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I am submitting herewith a dissertation written by Michael William Sunner entitled "Newsmen's Privilege and Branzburg v. Hayes: From Legal Antecedents to Recent Political Effects." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

Otis H. Stephens, Major Professor

We have read this dissertation and recommend its acceptance:

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NEWSMEN'S PRIVILEGE AND BRANZBURG V. HAYES: FROM LEGAL ANTECEDENTS TO RECENT POLITICAL EFFECTS

A Dissertation

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ABSTRACT

This study explores the apparent relationship between institutional decision-making expressly by the Supreme Court, and the behavioral consequences or effects attributable to such decisions. Focusing on the United States Supreme Court's pronouncement in Branzburg v. Hayes which refused to recognize a constitutional newsmen's privilege, we attempted to discern appreciable discisional effects, if any, on behaviors of newsmen at the local level.

Subsequent to the Branzburg decision, it was widely rumored that newsmen feared a massive attempt by law enforcement authorities to use the decision as a steppingstone to force disclosure of confidential sources and information. Such an effort, it was thought, might materially disrupt newsmen's relationships with their confidential informants or destroy any opportunity to establish contacts with other sources. Evidently, many members of the press strongly believed that if and when authorities moved to "annex the press" as an investigative arm of government, this condition would tend to "dry up" news sources and invariably restrict the "free flow of news to the public."

Hence, the scope of our study focuses primarily on judicial impact and attempts to determine as accurately as possible: (1) the behavioral consequences or effects attributable to Branzburg; (2) the nature of public policy resulting from institutional decision; and (3) to what extent decision-making has affected the press-government relationship, the free flow of news to the public and administration of the criminal law.

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CHAPTER I

INTRODUCTION

Political scientists have long questioned the necessity and appropriateness of developing a "theory of judicial impact." The search for impact theory, as one author has pointed out, may not be "conceptually justified or empirically possible."[1] However, if a theory of impact is to gain respectability within the discipline of political science, it must include: (1) a set of generalizations or theoretical assumptions, (2) a framework for interrelating those generalizations, and (3) suggested areas for future research.[2]

This paper does not attempt to build any grand scale theory of judicial impact or conceptual framework for interrelating accepted generalizations about impact. Instead, we adopt a more modest "public policy analysis" approach which attempts to account for a number of observable consequences flowing from a single United States Supreme Court decision. Furthermore, in the course of our investigation, we offer a "twist" to traditional impact research by attempting to distinguish between judicial decisions markedly affecting behavioral realities from those having limited impacts. We strongly believe that

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[1]Becker, Toward a Theory of Impact: Theoretical and Methodological Concerns, in The Impact of Supreme Court Decisions 213 (2d ed. T. Becker and M. Feeley 1973).

[2]Feeley, Power, Impact, and the Supreme Court, in The Impact of Supreme Court Decisions 227 (2d ed. T. Becker and M. Feeley 1973).

there is a definite need for scholarship which seeks to systematically classify public policy decisions on a basis of whether or not they manifestly alter or affect social behaviors. Such a classification schema requires micro-analysis of phenomena at the local level after the "targets" of institutional policy decisions have interacted with decisional data. Public policy analysis should not only be concerned with descriptions of decisional impacts, but should also offer some clues as to why those impacts or effects resulted.

Focusing on the need for a classification schema for public policy outputs, we devised a two-fold categorization especially for United States Supreme Court policy pronouncements. In this schema, Court policy statements may be classified as either action or non-action oriented. Theoretically, when a public institution delivers a policy statement which markedly influences social actions, the decision would be classified as action oriented. However, when a public institution delivers a policy statement which produces noticeable but limited social reactions or responses, the decision would be classified as non-action oriented. Adherence to a major two-fold schema for purposes of classifying policy analysis studies might serve to narrow the range of inter and intra disciplinary disagreement over the scope of impact flowing from such institutional policy-making decisions as Brown v. Board of Education.[3]

We theorize that a peculiar dimension of non-action oriented decisions is that such decisions do not manifestly affect or alter

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[3]347 U.S. 483 (1954).

established behavior patterns locally, and the observable consequences apparently resulting therefrom are chiefly symbolic rather than chiefly substantive. We define symbolic effects or consequences as human actions or communications arising subsequent to a Supreme Court or any other institutional decision which are directed toward some goal such as compliance, implementation or evasion; however, these human actions or communications rarely involve any real or palpable changes or adjustments in behavior.

Substantive impacts or effects, on the other hand, are human actions or communications arising subsequent to institutional decision-making which are directed toward decisional compliance, implementation or evasion, and, in fact, result in appreciable changes or modifications in human behavior at the local level. Both action and non-action oriented decisions may have symbolic and substantive effects concurrently or sequentially. Nevertheless, the nature of impact, whether chiefly symbolic or substantive, ultimately determines decisional classification as actional or non-actional.

How do we determine decisional classification? Unfortunately, there is no clear answer to this question, and we only offer several examples for each category as guides to others who might wish to pursue this idea further. For example, we would classify Miranda v. Arizona[4] as non-action oriented because there is strong evidence which suggests that the United States Supreme Court decision had little impact at the local level where police and alleged criminals interact. Interestingly

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[4]384 U.S. 436 (1966).

enough, many feared that, substantively, Miranda would impair and frustrate police investigative activities and serve to disrupt the effective functioning of the criminal justice system. Others praised the Warren Court for taking the necessary steps toward implementing guaranteed constitutional safeguards prohibiting police investigative abuses. However, the accumulated findings of certain researchers support a third view of Miranda, namely, that the Court's holding therein was not very "successful in altering the behavioral realities at the station house."[5]

Another case in support of our theory is Brown v. Board of Education.[6] We would also classify this decision as non-action oriented because of slow-paced and token desegregation which followed the Court's 1954 decision. While Brown's legal significance was monumental, i.e., the outlawing of separate but equal public educational facilities, its actual impact on day to day behaviors has been limited. Desegregation of public schools has not come quietly or quickly because of deep-seated societal racial animosities, the flight of whites from urban centers to surrounding suburbs and a general reluctance of middle class whites to send their children to racially integrated schools.

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[5]Funston, Symposium, The Burger Court: New Directions in Judicial Policy-making, 23 Emory L.J. 643, 651 (1974). See further Medalie, Zeitz and Alexander, Custodial Policy Interrogations in Our Nation's Capital: The Attempt to Implement Miranda, 66 (Mich. L. Rev. 1347 (1968). See also, O. Stephens, The Supreme Court and Confessions of Guilt (1973).

[6]347 U.S. 483 (1954).

Both decisions augured propitiously for civil liberties in the United States. Brown's command to desegregate with "all due deliberate speed"[7] and Miranda's instruction that the accused's right to counsel operates in police stations as well as in federal and state courtrooms[8] were designed to infuse "new" meaning into the Constitution. Through these and other related decisions, the Warren Court attempted to induce behavioral changes within educational and law enforcement systems. We most emphatically argue that neither Brown nor Miranda have manifestly altered extant behavioral realities at the local level. Certainly, school systems in most areas have "integrated" classrooms, however, de facto segregation based essentially on housing patterns continues. Furthermore, the Miranda warnings generally have not, as many feared, helped defendants to avoid prosecution, and the decision has had little impact on defendants' decisions to seek either post-arrest counsel or to remain silent.[9]

Symbolic desegregation (token integration) persists throughout the land for whatever reasons while Miranda's "safeguards" serve as perfunctory post-arrest reading literature. These decisions created furor and massive resistance against compliance, but long-term behavioral realities were not substantially altered. The Brown and Miranda decisions, from our perspective, have led to primarily symbolic impacts

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[7]Brown v. Board of Education, 349 U.S. 294 (1955).

[8]384 U.S. 436, 442 (1966).

[9]See especially, Medalie, Zeitz and Alexander, Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda, in The Impact of Supreme Court Decisions 148-49 (2d ed. T. Becker and M. Feeley 1973).

within the political system, and Court attempts to infuse "new" meaning into the Constitution while effecting broad behavioral changes within educational and law enforcement systems have largely fallen short. On the other side of the coin, we suggest that action oriented judicial decisions markedly influence social life. For example, Chief Justice Marshall's rejection of the narrow etymological connotation given to the word "commerce" in Gibbons v. Ogden[10] profoundly influenced the flow of commerce and "aided in the establishment of the first American common market."[11] Furthermore, the Granger Cases presaged Congress' entry into the rate regulation field in order to curb the abuses of the rail lines in the Middle West. These several judicial decisions left a lasting imprimatur on the economic and social structures of the United States.[12]

A more recent example of action oriented decision-making is in re Gault.[13] Proceeding through Gault, the Court established certain

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[10] 9 Wheat. 1 (1824).

[11] S. Wasby, The Impact of the United States Supreme Court: Some Perspectives 6 (1970).

[12] Since businesses were locally owned, the Court initially upheld state laws as not constituting a burden on interstate commerce. See Munn v. Illinois, 94 U.S. 113 (1877); Chicago B. & Q. R. Co. v. Illinois, 94 U.S. 155 (1877); Peik v. Chicago & Nw. Ry. Co., 94 U.S. 164 (1877); and Pickard v. Pullman Southern Car. Co., 117 (U.S. 34 (1896). After the various business panics of the 1870's and 1880's drove numerous small companies into bankruptcy which led to consolidation, great interstate systems emerged. Consequently, the Court ruled in 1886 that states could not set charges for carriage even within their own boundaries of those goods brought from outside the state or destined to points outside for that power was exclusively with the Congress. See Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886).

[13] 387 U.S. 1 (1967).

juvenile proceedings as criminal in nature thus bringing juveniles within the Constitution's protective penumbra.

One method of determining impact with respect to Gault, is to measure the subsequent increase in juvenile adversarial proceedings or where alleged delinquents are represented by counsel (either individually retained or court appointed). While one author has found that the manner in which constitutional rights were read to juveniles undermined the "spirit" of Gault,[14] we believe that the post-decisional rise in adversarial proceedings suggests a change in the manner in which juvenile authorities and police handle juvenile offender cases. Consequently, with evidence pointing to the fact that local behaviors have changed as a consequence of judicial decision-making, we classify Gault as action-oriented.[15]

Consequently, this dissertation examines judicial impact from the perspective that Court decisions markedly affecting behavioral realities (either through compliance, implementation or evasion) are best described as action oriented, and decisions having limited if any effects on normal interpersonal or group behaviors at the local level are best described as non-action oriented.

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[14]See Lefstein, Stapleton and Teitlebaum, In Search of Juvenile Justice: Gault and Its Implementation, 3 Law and Society Review 491-562 (1969).

[15]In a recent survey conducted under the auspices of the Georgia State Crime Commission, Bibb County Juvenile Court officials reported an estimated 50 percent increase in adversarial cases in the years following Gault. As of 1975, the Juvenile Court reported that 90 percent of all cases were adversarial, i.e., juvenile was represented by counsel at the pre-trial and trial stages.

We theorize that Branzburg v. Hayes[16] has had a limited impact on behavioral realities at the local level thereby typifying non-action oriented decision-making. We base this argument on evidence suggesting that the daily interactions between newsmen and their confidential sources and those interactions governing newsmen-law enforcement relationships have gone untouched by Court rule-making in this particular instance. These multiple relationships continue to be governed, for the most part, by the abilities and willingness of each group to satisfy the others' basic information needs.

Institutional actions arising in the wake of Branzburg were primarily legislative and judicial but symbolic in nature--unrelated to newsgathering locally. However, these "symbolic effects" visibly lessened the rhetorical intensity of the newsmen's privilege conflict. Legislative related responses to Court policy-making included Congressional consideration of a federal shield law, press lobbying activities at the state and national levels and shield law actions within several states. Judicially related responses involved almost uniform lower court compliance with Branzburg in both federal and state judiciaries.

Our argument that Branzburg has had little, if any, palpable effects on local behavioral realities rests on several empirical findings. For example, Gordon's research reported on selected law enforcement attitudes concerning newsmen's privilege in the post-Branzburg period.[17] The author reported that county prosecutors and police chiefs

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[16] 408 U.S. 665 (1972).

[17] D. Gordon, Newsmen's Privilege and the Law (1974).

did not perceive newsmen's privilege as a troublesome issue. Gordon's evidence showed that when requested, newsmen generally provided law enforcement officials their confidential information on a voluntary basis.[18]

Blasi's pre-Branzburg study focused on the relationship between shield laws and the flow of confidential information to the public. His survey data led him to conclude that despite the increase in state shields and the growing support for newsmen's privilege, no significant relationship emerged between the presence or absence of shields and the frequency with which newsmen were compelled to disclose confidential sources. Blasi also remarked that there was no compelling evidence which could link the practice of compulsory disclosure with a diminished flow of news to the public.[19]

Gordon found no apparent connection between the level of cooperation between law enforcement officials and newsmen and the presence or absence of state shield laws.[20] He did note, however, that "the better the press relationships, the more likely that a prosecutor will have received both information of any kind and confidential information of some sort from a journalist."[21]

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[18] Id. at 25-43.

[19] Blasi, The Newsmen's Privilege: An Empirical Study, 70 Mich. L. Rev. 229 (1971).

[20] D. Gordon, supra note 17 at 44-48.

[21] Id. at 34.

In summary, the evidence presented in these studies strongly suggests that the presence or absence of a newsmen's privilege is (1) unrelated to the frequency with which newsmen are compelled to disclose their confidential sources, (2) unrelated to the degree of cooperation between reporters and law enforcement officials regarding exchanges of confidential and non-confidential information, and (3) unrelated to the amount of information flowing to the public.

A recurrent theme appears in both Blasi and Gordon studies which suggests that there is an underlying pattern of cooperation between newsmen and law enforcement officials regarding the exchange of confidential information. However, both studies concur that some newsmen remain disinclined to reveal the identities of confidential sources in favor of a strong professional commitment to source anonymity.

Generally speaking, apparently many newsmen do not regard the confidential relationship as absolutely inviolate, and depending upon the circumstances will voluntarily disclose a source's identity to government authorities irrespective of whether or not a prior pledge of nondisclosure was made. However, despite this widespread practice, some newsmen perceive the confidential relationship as sacrosanct and will risk threats of contempt and jail sentences in order to protect their confidences.

Hence, the scope of our study focuses primarily on judicial impact and attempts to determine as accurately as possible: (1) the behavioral consequences or effects attributable to Branzburg; (2) the nature of public policy resulting from institutional decision; and (3) to what extent institutional decision-making has affected the

press-government relationship, the free flow of news to the public and the administration of the criminal law.

In this instance, we hypothesize that Court policy-making did not appreciably affect behaviors of newsmen at the local level, but in fact, led to symbolic outcomes essentially unrelated to the news-gathering function. However, before attempting to analyze policy outcomes, we should cursorily glance at the background and setting of newsmen's privilege as well as the broad constitutional questions associated with First Amendment press issues.

I. NEWSMEN'S PRIVILEGE--BACKGROUND AND SETTING

The question of whether or not newsmen should have testimonial privileges is a salient issue which has manifested time and again for well over a century in American politics. Answering this question affirmatively raises corollary questions. For example, if newsmen are granted a privilege, how should it be implemented and what should be its scope?

For the most part, laws regulating media operations in American society have developed incrementally in response to social and political demands.[22] The recent Supreme Court decision refusing to recognize a constitutional newsmen's privilege sparked yet another round of political actions aimed at establishing statutory protections for newsmen's confidential sources.

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[22] See M. McLuhan, Understanding Media (2d ed. 1963). Therein, the author discusses the ways in which media stimulates social and political change. See also, W. Rivers, T. Peterson and J. Jensen, The Mass Media and Modern Society (2d ed. 1971), for similar treatment of the developmental theory of communications and society.

Arguing for a constitutional privilege before the United States Supreme Court in Branzburg, newsmen claimed the First Amendment to the United States Constitution gave members of the press a right to refuse disclosure of confidential news sources when appearing before grand juries. Refusing to recognize a First Amendment privilege in this particular case, a 5-4 majority ruled that society's interest in the fair and effective administration of our criminal justice system "outweighed" any First Amendment claims.

Branzburg, however, departs somewhat from established judicial doctrine. Supreme Court dicta recognizes that, in some instances, the First Amendment may protect newsmen's confidential sources from compulsory disclosure. For several months following the Court's decision, disparate interpretations of Branzburg and its potential impact upon American society appeared in numerous dailies and periodicals. Many persons assumed, incorrectly, that Branzburg barred any future First Amendment privilege claims. However, others concluded, correctly, that the Court's decision was limited in scope and would probably have a limited impact on newsgathering.

Despite the low frequency of compulsory disclosure proceedings initiated throughout the United States and the diminished salience of the newsmen's privilege issue, the debate over whether or not newsmen should have confidential source protection continues. In his recent study, Gordon[23] concluded forcefully that Branzburg resolved little in the way of determining when prosecutors may compel disclosure

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[23] D. Gordon, supra note 17.

or when newsmen may withhold confidential information or the identities of their confidential sources.

We think there are several reasons that account for the continuing debate over newsmen's privilege despite the diminished salience of the issue and the relatively few documented confrontations between newsmen and prosecutors. Apparently, the issue remains alive and well because some newsmen perceive the lack of privilege as a threat to themselves and the newsgathering function. Therefore, newsmen's organizations continue to press for statutory protections. Furthermore, a marked uniformity has manifested in the form of lower court decisions which, in general: (1) narrowly construe state shield laws and require disclosure of confidential information as well as identities of confidential sources; and (2) refuse to recognize a constitutional privilege. On the other hand, some courts have deviated from recognized principles and endorsed a constitutional privilege or applied the shield law and prohibited compelled disclosure. Those few favorable decisions have culminated in a heightened press determination to continue to fight for a First Amendment privilege and favorable statutory interpretations through the courts. Ergo, the legislative and judicial "battles" for newsmen's privilege linger on within their respective institutional settings.

II. AN OVERVIEW OF THE PRIVILEGE

In the months following Branzburg, newsmen joined openly with liberal academics and crusading Congressmen to publicize the need for a national shield law. This wave of concern, reportedly, was ignited

by the Court's "adverse" decision. Justifying their quest for a federal statute, newsmen cited dicta found in Branzburg suggesting that Congress and state legislatures were free to determine the desirability and scope of shield laws.[24]

Legal traditionalists who viewed the further expansion of civil libertarian privileges as detrimental to society, hailed the Court's decision. Given the composition of the Court and the history of newsmen's privilege in the United States, the decision was not surprising. However, newsmen everywhere expressed "great shock" and dismay over this blow to society's right to a "free flow of information."

For almost two decades, courts in this country have consistently refused to recognize a constitutional newsmen's privilege. Past decisions, including Branzburg, have been grounded in well established common law principles on evidence.[25] Journalists have gained court sanctioned protection of sources only in limited circumstances where a state statute was favorably applied.

Both English and United States case law generally support the principle refusing to recognize a privilege. Evidentiary rules governing newsmen's privilege developed over years of judicial activity. The Burger Court justified its opinion on the weight of this past judicial activity, but left open to state and federal legislatures the questions

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[24]Hearings on Freedom of the Press Before the Subcomm. on Constitutional Rights Before the Senate Comm. on the Judiciary, 92nd Cong., 1st and 2d Sess. (1972). See also, Hearings on S. 36, 158, 318, 451, 637, 750, 870, 917, 1128 and J.R. 8 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess., at 681 (1973).

[25]See Chapter III of this dissertation.

of deciding: (1) whether or not newsmen were to have statutory privileges, and, if so, (2) what should be the proper scope of that legislation?[26]

The legislative and judicial history of newsmen's privilege shows that the legal norm requiring "everyman's evidence" has passed down from 17th century common law to recent applications in Branzburg and other cases.[27]

III. DEFINITION

What is a newsmen's privilege and what does it provide?

Generally speaking, privileges are those acts "that are prima facie unlawful but allowable in certain circumstances to all, or else to a limited number of persons."[28] A newsmen's privilege is defined as "a confidential status between a reporter and his news source which no court or state agency can compel him to reveal."[29] Manifestly, therefore, the privilege carries an explicit exemption from performing a legal duty. A newsmen's privilege, therefore, relieves certain persons classified as "newsmen" of normal testimonial requirements imposed by accepted common law principles.

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[26] See Chapter III of this dissertation for an analysis of Branzburg.

[27] See Chapter II of this dissertation.

[28] G. Paton and D. Derham, A Textbook of Jurisprudence 292 (1972).

[29] W. Steigleman, The Newspaperman and the Law 197 (1950).

Legislative or judicial recognition of newsmen's privilege is contrary to the common law, and generally courts refuse to grant newsmen's privilege. However, 26 states have adopted some form of privilege statute which purportedly protects newsmen's confidential sources from compulsory process, but invariably these laws can be circumvented by prosecutors who seek information in criminal cases. Newsmen, for their part, continue to fight for broad testimonial exemptions while law enforcement officials seem to support limited judicial and legislative recognition of the privilege.

IV. GOVERNMENT AUTHORITY AND THE FIRST AMENDMENT

The conflict between newsmen and law enforcement officials over newsmen's privilege is but one of many constitutional issues revolving around the question of how does government regulate the news media without placing undue burdens on First Amendment rights of expression? The journalistic community's ardent desire to protect confidential news sources against compelled disclosure has led to yet another "collision" between the First and Sixth Amendment guarantees of the United States Constitution.

The clash of free press principles with other social interests embodied in the Constitution is not of recent vintage. In fact, during the formative years of this country, most print media--represented by small printing press operations--were poisonous, malicious and irresponsible.[30] Thomas Jefferson, an early outspoken free press

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[30]C. Steinberg, The Communicative Arts 72 (1970).

advocate pleaded for journalistic responsibility, but his efforts yielded few, if any, results. For the most part, in the early years, the press was neither free nor responsible. However, significant changes have occurred since Jefferson uttered his famous dictum that in choosing between government without newspapers or newspapers without government, his choice would be for the latter arrangement. Nevertheless, a residue of social conflict regarding free press guarantees and other constitutional interests (especially those interests associated with the fair and effective functioning of the criminal justice system) remains a troubling twentieth century issue.

The government's regulation of the press and/or media has developed incrementally down through the years. Today, regulatory agencies govern virtually every aspect of media operations. Dennis McQuail has said that regulation of the media is directly related to the status and authority accorded to media by the masses.[31] Media's power and influence over society's behavior is widely accepted as fact, and its potential for abuse is well recognized since use of these instrumentalities is tantamount to exercising control over sources of truth and public opinion. Media interests are frequently in a position to give or withhold prestige and legitimation with respect to governmental policies. This is especially true of the press and news media in general. Given this power to shape men's thoughts and lifestyles, it is not surprising that government authority regulates closely the activities of both broadcast and print media. For example, the advent

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[31] D. McQuail, Towards a Sociology of Mass Communications 12 (1973).

of broadcast journalism moved Congress to adopt the Radio Act of 1927. The 1934 Communications Act followed and established the Federal Communications Commission for the purpose of regulating interstate and foreign communications. These legal manifestations symbolize society's interest and concern in controlling media operations. However, media are subject to government regulation not only because of their key position in the social system as disseminators of information, but also because of their commercial role.[32]

Governmental constraints governing competitive business practices, licensing standards, copyrights, patents, wages and tax liabilities are, for the most part, aimed at regulating the media's commercial role in society. Civil and criminal sanctions also apply to media interests concerning libel, invasion of privacy and publication of obscene materials. But when, for example, does freedom of expression infringe on personal rights of privacy, or damage the reputation of public officials or private citizens? Also, when does expression become morally objectionable to community standards and hence obscene? These and other questions emanating from the conflicts between First Amendment rights and other social interests have no precise answers and lend themselves to judicial interpretation.

V. THE CONSTITUTIONAL ISSUES

Down through the years the United States Supreme Court has served as arbiter for numerous constitutional conflicts which have arisen

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[32] Id. at 13.

between journalists and public officials. For example, the "prior restraint" doctrine recognized in the 1930's was recently reaffirmed when the Court held that the First Amendment would not tolerate governmental interference with the press prior to publication in the absence of proper justification.[33] But the Court has ruled that, in certain instances, First Amendment rights of expression infringe upon Sixth Amendment rights to a "fair trial."[34]

Yet, the Court has gone the other way upholding First Amendment rights of expression after a finding that news releases were compatible with Sixth Amendment "due process" requirements.[35]

Except in libel and obscenity cases, the Court has ruled that the First Amendment prohibits direct inquiries into the contents of expression. Before awarding public officials damages for libel, courts have required a showing that the alleged libelous statement was uttered with "reckless disregard of whether it was false or not."[36] The invocation of civil or criminal sanctions usually follows only after a clear

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[33]Near v. Minnesota, 283 U.S. 697 (1931); Further expanded in Kingley Books, Inc. v. Brown, 354 U.S. 436 (1957); Freedman v. Maryland, 380 U.S. 51 (1965); Blount v. Rizzi, 400 U.S. 410 (1971); and New York Times Co. v. U.S., 403 U.S. 713 (1971).

[34]Irvin v. Dowd, 366 U.S. 717 (1961); See also Rideau v. Louisiana, 373 U.S. 723 (1963). Cf. Estes v. Texas, 381 U.S. 532 (1965); extended in Sheppard v. Maxwell, 384 U.S. 333 (1966). See discussion in H. Abraham, Freedom and the Court: Civil Rights and Civil Liberties in the United States 149-56 (2d ed. 1972).

[35]Wood v. Georgia, 370 U.S. 375 (1962).

[36]New York Times v. Sullivan, 376 U.S. 255 (1964); Further expanded in Ocala Star Banner v. Damron, 401 U.S. 295 (1971) and Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

determination that the person uttering the statement knew with a high degree of certainty of its falsity.[37] The Court has also made a minor distinction in libel cases and awarded damages to "public figures" while in similar circumstances denied damage claims of certain "public officials."[38] Steadfastly adhering to the principle outlined in New York Times v. Sullivan, the Supreme Court has given the press a broad freedom to present news concerning persons involved in public affairs or matters which have a general interest to the community.[39]

In June, 1972, the United States Supreme Court was again asked to resolve yet another constitutional question involving governmental authority and the First Amendment right of expression. In Branzburg v. Hayes,[40] the Court refused to recognize newsmen's claims of privilege when appearing before grand juries. Reportedly, the conflict between newsmen's claimed First Amendment rights and government authority arose out of a "subpoena epidemic" which began in the late 1960's. Law enforcement officials began to zero in on anti-war protestors and Black radical groups who were allegedly involved in criminal activities. In an effort to gather evidence which would aid in the investigation and prosecution of these groups, several newsmen were ordered to appear and testify before grand juries concerning their sources relating to news

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[37]Garrison v. Louisiana, 379 U.S. 64 (1964); Ginzburg v. Goldwater, 396 U.S. 1049 (1970); Indianapolis Newspapers, Inc. v. Fields, 400 U.S. 930 (1970).

[38]Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[39]376 U.S. 254 (1957).

[40]408 U.S. 665 (1972).

stories about protestors and Black activists. Since many reporters had close working relationships with these groups, law enforcement officials were hopeful that information could be gained which would be helpful in the prosecutorial effort. In several instances, when newsmen were asked to divulge information relative to their confidential associations with radicals, they refused. Subsequently, the journalists were held in contempt and ordered to jail irrespective of their claims to a First Amendment privilege. Not all cases involving newsmen's claims to either a constitutional or statutory privilege in the late 1960's and early 1970's were concerned with prosecutors' attempts to gather information relative to anti-war protestors or Black radicals. However, most cases involved the withholding of evidence from law enforcement officials (in criminal cases) or persons seeking damages for libel (in civil cases). The withholding of evidence at the point where there is an official demand for disclosure generates the conflict between the First Amendment and Sixth Amendment rights, and the conflict continues.

