial. Thus, if there are reasonable grounds to believe that the reporter's information is material to the establishment of an element of the crime or defense, to a reduction in the classification of the crime charged, or to mitigation of the penalty, the privilege will be denied. Weighing the defendant's right to a fair trial against the first amendment interests at stake, the court determined that the privilege should be recognized since the testimony sought to be obtained was not material and essential to a fair trial.

This discussion of the criminal cases involving the constitutional privilege issue seems to reveal a developing trend. Clearly, some courts will recognize a qualified privilege in a criminal proceeding. The courts that recognize the privilege often utilize a Branzburg-type balancing approach to determine its applicability. Under this test, a privilege usually will be sustained if the disclosure of information had been made to the reporter in confidence and the information is irrelevant to a fair determination of the case.

The Controversy In Civil Proceedings

Although Branzburg expressly dealt with the grand jury situation,

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60 "Since our jurisdiction is limited to the issue certified to us, our disposition must be equally limited." Id.
62 The published information was attributed to a spokesman in the sheriff's department. Id. at 756, 204 S.E.2d at 430.
63 Id. at 757, 204 S.E.2d at 431 (emphasis in original).
64 Id.
65 Id. The court stated that "[s]ince the inconsistent statements were collateral and not material, the identity of the source was irrelevant." Id. at 758, 204 S.E.2d at 431.
some courts have applied its holding to civil proceedings. Therefore, a reporter often will be able to rely on a constitutional privilege. In *Loadholtz v. Fields*, for example, the court held that in the absence of a compelling state interest a reporter may not be forced to disclose his sources. Moreover, the court found that information obtained by a reporter may be privileged, reasoning that "[t]he compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants."  

Perhaps the most significant civil case dealing with the reporter's privilege issue is *Baker v. F & F Investment*. *Baker*, which apparently is the first case to recognize a privilege in the aftermath of *Branzburg*, involved a federal class action under the Civil Rights Act. Balk, a reporter, had written an article on "block busting" in Chicago based on information from an unnamed local real estate agent. The Court of Appeals for the Second Circuit, in an unanimous decision, refused to compel the reporter to disclose the identity of his source since it was not critical to the plaintiff's case and could be obtained from other persons.

In subsequent civil cases, the courts often found a qualified privilege when a newsman's testimony was sought. The District Court for the District of Columbia, in *Democratic National Committee v. McCord*, reasoned that a "chilling effect" would result unless a constitutional privilege is recognized and therefore found that a reporter's testimony was privileged. In *Apicella v. McNeil Laboratories, Inc.*, a personal injury action,
the privilege was extended to cover the chief executive officer of a medical newsletter. The finding of privilege, however, seems to have been based on the availability of other individuals who possessed the requisite information. Finally, in a recent decision, Gilbert v. Allied Chemical Corp., the District Court for the Eastern District of Virginia ruled that during discovery a qualified privilege protects confidential sources but not unconfidential information. Gilbert seems to have afforded newsmen more protection than prior cases. In distinguishing Branzburg and finding it inapplicable to civil proceedings, the court applied a balancing approach under which information must be crucial to the case and otherwise unobtainable to be privileged. The court further stated that only in "rare and compelling circumstances" would there be sufficient grounds to defeat the first amendment privilege.

Based upon this analysis of the civil cases dealing with the question of a constitutional privilege, it may be concluded that it is more probable that a journalist will be permitted a privilege in civil proceedings than in criminal proceedings; unless the reporter is a party to the action, there is a likelihood he will be able to claim a qualified privilege in a civil action.

The Modern Trend

A review of the recent case law reveals that the current status of a constitutional reporter's privilege is uncertain; the future of the privilege seems equally unpredictable. The presence of certain factors, however, creates a greater probability that a court will find a newsman's information privileged. In a civil proceeding, a claim of privilege has a greater chance to "bind itself to the possible 'chilling effect' the enforcement of the broad subpoenas would have on the flow of information to the press . . ." Id. at 1397. The court pointed out that this privilege might be defeated upon a showing that the need for the information is compelling and that there are no other sources available. Id. at 1398.

66 F.R.D. 78 (E.D.N.Y. 1975) (mem.), wherein the plaintiff commenced an action against a drug manufacturer, claiming he was injured by one of the defendant's products. An article enumerating the dangers of this drug had appeared in a medical newsletter. Both the drug manufacturer and the plaintiff sought to obtain the source of the article. The court refused to compel disclosure of the source unless it could be shown that the information was unobtainable elsewhere. Id. at 80, 85.

71 See id. at 85, 87.


73 Id. at 511.

75 Id. at 508-10.

81 Id. at 508. For a discussion of Gilbert see Note, Shaping the Contours of the Newsperson's Privilege—Gilbert v. Allied Chemical Corp., 26 DePaul L. Rev. 185 (1976).

Courts have refused to grant privilege to a reporter in an action in which he is a party. See, e.g., Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974); Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973). It has been said that the recognition of a privilege in such a situation would result in "immunity from practically all responsibility for libelous publications by the news media . . ." Carey v. Hume, 492 F.2d 631, 640 (D.C. Cir.) (MacKinnon, J., concurring), cert. dismissed, 417 U.S. 938 (1974).
of being sustained if the reporter is not a party to the action, the information is available from other persons, and the information does not go to the "heart" of the plaintiff's action. When the proceeding is criminal in nature, the probability that a claim of privilege will be upheld is weaker. In addition to the elements required in civil cases, it usually is necessary to establish that the information was furnished to the newsman in confidence and that it is not material to a determination of the defendant's innocence or guilt for an asserted privilege to be sustained. These additional requirements are necessary due to the public interest in controlling crime and the defendant's right to have compulsory process for obtaining witnesses. In a grand jury proceeding, a privilege usually will not be sustained unless the matter under investigation by the grand jury is not criminal in nature or there is no valid reason for seeking the reporter's testimony.

**Conclusion**

It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will [the] people . . . . Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press.

Although it seems accurate to conclude that a reliable reporter's privilege has not yet developed, it must be acknowledged that in the few short years since *Branzburg*, a decision that could have been construed to preclude the recognition of a constitutional privilege, the concept of a first amendment reporter's privilege has gained significant judicial recognition. In addition, the United States Department of Justice has acknowledged the necessity for at least a qualified reporter's privilege. Therefore, it appears that there
is a growing trend in the direction of recognizing a constitutional privilege for reporters. Hopefully, the Supreme Court will be presented with the issue in the near future and will determine that a qualified reporter's privilege is mandated by the first amendment. Until such time, reporters publishing confidential material will not be assured of any protection in the event that they are called upon to testify.

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

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