The question as to whether or not newsmen could claim a constitutional privilege in a civil matter was first answered at the federal appellate level in the 1958 Garland v. Torre libel case.[41] Potter-Stewart--then a Court of Appeals judge--ruled that newspaperwoman Marie Torre would have to disclose her confidential news source because the source's identity "went to the heart" of plaintiff Judy Garland's libel claim.[42]

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[41] 259 F. 2d 545 (2d Cir. 1958), cert. denied, 315 U.S. 910 (1958).

[42] Id. at 547.

Stewart reasoned that even if the First Amendment, in some cases, prohibited disclosure of confidential news sources, the facts of Torre demanded that the newsperson reveal the identity of the source who made the allegedly libelous statement.

Case law and legal commentary pertaining to newsmen's privilege indicate that within the last thirty years, free press advocates subtly shifted their First Amendment claims from individual rights of expression to claims involving a broad but vague public "right to know."[43] The First Amendment argument supporting most free press claims is now firmly rooted in the "right to know" or "right of access" philosophy. The "right to know" philosophy forms the raison de^ être of the expanding freedom of information movement. While newsmen's privilege has a long history in the United States, Torre was the instrument through which the freedom of information movement incorporated newsmen's privilege under the constitutional "right to know" rubric. Branzburg is yet another link in the continuing efforts of the press to expand First Amendment coverage over news activities. Also, recent attempts to legislate protective privileges for newsmen are further manifestations of the "freedom of information movement" which since its genesis in the United States after World War II, has been a continuing political issue.[44]

While the "free flow of information" principle never achieved international acceptance, the United States Congress adopted a freedom

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[43]H. Krieghbaum, Pressures on the Press 46 (1972).

[44]H. Brucker, Communication is Power 34 (1973).

of information law in 1958. While the legislation was supposed to "open up" the political process so that the public could fully view governmental operations, newsmen and others were convinced of the law's ineffectiveness.[45]

During the 1960's, newsmen, especially members of Sigma Delta Chi, professional journalism society, systematically campaigned at both Congressional and state levels for laws that would give them broad access to government information, notes, memoranda and documents. These efforts led to the adoption of a theoretically stronger access law in July, 1967.[46]

Despite the initial glowing rhetoric, newsmen soon complained that federal bureaucrats easily circumvented the law's intent. Placing the blame squarely on the press, one critic commented that any anticipated public benefits were "frittered away because correspondents were not eager enough to dig out what was really taking place."[47] The failure of the 1967 legislation rested, for the most part, on journalists because they never took full advantage of the law by systematically pursuing agency denials of information through the courts.

VI. THE 1970'S AND PRIVILEGE POLITICS

By the fall of 1972, some three months after Branzburg, a concerted press effort seeking shield laws had gained impetus. A total

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[45] Id. at 35.

[46] Public Information Act, 5 U.S.C. § 552 (1966), as amended.

[47] H. Krieghbaum, supra note 43 at 57.

of 68 newsmen's privilege bills were introduced during the First Session of the 93rd Congress.[48] Also, within two years of decision, nine states consented to place shield laws on their books.[49]

This fluttering of legislative activity marks the third major effort by journalists since 1935 to secure state shield laws.[50] The first drive occurred in 1935 and succeeded in increasing the shield law total from one to eleven (Maryland became the first state to formally adopt a shield law in 1896). Seven of these shields were enacted in the 1930's and three more were added in the early 1940's.

The second major effort to place shield laws in the code books began in 1948. However, that drive resulted in only one additional shield law and that came in 1950. In the next twenty-two years (1950-1972), five states added shield laws to their code books, and as of the Branzburg decision in July, 1972, a total of seventeen states had shields.

Within a two year period immediately subsequent to the Court's Branzburg holding, nine more states adopted shield legislation. These actions brought the total to twenty-six. Apparently, the 1972-1974 period upsurge in shield statutes is attributable, for the most part, to the Court's refusal to recognize a constitutional newsmen's privilege.

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[48] Hearings on S. 36, 158, 318, 451, 637, 750, 970, 917, 1128 and J.R. 8 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess., at 680-700 (1973), hereinafter cited as 1973 S. Hearings.

[49] Oklahoma became the 26th state to adopt shield legislation. The Oklahoma legislature took this action toward the end of 1974.

[50] W. Steigleman, supra note 29 at 197.

While we recognize the dangers of what seems to be post hoc analysis, we argue that not only are these recent legislative actions chiefly symbolic effects arising from judicial decision-making, but that lower court compliance with Court decision-making is also principally a symbolic phenomenon. This hypothesis rests upon the logical extrapolation of available evidence which has led us to tentatively conclude that Branzburg has had an imperceptible impact on (1) the actual gathering of both confidential and nonconfidential information; and (2) newsmen's relationships with either their confidential news sources or law enforcement officials. Ergo, we seek to explain Branzburg's actual impact as the appearance of significant institutional activities which were confined primarily to judicial and legislative settings.

Proceeding on this theoretical basis, initially we trace the legal antecedents of newsmen's privilege and subsequently discuss both legislative and judicial responses to Branzburg. To amplify the presupposed linkage between decision and effects, we examined Branzburg's ostensible impact within a national subsystem--Tennessee. We infer from our findings that newsmen's pre-Branzburg relationships with both their confidences and law enforcement officials have gone essentially undisturbed in the post-Branzburg period.

Apparently, the Court's decision prompted Tennessee's organized press to seek a statutory newsmen's privilege in the fall of 1972. These efforts culminated in the adoption of a qualified shield law by the General Assembley in March, 1973. While this law was enacted to provide protection for newsmen's confidential sources, we argue that there is little evidence to support the contention that the law, in

fact, offers the reporter-source relationship any more protection than existed pre-Branzburg. Furthermore, despite Branzburg and passage of the Tennessee shield law, there is no available evidence which indicates that flows of either confidential or nonconfidential information to the public have increased or decreased. Also, we found nothing to suggest that newsmen's relationships with either their confidential sources or law enforcement officials had visibly altered. We argue that, at best, the Tennessee shield has provided a legislatively administered placebo which while without altering newsmen's legal condition eventually pacified a major segment of the Tennessee press and diffused an emotionally charged atmosphere.

The following chapters examine the legal antecedents of newsmen's privilege and analyze the Burger Court's opinion. Historically, members of both bench and bar in the United States have opposed expanding testimonial privileges to journalists. Resting upon the argument that a newsmen's privilege would inhibit the fair and effective operation of our criminal justice system, the legal profession has effectively blunted any attempts to develop a substantive privilege for newsmen. Those arguing against establishment of either the constitutional newsmen's privilege or statutory shields have yet to offer conclusive evidence linking newsmen's privilege with a general dysfunctioning of the criminal justice system. On the contrary, evidence seems to indicate that irrespective of whether or not newsmen have a privilege against compulsory disclosure, the interests of the public in a fair and effective criminal justice system are first served since

journalists, most of the time, voluntarily cooperate with law enforcement regarding the disclosure of information both confidential and non-confidential in nature.

A brief outline of this dissertation shows that in the two following chapters, we examine legal antecedents of newsmen's privilege, and develop an opinion analysis of Branzburg. Chapter IV explores the non-actional aspect of judicial decision-making and describes what we have called symbolic effects within the scope of our policy analysis framework. Herein, we attempt to closely describe Branzburg's application within the judicial subsystem and various legislative actions which arose subsequent to decision. Chapter V attempts to amplify the relationship between judicial policy-making and effects by focusing on a single case study. The Tennessee case study amplifies those behavioral linkages that determine the relationship between national institutional policy-making and outcomes within a national subsystem--the State of Tennessee. Perhaps more importantly, we conclude that Tennessee's shield law has not produced any significant change with respect to the behavioral realities governing newsmen's relationships with either their confidential sources or law enforcement officials. Furthermore, the law, on the surface, appears inefficacious and imminently circumventable. In our opinion, the Tennessee shield law provides limited, if any, substantive protections to newsmen's confidential sources.

The concluding chapter synthesizes and presents a distillation of recent cases and political developments relating to the privilege issue. Also, we present selected findings of a local survey (included

in Appendix A to this dissertation) which reports the attitudes of various Tennessee newsmen and state legislators concerning why and how Tennessee adopted a shield. Our evidence suggests that newsmen feared that Branzburg might result in widespread attempts by government authorities to annex the press as an investigative arm of government. Therefore, newsmen decided to actively pursue statutory protections for the reporter-source relationship.

In the course of our investigation, however, we found no evidence whatsoever showing that government authority either increased the number of subpoenas to newsmen post-Branzburg or that the number of contentious cases significantly increased subsequent to decision.

We theorize that Branzburg's effects must be principally symbolic because even with the sudden outpouring of shield laws, Congressional contemplation of a national law and lower court compliance with Supreme Court decision, we could not detect: (1) any post-decisional changes in newsmen's behaviors with respect to their dealings with law enforcement officials; and (2) any increase in the frequency with which newsmen were officially compelled to disclose confidential sources. Therefore, we argue that Branzburg did not cause newsmen's confidential sources to "dry up" and that Supreme Court decision-making in this instance has not had a "chilling" effect on the "free flow of news to the public."

Hence, judicial or institutional decision-making may or may not result in conscious or "minded" behavioral changes, modifications or alterations locally by the "objects or targets of decision. Supreme Court policy decisions which generate little or no changes in local

behaviors may, in fact, result in chiefly symbolic effects or actions. The symbolic aftermath of a given Court decision may crystallize in a seemingly well defined public policy or law, i.e., a shield statute, which may be aimed toward the purposeful regulation of human behavior. However, these consequences (actions, communications, public policies or laws) merely pronounce conditions and are rarely, if ever, efficacious.

CHAPTER II

THE CASE LAW DEVELOPMENT OF NEWSMEN'S PRIVILEGE-- LEGAL ANTECEDENTS

This chapter examines relevant case law surrounding development of the newsmen's privilege principle, and describes legal principles upon which the United States Supreme Court based its 1972 decision in Branzburg v. Hayes.[1] That decision refused to recognize a constitutional newsmen's privilege in criminal cases, and further held that newsmen, like everyone, were required to give their evidence at the demands of grand juries, courts, legislative bodies and other government investigating bodies.[2]

The case law description presented herein, shows that, apart from statute, both state and federal courts have consistently refused to recognize either a common law or constitutional newsmen's privilege. Therefore, in describing legal antecedents, we proceed to marshall literature from varied but interrelated disciplines which outlines inchoate 17th century common law applications to formulae presently followed by United States courts. A systematic examination of both federal and state case law yields the following conclusions: (1) apart from newsmen's privilege statutes, courts have consistently refused to recognize either a common law or constitutional privilege, and (2) newsmen

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[1] 408 U.S. 665 (1972).

[2] Id. at 666.

may be legally compelled to testify and disclose their confidential news sources and/or information at the commands of grand juries, courts or legislative bodies.[3]

Several states have adopted shield laws which confer varying degrees of protection upon the reporter-source relationship, but this is essentially a recent phenomenon. Indeed, many newsmen have stressed that the best means of protecting news sources since the Supreme Court refused to recognize the constitutional claim to a privilege are through statutory shields either at the state or national levels or both.[4] However, there is presently a growing concern over whether or not statutory protections indeed are the best source of protection for the reporter-source relationship.[5]

In spite of the present disagreement over whether or not newsmen should continue to press for shield legislation or rely exclusively on a case by case application of the First Amendment, the vigor of the 1972-1973 shield law campaign wilted, and, for the most part, faded from sight. The sudden appearance and likewise sudden disappearance of support for shield laws is not an unusual phenomenon. In fact, the growth of privilege legislation in the United States has followed an accretive process of development since Maryland became the first state

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[3] 8 H. Wigmore, On Evidence, §§ 2192, 2285 (McNaughton rev. 1961).

[4] Hearings on Freedom of the Press Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92nd Cong., 1st and 2nd Sess. (1972); Hearings on S. 36, 158, 318, 451, 637, 750, 870, 917, 1128 and J. R. 8 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. (1973).

[5] See Royster, Shield Laws Have Boobytraps, 28 Seminar Quarterly 13 (1973), hereinafter cited as Sem. Q.

to adopt a shield law in 1896.[6] Since that time, twenty-five states have emulated the Maryland position. Extant shield legislation confers privileges which vary from absolute to qualified, some of which require a judicial determination of malice, bad faith, or that disclosure may be compelled only if such action is essential to the public interest.[7]

Prior to the United States Supreme Court ruling in Branzburg, seventeen states had some form of shield law. Within twenty-two months of the Court's ruling, nine more states adopted shield laws while numerous proposals were introduced into Congress calling for a national law. We speculate that this sudden burst of legislative energy is attributable in some measure to the Branzburg ruling. However, we feel certain that other factors including the Court's decision combined to create conditions which prompted newsmen to seek statutory protections at both state and national levels.

For example, there is no clear answer or explanation as to what precipitated the rapid "drumfire" of subpoenas to newsmen in the late 1960's and early 1970's which led to numerous jailings of newsmen throughout the country. It was speculated that widespread social unrest in the last decade prompted a "collision" between a significant number of dissident groups and government officials.[8] Supposedly, dissident

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[6]Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources of Information, 24 Vand. L. Rev. 667 (1971).

[7]4 Freedom of Information Digest 8 (1973), hereinafter cited as Free. Infor. Dig.

[8]Schmidt, Beyond the Caldwell Decision: The Decision is Tentative, 3 Columbia Journalism Review 25 (1972), hereinafter cited as Colum. J. Rev.

factions used the media to propel their causes into the center stage of public attention which "resulted in individual reporters being given knowledge on condition that other information or the identity of certain sources not be divulged."[9] The ensuing clash of interests between the press and government agencies responsible for the administration of the criminal justice system culminated in the dramatic symbolic conflict later presented to the Court in the form of Branzburg.

Yet elsewhere, the recent clash between the press and government officials over newsmen's privilege was characterized as a personal vendetta by former President Richard M. Nixon against a medium that he long despised and distrusted.[10] In any event, these explanations support the view that social conditions must be considered as an important factor with respect to the rise of legislative activity which is ostensibly geared to compliance, implementation or evasion in the face of judicial decision-making.

I. A RECURRING PATTERN

In the past, newsmen have advocated judicial recognition of either a common law or constitutional right to a confidential relationship with their news sources in cases apart from a shield statute. Newsmen have opted for the privilege of maintaining a confidential relationship with sources in the United States for well over a century

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[9] Id. at 26.

[10] H. Krieghbaum, Pressures on the Press 30-50 (1972).

with the first case being reported in 1848.[11] Traditionally, newsmen have sought to extend the journalists' privilege beyond protections normally accorded other privileged relationships such as attorney-client, physician-patient, husband-wife and priest-penitant. Generally, newsmen have sought protection of not only the communication per se, but also sources and unpublished materials, e.g., personal notes and film outtakes.[12]

Despite newsmen's claims, United States courts, for the most part, have refused to recognize a common law testimonial privilege. Exceptions to official demands for disclosure of sources and/or information have been few. Newsmen have enjoyed rare successes in avoiding official demands of disclosure, but where courts have granted newsmen protection for their news sources, the decision rested on (1) a Fifth Amendment claim against compulsory self-incrimination, (2) a ruling that the information sought was irrelevant to the case at bar, and (3) a determination that statutory provisions barred compulsory disclosure of the source.

During the last decade, the International Press Institute reported that the matter of professional secrecy for journalists was a crucial judicial problem facing the "free world" press.[13] However,

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[11]Nugent v. Beale, 18 F. Cas. 471 (No. 10, 375) (C.C.D.C. 1848).

[12]Graf, Newsmen's Privilege--Where to From Here? 11 Publishing, Entertainment Advertising Law Quarterly 479 (1973). Wherein, the author defines outtakes as materials (film) not included in the published end-product. See also Goodale, Subpoenas of News Reporters to Compel Disclosure of Confidential Information: An Analysis of Recent Legal Developments 49 L.A.B. Bull. 133 (1974).

[13]Professional Secrecy and the Journalist, 6 International Press Institute Reports 1-25 (1962).

many have lined up on the side of the press in support of a newsman's privilege based on the public's "right to know."[14] Dialogue, for the most part, has polarized the issue with those opting for expansion of the public's "right to know" taking a "threat--maximizing and defending role"[15] and placing government officials in the "power--maximizing and freedom threatening" role. Very few scholars have suggested that law enforcement agencies along with media adopt a mutually acceptable policy which would insure a "close and continuing integration of law and journalism in pursuit of their common objective--service to society."[16]

On the other side of the coin, most legal authorities would agree that newsmen should not have a special privilege protecting them from official demands of disclosure. Zechariah Chafee's position on this subject is generally recognized as representative of the legal community's position. He maintains that:

> The law ought not to be changed so as to confer this novel privilege. The trend of the best legal judgment is away from all occupational privileges, even that of attorney--and--client, which is much the oldest. The reporter's claim to silence is less persuasive than that of the doctor, and the physician--and--patient privilege (in states which recognize it) has produced many unfortunate results. It would be absurd to safeguard press confidences and leave the secrets of the confessional without legal protection, as is the case in

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[14]For a discussion of the legal basis of the "right to know" position, see H. Cross, The People's Right to Know (1963); K. Cooper, The Right to Know (1956); T. Emerson, Toward a General Theory of the First Amendment 3-15 (1966); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 89 (1965).

[15]M. Edelman, The Symbolic Uses of Politics 70-71 (1967).

[16]Seibert, The Law and Journalism, 32 Va. L. Rev. 771-80 (1946).

> nearly every state. Therefore, I conclude that judges should retain their present power to order a reporter to testify or else go to jail for contempt.[17]

He tempers this position by admonishing governmental officials in order that they exercise diligence in using official powers to command disclosure of newsmen's confidential sources and information.

Law reviews and legal treatise materials provide the major sources covering the legal and historical background of the newsmen's privilege issue. No single source, however, successfully synthesizes all relevant publications and data on the subject. The most comprehensive study to date on the legal background of newsmen's privilege came in 1971 when Aaron Gordon traced the development of the newsmen's privilege doctrine down through the 1970 Application of Caldwell decision.[18] Reliable descriptions of the case law development and legal principles governing newsmen's privilege are plentiful, but none are comprehensive.[19] With respect to laws on privilege, case notes and

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[17] Z. Chafee, Government and Mass Communications 496 (1965).

[18] A. Gordon, Protection of News Sources: The History and Legal Status of Newsmen's Privilege, June, 1971 (unpublished Ph.D. dissertation, University of Wisconsin School of Journalism), hereinafter cited as A. Gordon.

[19] Selected publications providing extensive analysis of the common law and constitutional basis of newsmen's privilege pre-Branzburg v. Hayes are: Beaver, The Newsmen's Code, The Claim of Privilege, and Everyman's Right to Evidence, 47 Ore. L. Rev. 243 (1968); Guest and Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18 (1969); D'Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information, 6 Harv. J. Legis. 307 (1969); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources of Information, 24 Vand. L. Rev. 667 (1971).

commentary[20] provide useful background information as do various treatises on the subject of evidence.[21] The federal and state reporters contain judicial analyses and comment on relevant case law filling any lacunae not already covered by previously mentioned sources.

Unquestionably, the vast majority of reported cases reflect the Wigmore position[22] which holds that apart from a statute to the contrary, newsmen may not be excused from giving their evidence when a court, legislative body or grand jury demands it. Not all cases on the subject are reported because newsmen, in some instances, make no effort to challenge the validity of subpoenas to appear and testify. In one instance, an attempt was made to collect data on the frequency of subpoena issuance at the lower court level. The findings revealed that unreported cases generally followed the rationale of those reported.

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[20]Note, Caldwell v. United States: The Newsmen's Constitutional Privilege, 32 U. Pitt. L. Rev. 406 (1971); Note, The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Cal. L. Rev. 1198 (1970); Note, Reporters and Their Sources, The Constitutional Right to a Confidential Relationship, 1970 Yale L.J. 80 (1970); Comment, Constitutional Protection for the Newsmen's Work Product, 6 Harv. Civ. Lib.-Civ. Rights Rev. 119 (1970); Note, Privileged Communications--News Media--A Shield Statute for Oregon, 46 Ore. L. Rev. 99 (1966); Note, Journalist's Testimonial Privilege, 9 Clev.-Mar. L. Rev. 311 (1960); Note, The Journalist and His Confidential Source: Should a Testimonial Privilege be Allowed? 35 Neb. L. Rev. 562 (1956); Note The Right of a Newsman to Refrain from Divulging the Sources of His Information, 36 Va. L. Rev. 61 (1950); 45 Yale L.J. 357 (1935). This is by no means an exhaustive listing of source materials which cover the case law development and legal principles of newsmen's privilege. However, these sources should provide the interested student a fair sampling of available commentary on the subject. For more recent publications, i.e., law reviews, consult the Index to Legal Periodicals.

[21]C. McCormick, Handbook of the Law of Evidence (1954).

[22]H. Wigmore, supra note 3.

However, there were exceptions where disclosure was not required.[23]

II. THE RULE ON PRIVILEGED COMMUNICATIONS

All major legal authorities agree that apart from a statute, communications to a journalist are not privileged, and evidentiary demands of a court, legislative body or grand jury must be met. In the absence of a shield law, the rule requiring everyman to give his testimony before grand juries, courts and legislative bodies has been an unyielding jurisprudential principle for most, if not all, legal authorities.[24] Professor Charles Tilford McCormick once noted, however, that "newer crafts and professions whose communications with their patrons are not privileged are exerting pressure from time to time for new statutory privileges."[25] This activity has resulted in legislative sanctioning of a number of new privileged relationships, but most legal authorities believe it unwise to further expand the principle to newer "classes" demanding protection for "confidential" communications.[26] The leading view holds that the "sanctity" of any confidential relationship automatically yields to the necessity of getting at the facts, and it

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[23]Note, The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Cal. L. Rev. 1198-99 (1970).

[24]H. Wigmore, supra note 3. See also McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447 (1938)1 Platz, A Code of Evidence for Wisconsin? Various Privileges, 1945 Wis. L. Rev. 239 (1945); Note, Privileged Communications--Some Recent Developments, 5 Vand. L. Rev. 590 (1952).

[25]C. McCormick, supra note 21 at 152.

[26]H. Wigmore, supra note 3.

is rare when the "public policy of protecting the relationship overrides the public policy of unrestricted inquiry."[27]

III. THE ENGLISH COMMON LAW POSITION

Evidentiary privileges for lawyers were frequently recognized under the common law during the reign of Elizabeth I in the 16th century. Case law indicates that by the 17th century, testimonial privileges for those other than lawyers were recognized only in rare instances.[28] Claims of "personal honor" or "honor among gentlemen" were sometimes recognized by courts as valid grounds for not testifying in open court.[29] However, the practice of expanding the protective penumbra of testimonial privileges beyond the attorney-client relationship has not received legal support in 20th century England. Illustrative of the English position is the 1963 Vassall case where two journalists appealed sentences imposed by a tribunal investigating offenses against the state.[30] The newsmen refused to reveal the sources of their publication accusing unnamed Admiralty officials of receiving bribes and participating in homosexual conduct.[31] The court ruled that journalists could

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[27] 3 B. Jones, The Law of Evidence, Civil and Criminal 1532 (1972).

[28] Note, 45 Yale L. J. 357-58 (1935).

[29] See Bulstrod v. Letchmere, 22 Eng. Rep. 1019 (1676); Lord Grey's Trial, 9 How. St. Tr. 127 (1682). These cases are usually cited as authority for the view that 17th century England recognized a privilege from compulsory disclose of information obtained in exchange for a promise of confidence. See also, Note, 37 Univ. of Colo. L. Rev. 388-89 (1965) for further comment.

[30] Note, 37 Univ. Colo. L. Rev. 388 (1965).

[31] A.-G. v. Mulholland, 1 All E. R. 767 (1963).

not refuse to answer questions proper to the inquiry, and that when a judge ordered disclosure "newspapers must disclose their information; they have no privilege to refuse."[32]

In the 17th century, one of the few justifications courts recognized for allowing witnesses to refuse to disclose information derived through a confidential relationship was after a claim of "personal honor." In one case where this principle was recognized, Lord Grey and several others were charged with causing Lady Henrietta "to commit whoredom, fornication, and adultery" after she was enticed away from her father's household for the purpose of living with Lord Grey.[33] When, in open court, the Attorney General asked Lady Henrietta to divulge the names of the individuals who had "moved" her from her father's home she refused to answer. The court ruled, however, that she did not have to answer the question only if the individuals charged in the information had not, in fact, transported her from her father's home. Her claim of "personal honor" was subsequently upheld.[34]

The concept of "personal honor" as an exception to the general rule requiring every man's testimony received its coup de grace toward the end of the 18th century after the British House of Lords conducted a bigamy trial. The Duchess Dowager of Kingston stood accused of a prior marriage which allegedly was ongoing at the time she became the wife of the Duke of Kingston.[35] In one of several rulings bearing on

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[32] Id. at 771.

[33] Lord Grey's Trial, 9 How. St. Tr. 127 (1682).

[34] Id. at 175.

[35] The Duchess of Kingston's Case, 20 How. St. Tr. 586 (1776).

the confidential relationships of the accused with various witnesses, the court held that information received through the physician-patient relationship "has no privilege where it is a material question, in a civil or criminal cause."[36] Later in the proceeding, Lord Barrington was asked directly if he knew that the Duchess had been married before her marriage to the Duke of Kingston. Lord Barrington declined to answer on the basis that his testimony on such matters would breach a confidence taken on his personal honor, and he could not, in good conscience, reveal such information.[37] The court disagreed with Lord Barrington and held that it was his duty before the law to "answer all questions put to him."[38]

The old English view allowing for "personal honor" or "honor among gentlemen" as an exemption from normal evidentiary requirements never acquired formal recognition in the United States. As previously mentioned, the English abandoned the "personal honor" exemption, and now require everyman's testimony in most cases. There is little support among those on the bench in England to expand the privilege concept in order to protect newsmen's confidential sources and/or information.[39]

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[36] Id. at 572.

[37] Id. at 586.

[38] Id. at 589.

[39] D. Lloyd, The Idea of Law 158 (1964). The author briefly discusses the English position in relation to American jurisprudential development.

Under American common law, journalists were consistently required to disclose their confidences at the request of either a grand jury, court or legislative body.[40] However, Gordon found that many newsmen risked threats of contempt or jail sentences rather than divulge the identity of a confidence. In fact, he found only three cases where reporters had revealed confidential sources without first receiving permission from the source.[41]

Another study concluded in the late 1960's reported that prosecutors' demands for confidential information were generally met at the pre-subpoena stage of the judicial process. The author further noted that since there were so few actual cases, it was manifestly difficult to properly determine the frequency and scope of past governmental requests for confidential information as well as press response. This study concluded that only infrequently were newsmen cited for contempt after refusing judicial disclosure orders.[42]

Traditionally, American courts have required professional confidential privileged relationships to meet four fundamental conditions: (1) The communication must originate in confidence that it will not be disclosed; (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the

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[40] D'Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information, 6 Harv. J. Legis. 307 - 10 (1969).

[41] A. Gordon, supra note 18, at 7-22.

[42] Note, The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Cal. L. Rev. 1198-1203 (1970).

parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by disclosure must be greater than the benefit gained for the correct disposal of litigation.[43] In accordance with these four conditions, United States courts have consistently refused to recognize newsmen's claims to confidential relationships. Failure to satisfy the fourth condition--"the greater benefit" doctrine has led to the exclusion of newsmen from the protective penumbra of the principles governing privileged relationships. Outside the attorney-client relationship, the common law principle that no pledge or oath of secrecy can stand against demands for information in a court of law has uniform application.

As McCormick has pointed out, other professional groups have sought protection for their confidential relationships, but courts have generally granted protection in well defined circumstances covered by statute, e.g., the doctor-patient relationship.[44]

IV. PRECEDENT AND NEWSMEN'S PRIVILEGE

The first group of cases involving the issue of whether newsmen were entitled to a common law testimonial privilege came around the middle of the 19th century, the first case being reported in Washington, D. C. in 1848.[45] The district court speaking through Judge Cranch

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[43] H. Wigmore, supra note 3 at 530.

[44] C. McCormick, supra note 21 at 152.

[45] Nugent v. Beale, 18 F. Cas. 471 (No. 10,375) (C.C.D.C. 1848).

unequivocally upheld the Congressional contempt power which had been brought to bear against newsmen who refused to testify before an investigating committee.[46] Two other early cases involved newsmen's refusals to testify before Congressional investigating committees, but were never reported. In all cases, the courts upheld the legislature's contempt authority and ignored newsmen's claims to a common law privilege.[47]

A case decided in 1874 involving the refusal of a New York City Tribune city editor to disclose the author of an allegedly libelous newspaper stody has often been cited as a leading precedent in support of the rule denying newsmen a common law privilege. Even though the issue in Phelps v. Fancher was author anonymity rather than source confidentiality, an appeals court reversed a lower court order freeing the editor from confinement while holding that the prior conviction and commitment had been proper. The court further added that there was no legal basis whatever for any newsman to refuse to testify before a legally constituted grand jury.[48]

Three years later, in yet another anonymous publications case, the Georgia Supreme Court held that since the publisher refused to identify the author of an allegedly criminally libelous publication, the publisher would be considered the author. The court further ruled that

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[46] Id. at 472.

[47] A. Gordon, supra note 18 at 190.

[48] People ex rel. Phelps v. Fancher, 2 Hun. 226 (N.Y. 1874).

the publisher was subject to indictment as well as contempt for his continued refusal to testify.[49]

At the close of the 19th century, three significant cases arose, all of which held that newsmen had no common law right to refuse to answer questions put to them by legal authorities. One of these cases went unreported, but it involved two reporters who refused to testify before a United States Senate investigating committee. The reporters had written newspaper articles alleging that certain Senators accepted bribes to vote favorable tariff amendments for the "Sugar Trust."[50] A Washington, D. C. district court upheld the Senate's contempt citation and the reporters' conviction. In doing so the court pointed out that to have ruled otherwise and allowed the newsmen to refuse to testidy would have been contrary to public policy.[51] The decision was reversed three years later because the information sought was ruled irrelevant, however the legal principle requiring newsmen's testimony in the absence of a statute to the contrary was reaffirmed.[52]

Two other reported cases occurred in California. The first case involved a homicide and the second revolved around a legislative investigation. In the homicide case, the defendant claimed that his incriminating statement to a reporter should not be used against him in a court of law since the statement was privileged information.

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[49]Pledger v. State, 77 Ga. 242, 70 S.E. 781 (1887).

[50]For commentary on this case, see 36 Va. L. Rev.61-79 (1950).

[51]A. Gordon, supra note 18 at 195-198.

[52]Id. at 198.

However, the court flatly refused the plea and ruled that there was no basis in the law for a newsmen's privilege.[53] In the case involving a legislative investigation, the court ruled that two San Francisco newsmen had no legal right to refuse disclosure of their confidential information after appearing before an investigative committee.[54]

During the latter half of the 19th century, six cases involving newsmen's privilege were reported. Three arose through legislative investigations, two through criminal court proceedings and one through grand jury action. In all cases, courts refused to recognize a common law privilege.[55]

V. TWENTIETH CENTURY CASES

We shall now examine the 20th century cases down to, but not including Branzburg which is taken up in a later chapter. In this section, the cases are divided into pre and post 1958 categories. All cases prior to 1958 involve claims to the common law privilege similar to that covering the lawyer-client relationship or claims to statutory protection. In the following years, newsmen began to claim a constitutional privilege along with claims to statutory protection where available.

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[53]People v. Durrant, 116 Cal. 179, 48 P. 75 (1897).

[54]Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897).

[55]See A. Gordon, supra note 18 at 435-436 for an analysis of unreported cases, especially the case associated with the adoption of the first shield law in Maryland in 1896.

The United States Court of Appeals decision, Garland v. Torre,[56] marked the advent of a new press strategy in the face of continued court refusals to recognize a common law newsmen's privilege along with unfavorable statutory interpretations in favor of compelling newsmen's testimony. Under this new strategy, newsmen sought an exemption from the rule requiring everyman's testimony, based on the premises that the First Amendment to the United States Constitution: (1) protects professional journalists from forced disclosure of confidential news sources developed or maintained in efforts to gather news for dissemination to the public through the press or other news media, and (2) demands that any burden placed on the newsgathering and news disseminating process must be justified by an overwhelming public interest in compelling disclosure.

The first 20th century case was reported in Ohio in 1901 where in a suit for libel, a reporter refused to divulge his source of information for a news article. The Ohio court ruled that a communication made to a reporter which was later published was not privileged; therefore, the reporter was compelled to disclose his source after all questions put to him had been ruled proper and relevant.[57]

A 1911 Georgia Supreme Court decision held that a police board was another agency having power to compel testimony from newsmen. The court ruled that since newsmen did not have a testimonial privilege to

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[56]259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

[57]Clinton v. Commercial Tribune Co., 8 Ohio N.P. 655 (1901).

refuse to answer questions put to them by courts, grand juries and legislative bodies, there was no reason to prohibit an administrative agency from exercising similar powers.[58]

Following the Georgia decision, a series of cases were adjudicated upholding grand jury authority to compel disclosure where newsmen claimed a common law privilege in the absence of a statute.[59]

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[58]Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

[59]All cases, including four unreported decisions which originated at the state level follow. Certain federal cases are included where the privilege issue was secondary. In re Wayne, 4 Hawaii Dist. F. 475 (1914), where a reporter revealed his source after the court refused to honor his claim to a privilege; U.S. v. Burdick et al., 211 F. 492 (1914) and Curtin v. U.S., 236 U.S. 96 (1914), companion cases where the 5th Amendment plea was successfully used to shield sources. Chafee in commenting on the 5th Amendment plea said that city editor Burdick of the New York Tribute received all the practical advantages "of a special newspaper privilege" by invoking the 5th Amendment defense. Z. Chafee supra note 17 at 498. Ex parte Holliway, 272 Mo. 108, 199 S.W. 412 (1917) another case not usually included in official listings of newsmen's privilege cases, held that a newsman who received information from a law breaker in confidence had no justification for declining to answer questions put to him by a grand jury, notwithstanding a claim of possible self-incrimination; Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919) where the court upheld the jailing of a newspaper owner after he refused to disclose to the grand jury the name of the author of an article which charged corruption in the grand jury; Elwell v. U.S., 275 F. 775 (1921) concerned an ill-fated 5th Amend. plea after the city editor of the Chicago Evening American refused to disclose to the grand jury the author of an article charging drug graft by an ex-U.S. agent; State v. Owens, No. 677 Misc., 1925 Cir. Ct., Carroll County, Md. (unreported). The court upheld an editor's refusal to divulge his source for an article to a grand jury citing the privilege law as an adequate defense; People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936) where the court refused to grant a privilege of nondisclosure as to a reporter's source concerning stories he had written about illegal gambling activities; In People ex rel. Clarke v. Truesdell and People ex rel. Leonard v. Truesdell, 79 N.Y. Supp. 2d 413 (1948), two reporters were jailed after their refusal to reveal their confidential sources to investigating officials; Clein v. State 52 So. 2d 117 (1950) where a Miami newspaper editor was jailed after he refused to divulge his source of information to a grant jury investigating alleged illegal gambling activities.

A leading case in the early 1900's was decided in New Jersey when a reporter declined to reveal his source for a muckraking story to a grand jury investigating government corruption.[60] When the reporter appealed his contempt conviction, the New Jersey high court held there was no legal basis for a testimonial privilege in the law, and such a privilege, if granted, would have a serious and deleterious effect on the proper administration of the law.[61]

In 1943, editors of several newspapers were ordered to appear in court as witnesses for the prosecution in criminal actions against a number of New Jersey public officials. Relying on the state statute, the editors refused to divulge the means through which various press releases had been conveyed to the newspapers. The court, however, through a narrow interpretation of the statute concluded that disclosure was proper since it was the identity of the messenger that was sought, not the source of information.[62]

Several years later, Ethel Rosenberg sought mitigation of her death sentence for espionage against the United States.[63] In this action, Rosenberg sought to compel a reporter to reveal the identity of a confidential government informant. The government official was quoted in an article saying that Rosenberg's death sentence would be lifted only if the convicted spy would reveal certain information. The court,

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[60] In re Grunow, 84 N.J.L. 235, 85 A. 1011 (1913).

[61] Id. at 1012.

[62] State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943).

[63] Rosenberg v. Carroll, 99 F. Supp. 629 (S.D. N.Y. 1951).

however, ignored Rosenberg's request and ruled that neither the identity of the news source nor any confidential information that could be given by the reporter were relevant to the main proceeding which dealt with espionage.

Two years later, James E. Folsom, the former Alabama governor, brought a libel action against a New York publishing house.[64] The author of the allegedly libelous publication had based his story upon information of an already identified newsmen. When asked to reveal his source, the newsman refused, claiming that the Alabama privilege statute prohibited compelled disclosure of confidential news sources in this situation. In upholding the newsman's contention through pre-trial examination, a federal district court ruled that the state statute barred any attempt to require disclosure.[65]

Several years later, a California case turned on a strict reading of the state statute. Newsman Jack Howard was briefly jailed for refusing to testify in court with respect to his confidential source and information. Subsequently, Howard was released after an appellate court reinterpreted certain facts in a habeas corpus proceeding. Regarding the issue of privilege under the state statute, the appeals court ruled that the lower court had erred in concluding that Howard had waived the privilege. The appellate court decided that Howard had not identified his source as the lower court had ruled. Therefore, the reporter's use of quotation marks in his story did not mean that "a

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[64] Ex parte Sparrow, 14 F.R.D. 351 (D.C. Ala. 1953).

[65] Id.

statement attributed to a union official had been made directly to Howard."[66] Consequently, since the confidential source had not been previously identified, waiver of the privilege could not be assumed.

One year later in an action for libel, the New Jersey Supreme Court held that a defendant newspaper editor had waived the state privilege since, in previous testimony, he disclosed both the identity of his source and all relevant information. Furthermore, the court concluded that the editor's testimony was necessary because his testimony would have a direct bearing on whether or not the identified source had intended malice toward the plaintiff. Consequently, testimony was compelled because the court ruled that such information would have an influence on the award of punitive damages, if any, to plaintiff.[67]

In yet another libel action, Senator Owen Brewster sought to compel the author of an allegedly libelous editorial to reveal the source of his information. As the case unfolded, it was discovered that a confidential memorandum formed the basis for the news story, and the court ruled section 26(b) of the Federal Rules of Civil Procedure rendered privilege claims invalid, and in this instance the author was ordered to produce the memorandum and reveal its source.[68]

Our analyses of pre-1958 newsmen's privilege cases supports the view that courts consistently applied the common law rule requiring everyman's testimony in the absence of a privilege statute. Both

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[66] In re Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

[67] Brogan v. Passic Daily News, 22 N.J. 139, 123 A.2d 473 (1956).

[68] Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416-17 (1957).

federal and state courts usually held that the mere existence of a communication made to a journalist in express or implied confidence did not create a legally constituted privileged relationship. According to our studies, the only professional privileged relationship that has been consistently recognized under the common law, apart from statute, has been where communications were uttered between attorney and client in pursuance of a lawful purpose.[69] Where states have erected statutory privileges for newsmen, generally courts have strictly interpreted such legislation while requiring disclosure.[70] Exceptions to the rule requiring disclosure in the absence of a privilege statute are few, and case law is insufficient to justify a minority doctrine of any significance. In cases where disclosure of newsmen's sources were sought in conjunction with grand jury proceedings, a Fifth Amendment plea against compulsory self-incrimination preempted official claims of disclosure.[71] In the absence of a protective statute, courts did not require a newsman to disclose his confidential source after a determination that either the source or the information sought were irrelevant to the main proceeding.[72] Where cases turned on statutory interpretation, newsmen

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[69]Beaver, The Newsmen's Code, The Claim of Privilege and Everyman's Right to Evidence, 47 Ore. L. Rev. 243 (1968).

[70]See especially, State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943); Brogan v. Passic Daily News, 22 N.J. 139, 123 A.2d 473 (1956).

[71]U.S. v. Burdick et al., 211 F. 492; Curtin v. U.S., 236 U.S. 96 (1914).

[72]Rosenberg v. Carroll, 99 F. Supp. 629 (S.D. N.Y. 1951).

were not compelled to disclose only after expansive readings of the shield laws.[73]

Generally, there was little pre-1958 support for either recognition of a common law newsmen's privilege or establishment of statutory provisions which would permit newsmen to refuse disclosure of their confidential sources at the commands of official authority. The most favorable independent views on newsmen's privilege legislation were presented in a 1949 report by the New York Law Revision Commission.[74] The report recommended that the New York state legislature adopt a newsmen's privilege statute based on the qualification that disclosure would be required for the protection of the public interest. The recommendation, however, was never adopted. Most pre-1958 legal authorities voiced the attitude that any extension or recognition of privileges would have a negative effect upon the fair administration of justice. Prior to 1958, little institutional support or sympathy existed within the ranks of either the bench or bar for statutory privileges for newsmen or any other professional class.

VI. GARLAND V. TORRE AND THE CONSTITUTIONAL QUESTION

Consistent judicial refusal to extend newsmen a class privilege and repeated unfavorable statutory interpretations of existing law prompted journalists to shift their attack to First Amendment grounds. Beginning in 1958, newsmen argued that the First Amendment to the

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[73] Ex parte Sparrow, 14 F.R.D. 35 (D.C. Ala. 1953); In re Howard, 136 Cal. App. 2d 816, 289 p.2d 537 (1955).

[74] H. Wigmore, supra note 3 at 536.

United States Constitution gave them the right to refuse to disclose confidential sources and/or information.[75]

The first constitutional challenge came in 1958 when Judy Garland commenced a civil action against the Columbia Broadcasting System for breach of contract and defamation. During pre-trial discovery proceedings, Garland sought the name of a certain CBS executive whose alleged defamatory statements were published in the New York Herald Tribune by columnist Marie Torre. Following Torre's refusal to reveal her source, she was held in contempt by the lower court.[76] On appeal, then-Circuit Judge Potter Stewart reasoned that possibly Torre's First Amendment rights were violated in requiring her to disclose the source. However, he went on to say that the circumstances of the case at-bar preempted any Constitutional protections that might apply.[77] In essence, Stewart concluded, that when the question asked goes to the "heart" of plaintiff's claim, the First Amendment right must yield to the public's interest in the fair and proper administration of justice.[78] Torre, with the exception of minor modifications, is the governing precedent as to the issue of whether or not the First Amendment affords newsmen's sources, unpublished information and outtakes, constitutional protection.[79] Therefore, in civil matters, when the testimony sought

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[75]Guest and Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18 (1969).

[76]Garland v. Torre, supra note 56.

[77]Id. at 550. [78]Id. at 549.

[79]Note, The Journalist's Prerogative of Nondisclosure: Fact or Fantasy, 20 Loyola L. Rev. 120-25 (1974).

"reaches to the heart" of the plaintiff's claim, courts usually require disclosure.[80]

Following on the "heels" of Torre were a number of cases involving claims of a constitutional newsmen's privilege. A Colorado Supreme Court decision involving a disbarment action refused to recognize a reporter's claim to a constitutional privilege. The court attempted to determine whether or not a certain attorney improperly provided a reporter with a copy of a petition prior to its official filing. The petition contained allegedly defamatory statements about a former chief justice of the Colorado Supreme Court. Sitting en banc, the court asked the reporter whether the attorney was her news source. The reporter based her refusal to disclose on the First Amendment, but the court ruled unanimously in favor of requiring disclosure.[81]

In a 1968 case, the editor of the University of Oregon student newspaper was summoned before a grand jury concerning a news article. The story concerned the widespread use of marijuana on campus and was based on several interviews with student users. The editor who had written the story was held in contempt after refusing to name those mentioned in the article. While upholding the editor's conviction, the Oregon high court refused to recognize the student editor's claim to a constitutional newsmen's privilege.[82]

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[80] Id. at 125.

[81] Murphy v. Colorado, 365 U.S. 843, cert. denied (1961).

[82] Buchanan v. Oregon, 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968).

Two other state court decisions which were not appealed also refused to recognize newsmen's claims to a constitutional privilege. The Supreme Court of Hawaii rejected the constitutional privilege claim of a news photographer, and affirmed a lower court contempt conviction which had been imposed after the photographer's repeated refusals to disclose a news source.[83] The case arose after a former member of the Honolulu Civil Service Commission brought an action against the city claiming that she had been illegally ousted from the commission. In deposition proceedings, the photographer admitted attending a secret ouster meeting after receiving information that an attempt would be made to dismiss the commission member.[84]

Two years later, the Pennsylvania Supreme Court summarily dismissed a constitutional privilege claim raised by two journalists in conjunction with a grand jury probe of criminal conduct and corruption in Philadelphia municipal government. However, their lower court contempt convictions for failing to testify before the grand jury were dismissed after the high court gave an expensive reading to the state privilege statute.[85]

In another state case where the news source was known, a grand jury sought details of a reporter's conversation with his source. After the lower court interpreted the state privilege statute as barring any further disclosures, a Maryland appellate court dismissed the state's

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[83] In re Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961).

[84] Id.

[85] In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

appeal as moot since the grand jury's term had expired. However, the appeals court ruled that the lower court had erred in not requiring disclosure since only the source was privileged under the statute and not the information.[86]

In a federal district court, a TV news director refused to disclose the source of allegedly libelous information which had been transmitted over the wires of the Associated Press.[87] The federal court applied a "balancing" test in requiring disclosure since the information was ruled necessary and went "to the heart" of plaintiff's claim.[88]

In a 1970 criminal case in Indiana, a confession made by defendant to a newsman while in a jail cell resulted in defendant's claim that the communication was privileged under the First Amendment. However, the appellate court refused to recognize that the defendant's confession was privileged (he admitted shooting a bartender during a robbery).[89]

Suffice it to say that the great weight of case law in the provinve of newsmen's privilege holds that in the absence of statutory protections, newsmen appearing before grand juries, courts or legislative investigating bodies must give their testimony upon request. Since 1848, American newsmen have unsuccessfully sought recognition of a common law privilege based on similar evidentiary privileges granted

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[86]State v. Sheridan, 248 Md. 320, 236 A.2d 13 (1967).

[87]Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969).

[88]Id. at 441.

[89]Lipps v. State, 254 Ind. 141, 258 N.E. 2d 622 (1970).

to such relationships as attorney-client, clergyman-penitant, and physician-patient.

The constitutional claim surfaced for the first time in 1958 when in Garland v. Torre,[90] the Court of Appeals for the Second Circuit ordered Marie Torre's testimony in order that a libel and breach of contract suit could proceed accordingly. Newsmen have also sought to protect confidential sources and materials from compelled disclosure through statutes. From 1896--when Maryland became the first state to adopt a statutory shield--until the present, newsmen have sought exemption from the normal testimonial requirements placed upon most men. In the 127-year-history of newsmen's privilege in the United States courts, arguments have ranged over a wide number of legal points, and even the most ardent supporters of newsmen's privilege cannot agree on the best or proper method of source protection.

In summary, Chapter II has presented the case law development of newsmen's privilege--the legal antecedents--which preceded the United States Supreme Court decision in Branzburg v. Hayes.[91] Aside from the various legal arguments which play on the newsmen's privilege controversy, we have demonstrated that courts in both England and the United States have consistently refused to recognize a common law privilege. Also, we have seen that courts have also viewed statutory privileges as derogations of the common law principle requiring everyman's evidence. Therefore, where cases have turned on the reading of a

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[90] 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

[91] 408 U.S. 665 (1972).

privilege statute, courts have generally leaned toward disclosure after a strict reading of the privilege law.

Hence, the legal norm requiring everyman's evidence passed down from 17th century common law substantially unchanged. In the long judicial decision-making history of newsmen's privilege in the United States, newsmen claimed common law, statutory and constitutional privileges generally to no avail. However, in 1972 the issue of whether or not newsmen could claim a constitutional privilege when appearing before a grand jury came before the United States Supreme Court, and newsmen took faith in the belief that their time had come.

CHAPTER III

THE SUPREME COURT AND NEWSMEN'S PRIVILEGE

We shall now focus on the substantive aspects of the 1972 United States Supreme Court decision which refused to recognize a constitutional newsmen's privilege before grand jury proceedings.[1] Glendon Schubert once said that the United States Supreme Court is a policy-making instrument whose decisions affect the political behavior of various actors operating within the political system.[2] In many instances, political behavior may be influenced by judicial decision-making which may "mirror" certain values held by certain persons in the social order or at least by various members of the Court.

In Chapter III, we proceed to analyze the most proximate case law inputs or lower court decisions which reflect traditional legalistic values regarding evidentiary privileges. In discussing those cases reviewed by the Supreme Court via certiorari, we reflect on the influence of common law principles in formulating the issues and language which helped shape the nature of the First Amendment arguments placed before the Court.

As discussed in Chapter II, First Amendment claims to a newsmen's privilege were consistently denied by both federal and state courts

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[1]Branzburg v. Hayes, 408 U.S. 665 (1972).

[2]G. Schubert, Judicial Policy-making 7-8 (1965).

since the 1958 Garland v. Torre decision.[3] However, in the absence of shield laws, newsmen continued in their First Amendment privilege claims. First Amendment claims stepped up in the late 1960's in view of an increase in the frequency of subpoenas to newsmen for the purpose of appearing and testifying before grand jury investigating bodies.[4]

Subsequently, in a precedent shattering decision, a California federal district court recognized a newsman's claim to a constitutional privilege in Application of Caldwell.[5] The unprecedented decision concerned the refusal of Earl Caldwell, Black reporter for the New York Times, to respond to a federal grand jury subpoena and answer questions concerning his personal observations of certain Black Panther Party activities.[6]

After receipt of a subpoena ad testificandum, reporter Caldwell moved to quash arguing that he would lose the confidence of his news sources if forced to appear and testify. The federal district court refused to grant Caldwell's motion to quash the appearance order, but ruled that when the reporter appeared before the grand jury, he was not required to reveal any confidential sources and/or information derived through his association with the Panthers.[7] The court concluded that if

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[3]259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

[4]13 Editor and Publisher 14 - 62 (1974).

[5]311 F. Supp. 358 (N.D. Cal. 1970).

[6]Id. at 359.

[7]Id.

the grand jury's power to compel testimony impinged upon or repressed First Amendment guarantees, that power should not be invoked "until there has been a clear showing of a compelling and overriding national interest that cannot be served by alternate means."[8]

Although partially protected by the district court order, Caldwell appealed the decision in an effort to avoid any appearances before the grand jury. The Court of Appeals agreed with Caldwell and ruled that he was not required to appear before the grand jury.[9] The Court went on to say that the order to appear was inconsistent with the grant of privilege, and acknowledged that if Caldwell were compelled to appear, his special relationship with the Panthers would be jeopardized. To require his appearance was a futile gesture, the appellate court ruled, since any foreseeable testimony was protected by the lower court order. In short, everything not already published was considered privileged information and beyond the scope of permissible interrogation. Therefore, absent some special showing of necessity by the government, Caldwell's attendance at a secret grand jury hearing was something he was privileged to refuse.[10] In concluding its opinion, the Court of Appeals warned that:

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[8] Id. at 359.

[9] Id. at 360.

[10] Caldwell v. United States, 434 F.2d 1081-84 (9th Cir. 1970). Caldwell's refusal to go before the grand jury resulted in a contempt order which was the subject of the appeal. See Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources of Information, 24 Vand. L. Rev. 667 (1971), for a detailed discussion of these two cases from the perspective of the Director of the School of Journalism and Mass Communication, University of Wisconsin.

> The public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the Government must respond by demonstrating a compelling need for witness' presence before judicial process properly can issue to require attendance.[11]

Eleven days later, in a similar case, the Kentucky Court of Appeals affirmed a contempt conviction leveled against Paul Branzburg, Louisville Courier reporter, who refused to reveal his confidential news sources before a local grand jury.[12] Branzburg had written a story concerning the local drug traffic based on personal observations with respect to the manufacture of hashish. After he was called to testify as to his observations, Branzburg refused to identify two men he had personally observed illegally converting marijuana into hashish.[13]

In his defense, Branzburg claimed that the Kentucky shield statute barred compelled disclosure of his news sources "in any legal proceeding or trial before any court, or before any grand or petit jury, or before any city or county legislative body, any committee thereof, or elsewhere. . . ."[14] The Kentucky court, however, ruled conversely and required Branzburg to disclose his personal observations. The decision unequivocally held that the Kentucky statute protected only the method through which or the person from whom the information was obtained.[15] Therefore, a newsmen's personal observations of

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[11] Id. at 1089.

[12] Branzburg v. Pound, 461 S.W. 2d 345 (Ky. 1970).

[13] Id.

[14] Ky. Revised Statutes Anno. § 421.100.

[15] 461 S.W. 2d 345 (Ky. 1970).

criminal conduct were not protected by the shield law.

Two months passed and Branzburg was again subpoenaed, but this time by a grand jury convened within another jurisdiction. The second subpoena was issued to inquire into the content of certain articles written about the drug traffic in Franklin County, Kentucky.[16] This time, Branzburg sought to quash the subpoena relying on the rationale of the Caldwell decision--a California federal district court case. In spite of the claim of a First Amendment privilege, the Kentucky Court of Appeals rejected Branzburg's motions, reaffirmed its former "construction" of the Kentucky code and refused to honor the First Amendment privilege claim.[17]

The Kentucky high court distinguished the Caldwell case from Branzburg on two separate grounds while requiring disclosure. The first distinction rested on the Kentucky court's understanding that Earl Caldwell had satisfactorily demonstrated that disclosure would produce a broad "chilling effect" vis-a-vis potential sources, however, Paul Branzburg could not support such a comprehensive claim.[18] Also, the Kentucky tribunal saw a basis for distinction where Caldwell claimed that he had publicly disclosed all information to which he could be compelled to testify, and Branzburg made no such claim.[19]

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[16] Branzburg v. Meigs (unreported).

[17] 461 S.W.2d 345 (Ky. 1970).

[18] Id. at 348.

[19] Id. See Nelson, supra note 10 at 674 for a comment on the Kentucky court's distinction of Caldwell and Branzburg cases.

After distinguishing the Caldwell and Branzburg cases, the state court concluded that it was under no obligation to follow the United States Court of Appeals ruling because the decision was a clear and unwarranted deviation from the widely accepted principle requiring newsmen to give their evidence at the demand of an official investigating authority.[20]

A week later, the Massachusetts Supreme Judicial Court joined the Kentucky Court in refusing to recognize a constitutional newsmen's privilege.[21] The Massachusetts case involved Paul Pappas, a television newsman-photographer, who was twice summoned to appear before a grand jury to answer questions relating to certain events personally witnessed inside Black Panther headquarters in New Bedford. Pappas, appearing in response to one of several subpoenas, refused to answer grand jury questions concerning his personal observations, and claimed a First Amendment privilege. With respect to a second subpoena to appear and testify, Pappas again raised the First Amendment privilege, this time as grounds to quash. Responding to Pappas' claim, the trial judge ruled that in the absence of a protective statute, newsmen could not legally justify persistent refusals to answer questions pertaining to personal observations of possible criminal behavior.[22] On appeal, the lower court decision was affirmed. The appellate court ruled that the local grand jury had proceeded properly in pursuit of reporter

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[20] 461 S.W.2d 345 (Ky. 1970).

[21] In re Pappas, 358 Mass. 604, 266 N.E. 297 (1971).

[22] Id. at 302.

Pappas' testimony because his knowledge of Black Panther activities inside the New Bedford headquarters directly related to the question of whether or not criminal behavior had occurred.

The court reasoned that only Pappas' testimony could prove whether or not the Panthers had behaved in a criminal fashion.[23] Consequently, within three months of the Court of Appeals ruling in Caldwell, both Kentucky and Massachusetts high courts resoundingly rejected First Amendment claims to a newsmen's privilege.

In other post-Caldwell rulings in cases involving newsmen's personal observations or knowledge of criminal activities, courts recognized the possibility of a limited constitutional privilege, but in the absence of a privilege statute required disclosure. Judge Zirpoli, who delivered the district court ruling in Caldwell,[24] arrived at a different decision in a similar case six months later. Like Caldwell, a grand jury was in the process of investigating Black Panther activities. In an opinion not inconsistent with Caldwell, Judge Zirpoli found that the government had met its prescribed burden of demonstrating a compelling and overriding national interest in disclosure.[25] Consequently, since the information could not be gained through any alternate means, the court ordered two Black Panther newsmen to appear and testify concerning their associations with persons suspected of criminal conspiracy.[26]

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[23] Id. at 303.

[24] 311 F. Supp 358 (N.D. Cal. 1970).

[25] Id.

[26] Id. at 574-577.

A Wisconsin court also recognized a limited constitutional newsmen's privilege, but ruled that the First Amendment did not excuse the editor of an underground newspaper from answering questions pertaining to alleged arson at Whitewater State University, and an explosion at the University of Wisconsin.[27] In affirming the editor's contempt conviction, the Wisconsin Supreme Court concluded that even if the Caldwell precedent were applicable in Wisconsin, the necessity to answer grand jury questions in this case was overriding because the public has the right "to protect itself from physical attack by apprehending the perpetrators of such attacks."[28] Slightly modifying Caldwell, the Wisconsin tribunal concluded that the editor could protect his sources only if he demonstrated alternative methods of gaining the information sought. Contrary to Caldwell dicta, the Wisconsin court would not consider placing the burden on state officials to seek alternative methods of acquiring the sought after information. According to the court, "The mere fact that the culprits are still at large is nearly conclusive proof that the state does not know who they are."

In New York, in a case which turned on a reading of the state privilege law, a local grand jury sought a letter provided to radio station WBAI-FM by a radical fringe group.[29] The letter contained information relating to a building explosion, and WBAI-FM moved to quash a subpoena duces tecum. The trial court ruled that the state's shield

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[27] State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

[28] 49 Wis.2d 647, 658, 183 N.W.2d 93, 99 (1971).

[29] In re WBAI-FM, 326 N.Y.S.2d 434 (1971).

law did not confer any right or privilege of nondisclosure where the enforcement of the criminal law was at issue.[30]

After grant of certiorari by the United States Supreme Court in Caldwell, Pappas and Branzburg, a California appeals court, in December, 1971, affirmed a lower court contempt holding against William T. Farr, a newspaperman for the Los Angeles Examiner.[31] The Farr case was a byproduct of the sensational Charles Manson murder trial, and, according to the court, raised a fair trial question rather than the newsmen's privilege issue. Previous to the publication of Farr's story which carried a prejudicial statement by a prosecution witness, the trial judge entered a court order against the release of any testimony which might possibly be produced at trial by attorneys, court employees or witnesses. After publication, Farr was asked by the trial judge to reveal the source of his story. After Farr's continued refusal to disclose the source's identity, he was ordered to jail. In reviewing the lower court contempt ruling, an appellate court noted that

> The context of the case at bench precludes the necessity of awaiting the outcome of the three cases now before the United States Supreme Court. All involve inquiries into reporter's sources of information relevant to prosecution of criminal activity but none involves questions seeking the sources of the violation of a trial order designed to prevent prejudicial publicity as does the matter here. Existing United States Supreme Court precedent indicates that regardless of the outcome of the three cases now before that tribunal no rule of confidentiality of source will protect the petitioner in the case at bench.[32]

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[30] Id.

[31] Farr v. Superior Court, 22 Cal. App. 60, cert. denied, 409 U.S. 10-11 (1972).

[32] Id. at 72.

Several weeks prior to the Branzburg decision, in another New York case where the First Amendment privilege claim was not at issue, an appellate court required the Village Voice to surrender an original manuscript of a published article written by an inmate indicted for his participation in the Tombs prison riots.[33] The appellate court ruled that the state privilege law was not applicable because the manuscript had been published and the author identified.[34] Consequently, prior to Branzburg, the question of whether or not the First Amendment protected newsmen's sources and materials from compulsory disclosure was consistently answered in the negative with few exceptions. Also, state courts narrowly interpreted protective statutes while usually requiring disclosure in cases relating to possible criminal law violations. Courts recognizing a limited constitutional privilege generally required either: (1) government officials to demonstrate a "compelling and overriding" need for the sought after information, or (2) newsmen to demonstrate that the information was available elsewhere and/or that disclosure would result in an unnecessary burden on the "public's right to know."

However, in all cases where the government established a "paramount" interest in the identification of a newsman's confidential source or the disclosure of unpublished materials, courts consistently compelled newsmen to appear and testify before official authority. Courts justified their rulings "compelling disclosure" on the basis of a

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[33]People v. Wolf, 333 N.Y.S.2d 299 (1972).

[34]Id. at 301.

paramount societal interest in the fair and effective operation of the criminal justice system.

I. BRANZBURG V. HAYES

On June 29, 1972, the United States Supreme Court decided five to four that the First Amendment to the United States Constitution does not relieve a newspaper reporter of the obligation to respond to a grand jury subpoena. The Court concluded that there is no First Amendment right which sanctions a newsman's refusal to answer relevant and material questions asked during a good-faith grand jury investigation. White, speaking for the majority, was joined by Burger, Blackmun and Rehnquist while Powell added a concurring opinion. Stewart, in dissent, was joined by Brennan and Marshall while Douglas added a lone dissent.[35]

The paramount issue in the case was whether or not the requirement that newsmen appear and testify before state or federal grand juries concerning their confidential sources of information abridged the freedom of press guarantee under the First Amendment of the United States Constitution. Broadly speaking, the majority found that the Constitution does not afford newsmen a testimonial privilege when the sought after information is relevant to a grand jury investigation and the reporter agrees to conceal the criminal conduct of his source. In holding that society's best interests are reflected through the continued investigative function of the grand jury, the majority accepted the position that where criminal conduct has occurred, the public has

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[35]408 U.S. 665 (1972).

an "inherent right" to everyman's evidence to effectuate proper enforcement of the criminal codes. Substantively, through this landmark case, the Burger Court declared that the public need for the fair and efficient operation of criminal justice system "outweighs" any alleged burdens on newsgathering which may or may not occur by compelling newsmen to disclose their confidential sources and/or information where there is a hint of criminal activity.[36] White, for the majority, decided that it would be improper to assume that the First Amendment exempted newsmen from performing the normal duty of all citizens to appear and provide information relevant to a grand jury investigation.[37] White unequivocally warned that where reporters personally observed criminal activities, they could not rely on the First Amendment to shield themselves from officials demands of disclosure.[38] He went on to say that newsmen are entitled to confidential relationships with their sources only where legislatures sanction the practice because:

> Congress has the freedom to determine whether a statutory newsmen's privilege is necessary and desirable, and to fashion standards and rules as narrow and broad as deemed necessary and desirable. . . . 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

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[36] Id. at 685.

[37] Id. at 690-92. The Court points out that the public interest in law enforcement is grounded in the constitutionally mandated role of the grand jury. See Costello v. United States, 350 U.S. 359, 362 (1956); Hannah v. Larche, 363 U.S. 420, 489-90 (1960); and Wood v. Georgia, 370 U.S. 375 (1962) where the grand jury's Fifth Amendment role is defined.

[38] 408 U.S. 665, 690-92 (1972).

> and press. . . . we are powerless to erect any bar to state courts recognizing a newsmen's privilege either qualified or absolute.[39]

Clearly, Branzburg demonstrates that the Burger Court is reluctant to expand the scope of First Amendment protections to include newsmen's confidential sources and materials especially in cases involving criminal activities where newsmen possess information relating to violations of the criminal law. On the other hand, four dissenting justices and one member of the majority see some basis for recognizing a limited constitutional privilege. These four members of the Court agree that, in certain well-defined instances, the Constitution grants newsmen a limited privilege to refuse disclosure of their confidential news sources before a grand jury investigating body.[40]

The Branzburg decision was the result of a combined input of three cases joined and reviewed by the Supreme Court on writs of certiorari to the Court of Appeals of Kentucky, the Supreme Judicial Court of Massachusetts and the United States Court of Appeals for the Ninth Circuit.[41] In summation, the United States Supreme Court ruled that contrary to Caldwell, there was no constitutional right to refuse to answer relevant and material questions asked by a legally constituted grand jury. The Court further ruled that there was no legal support to

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[39] Id. at 706.

[40] Apparently Justices Powell, Stewart, Marshall, Brennan and Douglas support some form of constitutional newsmen's privilege.

[41] Respectively, Branzburg v. Hayes, 461 S.W.2d 345 (Ky. 1970); In re Pappas, 266 N.E.2d 297 (1971); Caldwell v. U.S., 434 F.2d 1081 (1971).

justify Caldwell's refusal to appear before the grand jury until the government demonstrated a compelling need for his testimony. The Court affirmed the Kentucky high court ruling which required a newsman to appear and answer questions put to him by a grand jury. Since reporter Paul Branzburg had written news stories concerning his personal observations of criminal conduct which the grand jury was investigating, the Supreme Court concluded that the Kentucky position requiring Branzburg's appearance and testimony was proper. The Court also agreed with the Massachusetts decision which required reporter Paul Pappas to appear and answer questions relevant to a grand jury investigation.[42]

II. THE ARGUMENT FOR RECOGNITION OF A CONSTITUTIONAL PRIVILEGE

The entire argument for recognition of a constitutional newsmen's privilege rested on the basic premises that (1) to gather news, it is sometimes necessary to grant anonymity to news sources, and (2) if reporters are consistently forced to divulge their confidential sources to grand juries, the flow of information to the public would be deterred because potential sources who feared disclosure for whatever reasons would cease furnishing information to newsmen.[43] The most impressive aspect of the argument for a constitutional newsmen's privilege focused on the contention that if newsmen were consistently compelled to disclose, a "chilling" effect would result thus inhibiting the flow of

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[42] 408 U.S. 665 - 708 (1972).

[43] Id. at 709.

news to the public.[44] The Court, however, brushed aside the "chilling" effect argument observing that such a conclusion was merely speculative since it was unclear whether the general rule requiring disclosure has had any perceptible impact on the flow of news in states without privilege statutes. The Court based this conclusion partly on an empirical study which reported that only one-half of 975 reporters questioned relied on regular confidential sources for information, and of this group, only 8 percent said with certainty that their professional functioning had been affected adversely by the threat of subpoena.[45]

In their attempts to gain judicial recognition of a constitutional privilege, newsmen recommended that the Supreme Court adopt strict criteria under which reporters could be subpoenaed for purposes of testifying about their confidential sources and/or information. Those criteria suggested that: (1) sufficient grounds should be demonstrated that the reporter does indeed possess the information relevant to the grand jury investigation, (2) only the reporter must possess the information sought, and it is not available from or through any other source, and (3) the need for the information is sufficiently compelling to override the alleged invasion of First Amendment rights.[46] Pro-privilege advocates argued that the burden on newsgathering in these

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[44] Id. at 693-94.

[45] Blasi, The Newsmen's Privilege: An Empirical Study, 70 Mich. L. Rev. 229, 247-51 (1971).

[46] Branzburg v. Hayes, 408 U.S. 665, 679-82 (1972).

cases, far outweighed any public interest in the effective administration of the law. It was further urged that when official action adversely affects First Amendment guarantees, that "action" must be justified by a clear showing that the public interest requires an infringement of basic constitutional rights. For in the "eyes" of newsmen, the government, in Branzburg, had not conclusively demonstrated any compelling reasons which could justify a blatant disregard for newsmen's First Amendment rights. Newsmen also mounted a collateral attack against the government's use of unnecessarily broad means to achieve purportedly legitimate ends. It was felt that the means (forced disclosure of sources) should not have a "restrictive impact" on First Amendment rights of speech or press as was evident in these particular cases.[47]

III. THE GOVERNMENT'S CASE

Briefly, the argument prepared by the government concluded that the Court should not recognize a constitutional newsmen's privilege because: (1) the function of the grand juries in all cases under review had been legitimate, and (2) the law required newsmen to testify unless specifically exempted by statute. Government lawyers urged the Court to affirm both Kentucky and Massachusetts decisions and to reverse the United States Court of Appeals decision because Caldwell deviated from the well established legal principle requiring newsmen to disclose

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[47] Id.

their confidential sources and/or information in the absence of a privilege statute.[48]

IV. OPINIONS OF THE COURT

Having examined the position of the Branzburg majority along with respective arguments of the parties before the Court, we shall now distinguish the separate concurring and dissenting opinions. Turning to Powell's concurring opinion, we find that he felt strongly that newsmen in the present case were not entitled to a First Amendment privilege. However, he added that in certain instances the Constitution does provide limited protection for newsmen's confidential sources. Claims to a constitutional privilege, according to Powell, should always be adjudged by a careful weighing of "all attendant facts." Decisions as to whether or not newsmen should be compelled to disclose must be made after striking a proper balance between "freedom of the press" and the public need for the "fair and effective administration of the law."[49] Powell emphasized that newsmen subpoenaed to appear before a grand jury were not without First Amendment rights with respect to gathering of the news or in safeguarding their confidential sources of information.

Justice Stewart wrote a dissenting opinion endorsed by Brennan and Marshall. He condemned the majority decision as an invitation to governmental authorities to "undermine the historic independence of the press by attempting to annex the journalistic profession as an

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[48] Id.

[49] Id. at 710.

investigative arm of the government."[50] The right to gather news, Stewart wrote, is a corollary to the constitutional right to publish. Furthermore, the right to gather information would become severely restricted or curtailed if no protection whatever were afforded the process of gathering news from confidential sources. He argued that the right to gather information was implicit in the First Amendment guarantee of a free press, and a limited constitutional newsmen's privilege was indispensable to the right to gather news. The use of an "unrestrained subpoena power," in Stewart's words, would deter future sources from divulging information or inhibit reporters from engaging in innovative reporting.[51] Stewart concluded that:

> . . . when government officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it because uncertainty about the power will lead to self-censorship.[52]

Douglas, in a separate dissent, said that the Constitution conferred an absolute privilege on newsmen which gave them the right not to disclose their confidential sources and/or information. He said that unless reporters were granted an absolute privilege to withhold the identity of their sources, government officials could victimize the journalistic profession and subvert First Amendment rights. Douglas repeated his long-held view that the press is entitled to a "preferred" position within our democratic setting for without knowledge of events,

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[50] Id. at 725.

[51] Id. at 727-28.

[52] Id. at 731.

the public's "right to know" would be meaningless. He concluded that:

> The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of the government becomes more and more pervasive. It is a power to suffocate both people and causes. Now that the fences of law and the tradition that has protected the press are broken down, the people are the victims.[53]

In summary, four distinct positions or perspectives emerge from Branzburg concerning the issue of whether or not the United States Constitution protects newsmen from compulsory disclosure of their confidential sources and/or information during grand jury investigations: (1) the majority position holds that the First Amendment does not relieve a reporter of the obligation incumbent upon all citizens to respond to grand jury subpoena, and that any questions considered by judicial authority to be relevant and proper should be answered; (2) the Powell position which concurs with the majority view that the newsmen in these cases do not have a First Amendment privilege to refuse to disclose. He adds, however, that courts are obliged to carefully investigate all facts surrounding any claim to a privilege, and newsmen will always have judicial recourse in cases where they believe that any grand jury probe is unnecessary or illegitimate. Finally, Powell cautioned that courts must give extensive scrutiny to the merits of any privilege claims. Also, where there is evidence of criminal conduct, he asks courts to "strike a balance" between "freedom of the press" and the societal interest in "fair and effective enforcement of the law" before

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[53] Id. at 712-15.

deciding whether or not to require disclosure of sources and/or information; (3) the minority view holds that where disclosure is sought, the government clearly must demonstrate a compelling and overriding need for the information, and that the investigation is substantially related to the sought after information; and (4) Douglas position holds that at no time does the need for testimony qualify a newsman's immunity from appearing or testifying before a grand jury. Even where the reporter is implicated in a crime, the Fifth Amendment stands as a bar against compulsory disclosure. Therefore outside criminal conduct or involvement, the First Amendment stands as an absolute bar against official demands for disclosure of confidential sources and information. Even where reporters are involved in a crime, the Fifth Amendment will prohibit official authority from compelling newsmen to disclose their information.

Powell, the "swingman" in this case, recognizes some basis for limited constitutional protection of newsmen's confidential sources and information. This limited protection would shield newsmen only after a court determination that First Amendment rights supercede the societal interest in law enforcement. Powell criticizes Stewart's "compelling need" test as an unnecessary burden on law enforcement authorities. Compromising with both majority and minority views, Powell sanctions judicial recognition of a limited constitutional right protecting newsmen's confidential sources and/or information. However, he concludes that First Amendment rights can be protected only under well-defined conditions. On the other hand, the minority opinion expresses the view that First Amendment rights unequivocally provide limited

protection for newsmen's confidential sources and/or information. Only after the state clearly demonstrates a compelling and overriding need for a newsman's testimony, according to the minority view, do First Amendment rights yield to society's interest in the "fair and effective administration of the law" which requires that reporters disclose their confidential sources at the demands of official investigating bodies.

The Burger Court majority held unequivocally that the claim of a First Amendment privilege, in this instance, must yield to society's broader interest in the fair and effective administration of the criminal justice system. The majority, in this case, is convinced that: (1) the constitutionally mandated role of the grand jury (a Fifth Amendment requirement); (2) the "due process" requirements of the Fifth Amendment; (3) the Sixth Amendment guarantee of compulsory process for favorable witnesses, and (4) the Sixth Amendment right to confront hostile witnesses provide sufficient grounds or justification to eclipse any claims to a First Amendment newsmen's privilege. The Court exercised "judicial restraint" in relying on the traditional legal principle which requires everyman to give his evidence at the demands of either courts, grand juries or legislative bodies in the pursuance of legitimate law enforcement ends. According to White's opinion, the Court did not wish to recognize a constitutional newsmen's privilege because such action would be tantamount to usurping legislative prerogative. In paraphrasing the Court, the function of "creative law-making" is firmly within the purview of the legislative branch of government, and the judicial branch should not become entangled in the business of legislatures.

Contrasting the majority view, the minority argues for an expansion of First Amendment rights in order to protect newsmen's confidential sources of information. Stewart eloquently sounds the view that a refusal to recognize a limited constitutional newsmen's privilege does restrict society's access to information violating the public's "right to know" principle. There is no doubt, according to Justice Stewart, that this decision will have the opposite effect of that intended by the majority especially in the area of crime detection. Informants will no longer come forward if they cannot be guaranteed anonymity, warns Stewart, and such restraint will have a deleterious effect on the criminal justice system because crimes will go unreported.

Douglas, the recognized First Amendment absolutist of the Burger Court, flayed against the increasing encroachment by big government on rights of personal privacy. He believes strongly that individuals not only have a First Amendment right to their opinions and beliefs, but also that the public's "right to know" is the sine qua non of any free and open society. To paraphrase Douglas, no one can balance absolute rights against such vagaries as the "fair and effective administration of the law." He reasons that such vaguely defined interests must yield to the preferred freedoms of speech and press. He further points out that a newsman's First Amendment right to a confidential relationship with his news sources must be accorded a preferred position in our society, and the Branzburg ruling is certain to lead to further derogation of the "free press."

In summary, if Branzburg is now the rule in criminal cases, it would appear that to afford protection for the reporter-source

relationship, newsmen will have to rely on protective statutes if and where they are available. However, according to Powell, courts should strike a balance between "freedom of the press" and the interest in the "fair and effective enforcement of the law" before deciding whether or not to require disclosure. In either event, whether or not newsmen need special laws to protect them from official inquiries seeking forced disclosure is a question that has been often raised since the Court's decision in Branzburg. Also, judicial decisions in the wake of Branzburg have generally followed the principle requiring testimony in the absence of compelling evidence in support of the privilege.

We interpret Powell's conciliatory tone, in his concurring opinion, as an effort to find a "middle ground" of compromise. His position that reporters should be compelled to disclose their confidential sources only after a "judicious balancing" of relevant facts, tempers somewhat the peremptory statement of the majority flatly refusing to recognize a newsman's constitutional privilege. Whether Powell is attempting to further define the majority view or to assuage anxious feelings of his dissenting brethren is moot. However, in effect, his opinion serves both ends. First, he clearly states that in all probability and in the proper circumstances, he would support a constitutional newsmen's privilege. We presume that he would not recognize a constitutional newsmen's privilege in cases similar to those before the Court. Secondly, Powell's position of accommodation serves to undercut the basic premise of the minority argument, namely, that the majority refuses to discern any connection between the right to gather information and a newsman's right to protect his confidential sources. There

is, according to Powell, no question that within the proper factual setting, the Court would sanction a limited constitutional privilege which would allow newsmen to refuse to respond to a grand jury's demand for testimony. However, Powell implies that this "proper factual setting" would not include cases where: (1) the newsman personally observes criminal activities, (2) the newsman has information relating to serious criminal activities, and (3) the newsman is in some way implicated in criminal activities.

Legal commentary on Branzburg primarily focuses on the Court's reluctance to deviate from the traditional rule requiring newsmen to disclose their confidential sources in the absence of a statute to the contrary while refusing to recognize a limited constitutional privilege under the First Amendment.[54] The Court's decision has been criticized for a number of reasons: (1) Branzburg was too broad and left little discretion to lower court judges who in future cases might wish to grant some type of constitutional privilege to newsmen;[55] (2) the Court failed to distinguish Caldwell, Pappas and Branzburg because they involved unique factual situations, and, therefore should have been adjudicated separately;[56] (3) the decision lacked any understanding of

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[54]Note, Beyond Branzburg: The Continuing Quest for Reporters' Privilege, 24 Syracuse L. Rev. 731 (1973); Note, No Testimonial Privilege for Newsmen, 51 N.C. L. Rev. 562 (1973); Note, Requiring Newsmen to Appear and Testify Before Federal and State Grand Juries Does Not Abridge Freedom of Speech or Freedom of Press Guaranteed by the First Amendment, 4 Loyola U.L.J. 227 (1973).

[55]Note, Requiring Newsmen to Appear and Testify Before Federal and State Grand Juries Does Not Abridge Freedom of Speech or Freedom of Press Guaranteed by the First Amendment, 4 Loyola U.L.J. 227-34 (1973).

[56]Friendly, Beyond the Caldwell Decision--Justice White and Reporter Caldwell: Finding a Common Ground, 11 Colum. J. Rev. 31-35 (1972).

the present day exigencies of newsgathering;[57] (4) the Court left unsolved a problem of a wide variance in shield law protections which exist from state to state;[58] and (5) the ruling has pressed upon states the question of who should be protected. In deciding who should be protected, it is conceivable that an "equal protection" question might arise.[59] Elsewhere, it is forcefully argued that because of recent decisions in federal jurisdictions, newsmen now have a limited constitutional privilege in civil matters.[60] One author suggests that the law of "communications subpoenas" should develop on a case by case basis in reference to whether or not newsmen should: (1) appear and testify as to general considerations, (2) appear and authenticate what the newsman saw or heard in connection with a news story, and (3) produce outtakes or any unpublished materials not used in the published end product.[61] We conclude that the Burger Court is unwilling to recognize a constitutional newsmen's privilege in cases: (1) where reporters are

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[57]Note, Branzburg v. Hayes: A Need for Statutory Protection of Sources, 61 Ky. L.J. 551 (1973).

[58]Note, State Newsmen's Privilege Statutes: A Critical Analysis, 49 Notre Dame Law 150 (1973).

[59]Note, Piercing the Newsman's Shield: The Supreme Court and the States Assess Privilege Legislation, 3 Capital U.L. Rev. 53 (1974).

[60]Note, Newsmen's Privilege Against Compulsory Disclosure in Civil Suits--Toward an Absolute Privilege? 45 Colo. L. Rev. 173 (1973); Note, Newsmen's Privilege: A Challenge to Branzburg, 53 B.U.L. Rev. 497 (1973); Note, Assertion of A Journalists Privilege in Conflict with the Final Judgement Rule in Civil Litigation, 1973 Duke L.J. 1063.

[61]Goodale, Subpoenas of News Reporters to Compel Disclosure of Confidential Information: An Analysis of Recent Legal Developments, 49 L.A.B. Bull. 133 (1974).

personally involved in criminal conduct, and (2) where reporters are not engaged in criminal activities but possess information related to the criminal conduct of others. Chapter III has described and analyzed the question taken up in Branzburg which asks whether or not journalists may claim a First Amendment privilege in refusing to disclose confidential news sources and/or information at the demands of federal and/or state grand jury investigating bodies.

Our analysis yields four perspectives with respect to how members of the Court view the proper legal relationship between newsmen and government authority. We conclude that while the present Court is reluctant to recognize a constitutional newsmen's privilege in such cases as Branzburg, the decision is not an absolute bar to future First Amendment claims of privilege. Also, if Branzburg is viewed along with recent federal case law which hints that newsmen have a limited constitutional privilege of nondisclosure in civil cases, the case for First Amendment protections appears to have gained some judicial support.[62] Furthermore, the decision is largely confined to those cases where a newsman's information is sought in connection with a grand jury inquiry even though Court dicta suggests a far wider reading of the case. Dicta emanating from Branzburg concluded that the principle requiring everyman to give testimony should also apply in both judicial

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[62]Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Baker v. F. and F. Investment, 470 F.2d 778 (2d Cir. 1972); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

and legislative proceedings. Precedent shows, interestingly enough, that newsmen's First Amendment privilege claims are, generally, never recognized before grand juries, court and legislative investigative bodies.

CHAPTER IV

LEGISLATIVE AND JUDICIAL EFFECTS: THE SYMBOLIC AFTERMATH

We now attempt to account for a number of observable consequences flowing from a judicial policy-making decision. Furthermore, we assume that Branzburg[1] has not palpably affected behavioral realities at the local level, but, in fact, has resulted in symbolic political outcomes essentially unrelated to newsmen's interactions with either their confidential sources or local law enforcement officials.

In analyzing policy outcomes vis-a-vis Court decision-making, we examine lower court response to Branzburg and the relationship between Court decision and subsequent legislative activity in Congress and several states. This descriptive effort should provide an overview of events following Court decision while establishing a firm basis for explaining why those actions occurred.

Nelson wrote that immediately preceding Branzburg newsmen throughout the country were subjected to an intensive flurry of subpoenas seeking disclosure of confidential sources.[2] After several newsmen were jailed for their refusals to disclose confidences which occurred in conjunction with the Branzburg decision refusing to recognize

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[1] 408 U.S. 665 (1972).

[2] Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971); See also, H. Krieghbrum, Pressures on the Press 4 (1972).

constitutional newsmen's privilege, some newsmen pressed for federal and state shields while others continued to get caught up in judicial actions involving the privilege question.

Lower court application of Branzburg was generally consistent in both state and federal courts. Federal courts, in some cases, recognized a limited constitutional privilege in civil cases, but steadfastly required disclosure in criminal cases. In state cases decided under a shield law, newsmen were ordered to answer grand jury questions usually after courts distinguished between information derived through sources and information derived through personal observations. In these circumstances, courts generally held that statutes protected information gained through confidential sources; however, a reporter's personal observations were subject to disclosure. In cases decided where there was no statute in force, courts generally required newsmen to disclose confidential sources and/or information irrespective of the factual situation after law enforcement officials demonstrated a need for the information.

In the months following Branzburg, newsmen argued forcefully before Congressional and state legislative committees for the adoption of either state or national laws which would protect newsmen's sources from compelled disclosure.[3] Widespread support for shield protections

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[3]Hearings on H.R. 717 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., ser. 5 (1973). See also, Hearings of Freedom of the Press Before the Subcomm. on Constitutional Rights of of the Senate Comm. on the Judiciary, 92nd Cong., 1st and 2nd Sess. (1972); Hearings on S. 36, S. 158, S. 318, S. 451, S.637, S.750, S. 870, S. 1128 and S.J. Res. 8 Before the Subcomm. on the Judiciary, 93rd Cong., 1st Sess. (1973).

appeared both in Congress and several states. While a national shield law never crystalized, nine states adopted newsmen's privilege legislation through 1974.[4] Also, several other states considered adopting shield laws, but the proposals died for various reasons.[5]

The Supreme Court's ruling in Branzburg (discussed in Chapter III) held government's responsibility to insure the fair and effective administration of the criminal justice system as embodied in the Sixth Amendment far outweighed any claims to a First Amendment newsmen's privilege. In absence of a privilege statute, the Court reasoned, newsmen could not refuse to appear or testify before a legally constituted grand jury.

The decision, according to one legal commentator, probably caused more gloom within the communications bar than any other previous case dealing with First Amendment press considerations.[6] Despite Branzburg, many journalists continue their claims of a First Amendment privilege while resisting law enforcement efforts to compel disclosure through the subpoena power.

The government's interest in compelling newsmen to disclose confidential news sources and/or information in order to enhance the prosecutorial effort is widely recognized. In fact, in an effort to

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[4]Delaware, Illinois, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island and Tennessee.

[5]Kansas, Wisconsin and Missouri.

[6]Goodale, Subpoenas of News Reporters to Compel Disclosure of Confidential Information: An Analysis of Recent Legal Developments, 49 L.A.B. Bull. 133 (1974).

assuage press criticism concerning this practice, the United States Justice Department promulgated guidelines outlining the circumstances under which federal prosecutors could seek to compel disclosure of newsmen's confidential news sources.[7] The guidelines (now federal regulations)[8] were drawn up and set into operation two years prior to Branzburg and had the full support of the Nixon Administration.[9] In fact, President Nixon went on record as openly opposing any national shield law, and instead, endorsed the Justice Department's subpoena policy.[10]

The federal "guidelines" only apply to those situations where federal law enforcement officials seek confidential information from newsmen.[11] These "guidelines" require federal prosecutors to carefully consider the need for confidential information in each case and suggest pre-subpoena negotiation between prosecutors and newsmen in order to settle the matter. If negotiations fail to produce a settlement satisfactory to the parties, then prosecutors may seek the express authorization of the United States Attorney General to pursue the desired information through the subpoena process. Announced publicly in 1970, the Justice Department recognized that compulsory process might have an

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[7]Department of Justice Guidelines for Subpoenas to the News Media, Memo 692 (September 2, 1970).

[8]28 C.F.R. 211 (1973).

[9]The Knoxville News-Sentinel, Nov. 9, 1972, p. 12, col. 2.

[10]Klein, Newsmen and Their Confidential Sources, 26 Seminar Quarterly 22 (1972), hereinafter cited as Sem. Q.

[11]Id.

adverse impact on First Amendment rights. However, the guidelines were drafted in such a manner as to insure that prosecutors made a reasonable effort to obtain the information from non-press sources before considering the subpoena process.[12]

Subsequent to implementation of the subpoena policy, within 30 months, thirteen subpoenas were issued to journalists in accordance with Justice Department guidelines.[13] Eleven newsmen gave prior consent to cooperate with law enforcement officials but requested a subpoena for their own personal reasons. From approximately February, 1973 until June, 1974 (the following 15-month period), federal prosecutors successfully subpoenaed seventeen other newsmen. A majority gave information voluntarily, but requested a formal subpoena for personal reasons. Out of 30 cases, only four newsmen refused to cooperate with federal prosecutors, and only eight government subpoena requests were officially denied by the Attorney General.[14]

The "guidelines" were promulgated as formal regulations under Attorney General Elliott Richardson in October, 1973. Certain provisions were added to insure that newsmen would not be questioned concerning any alleged offense they observed while covering a news story, nor would newsmen be arrested or indicted while covering a story for committing an alleged offense without the Attorney General's prior authorization.[15]

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[12] 28 C.F.R. 211 (1973).

[13] Time, March 5, 1973, p. 65, col. 2.

[14] Dixon, The Constitution is Shield Enough for Newsmen, 60 A.B.A.J. 707, 710 (1974).

[15] Id.

These regulations continue to govern federal prosecutors' efforts to compel disclosure of newsmen's confidential news sources, and reflect a case-by-case approach to the problem.

At the state level, from June, 1972 until March, 1973, reportedly 35 newsmen were subpoenaed and ultimately cited for contempt after refusals to cooperate with local prosecutors.[16] States employ varying standards with respect to compulsory process. However, most state and local prosecutors have little difficulty in securing judicial orders mandating disclosure in the absence of shield laws.

I. LOWER COURT APPLICATION

The Branzburg decision elicited an avalanche of legal commentary, and, in many places, comments were quite critical.[17] Several post-Branzburg decisions did not construe the majority holding as an absolute bar against future claims of First Amendment newsmen's privilege.[18] However, generally, courts required newsmen to disclose their confidential sources and/or information when required by a grand jury.

The Court of Appeals for the Ninth Circuit decided in Bursey v. United States (one day after the Branzburg ruling) that newsmen could

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[16] Time, supra note 13 at 64, col. 2.

[17] Note, 4 Loyola U.L.J. 227-34 (1973); Friendly, Beyond the Caldwell Decision--Justice White and Reporter Caldwell: Finding a Common Ground, 12 Colum. J. Rev. 31 (1972); Note, Branzburg v. Hayes: A Need for Statutory Protection of Sources, 61 Ky. L.J. 551 (1973); Note, State Newsmen's Privilege Statutes: A Critical Analysis, 49 Notre Dame Law. 130 (1973).

[18] Cervantes v. Time, Inc. 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). See also, Baker v. F. & F. Investment Co., 470 F.2d 778, 782 (2d Cir. 1972).

claim a First Amendment privilege while refusing to testify before a grand jury investigating body. In upholding the refusals of two staff members of the Black Panther (a Black activist newspaper) to answer a federal grand jury's questions pertaining to the publication of an inflammatory speech by Panther official Dave Hilliard, the court based its decision on both the First and Fifth Amendments. The compelling of testimony, in this particular case, would adversely affect rights of associational privacy and have an impermissibly chilling effect upon freedom of the press. However, more importantly, the court reasoned that testimonial requirements focusing primarily on the internal operations of the newspaper deprived the newsmen of Fifth Amendment "due process" rights and the privilege against compulsory self-incrimination.[19]

In Cervantes v. Time, a federal diversity case, the Court of Appeals for the 8th Circuit stressed the limited nature of Branzburg.[20] After Mayor Cervantes of St. Louis, Missouri, was publicly accused of having ties with local mobsters in a news story, the mayor brought an action in libel against Time, Incorporated. During pre-trial discovery, the reporter who gathered the information for the story refused to disclose his confidential news sources on grounds that the First Amendment of the United States Constitution and Missouri law recognized a qualified privilege as long as the story was fair and not actuated by malice. The federal court recognized a newsmen's privilege in this

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[19]Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972).

[20]464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1972).

case based on state evidentiary requirements and not the First Amendment. In expressing an awareness that prior holdings refused to recognize a constitutional newsmen's privilege, the court ruled that in actions for libel, motions seeking compulsory disclosure of anonymous news sources would not be granted without first inquiring into the substance of the allegation. The court concluded that such inquiries were necessary to insure application of fundamental constitutional safeguards when enforcing state libel laws.[21]

The Court of Appeals for the Second Circuit in Baker v. F. and F Investment Co. held that a reporter could not be compelled through civil discovery proceedings to disclose a confidential news source. It was charged that the source leaked information pertaining to alleged discriminating practices by sellers of homes in the Chicago area.[22] Emphasizing Justice Powell's "balancing" test outlined in Branzburg, the Baker court declared that if at times First Amendment considerations outweigh the duty of a newsmen to testify in the context of a criminal investigation, then unquestionably courts must recognize the public's interest in non-disclosure in civil cases.

Meanwhile in a criminal case, a federal district judge denied the request of a Washington Based bureau chief and several reporters of the Los Angeles Times to quash a subpoena duces tecum requiring the newsmen to appear and testify concerning various confidential materials

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[21] Id. at 1002-03.

[22] 470 F.2d 778, 782 (2d Cir. 1972).

which related to the Watergate matter.[23] In this particular case, a reporter possessed several tape-recorded conversations which were alleged to have some bearing on the main proceeding. After repeatedly ignoring court requests to turn over the tapes in question, the reporter was jailed. Subsequently, the Court of Appeals for the District of Columbia upheld the lower court's ruling and concluded that no First Amendment interests in this case outweighed the necessity for disclosure.[24]

In that same year, William Farr, newspaperman for the Los Angeles Examiner, was jailed after persistently refusing to reveal the source for a news story concerning the sensational Charles Manson murder trial. After Farr's petition of certiorari to the United States Supreme Court was denied,[25] Justice Douglas noted that the refusal to grant certiorari imported no implication or inference with respect to the Court's view of the case's merits. Subsequently, Douglas ordered Farr's release on his own recognizance pending outcome of a Court of Appeals habeas corpus proceeding.[26]

In another California case, a federal district court ruled that an illegal entry and subsequent unlawful search of a newspaper office adversely affected First Amendment interests.[27] The court ruled that

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[23]U.S. v. Liddy, 354 F. Supp. 208 (1972).

[24]U.S. v. Liddy, 478 F.2d 586 (D.C. Cir. 1972).

[25]Farr v. Superior Court, 22 Cal. App.3d 60, cert. denied, 409 U.S. 1011 (1972).

[26]Farr v. Pitchless, 409 U.S. 1243 (1973).

[27]Standford Daily v. Zurcher, 353 F. Supp. 124 (1972).

members of the press had greater Fourth Amendment protections than other citizens in light of potential First Amendment considerations. Search and seizure tactics, the Court ruled, could only be justified after "a clear showing both that important materials will be destroyed or removed from the jurisdiction and that a restraining order would be futile."[28]

In Democratic National Committee v. McCord, the issue was whether or not certain subpoenas to members of the press were valid under the First Amendment.[29] Citing Garland v. Torre[30] the leading civil case under newsmen's privilege, the D.C. District Court quashed the subpoenas since those seeking disclosure never proved that the information sought went to the "heart" of their claim. The court reasoned further that newsmen were entitled to a qualified or limited constitutional privilege because the First Amendment would not tolerate unjustified intrusions on the free press and the public's right to know.[31]

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[28] Id. at 125.

[29] 356 F. Supp. 1394 (1973). The subpoenas were issued on behalf of the Committee for Reelection of the President (CREEP) and others. The subpoenaed journalists were not parties to the original action, but had been called for the purpose of testifying and producing documents at pre-trial hearings.

[30] 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958). Potter Stewart who was a Court of Appeals Judge at the time, wrote the opinion developing the "heart of the matter" test. In this test, the party seeking to compel disclosure must prove that the information goes to the "heart" of his claim without which the claimant's case cannot be given fair consideration.

[31] Democratic National Committee v. McCord, 356 F. Supp. 1394, 1399 (1973).

The Court of Appeals for the D.C. Circuit in Carey v. Hume affirmed a lower court order requiring columnist Brit Hume to answer questions relating to his confidential sources for an allegedly libelous news story.[32] Since Hume's source claimed through the article that he personally observed Edward Carey surreptitiously enter and remove certain documents from United Mine Worker's offices, the Court of Appeals concluded that the information sought went to the heart of Carey's libel action.[33]

II. SELECTED STATE CASES

In the aftermath of Branzburg, state courts generally required newsmen to disclose their confidential sources and/or information in jurisdictions without shield laws. In jurisdictions with shield laws, courts generally held that statutes protected information gained through confidential sources, however, a reporter's personal observations were subject to disclosure.

A Maryland appellate court in Lightman v. State distinguished between a newsman's source of information and information derived through personal observations.[34] In holding that the state privilege law did not shield personal observations from compulsory process, the court ruled that neither the First Amendment nor state law could protect the identity of a confidential source in a criminal case.

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[32]Carey v. Hume, 492 F.2d 631, Petition for cert. dismissed, 417 U.S. 938 (1974).

[33]Id.

[34]15 MD. 713, 294 A.2d 149 (1972), cert. denied, 411 U.S. 951 (1973).

In re Bridge, a New Jersey decision, ruled that a trial court correctly required Peter Bridge to give his testimony before a local grand jury in an alleged bribery case.[35] The New Jersey high court concluded that reporter Bridge waived the state shield law after previously identifying the source in his news story. Bridge subsequently served a jail term for his refusal to testify.

Prior to the adoption of Tennessee's "Freedom of Information" Act which was passed in March, 1973,[36] Harry Thornton, news reporter for WDEF-TV in Chattanooga, was jailed briefly for his refusal to disclose the identity of a grand juror who in a telephone call on Thornton's morning television show publicly accused fellow grand jurors of white-washing an investigation of a local judge.[37] On appeal, the Tennessee Supreme Court ruled that an intermediate appeals court judge had improperly ordered Thornton's release from jail. However, the issue of whether or not Thornton could properly refuse to disclose his telephone caller's identity was declared moot after adoption of the state shield law.

A Vermont decision required Burlington reporter John Gladding of WCAZ-TV to reveal the identity of a confidential informant who leaked the time and place of an imminent police drug raid. The court, in the absence of a state shield law, placed limits on the compulsory disclosure

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[35] 120 N.J. Super. 460, 295 A.2d 3 (1972), cert. denied, 410 U.S. 991 (1972).

[36] 27 Tenn. C. Anno. § 24-113 (1973).

[37] State v. Thornton, 492 S.W.2d 912 (1973).

process,[38] and concluded that a news gatherer may refuse to answer questions in a deposition proceeding unless the interrogator can conclusively demonstrate that no other adequately available source exists with respect to the information sought.[39] The court ruled further that the information sought must be relevant and material as to the issue of guilt or innocence before disclosure is ordered.

In New York, TV news reporter Stewart Dan and cameraman Roland Barnes of WGR-TV, Buffalo, refused to answer questions raised by a grand jury concerning the Attica prison riots.[40] In upholding the lower court's decision compelling the newsmen's testimony, an appellate court ruled that the New York privilege statute protected newsmen's sources only, and therefore, the newsmen's personal observations were subject to compulsory process where possible criminal violations had occurred.

An Ohio case adjudicated under the state shield law distinguished between the identity of a news source and testimony relevant to the conduct of a libel case.[41] In Forest Hills Utility Co. v. City of Heath, the court required a newswoman to answer questions relevant to the main proceeding, but ruled that Ohio law would not require identity of a news source where such information was irrelevant to the conduct of the case.

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[38]State v. Peter, 132 Vt. 266, 315 A.2d 254 (1974).

[39]7 Editor and Publisher 15 (1974), hereinafter cited as Ed. and Pub.

[40]People v. Dan, 342 N.Y.2d 731 (1973).

[41]302 N.E.2d 593 (1973).

In Dow Jones, Inc. v. Superior Court, a Massachusetts court upheld disclosure in an action for libel against a newspaper and reporter.[42] The court ruled that there was no privilege which would preclude a newswoman from disclosing the identity of an unnamed town official who uttered an allegedly libelous statement which was published in a news article.

Where a newspaper photographer of the Wilmington, Delaware News Journal was directed by subpoena (In re McGowen) to present photographs of a local anti-bussing demonstration to police, the court ruled that the subpoena was improperly issued and should be quashed.[43] Avoiding a First Amendment question, the appellate court's decision was based on procedural matters. However, the court stated that in such cases where a government investigating body seeks compulsory disclosure of a newsman's sources, Branzburg v. Hayes would apply.

In Virginia, Charles Willie Brown appealed his second degree murder conviction on grounds that the trial court erred in refusing to compel a newspaper reporter's testimony which had some bearing on the case.[44] Brown claimed that the identity of a newsman's source quoted in a news story which provided a detailed account of the murder was crucial to a proper defense. Rejecting the defendant's claim, the court ruled that the newsman's testimony was irrelevant to the murder trial and that the lower court had correctly ruled against compulsory disclosure.

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[42]303 N.E.2d 847 (1973).

[43]303 A.2d 645 (1973).

[44]Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974).

The following compilation of newsmen's privilege cases, lists, for the most part, unreported cases and many of the citations are docket numbers. The cases will be officially reported after they are decided and the opinions printed up and distributed. The time between decision and reporting varies, and it is our experience that the majority of state decisons are not published until six months to a year after final decision is rendered. In federal cases, major appellate decisions are usually published within two months after final adjudication. However, some courts are not reporting all decisions. In accordance with a recent rule adopted by the Judicial Conference of the United States, judges may order the court clerk not to publicly post an opinion if the court determines that the case presents no novel question of law.

Case citations were provided through The Reporters Committee for Freedom of The Press Legal Defense and Research Fund, Washington, D. C. This listing is not intended to represent an exhaustive compendium of all recent newsmen's privilege cases. Cases were selected from the Press Censorship Newsletter which is compiled and distributed as a public service by the Reporters Committee on a quarterly basis. The committee also maintains a current log of court opinions, briefs, case citations, pending press related bills, legislative analyses, news clips and other background information concerning press related matters.

III. RECENT STATE CASES

Lucy Ware Morgan, St. Petersburg Times reporter, refused to identify a confidential source who had allegedly given her information relative to a secret grand jury presentment concerning corruption among Dade City, Florida, officials.[45] Subsequently, she was cited with two criminal contempt citations which carried prison sentences of eight months. The contempt citations are still pending.

A state trial court judge avoided ruling on the Minnesota shield law and quashed a subpoena demanding Joe Delmont of the St. Paul Dispatch and Pioneer Press to reveal confidential news sources.[46] The case arose when a Bloomington, Minnesota collection agency sought the identity of a news source who had provided Delmont with information describing the agency's business practices as unsavory. The court concluded that the information sought was irrelevant to the libel action.

During the trial of a New York police officer charged with the murder of a young boy, defense attorneys subpoenaed New York Times reporter Ronald Smothers to testify concerning his published interview with the deceased's father. Since the dead boy's father had been an eye witness to the alleged murder, the defense claimed that the reporter's testimony was needed to bring out alleged discrepancies between the father's published account of the shooting more than a year

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[45] State v. Lucy Ware Morgan, No. 73-741 (Circuit Court of the 6th Judicial District for Pasco Co., Fla., December 1974).

[46] No citation available. See Reporters' Committee for Freedom of the Press, 3 Press Censorship Newsletter 10 (1973), hereinafter cited as Press Censor. News.

earlier, and his trial testimony. The Times moved to quash the subpoena on First Amendment and on procedural grounds. The judge ruled for the Times reporter announcing that the reporter's testimony did not meet the technical requirements for "proper evidence."[47]

In Massachusetts, a state court ruled that two newsmen of the Lowell Sun could plead the Fifth Amendment and avoid disclosing their confidential source regarding a grand jury leak in connection with the investigation of four town officials allegedly involved in an extortion scheme.[48]

Austin I. Stonney, who stood accused of rape, sought to compel Miami Herald reporter, Bea Hines, to testify at his trial concerning the reporter's interview with the alleged rape victim. Stonney's lawyers said they were planning to show at trial certain inconsistencies between various statements made by the rape victim. However, on August 13, 1974, a Florida State court judge granted Ms. Hines' motion to quash the subpoena. In relying primarily on the First Amendment, the court ruled that there had been no showing of a compelling need for the information sought, and no indication that the reporter's testimony and notes were unavailable from other sources.[49]

In another Florida case, Randolph Pendleton of The Times Union in Jacksonville was subpoenaed in a civil action in order to testify

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[47]No citation available. See 6 Press Censor. News. 33 (1975).

[48]Grand Jurors of Middlesex County v. Frank Phillips, Nos. 111800-111801 (Superior Court, 1974).

[49]State v. Stoney, Crim. Div., Case No. 74-227 (Circuit Court of the 11th Judicial District for Dade County, Fla., August 13, 1974).

by deposition concerning an article about a building condemned because of cracks and other structural damage. The building's owner was suing the contractors responsible for its construction. Prior to the deposition proceeding, a Florida judge granted Pendleton's motion to quash the subpoena since this was an attempt to inquire into the gathering of news and sources without compelling or overriding justification.[50]

In November, 1973, a Maryland school principal won a $281,000 libel judgement against the Montgomery County Sentinel. The case arose subsequent to a 1971 article by former Sentinel reporters Bob Woodward and William Bancroft in which they called the principal "unsuited" for his job. At trial, the reporters refused to disclose their sources, and the court ruled that defendants were not covered by the Maryland shield law and therefore were obligated to disclose.[51]

In August, Dayton (Ohio) Journal Herald investigative reporters, Andrew Alexander and Keith McKnight, wrote a series of articles documenting alleged corruption in the Bureau of Vocational Rehabilitation, a state agency funded 20 percent by the state and 80 percent by the federal government. When the state prosecutor asked the reporters to disclose their sources, they refused and subsequently the Mahoning County grand jury issued a subpoena to Alexander. Alexander refused to appear and the subpoena was quashed because of a technical defect.

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[50]Harris v. Blackstone, Case No. 71-1525-CA (Circuit Court, Duval County, Fla., November 1, 1974).

[51]No citation available. See 6 Press Censor. News. 34 (1975).

Another subpoena was issued to the reporter; however, during the interim, Alexander turned his notes over to the Journal Herald publisher who was also required to appear before the grand jury.[52]

In Florida, a Circuit judge cited the First Amendment in quashing a subpoena issued to a Marathon, Florida, weekly Keynoter reporter, Ronald Edward Mason. Defense attorneys for a convicted marijuana smuggler, Ron W. Laughlin, were attempting to get information from Mason concerning alleged illegal wiretapping of Laughlin by federal and county law enforcement agents. The court ruled that the defense failed to demonstrate that the reporter had information bearing on the case, and that to force disclosure in this instance would be a clear violation of the First Amendment.[53]

IV. RECENT FEDERAL CASES

Daily Oklahoman reporter Jack Taylor was subpoenaed by a federal grand jury probing the affairs of Oklahoma governor David Hall. The grand jury foreman questioned Taylor briefly in relation to his source of information for news stories which contained alleged secret grand jury information. However, after Taylor's insistent refusal to disclose his news source, the 17 member grand jury dismissed him and failed to take any further action on the matter.[54]

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[52]No citation available. See 6 Press Censor. News. 35 (1975).

[53]State v. Laughlin, Crim. Div., Case No. 73-530 (Cir. Ct., 16th Jud. Dist., Monroe Co., Fla., July, 1974).

[54]No citation available. See 6 Press Censor. News. 37 (1975).

In July, 1974, the Texas Medical Association (T.M.A.) subpoenaed documents, financial records and information concerning the confidential news sources of Jackie (J.L.) Cox, a free-lance reporter who had published articles in the Texas Observer critical of the T.M.A. The articles concerned the internal operation of the medical organization and had quoted anonymous members of the group regarding harassment of physicians who disagreed with T.M.A.'s political philosophy. Cox also testified about these matters before United States Senate and Department of Health, Education and Welfare (H.E.W.) committees. Previous to the Cox subpoena, the T.M.A. filed suit in federal district court in Texas challenging certain H.E.W. regulations requiring the establishment of a body to review the professional standards of the medical profession in Texas. With respect to the Fox subpoena, the T.M.A. claimed that the reporter had information concerning the method by which H.E.W. regulations were promulgated. After Cox moved to quash the subpoena, T.M.A. and Cox agreed to an off-the-record session. The federal court ruled that Cox would not have to testify with respect to her confidential news sources or her actual work product, but the reporter was required to testify about matters previously discussed before both Senate and H.E.W. committees.[55]

In a libel case against CBS which is still pending, Henry Buchanan, brother of former White House aide, Patrick Buchanan, filed a $12 million libel suit against CBS, Walter Cronkite, and CBS affiliate WTOP-TV in Washington, D. C. The suit contended that a May 8, 1973

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[55]No citation available. See 6 Press Censor. News. 37 (1975).

CBS Evening News broadcast, which said that Buchanan's accounting firm had been used to "launder" campaign contributions to the Nixon presidential campaign, was false and malicious. CBS retracted its story three days after it was originally broadcast. ABC and NBC did not air broadcasts containing the charges. CBS reportedly based its story on an Associated Press (A.P.) dispatch. A.P. was also sued as was A.P. reporter Stephen Cohen. In May, 1974, attorneys for Buchanan subpoenaed ABC Evening News producer, Herbert Dudnick. The subpoena sought "testimony, records, memorandums and documents" relating to their handling of the Buchanan story. The district court quashed the subpoenas against Lord and Dudnick concluding that the information sought did not go to "the heart of their case." The court further ruled that Buchanan had failed to show that the information sought was not available from other sources.[56]

In a California case, U. S. District Court Judge Andrew Hauk ruled that a state shield law was not applicable in a case which involved the possible violation of federal law. As to the allegation that Will Lewis, station manager of Los Angeles Pacifica station KPFK-FM, who was previously held in contempt and jailed in violation of the Justice Department's guidelines, Judge Hauk ruled that there was no burden on the Government to demonstrate that they had adhered to that particular policy statement. The second Lewis case carried an extremely crucial issue before the Ninth Circuit Court of Appeals which heard oral argument in March, 1975.

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[56]Buchanan v. Cronkite, Civil Action No. 1087-73 (D.C.D.C., September, 1974).

That issue is whether or not federal courts should apply state shield laws in federal cases which may involve exclusively federal questions or violations of federal statute. Lewis' brief contends that if federal courts are allowed to ignore state privilege statutes, the ultimate effect of this situation would be the nullification of 26 shield laws with respect to federal question.[57]

Occasionally, police have used no-notice warrants to search media files instead of relying on subpoenas to compel disclosure of confidential information. Use of no-notice warrants preempts either First Amendment objections or state shield laws which would have application if authorities adhered to the formal subpoena process.[58] In 1972, a federal judge in California ruled that no-notice police search warrant raids of news offices violated both First and Fourth Amendments.[59] Despite the California federal district court holding, police in that part of the country have continued their no-notice search warrant policy, and four such searches were reported during 1974.[60]

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[57]No case citation available. However, in previous litigation where Will Lewis was held in contempt for refusing to turn over alleged confidential materials to a federal grand jury, both trial and appellate courts refused to sustain a claim of privilege. See In re Lewis, 501 F.2d 418 (9th Cir. 1974). See also 6 Press Censor. News. 38-39 (1975).

[58]No citation available. See 6 Press Censor. News. 30-40 (1975).

[59]Standford Daily v. Zurcher, 353 F. Supp. 124 (1972).

[60]No citation available. See 6 Press Censor. News. 30-40 (1975). Media agencies involved were the L.A. Star and the Berkeley Barb (two warrants were served on the Barb's attorneys), and radio stations KPFA-FM in Berkeley, KPFK in Los Angeles and KPOO-FM in San Francisco.

In view of extant case law, it appears that state courts, in the absence of a shield law, and in criminal cases, generally follow the common law rule requiring everyman's evidence. Where newsmen either personally observe criminal conduct (Lightman v. States,[61] People v. Dan)[62] or possess knowledge of alleged criminal conduct or crimes (In re Bridge,[63] State v. Peter,[64] In re McGowan)[65] state courts usually compel disclosure of confidential information even where shield laws are operative.

Case law relating to the newsmen's privilege question demonstrates that state courts continue to construe newsmen's privilege statutes as exceptions or derogations to common law principles governing testimonial requirements. The majority rule, as applied by courts, demands that courts should not circumvent the rule requiring "everyman's evidence" any further than the explicit wording presented in a shield law.[66]

In federal cases, courts have generally adhered to the Branzburg rationale in criminal cases with few exceptions (Bursey v. United

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[61]15 MD. 712, 294 A.2d 149 (1972), cert. denied, 411 U.S. 951 (1973).

[62]342 N.Y.2d 731 (1973).

[63]120 N.J. Super. 460, 295 A.2d 3, cert. denied, 410 U.S. 991 (1972).

[64]132 Vt. 266, 315 A.2d 254 (1974).

[65]303 A.2d 645 (1973).

[66]Note, The Journalists' Prerogative of Nondisclosure: Fact or Fantasy, 20 Loyola L. Rev. 135-37 (1974).

States),[67] but have not construed the decision as an absolute bar against future claims of a First Amendment newsmen's privilege in criminal cases (Baker v. F. and F. Investment Co.,[68] U. S. v. Liddy).[69]

Recently, it was reported that the Justice Department is currently violating the subpoena "guidelines" established under John Mitchell in 1970. However, then Attorney General William Saxbe contended that during his tenure in the Justice Department, he authorized fifteen subpoenas to reporters most of whom cooperated but requested subpoenas for their own personal reasons.[70]

V. FEDERAL QUESTIONS

Where cases are based on diversity jurisdiction, does the federal court apply a state shield law if one is operative? In Hyde Construction Co., Inc. v. Keering Co., the Court of Appeals for the Fifth Circuit held that unquestionable unanimity exists among all federal judicial circuits which have considered the question.[71] The Court of Appeals ruled that legislatively created privileges should be treated as substantive law, and the applicable state statute should govern in accordance with the Erie doctrine.[72]

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[67]466 F.2d 1059 (9th Cir. 1972).

[68]470 F.2d 778 (2d Cir. 1972).

[69]478 F.2d 586 (D.C. Cir. 1972).

[70]6 Press Censor. News. 30 (1975).

[71]Hyde Construction Co., Inc. v. Keering Co., 455 F.2d 337 (5th Cir. 1972).

[72]Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Where a diversity of citizenship question arises, and the trial court is located in a shield law jurisdiction but depositions are secured in a state without a shield law, the individual claiming the privilege of nondisclosure is usually protected since the law of the trial forum is controlling.[73] However, despite the shield statute of a trial forum, federal courts have required disclosure after a narrow reading of the privilege law.[74]

A federal court may, in most cases, ignore a state rule which extends a privilege where there is a compelling reason for the court to follow an independent federal rule. Consequently, where there are clear indications of a federal policy toward uniformity, and no significant state policy would be served by absorption of the state law into the federal proceedings, federal law may preempt the state rule.[75] Accordingly, this position applies to diversity of citizenship questions as well as those cases involving substantive federal law questions. In cases involving subject matter jurisdiction, federal courts have demonstrated some confusion over whether to apply the state shield[76] or applicable federal rules of evidence governing privileges.[77] However,

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[73] Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953). See also, Cervantes v. Time, 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

[74] Cepeda v. Cohane, 233 F. Supp. 465 (D.C. N.Y. 1964).

[75] Baylor v. Mading-Dugan Drug Company, 57 F.R.D. 509 (D.C. Ill. 1972).

[76] Baird v. Keerne, 279 F.2d 623 (9th Cir. 1960).

[77] Baker v. F. and F. Investment Co., 470 F.2d 778 (2d Cir. 1972).

the recent changes to the Federal Rules of Evidence provide that federal courts may ignore a state privilege statute where the manifest exigencies of a given case demand disclosure. Essentially, the new rules allow federal courts total discretion as to whether or not to apply a given state shield in cases involving substantive federal criminal law questions and in non-diversity civil cases.

VI. COURTS, JURISPRUDENTIAL TESTS AND NEWSMEN'S PRIVILEGE

Court decisions taken alongside of the recent rule changes to the Federal Rules of Evidence reinforce the position that irrespective of whether or not a state shield is applicable in a given case, courts retain a vast reservoir of discretion in the disposition of newsmen's privilege claims. Even where shield laws are clearly applicable, both state and federal courts have circumvented substantive law considerations in order to meet the needs of a given case (Baylor v. Mading-Dugan Drug Co.,[78] Cepeda v. Cohane,[79] In re Lewis,[80] Lightman v. State,[81] In re Bridge).[82] Where no state shield is applicable, the basic argument for refusing recognition of newsmen's privilege is grounded in

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[78] 57 F.R.D. 509 (D.C. Ill. 1972).

[79] 233 F. Supp. 465 (D.C. N.Y. 1964).

[80] 501 F.2d 418 (9th Cir. 1974).

[81] 15 Md. 713, 294 A.2d 149, cert. denied, 411 U.S. 951 (1972).

[82] 120 N.J. Super. 460, 295 A.2d 3, cert. denied, 410 U.S. 991 (1972).

well established common law principles. The constitutional claim to a newsmen's privilege, however, is subject to an "ad hoc" balancing test which theoretically "weighs" various social considerations before either granting or refusing the claim.

In the newsmen's privilege area, both federal and state courts have through the years applied or discarded state shield laws as they have seen fit. More importantly, courts have employed, whether consciously or unconsciously, certain jurisprudential tests with respect to newsmen's claims to a constitutional, common law or statutory privilege. One such test asks the government to show a compelling need for the information which "outweighs" society's interest in protecting newsmen's confidential sources.

Superimposing this "competing social interests" framework raises a basic "fairness" question which courts have been asked to resolve. What social interest shall prevail given the various factual conditions of each case? Balancing one social interest against another in order to decide which "outweighs" the other is a highly subjective task. Therefore, courts have developed various jurisprudential tests within the "competing social interest" framework as guides to judicial decision-making. While such tests are not panaceas, authority shows five judicial tests as necessary corollaries to the decision-making process.

The first is the "reasonable likelihood" test. Employed in both federal and state decisions involving criminal investigations, courts assume that confidential information sought by law enforcement authorities is "likely" to be relevant to a criminal investigation. The principle was announced clearly through In re Goodfader where the

court found a reasonable likelihood existed that the desired information would lead to discovery of evidence related to the grand jury's investigation.[83]

Employed in both federal and state civil cases is the "heart of the matter" test. Courts have ruled where a newsman's confidential information is crucial to development of a party's case, disclosure may be compelled. Announced by Potter Stewart--then Court of Appeals Judge for the Second Circuit--in Garland v. Torre,[84] Stewart ruled that when information is crucial to plaintiff's case, the public's right to know must yield to "fair administration of justice" requirements.

Exclusively used in state criminal cases, the "miscarriage of justice" test had applicability where a trial court ruled in People v. Dohrn that a newsman must reveal confidential sources where nondisclosure would result in a miscarriage of justice.[85] However, before requiring compulsory process, it must be determined (1) whether or not the newsman has relevant information bearing on the inquiry, (2) whether or not compulsory process is the only method through which the evidence can be obtained, and (3) whether or not a substantial "miscarriage of justice" would result if the information is not disclosed.

Advanced first in Application of Caldwell, the "compelling need" test required either a newsman's appearance or testimony before a grand

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[83]45 Hawaii 317, 367 P.2d 472 (1961).

[84]259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

[85]Crim. No. 69-3808 (Cir. Ct. Cook County, Ill. 1970).

jury be conditioned upon a clear demonstration that a compelling and overriding need for the information existed.[86]

The United States Supreme Court in Branzburz v. Hayes rejected "compelling need" in favor of ad hoc balancing after a finding that society's interest in the fair and effective functioning of the criminal justice system far outweighed any possible adverse effects on First Amendment rights. On the one hand the Court ruled that newsmen's confidences were not without constitutional protections. However, on the other hand, the Court held that First Amendment rights were never absolute and the facts of the case required disclosure.[87]

VII. THE FEDERAL RULE CHANGES AND NEWSMEN'S PRIVILEGE

In 1965, Chief Justice Warren empaneled an Advisory Committee on Evidence to draft the Federal Rules of Evidence for United States Courts and Magistrates. On November 20, 1972, these rules proposals were made public. The project first began in 1961 when Warren appointed a Special Committee of the Judicial Conference of the United States in order to determine the feasibility of drafting uniform rules of evidence for federal courts. After a year, the committee reported favorably on the matter and several years thereafter Warren empaneled the Advisory Committee for the purpose of drafting the rules proposals.[88]

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[86] 311 F. Supp. 358 (N.D. Cal. 1970).

[87] 408 U.S. 665 (1972).

[88] See, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Rules of Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts 30 F.R.D. 73 (1962).

It was reported that the rule proposals to the Federal Rules of Evidence would in federal diversity cases leave open the question of whether or not a federal court should apply a state shield law whenever a claim of privilege arose. Consequently, the implementation of these rules could not only affect substantive federal law questions, but lead to the frustration of a state created right in a federal diversity action. The rule changes characterize the law of privileges as procedural with respect to preliminary questions of fact despite the widespread agreement among courts that privileges are essentially substantive in nature and not procedural. Consequently, it was argued that changes of this kind were beyond the scope of any special judicial committee's action.[89]

Under 18 U.S.C.A. §§ 3402, 3771, 3772, and 28 U.S.C.A. §§ 2071-2073, the United States Supreme Court has the power to prescribe, by general rules, the forms of process, writs, pleadings, and the practice and procedure for criminal and civil proceedings in federal courts. In the exercise of that power the Court, through an Advisory Committee, proposed 77 rules of evidence for federal proceedings, and a majority of these proposals were adopted by the 93rd Congress as submitted or with only minor nonsubstantive changes.[90]

Substantive changes which affect newsmen's privilege are as follows: Rule 104 (a) Questions of admissibility generally. Preliminary

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[89]See Comment, The Privilege Doctrine and the Proposed Rules of Evidence, 24 Syracuse L. Rev. 1173, 1174 (1973).

[90]See generally, 1 U.S. Code Cong. and Ad. News 1-50 (1975).

questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court of record subject to the provisions of subdivision (b). Therefore, when making a determination of fact, courts are not bound by rules of evidence except those with respect to privileges. Rule 104 (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Under Article v. dealing with privileges, Rule 501 states the following: 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, those privileges of any witness, person, government, State or political subdivision thereof shall be governed by common law principles as interpreted by United States Courts in light of reason and experience. However, in civil actions and proceedings where there is a question concerning which state law supplies the rule of decision with respect to an element of a claim or defense, the privilege of witness, person, government, State, or political subdivision thereof shall be determined according to state law.[91]

In summary, these substantive changes to the Federal Rules of Evidence permit federal courts to develop the law of privileges on a

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[91] Id.

case-by-case basis under the common law, particularly in those cases where reporters raise a state shield law as a defense where federal questions are involved.

We have considered Branzburg's impact on both federal and state courts and found that the principle requiring "everyman's evidence" retains widespread application even where state shield laws offer evidentiary exclusions for newsmen seeking to protect confidential information from compulsory process requirements. Now let us turn to a consideration of the relationship between Branzburg v. Hayes and subsequent political activity arising in Congress and several selected states.

VIII. SOUND AND FURY: THE SYMBOLIC AFTERMATH

Senator Sam Ervin (D--North Carolina) was one of the first congressmen to call for the adoption of a federal shield law in the aftermath of Branzburg v. Hayes. Ervin's Senate Judiciary Subcommittee on Constitutional Rights began formal hearings in February, 1973, for the purpose of determining the desirability and scope of a national shield law.[92] These hearings were eseentially a distillation of previous subcommittee hearings held during the 92nd Congress which

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[92]Hearings on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 1128 and S.J. Res. 8 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. at 1-10 (1973), hereinafter cited as 1973 S. Hearings.

considered several First Amendment press considerations.[93]

In the House, Robert Kastenmeir (D--Wisconsin) led his Judiciary subcommittee toward what he termed the:

> . . . final round of public hearings on measures designed to create a statutory privilege--a so-called newsmen's privilege--in reporters and other newsmen to refuse to disclose information or the source of information received in the course of newsgathering.[94]

Kastenmeir's subcommittee conducted five days of exploratory hearings from September through October, 1972, relating to the question of whether or not Congress should adopt a federal shield law. The hearings in the 93rd Congress which began February 5, 1973, were specifically geared to determine the necessity and scope of a national shield law.

Meanwhile, members of the press continued their support of various legislative proposals at either the federal or state level aimed at giving newsmen some type of protection from officials interested in compelling disclosure of confidential sources and/or information. The press crusade for shield laws focused on the necessity of "maintaining an open and robust democratic society" and the public's "right to know." Members of the journalistic community cited numerous governmental efforts to abuse the subpoena power to restrict or curtail the "free and open transmission of ideas."

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[93] Hearings of Freedom of the Press Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92nd Cong., 1st and 2d Sess. (1972). Specifically, the Committee considered (1) the increase of subpoenas to journalists, (2) government attempts to enjoin publication of classified information, (3) widespread use of false press credentials by government investigators, and (4) growing media concern over government controls of the press.

[94] Hearings on H.R. 717 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 93rd Congress, 1st Sess., ser. 5 (1973), hereinafter cited as 1973 H. Hearings.

Editorials in newspapers and magazines questioned the use of subpoenas to compel disclosure of newsmen's confidential sources and information. Journalists complained that they were being used to help law enforcement officials investigate alleged criminals, subversives, Black revolutionaries and counter-culture drug pushers. In response to these and other press criticisms of law enforcement officials, one author opinioned that attempts by newsmen to reduce governmental investigative powers through shield laws, slogans and shibboleths were not only illogical but ill-advised.[95]

Elsewhere, the self-righteous attitude of newsmen was vociferously attacked. At the annual meeting of the Allied Social Science Associations, Economics Professor Ronald Coase of the University of Chicago argued that the press usually acted out of self-interest and the "right to know" philosophy was another manifestation of that self-interest. On the subject of newsmen's privilege, Coase told the Association that to desire to know the source of a story is not idle curiosity" because often times it is extremely difficult to know how much credence to give information or to check its accuracy if one is ignorant of the source.[96]

Another writer commented on the hypocrisy exhibited by many newsmen who once demanded an absolute privilege for themselves, and

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[95]Friendly, Beyond the Caldwell Decision--Justice White and Reporter Caldwell: Finding a Common Ground, 11 Colum. J. Rev. 31, 37 (1972).

[96]Swietnicki, The First Amendment Conflicts Concern Social Scientists, 1 Ed. and Pub. 19 (1974).

then in the wake of the Watergate investigations denounced President Nixon's claim of executive privilege. Also, it was suggested that the legal controls placed upon the press are quite modest and that this fact alone places an obligation on the press to exercise self-restraint.[97] Elsewhere, it was argued that claims of confidentiality indicate the amoral attitude of journalists who report the news, and if such claims are granted, this may lead to a journalism without regard to consequences.[98]

In spite of sharp criticism by those anti-shield law advocates, Congressional support for federal legislation was considerable in the post-Branzburg period. Efforts to adopt shield legislation, however, faltered in both the 92nd and 93rd Congresses and as the 94th Congress convened, newsmen expressed little hope of adopting a national law. Past efforts to enact a national shield failed mainly because of an apparent lack of agreement on the proper scope of such a law. For example, an analysis of the House subcommittee hearings reveals that approximately 140 United States Representatives and Senators sponsored or co-sponsored newsmen's privilege bills during the 93rd Congress. During the 92nd Congress, approximately 30 newsmen's privilege bills were introduced, and in the first six weeks of the 93rd Congress, 38 shield bills were introduced with over 100 sponsors and co-sponsors. Newsmen's privilege legislation before the 93rd Congress was voluminous

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[97]Methin, The Hypocrisy of Absolute Privilege, 30 Sem. Q. 17 (1973).

[98]Kauper, The Role of the Press in a Democratic Society, 7 Ed. and Pub. 9 (1974).

and was subsequently categorized under six major language groups which distinguished them by the nature of the bill's wording.[99]

IX. NEWSMEN'S PRIVILEGE: A DE-FUSED ISSUE?

Beginning in February, 1972, many congressmen eagerly supported the establishment of shield laws either federal or state. The Nixon administration, however, remained opposed to the establishment of a federal shield law. Instead the Administration endorsed the Justice Department guidelines which encouraged negotiation between newsmen and law enforcement officials concerning claims regarding confidential relationships.[100]

The diminished saliency of newsmen's privilege became manifest after national attention turned to Watergate and related criminal activities. Preoccupation with the Senate hearings on illegal presidential campaign activities served to divert congressional energy from newsmen's privilege to the investigation of the Nixon Administration. Focusing on charges that various Nixon aides had engaged in illegal campaign activities during the 1972 presidential campaign, Senator Ervin launched a special investigating committee on an inexorable bipartisan march which culminated in the resignation of the President.

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[99] 1973 H. Hearings, supra note 94 at 585-87.

[100] See H. Krieghbaum, Pressures on the Press 24-44 (1972). The author presents a brief description and analysis of the Nixon Administration's strained relationship with the press under Vice-President Agnew and Attorney General John Mitchell, with respect to subpoenas to the press.

The de-fusing of the newsmen's privilege issue with respect to growing congressional and press disinterest is appropriately chronicled in Congressional Quarterly. What had amounted to a steady coverage of the status of shield legislation from early February, 1973, abruptly ceased after a June 16 article. In what was a farewell report on newsmen's privilege insofar as the 93rd Congress, Congressional Quarterly reported in three lines that the National Press Club had condemned the Justice Department under President Nixon as "particularly hostile to adequate legal protection for newsmen" seeking protections for their confidential news sources.[101]

In the following month, support for a national shield was voiced from a small group within the American Bar Association (hereafter referred to as the ABA). Consequently, a six-man ABA study group prepared a shield law proposal conforming to bills supported by Senator Ervin and Representative William S. Cohen (D--Maine). The ABA proposal offered protection against compulsory process except for cases involving libel, slander and non-confidential communications.[102] However, after the study group presented their recommendations before the full ABA House of Delegates in August, 1973, the delegates voted to postpone indefinitely any action on the shield law proposal.[103] However, the 94th Congress is presently considering three new shield law proposals

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[101] 31 Cong. Q. 1527 (1973).

[102] 28 Ed. and Pub. 8 (1973).

[103] 32 Ed. and Pub. 14 (1973).

and on April 23rd and 24th, House hearings opened on shield law legislation.[104]

Theoretically, newsmen's privilege is part of a larger question which asks: What is the proper role of the press with respect to government? Many believe that the press should assume and maintain the role of "friendly adversary" with respect to government at all levels whether it be federal, state or local. The adversarial role demands that members of the press monitor the complex processes of government while keeping the public informed concerning government policies and objectives. Quite possibly, statutory newsmen's privileges or a constitutionally sanctioned privilege may in some way enhance the newsgathering abilities of the press despite Blasi's empirical findings.[105] Available survey research suggests that the threat of subpoena does not adversely affect the newsgathering function or lessen the observable frequency with which informants offer journalists information. Our findings in the Tennessee case study do not contradict Blasi's evidence. Furthermore, Tennessee newsmen who were interviewed could not agree on whether or not the Supreme Court's refusal to recognize a First Amendment privilege has had an adverse impact on the newsgathering function.[106]

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[104] 7 Press Censor. News. 99 (1975).

[105] Blasi, The Newsmen's Privilege: An Empirical Study, 70 Mich. L. Rev. 229, 247-51 (1971). Blasi reported that only one-half of 975 reporters questioned relied on regular confidential sources for information, and, of this group, only 18 percent could say with certainty that their professional functioning had been adversely affected by the threat of subpoena.

[106] See Appendix A for Tennessee Q Study.

Despite the empirical data which show an inconclusive relationship between the presence or absence of a newsmen's privilege and the volunteering of information by informants, many newsmen still argue for statutory and/or constitutional protections. For example, Peter Bridge, a journalist jailed for several weeks after persistent refusals to reveal a confidential source, declared recently that absolute shield protection for the journalist is a necessary instrument of twentieth century journalism.[107]

X. SHIELD LAWS--A DOUBLE EDGE

Many journalists have concluded that shield laws cause more problems for newsmen than they solve because of "loopholes" and wide variance in judicial interpretation and application.[108] Both the American Society of Newspaper Editors (ASNE) and American Newspaper Publisher's Association (ANPA) now support either an absolute shield or none at all.[109] Quite possibly, shield laws could adversely affect the administration of the criminal justice system and encourage (unwittingly) the inaccurate reporting of the news if sources remained anonymous.

Columbia University Professor of Broadcast Journalism, Fred W. Friendly, in a speech to the Law and Layman's Program of the American Bar Association said congressional shield legislation might become a

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[107] Bridge, Absolute Immunity, Absolutely, 61 The Quill. 8-11 (1973).

[108] 7 Ed. and Pub. 15 (1974). See also, Royster, Shield Laws Have Boobytraps, 28 Sem. Q. 13 -14 (1973).

[109] Fields, Shield Laws After a Year, 29 Sem. Q. 25-27 (1973).

"shield of Damocles" for the press, and past clamor for a national shield law was related to a "rash of subpoenas" emanating in the late 1960's. Friendly argued that the issue had grown out of proportion to newsmen's need for source protection and many journalists had been diverted from newsgathering tasks to the "politics of journalism." Adding that he was against all legislated privileges, Friendly concluded that a proper reading of First and Sixth Amendments by prosecutors, judges and newsmen would eventually abate the emotionalism associated with the controversy.[110]

Public support for newsmen's privilege in the immediate post-Branzburg period was reportedly moderate. A Gallup poll conducted November 10 through 13, 1972, reported that 57 percent of those interviewed supported a newsman's right to protect confidential news sources. Of those 1,462 persons interviewed in 300 localities across the country who attended college, 68 percent felt that newsmen had a right to protect their confidential news sources.[111] In a follow-up survey conducted one year later (November, 1973), Gallup showed that 62 percent of those interviewed believed that newspaper reporters should not

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[110] 13 Ed. and Pub. 14 (1974).

[111] 1973 H. Hearings, supra note 94 at 294. The following question was posed to respondents in the survey: Suppose a newspaper reporter obtains information for a news article he is writing from a person who asks that his name be withheld. Do you think that the reporter should or should not be required to reveal the name of this man if he is taken to court to testify about the information in the news article? In announcing the results of the survey, George Gallup stated, "One argument frequently given by persons in the survey who think newsmen should not be required to reveal sources is that decisions to jail newspaper reporters could eventually deplete the confidential sources on which newsmen rely to fulfill their responsibility to the public."

be compelled to reveal their sources, a 5 percent increase over the previous year.[112]

In summary, our findings show a post-Branzburg upsurge in political activity aimed at establishing newsmen's privilege legislation at both the national and state levels. Newsmen pressed for adoption of shield laws in response to Branzburg and resultant fears that law enforcement officials would attempt to step-up subpoenas to the press. Post-Branzburg political efforts netted nine new shield laws and large quantities of "free press" propaganda for newsmen's rights. Oklahoma, in late 1974, became the 26th state to provide statutory protections for newsmen's confidential sources.[113] No other states have adopted shield laws as of the writing of this dissertation. However, in April, 1975, a United States House of Representatives subcomittee opened hearings on H.R. 215, a qualified proposal, introduced by Robert Kastenmeir (D--Wisconsin).[114] While a national law was not adopted by

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[112] 15 Freedom of Information Digest 5 (1973).

[113] Alabama, Alaska, Arizona, Arkansas, California, *Delaware, *Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, *Minnesota, Montana, *Nebraska, Nevada, New Jersey, New Mexico, New York, *North Dakota, Ohio, *Oklahoma, *Oregon, Pennsylvania, *Rhode Island and *Tennessee. Kansas, Wisconsin and Missouri considered shield law measures but voted against formal adoption. For a report on Kansas, Wisconsin and Missouri shield law efforts, see 15 Freedom of Information Digest 2 (1973). (Asterisks denote post-Branzburg shield laws.)

[114] 7 Press Censor. News. 16 (1975). By the end of February, 1975, three bills providing shield protection to reporters had been introduced into the House to establish a federal newsmen's privilege--H.R. 172, sponsored by Rep. Bella Abzug (D--N.Y.) would provide absolute protection; H.R. 562, sponsored by Rep. Edward Koch (D--N.Y.) provides that no newsman can be compelled to disclose to Congress or any federal court or agency information or sources which have been procured for publication or broadcast; H.R. 215, sponsored by Robert Kastenmeir, which is a qualified proposal. All three of the House bills were assigned to the Judiciary Subcommittee chaired by Kastenmeir.

the 93rd Congress, there appears to be a sufficient base of support in the 94th Congress to keep the newsmen's privilege issue alive.

With respect to the failure of the 93rd Congress to adopt shield legislation, we found that manifest opinion differences among members of the media, organized bar and legislature concerning the proper scope of such a law, deferred passage of a national law until a later date.

With respect to judicial activities following Court decision-making, we found that in federal cases, courts have consistently upheld disclosure under the Branzburg rationale, but in civil cases under the Torre doctrine, courts have generally upheld disclosure only after a showing that the information sought went to the "heart" of plaintiff's case.[115]

Where efforts have been directed toward compelling newsmen to disclose their confidential news sources in federal civil proceedings, court response has been mixed. In diversity cases, or suits between citizens of different states, federal courts have generally applied the state shield of the trial forum, if available. In other civil cases, federal courts have been free to "absorb" state law on a case-by-case basis, and where no shield law is applicable, courts have followed the "heart of the matter" doctrine in determining whether or not to require disclosure.

Under the new Federal Rules of Evidence, federal courts are required to apply the state shield in diversity cases. This is merely

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[115] 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

a codification of a common law practice. In all other civil cases and criminal actions, federal common law applies.

In state cases, in the absence of a statute courts generally follow the common law principle requiring newsmen to give their testimony with respect to criminal cases. Where a privilege statute is operative, generally courts strictly construe the privilege when determining whether or not to compel disclosure. However, in civil proceedings, shield law forums generally apply the privilege scrupulously while ruling against compulsory process. In the absence of a state shield, newsmen generally have been compelled to disclose their sources in civil cases where the information sought was declared relevant to the main proceeding.

We postulate that several well publicized newsmen's privilege cases which occurred in the late 1960's and early 1970's along with the United States Supreme Court decision refusing to recognize a constitutional newsmen's privilege prompted a press drive for shield laws.

Initially, newsmen perceived Branzburg as an effective bar to a First Amendment privilege. It was also feared that the decision would spark an increase in subpoenas demanding disclosure of confidential sources. Neither assumption, from our perspective, is supported by evidence. In fact, Branzburg has not been interpreted by lower courts as an absolute bar against First Amendment newsmen's privilege claims. Furthermore, prosecutors have not attempted to use Branzburg as a steppingstone to journalists' confidential sources and/or information.

Consequently, after discussing lower court application of Branzburg and describing the relationship of that decision to a

subsequent rise in political activity, we conclude the following: (1) in the absence of shield laws, courts generally follow the Branzburg rationale in criminal cases when requiring disclosure, and (2) Branzburg led directly to various political activities at both state and national levels aimed toward establishing shield laws which would exempt newsmen from common law testimonial requirements. However, there is no demonstrable evidence which points to the fact that Branzburg has palpably affected newsmen's behaviors at the local level. Hence, as far as we can determine, Court decision-making, in this instance, has had little or no apparent effects on behavioral realities and falls under our classification of non-action oriented decisions.

Chapter IV has described the general political aftermath of Branzburg which arguably has not affected behavioral realities at the local level. Furthermore, we described how and why newsmen joined together in a loosely organized movement aimed at securing statutory shield and judicial recognition of a constitutional newsmen's privilege.

In summary, we found little evidence to support newsmen's claims of increased subpoena abuse and widespread harassment of the news media. While Tennessee newsmen apparently felt compelled to seek a shield law following the Court's Branzburg pronouncement, our research found nothing to substantiate claims that prosecutors rushed to take advantage of the decision. In fact, we found little evidence to support the case for shield legislation in the state. Since the drive for a Tennessee shield law was unrelated to any law enforcement "conspiracy" to take advantage of Court decision-making through the subpoena power, we conclude that the push for shield legislation took the form of an

emotionalized ritual. Furthermore, formal adoption of shield legislation, however insubstantive, helped diffuse an emotionally charged atmosphere which existed within press ranks.

Congressional debate and shield law-making activities in several states apparently assuaged newsmen's fears of subpoena abuse. Newsmen, subsequent to Branzburg, eventually came to believe that the Supreme Court had not openly invited government prosecutors to use or "annex" investigative journalism for the purpose of supplementing official law enforcement capabilities. While Congressional rhetoric and state shields have changed little in the way newsmen and public prosecutors interact, newsmen's privilege vividly symbolizes society's lofty hope for a "free and open press."

We now turn our focus to the process which ultimately led to the adoption of Tennessee's shield law. As expected, we found strong evidence to support our contention that Branzburg prompted Tennessee newsmen to seek statutory protections. More importantly, however, we conclude that effects of decision--especially the Tennessee shield--are chiefly symbolic rather than chiefly substantive. Tennessee's shield law, from our perspective, echoes legislative support of the First Amendment guarantee insuring a "free flow of information to the public," however, that law does little to operationalize that constitutional guarantee because of its limited nature.

CHAPTER V

THE TENNESSEE SHIELD: A SYMBOLIC DIMENSION OF JUDICIAL IMPACT

Following the United States Supreme Court decision in Branzburg v. Hayes,[1] nine states adopted some form of shield legislation extending varying levels of protection for newsmen's confidential sources and/or information.[2] This rise in political activity brought the total number of states with shield laws on their books to 26.[3] Tennessee was one of those states adopting shield legislation in the aftermath of the Branzburg decision.[4]

From our study of the newsmen's privilege phenomenon, we postulate that several main factors contributed heavily to the rise of political activity in Tennessee which ultimately culminated in the adoption of a shield law. Those several factors were: (1) the growing fear of "subpoena abuse" along with the jailings and threatened jailings of several Tennessee newsmen, (2) the United States Supreme Court's Branzburg decision, and (3) the belief among many Tennessee newsmen that statutory protections were necessary to protect the newsgathering function.

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[1] 408 U.S. 665 (1972).

[2] Delaware, Illinois, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island and Tennessee.

[3] 6 Press Censorship Newsletter 31 (1975).

[4] Tenn. C. Anno. § 24-113 (1973).

For a number of years, newsmen have cooperated with law enforcement authorities on an informal basis with respect to revealing confidential sources and/or information, and "swapping such information" paid off in news stories for media and missing evidence for police, FBI agents, and others. It was reported that until the disorders of the 1968 Chicago Democratic convention, formal requests through subpoena for newsmen to appear and testify regarding their confidential sources and/or information were indeed rare.[5] However, in late 1968 and through the early 1970's, a deluge of subpoenas poured forth from prosecutors, defendants, grand juries and a presidential commission all requesting information such as photographs, films and videotapes from newsmen and news organizations. Many newsmen who were actually involved in covering the social disturbances were also subpoenaed to appear and testify with respect to their observations or alleged criminal activities. Prosecutors at all levels of government concluded that such testimony would be useful in seeking indictments of those who had violated the criminal law.[6]

No social disturbances were reported in Tennessee in late 1968 or during 1969 involving newsmen covering demonstrations or protest activities.

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[5]H. Kreighbaum, Pressures on the Press 30 (1972).

[6]Schonfeld, The Film on the Cutting Room Floor, 4 Colum. J. Rev. 52 - 55 (1974). Schonfeld discusses how prosecutors descended on the network film libraries as they sought to identify, indict and convict demonstrators only on the basis of film evidence gathered by the news media.

However, in 1972, a few months after the Court delivered Branzburg, one Tennessee newsman was actually jailed for refusing to disclose a confidential news source before a grand jury while several others were threatened with jail for refusing to divulge confidential information requested by a state legislative investigating committee. Also, during the fall of 1972, the Farr case in Los Angeles and the Bridge case in New Jersey received national press coverage. Meanwhile, the editorial sections of the major newspapers in Tennessee attacked the Court's Branzburg decision as a damaging "blow" to the public's "right to know." Partly in response to these reported occurrences, the Tennessee Press Association (TPA) began organizing its membership in an attempt to convince state legislators and journalists from throughout the state of the need for a state shield law. This small but well organized group of publishers and editors under the leadership of Ralph Millett, editor of the Knoxville News-Sentinel and chairman of the TPA "Freedom of Information Committee," embarked upon a project to create the image of a beleaguered press struggling to gain source protection.

This elite group of journalists who made up the "Freedom of Information Committee," along with help from the regional chapters of Sigma Delta Chi, the professional journalism society and the Capitol Hill Press Corps joined in a statewide shield law campaign which eventually culminated in the adoption of a qualified shield law for Tennessee. In the aftermath of Branzburg, press organizations in other states (Delaware, Illinois, Minnesota, Oklahoma, Nebraska, North Dakota, Oregon and Rhode Island) led similar successful movements in support of statutory protections for newsmen. Consequently, if the Tennessee

case is indeed exemplary, we have in part, remarked on an interesting political pattern.

In describing the impact relationship between Branzburg and the adoption of the Tennessee shield law, we attempt to answer two basic questions: (1) what is the relationship between Branzburg v. Hayes and subsequent political activities of newsmen in Tennessee, and (2) to what extent has the political behavior or activity of Tennessee newsmen affected legislative decision-making? In order to answer these questions we think it appropriate to tap those perceptions and attitudes of newsmen and state legislators who in some way played a significant role in the movement which led to the adoption of Tennessee's Freedom of Information Act.

According to one contemporary student of the judicial process, any use of terms such as impact, implementation and compliance should be handled with caution since they all carry similar connotations.[7] Stephens warns that to label several important events as the aftermath of a major judicial decision only serves to further distort reality.[8] Consequently, we approach our case study with the caveat in mind that Branzburg was but one factor in the complex process which led to the adoption of a shield law in Tennessee.

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[7] O. Stephens, The Supreme Court and Confessions of Guilt 168 (1973).

[8] Id. In his discussion of the political impact of the Miranda decision, Stephens defines impact as those "changes in policy perceptions, attitudes and practices that can be attributed to the Miranda requirements." Implementation for Stephens denotes the process "by which these requirements have been put into formal operation as a part of the routine preceding interrogation." Compliance in Stephen's words "include police adherence to the spirit as well as the letter of Miranda."

In considering the relationship between Branzburg and the adoption of a Tennessee shield law, we found that in the post-decisional period, a small group of journalists joined in an organized effort to convince state legislators of the necessity for shield legislation in Tennessee. Responding to the demands of the press, state legislators adopted the "Freedom of Information" law which was drafted by the Tennessse Press Association.

I. THE SETTING

The first organized rumblings supporting a state shield law emanated from the Tennessee Press Association. In October, 1972, four months after the Branzburg decision, the "Freedom of Information" Committee of the TPA voted to seek the adoption of a Tennessee shield law.[9] Three major events were reported as providing the initial impetus for the shield law campaign: (1) the Court's ruling in Branzburg, (2) the jailings of several reporters such as Peter Bridge in New Jersey and William Farr in California, and (3) threats by a legislative committee to jail Joseph A. Weiler, reporter for the Memphis Commercial Appeal, and the brief jailing of Harry Thornton, a Chattanooga newsman for WDEF-TV.

Branzburg and various sequel cases are discussed elsewhere in this study, however, the Tennessee cases are illustrative of the problem as it surfaced in that locale. Joe Weiler, reporter for the Memphis Commercial Appeal, was ordered in September, 1972, to appear before the

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[9] 5 The Tennessee Press 1-3 (1972).

state Senate General Welfare and Environmental Committee to show cause as to why he should not be held in contempt of the legislature for refusing to identify news sources. The Senate probe dealt with alleged child abuse at the Memphis Arlington School for the Mentally Retarded. However, according to a ruling by the Assistant Attorney General, Robert H. Roberts, the legislative committee had no authority to require Weiler to appear and testify since the legislature had adjourned.[10] Senator Ray Baird (D--Rockwood) commented on the Weiler case and said: "It seems to me that the committed seemed to be more interested in finding out who squealed than in trying to find conditions at the institution."[11] Joe Weiler called attention to the need for a state shield law when he said:

> . . . the original investigation by the Senate Committee, the show cause order and the attorney general's ruling are of little importance compared to the need for a freedom of information act in Tennessee.[12]

During the turmoil over the Weiler case, Harry Thornton, morning television host on WDEF-TV in Chattanooga, received certain information from a phone caller while on the air. The caller, a member of the local grand jury accused that same body of conducting a "whitewash" investigation of former municipal judge Bennie Harris who stood accused of corruption while on the bench. Subsequently, Thornton was subpoenaed to appear and testify in order to identify his caller before the local

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[10] The Knoxville News-Sentinel, Dec. 7, 1972, p. 14, cols. 1-2.

[11] Id.

[12] Id.

grand jury. After Thornton repeatedly refused to identify the caller, Criminal Court Judge Tillman Grant ordered him jailed.[13]

A less publicized case involved reporter Joe Pennington of radio station WREC in Memphis. Upon being threatened with legislative contempt, Pennington disclosed the name of a woman who allegedly provided him with information concerning abuses at a home for retarded children. Although the woman denied that she had provided Pennington the information, she was dismissed from her job at the children's home. Subsequently, a legislative committee recommended that the state attorney general indict either Pennington or the woman for perjury.[14]

Amidst this swirling controversy involving legislative threats to both Weiler and Pennington along with the Thornton jailing, the TPA while meeting in Nashville, Tennessee, voted unanimously to submit proposed legislation insuring protection for newsmen's confidential sources. TPA's move was preceded a day earlier by an offer from the Middle Tennessee Chapter of Sigma Delta Chi to support Thornton, and a promise to draft legislation protecting newsmen's confidential sources.

Two weeks later, the Tennessee Trial Lawyers Association (hereafter referred to as TTLA) began drafting a bill which would

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[13] The Knoxville News-Sentinel, Nov. 30, 1972, p. 41, cols. 5-6. The same grand jury that stood accused of conducting the "whitewash" subpoenaed Thornton and subsequent to his refusal to answer the grand jury's question, he was taken before judge Grant who asked him to identify the caller, and again Thornton refused to do so.

[14] Hearings on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128 and S.J. Res. 8 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, United States Senate, 93rd Cong., 1st Sess., at 754 (1973).

permit newsmen to protect their confidential sources of information.[15] According to Ralph Lawson, then President of the TTLA, the Association clearly favored the adoption of shield legislation.[16] What percentage of the total membership supported the shield proposal is unknown since no effort has been made to poll that body.

During the second week of December, 1972, Governor Winfield Dunn, while in Cleveland, Tennessee, was quoted as saying that:

> Legislation to guarantee certain freedoms for members of the news media is necessary not only for the benefit of the general public, but for officialdom in government as well. . . . A news reporter must have some protection of his confidential sources in order to do a good job in informing the public.[17]

II. LEGISLATIVE CONSIDERATIONS

In the first two weeks of the opening session of the 88th General Assembly, January, 1973, three bills were introduced granting newsmen the right to refuse disclosure of their confidential sources of information. All proposals introduced during that period included provisos allowing for divestiture of the privilege through a separate action in the appellate courts.[18]

Governor Dunn reiterated his support for shield legislation in the January "State of the State" message,[19] and later in the month,

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[15] The Knoxville News-Sentinel, Dec. 1, 1972, p. 1, col. 6.

[16] The Knoxville News-Sentinel, Dec. 12, 1972, p. 1, col. 6.

[17] The Knoxville News-Sentinel, Dec. 13, 1972, p. 10, col. 1

[18] H.R. 31, S. 2 and S. 55, 88th General Assembly, 1st Sess. (1973).

[19] 7 The Tennessee Press 1 (1973).

members of the TPA unanimously endorsed a shield law proposal at their Winter Convention in Nashville. Ralph Millett, editor of the Knoxville News-Sentinel, presented the proposal which had been drafted by the Freedom of Information Committee which Millett chaired. Chris French, Associated Press correspondent, attended the semi-annual meeting and interviewed several members. French reported that Ralph Millett believed the Court had erred in Branzburg, and the TPA's position was:

> . . . a reverse of our position of a year ago when we thought we could rely on the protection of the First Amendment. . . . We felt that the First Amendment has been taken away from us by the Supreme Court.[20]

Ken Morrell, executive vice-president of the Nashville Banner, in an interview with reporter French, said that there was no doubt that newsmen needed protection, but that:

> It is impossible to write a perfect freedom of information statute . . . but the current wave of judicial interpretation has led to a dozen jailings. . . . Traditional privileges of newspaperman--those designed to protect the people's right to know--have been attacked in ways not thinkable under the first amendment ten years ago. The pendulum is swinging against us and needs to be pushed back to its original position by statutory law enforcement both the state and national level.[21]

The French article reported on the positions of several other TPA members vis-a-vis the shield law proposal. Sam Kennedy, publisher of the Columbia Daily Herald said that he did not and would not support an absolute privilege for newsmen at any time. On the other hand,

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[20] The Knoxville News-Sentinel, Jan. 21, p. 2, cols. 306.

[21] Id. at col. 5.

John Seigenthaler, editor for the Nashville Tennessean came out in support of an unqualified law for Tennessee. Angus McEachran, associate managing editor of the Memphis Commercial Appeal, said that since a certain secretary had been fired from her job at a children's home for disclosing information relating to child abuse there, something had to be done immediately to prevent future news sources from "drying up."[22]

Editorializing in a Knoxville paper, Ken Mink applauded TPA efforts in drafting a freedom of information proposal, and urged continuation of the TPA inspired campaign to inform the public of the "critical need for shield legislation." Mink went on to chastise the Court for its restrictive view of the first amendment and said:

> The United States Supreme Court in recent years has taken a restrictive attitude toward the freedom of the press. And such restrictions are tantamount to blindfolding the public. . . . Too many people have the misconception that the press is an entity unto itself. Restricting the press is restricting the people.[23]

Who participated in drafting the TPA proposal? According to the official voice of the TPA, fourteen editors and publishers participated in the draft during a work session of the Winter Convention held at Nashville in late January. The proposal, originally entitled the "Free Flow of Information" act, was called the "Freedom of Information" act because of the broad significance of the phrase and its favorable connotations.[24]

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[22] Id. at col. 6.

[23] The Knoxville News-Sentinel, Jan. 27, 1973, p. 4, col. 3.

[24] The Tennessee Press, supra note 9 at 3.

The need for press unanimity in the campaign for a Tennessee shield law was voiced in early September, 1972, by TPA officials. In spite of the concern for mounting a unified "press voice," disunity within the Tennessee press became increasingly apparent. According to Franklin Yates, president of the TPA:

> Numerous bills have or will be introduced but with considerable confusion due to lack of uniformity . . . hence the need for agreement on and backing of one compromise bill that we can all live with. For years newsmen have shied away from any "shield" law, depending on the First Amendment. TPA membership has been split . . . our meetings have seen considerable conflict of opinion. But recent events (jailing newsmen in California, New York and New Jersey and threatened jailings in Memphis and Chattanooga) have caused second looks by those doubtless responsible for no action in Tennessee.[25]

Reportedly, Millett's Freedom of Information Committee (hereafter referred to as FOIC) researched the problems vis-a-vis statutory shield legislation for months prior to the January convention held in Nashville. TPA officials commented that the FOIC's efforts resulted in a legislative proposal which would be acceptable to most editors and publishers from across the state. Subsequently, a series of statewide meetings were held to explain fully the proposal to concerned editors and publishers and to test the general attitudes of the TPA membership toward the proposed shield law.[26] One such meeting was held before the East Tennessee Professional Chapter of Sigma Delta Chi. In the ensuing panel discussion, Foster D. Arnett, Knoxville lawyer and former president of the Tennessee Bar Association, along with Ralph

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[25] Id. at 3, col. 2.

[26] Id.

Millett, Glenn McNeil, TPA secretary-manager and Jim Early, editorial and documentary director for WBIR-TV expressed their views on the necessity for a state shield law. Arnett told the audience that he did not endorse a statutory privilege and couldn't see "all the ghosts and hazards" most newsmen saw in the Branzburg decision.[27] He concluded that if newsmen were, in fact, serious about absolute protection, they should seek to amend the United States Constitution. However, Arnett went on record as supporting a qualified shield law which would allow for some method of forcing disclosure where the information was necessary to protect the public interest. Later in the discussion, Millett expressed both anger and concern over what he termed an apparent attempt by the judiciary to use newsmen to find out "who squealed" or leaked information concerning abuses in government institutions. Millett insisted that Tennessee newsmen were not as concerned about the United States Supreme Court ruling as they were about the way certain state judges would construe the decision.[28]

II. LEGISLATIVE PROPOSALS

As of February 3, 1973, three shield proposals were introduced into the 88th General Assembly. Senate Bill No. 2 (S. 2) sponsored primarily by Senators Roberson (D--Nashville) and Person (R--Memphis) provided that:

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[27] The Knoxville News-Sentinel, Feb. 2, 1973, p. 3, cols. 4-8.

[28] Id. at col. 5.

> A person connected with or employed by the news media or press, or who is independently engaged in gathering information for the purpose of publication or broadcast, shall not be required by a court, a grand jury, the legislature, or any other administrative body, to disclose before the General Assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.[29]

The bill further provided that disclosure could be compelled only after any person seeking the confidential information applied to the state Court of Appeals for an order divesting such protection. Accordingly, the Court of Appeals after a hearing would determine whether the individual seeking disclosure had clearly demonstrated that: (1) the information sought was clearly relevant to a specific probable violation of the law, (2) the information sought could not be obtained by alternative means, and (3) there was a compelling and overriding public interest in the information. Also, under S. 2, in cases involving civil actions for defamation, newsmen could not assert a defense based on confidentiality of the source.

Senate Bill No. 55 (S. 55) sponsored by Senators Talarico (D--Memphis) and White (D--Memphis) differed from S. 2 only where it specifically spelled out "who" and "what" were covered under the proposed legislation. For example, S. 55 specified what constituted a "newspaper," "magazine," "news agency," "press association," "wire service," "professional journalist," "newscaster," and "news."[30] Furthermore, the Talarico-White measure provided for the same method of compelling

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[29] S. 2, 88th General Assembly, 1st Sess. (1973).

[30] S. 55, 88th General Assembly, 1st Sess. (1973).

disclosure along with similar exclusions for slander and defamation as the Roberson-Person proposal.[31]

House Bill No. 31 (H.R. 31) was reportedly similar in coverage to both S. 2 and S. 55; however, efforts to gain a copy of the proposal from a number of document depositories in the state were unsuccessful.[32]

On March 1, 1973, Ned McWherter, Speaker of the Tennessee House, introduced the TPA sponsored bill--House Bill No. 110 (H.R. 110). Meanwhile, next door in the Senate chamber, Lieutenant Governor John Wilder introduced an identical measure--Senate Bill No. 116 (S. 116). With slight modification, the TPA sponsored proposal became the law of Tennessee. We can only provide a sketchy account of the fate of the other shield law proposals introduced into the 88th General Assembly. S. 55 was formally recalled from the judiciary committee and withdrawn without comment February 28, 1973. On March 5, Senate Bill No. 2 was recommended for passage by the Judiciary Committee and referred to the Calendar and Rules Committee for further action. H.R. 31 remained pigeonholed in the House Judiciary Committee until formally withdrawn two months later.[33]

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[31] The Knoxville News-Sentinel, Feb. 4, 1973, p. A-8, cols. 3-5.

[32] Unsuccessful checks were made at the following document depositories: The Tennessee Archives, Nashville, Tennessee, and The University of Tennessee School of Law, Knoxville, Tennessee.

[33] The Knoxville News-Sentinel, Mar. 8, 1973, p. 4, col. 1. Twenty-nine representatives co-sponsored H.R. 110.

IV. AN ABSOLUTE OR QUALIFIED PRIVILEGE FOR TENNESSEE

On March 8, 1973, Dana-Ford Thomas, legislative reporter for the Knoxville News-Sentinel and president of the thirty-man member Capitol Hill Press Corps, came out against all qualified shield law proposals while recommending adoption of an absolute law. Thomas' comments came subsequent to Senate Judiciary Committee action which forwarded two qualified shield proposals to the Senate Calendar and Rules Committee at the request of Lieutenant Governor Wilder. While appearing before the Judiciary Committee, Wilder recommended that either his proposal S. 116 or the Talarico-White measure S. 55 be adopted because both bills provided "an ordinary method for obtaining the information" if disclosure became necessary.[34]

Responding to the Thomas pronouncement that the Capitol Hill Press Corps would only accept an absolute shield, Representative Tom Burnett (D--Jamestown) retorted that the "press corps" had placed "the Legislature in a very embarrassing position" by presenting their claims at such a late date.[35]

In spite of unfavorable reaction in the House, Thomas pressed the absolute shield argument before judiciary committees of both houses while explaining that the main reason for dissatisfaction within the Press Corps was attributable to the provision in the TPA bill giving the Tennessee Court of Appeals the power to compel disclosure of confidential

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[34] Id.

[35] The Knoxville News-Sentinel, Mar. 9, 1973, p. 3, cols. 1-2.

sources and/or information. He went on to say that the Press Corps endorsed a "Florida-drawn measure" which offered complete protection to the reporter-source relationship, but would not protect libel, slander or defamation or prevent anyone witnessing a crime from testifying in open court.[36]

Testifying before both the Senate Judiciary and Calendar Committees, Glenn McNeil, chief legislative lobbyist for the TPA and Dana-Ford Thomas presented clashing views as to whether Tennessee should adopt either an absolute or qualified shield law. While appearing before the House Judiciary Committee, McNeil issued a statement which set off a ripple of legislative protest.[37] McNeil explicitly stated that Ralph Millett, Thomas' employer, had not authorized "any member of his staff to come out and oppose this bill" (he was referring to the TPA sponsored proposal).[38] Representative Riley Darnell (D--Clarksville) took issue with McNeil replying:

> Are you saying the editors had made a decision and the working press had no business coming up here and telling us their side? If this is your position, I want to withdraw as a sponsor of the bill. If this is a labor-management issue, I'm on the side of labor.[39]

Victor Ashe (R--Knoxville) became involved in the embroylio adding that "the implication that they (the Capitol Hill Press Corps)

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[36] Hearings on H.R. 110, 127 Before the House Judiciary Comm. 88th Tennessee General Assembly, 2d Sess. (1973). See Legislative Recordings, House Judiciary Comm., Mar. 19, 1973, record number PH-001-004, Tennessee Archives. (Hereinafter cited as 1973 H. Hearings.)

[37] The Knoxville News-Sentinel, supra note 35.

[38] Id.

[39] Id.

don't have authority to speak on this bill is going a little too far, if this is your implication."[40]

To which McNeil retorted flatly, "Its not an implication, its a statement of fact."[41]

Further hearings were set for March 19, and in the meantime, Lieutenant Governor Wilder had the TPA proposal (SB 116) placed on the Senate Calendar in spite of Senate Majority Leader William Peeler's (D--Waverly) suggestion that the Calendar Committee hold hearings in conjunction with the House Judiciary Committee. While the House Judiciary Committee held a hearing on H.R. 110 (TPA bill) and H.R. 237 (the Capitol Hill Press Corps' proposal), the Senate by a 28-2 vote adopted the TPA bill with the addition of several minor amendments.[42] One of those amendments dealt with the disclosure provision and altered the requirement that those seeking disclosure would now have to demonstrate that there was no other "reasonable" way to acquire the information.[43] What was "reasonable," of course, was left to the discretion of the courts.

Senator Avon Williams (D--Nashville), one of two senators voting "no" on the proposal, urged his colleagues not to accept the TPA proposal and that the legislature should:

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[40] Id.

[41] Id.

[42] The Knoxville News-Sentinel, Mar. 14, 1973, p. 7, col. 2.

[43] The Knoxville News-Sentinel, Mar. 20, 1973, p. 1, col. 8.

> . . . give serious study to the basic constitutional right not only of the reporters but of the general public. . . . This will have a chilling effect if we allow this to pass, it will seriously harm the right to know.[44]

Senator E. H. Gillock (D--Memphis), another Senator voting "no" on the proposal said "We have opened up what the press might eventually regret."[45] Gillock concluded that from his point of view, any qualified legislation would impose a heavy burden on First Amendment rights.

Next door in a House Judiciary hearing, rival TPA and Capitol Hill Press Corps proposals were being aired. Appearing before the committee in behalf of H.R. 110 (the TPA bill) were Georgiana Vines, Knoxville News-Sentinel reporter, and president of the East Tennessee professional chapter of Sigma Delta Chi; Morris Simon,[46] publisher of The Tullahoma News; Robert Pigg, publisher of the Fentress County News in Jamestown; Jim Charlet, managing editor of the Clarkesville Leaf-Chronicle; Ralph Millett; Dan Hicks, editor of the Leader Times of Jamestown; Joe Wilder, reporter for the Memphis Commercial Appeal; Sam Kennedy, publisher of The Daily Herald in Columbia; and Wayne Sargent, publisher of the Nashville Banner.[47] Testifying in behalf of H.R. 237 (the Capitol Hill Press Corps' proposal) were Dana-Ford Thomas,

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[44] Id. at p. 4, col. 4.

[45] Id. at p. 4, col. 3.

[46] In a letter from Simon in response to a request that he participate in our study, he said, "After reading the questions posed by Mr. Sunner, I did not feel that I could do a very competent job answering them. Therefore, I did not desire to participate in the survey." Letter to Professor Thomas D. Ungs, Head, Dept. of Political Science, The University of Tennessee, Knoxville, May 14, 1974.

[47] 9 The Tennessee Press 1, 3 (1973).

Chris Clark and Fred Sedahl, reporter for United Press International and member of the Capitol Hill Press Corps.[48]

During the hearing, Thomas advocated adoption of a strong absolute shield law which would afford newsmen similar testimonial privileges as those statutorily accorded attorney-client, doctor-patient or priest-penitant relationships.[49] H.R. 237, argued Thomas, would not protect "libel, slander or defamation . . . and he or she who has witnessed a crime must come into court and testify." Speaking in support of H.R. 237, Chris Clark felt that the Press Corps' proposal "reenacted the first amendment," and gave reporters the absolute protection "the founding fathers intended." Vehemently attacking the TPA qualified bill, Fred Sedahl stated that from his point of view qualified shield laws would inevitably lead to "press censorship." According to Sedahl, the TPA sponsored bill would only protect editors and publishers, not the working newsman. He argued further that if Tennessee was to have statutory protection, then it should be of the same genre as the unqualified "Florida" measure.[50]

Support for the TPA drawn proposal at the March 19 hearing included prominent legislators and newsmen from within the state. Representative John Bragg (D--Murfreesboro) who in the past had been a

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[48] Id. See also The Knoxville Journal, supra note 43 at 4, cols. 3-4.

[49] 1973 H. Hearings, supra note 36.

[50] There is some confusion here as to what Mr. Sedahl was referring--a newsmen's privilege law or an open meetings law. We think that he was talking about Florida's "sunshine" law which, reportedly, is one of the strongest in the country.

reporter, editor, publisher and president of the TPA, openly proclaimed that he had ridden "the white horse of a free press judiciously," but an absolute shield law could lead to circumstances where an accused in a criminal case would be denied the right to know or confront his accuser. Therefore, Bragg could only support a qualified shield because he believed that such a law would be more in line with the Fifth and Sixth Amendments to the United States Constitution.[51]

Georgiana Vines who purportedly voiced the unanimous view of the membership of the East Tennessee Chapter of Sigma Delta Chi, said that newsmen should have broad but not absolute immunity. Millett who spoke briefly in behalf of the TPA proposal discussed the problems of judicial interpretation which he considered to be of paramount importance. He pointed out that two other states recently enacting absolute shield laws experienced court challenges as to the constitutionality of such laws. Millett concluded that through "judicial interpretation these laws were qualified," and Tennessee should make every effort to avoid a similar problem. From Millett's point of view, a well drafted qualified shield law would remove the possibility of judicial reconstruction, but an absolute law would be open to judicial interpretation. Therefore, a qualified law would be strong.[52]

At the conclusion of testimony by all witnesses and committee members, the hearing was adjourned in the late afternoon of March 19 without further action by the committee. Over in the Senate, however,

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[51] 1973 H. Hearings, supra note 36.

[52] Id.

the TPA proposal was passed by an overwhelming 28 to 2 majority. House approval (79-11) of the same proposal followed nine days later, and the following week, April 5, 1973, Governor Dunn signed the TPA bill into law.[53]

Today Tennessee has a qualified shield law, which provides limited protection against those seeking forced disclosure of newsmen's confidential sources and/or information.[54] Within this political setting which led to the adoption of a shield law, a number of "players" held important roles which helped determine political outcome, e.g., the TPA, SDX, Capitol Hill Press Corps and members of the 88th General Assembly. Everyone interviewed from these groups strongly agreed that the TPA was the single most important force in the policy-making process which culminated in the Tennessee shield law. Both TPA and Press Corps members alike rendered severe criticism of the other for their respective positions on whether Tennessee should adopt an absolute or qualified law.

Franklin Yates, president of the TPA attacked the Press Corps lobby effort to have the General Assembly adopt an absolute law as an attempt by a:

> Johnny-come-lately group . . . in which a few spokesmen for a reported 40 writers and broadcasters claimed they were not consulted who slashed critically at TPA's bill and its sponsors, including numerous somewhat slanderous personal remarks at your FOI committee and associates who have worked long and hard days and given many miles and personal expenses in behalf of all newsmen. Untruths were told, even before the

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[53] The Tennessee Press, supra note 47 at 1-3.

[54] 27 Tenn. C. Anno. § 24-113 (1973).

> judiciary committee, but TPA should be proud of those who calmly and methodically presented our case without resorting to ugly tactics.[55]

Bob Poe, political editor of the Chattanooga News-Free Press said, in a letter to the author, that from his perspective, the basic philosophies of the TPA and Press Corps:

> . . . are entirely different, and that generally the conclusions published are those by TPA members crusading for a cause. Most TPA members who are active in TPA activities know about as much as a two-year-old child as to what takes place on Capitol Hill, especially as it relates to the legislature.[56]

In commenting on the type of shield law he favored, Poe added that:

> I personally am willing to stick to the first amendment, as are about 20% of the members of the Capitol Hill Press Corps. Another 70% want an unqualified shield and the balance a qualified law.[57]

Most of those interviewed believed that Tennessee would not have adopted a shield law but for the United States Supreme Court decision in Branzburg v. Hayes.[58] Professor Dozier Cade, Director of the School of Journalism at The University of Tennessee, Knoxville, commented on what he believed to be the political effects of the Court's policy-making decision. According to Cade, newsmen in Tennessee "felt compelled to devise a law to protect their confidential sources of information on account of the Supreme Court ruling."[59] Wayne Sargent, publisher

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[55] The Tennessee Press, supra note 47.

[56] Letter from Bob Poe to Michael W. Sunner, April 1, 1974.

[57] Id.

[58] 408 U.S. 665 (1972).

[59] Interview with Dozier Cade, Director of the School of Journalism at The University of Tennessee, Knoxville, January 16, 1974.

of the Nashville Banner felt strongly that the Burger Court's decision had prompted the legislature to seek statutory protections. According to Sargent, "The Tennessee legislature accepted the invitation of the United States Supreme Court to pass such a law which would be in accord with the First Amendment.[60] House Minority Leader Tom Jensen (R--Knoxville) viewed the Court's decision as the catalytic agent which moved the press to seek legislative protection. From Jensen's perspective, Tennessee legislators were really not so much concerned with the question of whether or not newsmen needed statutory protection, but were interested in "currying favor with a press that might or might not support them for reelection."[61]

Representative Gentry Crowell (D--Lebanon) confirmed Jensen's skepticism vis-a-vis legislative motives for supporting shield legislation when he disclosed in a separate interview his motivation for supporting the TPA proposal:

> I took a position from a pure political standpoint. My hometown editor was very much in favor of the TPA bill; moreover, he lives in my district, votes in my district and operates a business in my district. Therefore, I took the position that he favored, and I'm sure that if I were forced to admit to it, I would say that he definitely influenced me.[62]

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[60]Interview with Wayne Sargent, publisher of the Nashville Banner via telephone from Knoxville to Nashville, Dec. 15, 1973.

[61]Interview with Tom Jensen, House Minority Leader, Tennessee General Assembly, 88th Sess., Knoxville, Feb. 9, 1974.

[62]Interview with Gentry Crowell, Democratic Caucus Chairman and Chairman of the Calendar and Rules Committee, Tennessee General Assembly, 88th Sess., Nashville, Tennessee, March 5, 1974.

Jensen concluded that it was no secret that press concern for legislative protection for newsmen's confidential sources in Tennessee stemmed from a state legislative committee's threat to jail Joe Weiler, and the actual jailing of Chattanooga news personality Harry Thornton.[63]

Dana-Ford Thomas said flatly that the Tennessee shield law was largely a "product of the United States Supreme Court decision along with the jailing of reporters," and it was his firm belief that "Tennessee would not have a shield law today had it not been for the Supreme Court decision."[64]

Speaker Ned McWherter speaking in an open-ended interview said that the press had lobbied the legislature "heavily in support of a shield law," and that press attempts to influence legislative thinking had commenced early in the fall of 1972 before the convening of the 88th General Assembly.[65]

Professor Cade credited the combined efforts of the TPA and Sigma Delta Chi (SDX) for convincing legislators of the need for a shield law in Tennessee. He added that the TPA is a very powerful organization, and since legislators rely on the support of newspapers, this naturally gives the press political leverage with the legislature. According to Cade, most Tennessee legislators really didn't care one

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[63]Interview with Wayne Sargent, supra note 60.

[64]Interview with Dana-Ford Thomas, president of the Capitol Hill Press Corps, Nashville, Tennessee, March 7, 1974.

[65]Interview with Ned McWherter, Speaker of the House, Tennessee General Assembly, 88th Sess., Nashville, Tennessee, March 5, 1974.

way or another about shield laws until after the press brought the issue to their attention through an intensive lobbying effort.[66]

All legislators interviewed as of June, 1974 considered the TPA as the most significant press lobby in influencing legislative policy-making.[67] Sigma Delta Chi (no specific chapter) and the Capitol Hill Press Corps were both frequently mentioned as secondary but nevertheless important influences in the legislative policy-making process. The two factors most often mentioned as primary forces leading to the enactment of the Tennessee shield law were: (1) the Branzburg decision, and (2) the subsequent widespread jailings of reporters in Tennessee and elsewhere throughout the country. Consequently, the emergent post-Branzburg period was filled with a sense of necessity which apparently motivated newsmen to seek legislative protections for their confidential sources and/or information. It is apparent that when members of the Tennessee press became fully aware of the legal implications of the Branzburg decision, organized efforts were directed toward securing protective legislation. A number of shield proposals emanated from these early organizational efforts and with the sponsorship of the legislative leadership and support of a majority of both houses, the Tennessee shield law became a reality. The only major difficulty confronting newsmen and legislators alike during this period was the question of whether the law should be qualified or absolute,

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[66] Interview with Dozier Cade, supra note 59.

[67] Senator Peeler, Representatives McWherter, Jensen, Crowell, Bissell and Ashe.

and this was resolved without a great amount of "bloodletting" by supporters of either side of the issue.

Throughout the legislative process--from initial organized lobbying activities to adoption of a shield law--newsmen encountered little resistence from legislators who for the most part were eager to please. However, a problem developed when the dialogue shifted from consideration of the question of whether or not Tennessee should adopt a shield law to the question of whether Tennessee should adopt a qualified or absolute law.

While legislative discussions focused on the question of qualified or absolute, Senator William Peeler (D--Waverly), an outspoken advocate of the absolute privilege, said:

> I had reservations about supporting any shield law because I felt to adopt a shield law would be an admission on the part of the press that they could no longer rely on the first amendment.[68]

Commenting on the merits of both the qualified and absolute shield proposals, Representative Crowell concluded that the proposal drafted by the Capitol Hill Press Corps would give newsmen the protection necessary to properly report the news, but in the end, he supported the qualified TPA bill because of political considerations.[69] Representative Keith Bissell (D--Oak Ridge) added that he firmly believed that many legislators wanted to support an absolute bill, but went with

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[68]Interview with Senator Wm. J. Peeler, Senate Majority Leader, Tennessee General Assembly, 88th Sess., in Nashville, Tenn., March 5, 1975.

[69]Interview with Gentry Crowell, supra note 62.

the TPA proposal for varying reasons.[70] Speaker McWherter pejoratively dubbed those who sought an absolute shield as the "deep-end gang." McWherter was very pleased that "radicals" who sought an absolute shield didn't find the necessary support in the Tennessee General Assembly.[71]

The discussion over whether to adopt an absolute or qualified law blossomed late February, 1973, and by early March, the battle lines were clearly drawn. The conflict over the scope of the shield law was apparent only after legislators, for the most part, were convinced of the necessity for adopting shield legislation. According to House Minority Leader Jensen, the chief opponents of qualified legislation were members of the Capitol Hill Press Corps.[72] Georgiana Vines, in a letter to the author, commented that the extent of press support for an absolute shield law was limited, and:

> The working press, as exemplified by the Capitol Hill Press Corps is not characteristic of all working press. In East Tennessee, our Sigma Delta Chi chapter unanimously backed the TPA act and we have working press represented as well as editors and university educators.[73]

The controversy between those who supported either an absolute or qualified shield law reached its climax at the House Judiciary Committee hearing on March 19, 1973. According to Georgianna Vines,

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[70]Interview with Keith Bissell, member of the House Judiciary Committee, Tennessee General Assembly, 88th Sess., in Nashville, March 5, 1974.

[71]Interview with Ned McWherter, supra note 65.

[72]Interview with Tom Jensen, supra note 61.

[73]Letter from Georgiana Vines, Reporter, Knoxville News-Sentinel, to Michael W. Sunner, April 5, 1974.

"The TPA came running to Sigma Delta Chi for help when Glenn McNeil and the Capitol Hill Press Corps disagreed over the type of shield bill."[74] After both sides were given the opportunity to "air" their respective views, the state legislature adopted a qualified law. According to one legal source, the Tennessee law does not apply in a defamation action where the defendant attempts to shield the source of the alleged defamatory information. Also, in other cases, privilege divestiture may occur only after a ruling by the Court of Appeals that the information sought is not privileged under the statute. Since March, 1973, Tennessee trial courts have upheld newsmen's privilege claims in three cases, and there has not been a successful divestiture action in the meantime.[76]

V. APPRAISAL AND COMMENT

The controversy among those of the Tennessee press concerning the proper scope of the shield law was one of form rather than substance. Essentially, the problem confronting both newsmen and state legislators alike in Tennessee was the selection of either an absolute or qualified law. More specifically, the question facing shield law proponents was what type of shield law proposal would be acceptable to a majority of those persons participating in the shield law-making process.

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[74] Comment, Tennessee Grants Newsmen a Qualified Disclosure Shield, 1973 Memphis State U. L. Rev. 143, 144 (1973).

[75] Id.

[76] 4 Freedom of Information Digest 5 (1973).

Apparently, by early 1973, both newsmen and state legislators concurred on the need for protecting newsmen's confidential sources and/or information. However, there was no uniform agreement on the scope of such a law. After a few Capitol Hill reporters helped introduce an absolute shield law proposal, it became patently clear that a majority of the State's legislators could not support such a law for varying reasons. Also, the leadership of the General Assembly unequivocally opposed the absolute shield law solution. Consequently, in the face of growing legislative opposition to an absolute law, Tennessee newsmen settled for qualified protection of their confidential sources and information.

Although it seems obvious that TPA influence and leadership were crucial to the final outcome--the decision to enact a qualified shield in Tennessee--this study has only approximated those events leading to a rise in political activity and subsequent legislative decision-making. Our description of the Tennessee case is at best an idiosyncratic view of the impact relationship, and in our concluding chapter, we present selected results of a pilot survey which explores the attitudes of selected newsmen and state legislators concerning their perceptions of various events arising in Tennessee subsequent to Branzburg. Weaving the Tennessee survey data into our other findings furnishes a broader description of the judicial impact relationship. Relying upon our "public policy analysis" framework, we see clearly how a specific policy output at the national level affects institutional decision-making at the state level. However, the crux of our

analysis points to the inescapable conclusion that despite institutional response to Court action, behavioral realities at the local level have gone unaltered.

CHAPTER VI

CONCLUSION

The basic purpose of this dissertation was to examine the judicial impact phenomenon and determine (1) the behavioral consequences attributable to Branzburg v. Hayes;[1] (2) the nature of public policy resulting from judicial decision in this case; and (3) to what extent Branzburg affected the press-government relationship, the free flow of news to the public and administration of the criminal law.

Proceeding within a public policy analysis framework, we accounted for a number of visible and interrelated institutional activities which ostensibly arose in response to Court decision-making. A landmark case decided in 1972, Branzburg refused to recognize a constitutional newsmen's privilege when claimed before grand jury investigative proceedings.

A principle having wide acceptance among political scientists presumes that some Supreme Court decisions have more of an impact than others on behavioral realities at the local level. Our inquiry into judicial impact has prompted us to conclude that, among other things, Branzburg had a limited impact on both newsgathering and the flow of news to the public. Initially, it was feared that Branzburg would lead to widespread subpoena abuse by local law enforcement agencies in order to gain the identities of confidential sources as well as unpublished

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[1] 408 U.S. 665 (1972).

confidential information. Furthermore, many newsmen feared that such efforts by law enforcement authorities would eventually "dry up" newsmen's confidential sources and that this would severely restrict the flow of news to the public.

However, while we believe that misuse of the subpoena power very well might have damaging consequences on the newsgathering and dissemination processes, we found no evidence to suggest that either law enforcement officials attempted to abuse the subpoena power or that the flow of news to the public was restricted in the post-Branzburg period. Available evidence shows that the Court's refusal to recognize a constitutional newsmen's privilege in connection with grand jury investigations has not manifestly altered or modified newsmen's daily relationships with either law enforcement personnel or their confidential sources.

In view of the findings, we labeled Branzburg and other Court pronouncements which have had limited observable effects on actual local behaviors as non-action oriented institutional decisions. Furthermore, we labeled Court or institutional decisions which have palpably affected human behavior as action oriented. Scholarly classification of institutional decisions on an actional/non-actional basis could prove helpful in redefining or redrawing extant laws and legal principles which have outlived their usefulness or in redirecting law-making energies to areas where action-oriented decision-making is desirable.

Theoretically, non-action oriented institutional decision-making has little or no effects on existing behavioral patterns. Clearly, we did not find any evidence linking Branzburg to any appreciable changes in the way newsmen gathered confidential or nonconfidential

information. Also, there is no evidence which patently shows that the presence or absence of newsmen's privilege is related to the quantity or quality of news gathered through confidential or non-confidential sources.

Tentatively, we argue that given the available evidence, even if the Burger Court had indeed recognized a constitutional newsmen's privilege, such a decision would not have appreciably improved or affected the ability of newsmen to gather confidential information or effectively enhanced the free flow of news to the public.

The available evidence presented in Blasi's and Gordon's studies as well as the Tennessee case study, indicates that the gathering of both confidential and nonconfidential information is generally unrelated to the presence or absence of either a constitutional or statutory newsmen's privilege.

Past studies indicate that there is little or no relationship between the presence or absence of statutory newsmen's privileges and (1) the level of cooperation between newsmen and law enforcement officials concerning exchanges of both confidential and nonconfidential information, (2) whether or not newsmen are ultimately subpoenaed in order to appear at compulsory disclosure proceedings, and (3) whether or not newsmen voluntarily or involuntarily disclose confidential sources of information.[2] Consequently, the absence of a newsmen's

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[2]The two best empirical studies on newsmen's privilege were completed in the 1970's. See Blasi, The Newsmen's Privilege: An Empirical Study, 70 Mich. L. Rev. 229 (1971). See also, D. Gordon, Newsmen's Privilege and the Law (1974). For a report on the frequency of subpoena issuance at the local level, see Note, The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Cal. L. Rev. 1198 (1970).

privilege as well as the accepted practice of compelling newsmen to disclose confidential sources have not yet been convincingly linked with the adverse effect of a diminished flow of news to the public.

I. THE TENNESSEE STUDY

In our survey of Tennessee state legislators and newsmen (reporters, editors and publishers), we found no evidence indicating that pre-Branzburg relationships which had existed between newsmen and either their confidential sources or local law enforcement officials were disrupted or substantially changed because of the Court's refusal to recognize a First Amendment privilege. In fact, a survey of selected newsmen and legislator attitudes reported no visible increase in law enforcement efforts to subject newsmen to compulsory disclosure proceedings post-Branzburg. Despite this finding, substantial numbers of newsmen surveyed indicated that there was a definite need for an absolute or unqualified privilege to guard against potential subpoena abuse. Hence, in view of the assembled evidence, we offer a tentative hypothesis that, at least in Tennessee, Supreme Court decision-making has had little effect on how newsmen relate to either their confidential news sources or local law enforcement officials. Also, our findings show a definite relationship between Branzburg and a subsequent rise in pro-shield law support among members of the Tennessee press which ultimately manifested in a statewide shield law movement.

While newsmen in Tennessee and elsewhere successfully gained statutory shields, we found little evidence to confirm that the reporter-source relationship is "better off" under a statutory shield,

or that a newsmen's privilege per se, in any way, effectively enhances the "free flow of news to the public." Despite the presence of a statutory shield, prosecutors in Tennessee may legally seek compulsory disclosure of confidential sources and information in criminal cases. However, any prosecutor's claims for information must be brought directly before an intermediate court of appeal. Consequently, an original determination of whether or not a newsman should be ordered to disclose confidential sources has been transferred from trial to appellate courts.

According to our survey results, many Tennessee newsmen remain skeptical of any claims that either the shield is protecting newsmen from compelled disclosure proceedings or that the shield has enhanced the free flow of news to the public. Furthermore, we found that apparently the Tennessee shield was pursued by an organized press (the Tennessee Press Association) that foresaw potential subpoena abuse resulting directly from the Court's refusal to recognize a constitutional newsmen's privilege. Unquestionably, most newsmen would have preferred an absolute law conferring an unqualified privilege irrespective of situations or conditions. However, the absolute shield was an impractical solution given the predispositions of an overwhelming legislative majority. As our survey shows,[3] most legislators serving in the Tennessee General Assembly were unwilling to establish an absolute shield law for a multiplicity of reasons. In fact, most

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[3]See Appendix A where the results of the Tennessee survey are fully reported.

legislators concurred with the Court's Branzburg decision which refused to confer or recognize a First Amendment based newsmen's privilege.

Attempting to assess the actual perceived effects of Branzburg on the behaviors of Tennessee newsmen and lawmakers, we used Q Technique in reporting four major perspectives or viewpoints characteristic of a sample population drawn from newsmen and legislators residing and working within Tennessee. The four major attitude groups were organized around the context of issues relating to newsmen's privilege and other press related matters. In presenting the survey results, we employed descriptive labels depicting each of the four character types that emerged through implementation of Q Technique procedures. The four character types were named: (1) liberal crusaders, (2) traditional legalists, (3) pragmatic conventionalists, and (4) ambivalent moderates.

The Q sorting operation and factor analysis functions of Q Technique defined four types of persons who held similar viewpoints regarding newsmen's privilege and other "free press" issues. We shall briefly describe each character type and relate the general "ethos" of each group to our discussion of Court decision-making and its impact in Tennessee.

The liberal crusader in our sample reflects a "working newsman's" ethos, and a statistical relationship manifested between the scores of these persons and those who identified themselves as reporters ($p < .01$). Characteristic of the liberal crusader is his fear or concern over undue government interference in "free press" operations, his strong feeling that the Supreme Court's decision in Branzburg v. Hayes was an

incorrect interpretation of First Amendment press guarantees, his strong belief that newsmen need absolute protection for their confidences, and his understanding that Branzburg "compelled" Tennessee newsmen to seek statutory protections in order to protect the public's "right to know" against potential governmental abuses of the subpoena power.

The traditional legalist characterization most closely depicts the Tennessee legislators who responded to our survey. This person accepts the legal argument advanced by the Supreme Court refusing to recognize a constitutional privilege and is against expanding privileges because of possible adverse effects on the criminal justice system. Another dimension of persons loading on this factor expressed concern over possible monopolistic tendencies of the media. Essentially, the traditional legalist shows signs of deep distrust for the media, and a significant statistical relationship emerged between the scores of this character type and those who identified themselves as state legislators ($p < .01$).

The pragmatic conventionalist exemplifies a pragmatic "news management" perspective. All but one of the editor-publisher persons in our sample identify with this character type ($p < .01$). This person agrees that newsmen should have a newsmen's privilege, disagrees with the Branzburg decision, but concedes that while there are valid grounds for conferring an absolute privilege on newsmen, a limited shield law best serves the interests and needs of the Tennessee press. The pragmatic conventionalist concurs that the news media has great political power but that this power is rarely abused. Furthermore, like the

liberal crusader and traditional legalist, this person agrees that Branzburg was the primary reason for Tennessee newsmen's decision to seek a statutory shield.

Our fourth factor is atypical of those factors which were statistically related to specific occupational groups. Emerging through this factor is a conglomerate newsmen-legislator type who agrees with the Supreme Court's decision and rejects an absolute newsmen's privilege. One dimension of the factor expresses the belief that newsmen and legislators generally work within a reciprocally harmonious framework. This type believes strongly that newsmen should have only limited protections for their confidential sources and information, and apparently accepts institutional control over the flow of news to the public. Expressing mild alarm over the growing monopolistic tendencies of the media and equal concern over governmental abuses of "press freedoms," the ambivalent moderate lacks any real conviction as to which "evil" is worse. Of all types that manifested through Q Technique procedures, the ambivalent moderate was the only character type who remained unconvinced that Court decision-making in Branzburg prompted the shield law "movement" in Tennessee.

Q Technique identified four distinct perceptual dimensions with respect to agreement or disagreement with the Supreme Court's decision in Branzburg. However, there was general agreement although in varying intensities, as to the lack of any post-Branzburg law enforcement efforts to increase the level of subpoenas for compulsory disclosure proceedings.

As our evidence strongly suggests, newsmen were deeply concerned about what Branzburg might spawn in the way of future abuses of the subpoena power. However, we found no evidence whatsoever which indicated that there was a post-Branzburg upsurge in subpoenas to the news media in order to compel disclosure of either confidential news sources or information.

The Tennessee survey materials also indicate that newsmen were more likely to support an absolute shield than were legislators. Quite clearly, legislator scores show a strong bias against the absolute shield law concept. This bias was apparent during post-Branzburg legislative deliberations over the scope of Tennessee's shield. Also, Tennessee newsmen's scores show two levels of support for shield laws--one group supported an absolute shield and the other supported a qualified law. Those newsmen whose scores indicated they supported a qualified law were primarily editors and publishers and members of the Tennessee Press Association. This group pushed for a qualified shield and their proposal was eventually adopted by the Tennessee legislature. The other press group supporting an absolute shield were primarily newsmen who identified themselves as reporters. Many of these persons supported the absolute shield law introduced by members of the Capitol Hill Press Corps. This bifurcated support among members of the Tennessee press may not only indicate the realities of press politics but perhaps foretells a trend which does not augur well for proponents of a strong federal shield law.

The survey results are fully reported in Appendix A of this dissertation. Viewed alongside the interview materials, government

documents and newspaper articles bearing on the Tennessee study, we suggest that at least in this instance Branzburg did not palpably affect behavioral realities. Note should be made here that Knoxville . and Knox County law enforcement officials as well as the local staff of the Federal District Attorney's office declined to participate in the survey. Attempts to survey other law enforcement agencies elsewhere in Tennessee also produced negative results. We speculate that the reason for this phenomenon is that at the time of our survey, the Watergate investigation was in full blossom and apparently law enforcement officials everywhere were particularly sensitive toward the media and to anything media related. This was particularly evident at the federal level where one United States Assistant District Attorney claimed that the local staff had received a memorandum directing that no information about agency activities was to be released unless first cleared by higher authority. When asked why this procedure was implemented, the federal officer responded that it was his guess that the silence order was Watergate related.

Consequently, for various reasons, attempts to survey local (municipal and county) and federal law enforcement officials failed. However, for our limited purposes in this paper, one of which was to determine whether or not there was an observable increase in post-Branzburg subpoenas to the press in Tennessee, the survey of reporters and legislators provided the necessary information.

Earlier we defined symbolic effects as human actions or communications arising from or subsequent to institutional decisions which are invariably directed toward some measurable goal or activity.

We said that Branzburg produced or apparently produced a subsequent rise in shield laws and uniform judicial compliance with the principle refusing to recognize a constitutional newsmen's privilege. Furthermore, we said that these activities apparently arising in response to judicial decision-making had not involved any actual changes or adjustments in social patterns of behaviors. In keeping with our empirical observations, we concluded that these institutional activities were chiefly symbolic effects because newsmen's actual behaviors with respect to gathering confidential information had not been affected adversely or otherwise, at least as far as we could determine.

Philosophically speaking, Branzburg and its related consequences symbolize a long-standing dispute which concerns certain press freedoms which if exercised might adversely affect proper administration of the criminal law.

Law enforcement authorities and professional newsmen tend to hold differing attitudes on the question of whether or not journalists should have a constitutional testimonial privilege.

As reported in the Tennessee case study, distinct preferences are apparent among newsmen and state legislators with respect to which concern--a free and open press or fair and effective application of the criminal law--deserves the highest priority when in conflict. Generally, legislators in our Tennessee sample were less likely to agree that newsmen were entitled to a constitutional privilege than were reporters. Also, legislators expressed more concern for maintaining a highly efficient criminal justice system than for protecting newsmen's First Amendment rights. This strong support for maintaining

an efficient criminal justice system and proper administration of the criminal law might be a reflection of many legislators' legal orientation, however, we made no effort to discern statistical relationships, if any, between the presence or absence of legal training and support or nonsupport for a newsmen's privilege.

Our research underscores the view that support or nonsupport of institutional policy-making is closely related to the roles of those having a direct or perceived interest in such policies. As Krislov succinctly stated, consumers, clienteles or those persons who either support or oppose judicial policies may be "as in the segregation cases, virtually coterminous with the general public itself, or may involve a dozen or so highly specialized and well publicized individuals as stockholders."[4]

The Tennessee study presented strong evidence which linked support or nonsupport for a constitutional privilege to respondents' role as either a newsman or legislator. Clearly, all available evidence points to the fact that Branzburg was received differently by legislators and newsmen in Tennessee. More importantly, however, we ascertained that the Court's decision had little or no perceptible effects on (1) newsmen's relationships with law enforcement authorities, (2) newsmen's relationships with their confidential sources, (3) the gathering of both confidential and nonconfidential information, and (4) the frequency or infrequency with which newsmen are subpoenaed to appear and testify before grand juries.

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[4]S. Krislov, The Supreme Court and the Political Process 135 (1965).

Despite the Court's refusal to grant a constitutional privilege, newsmen apparently continue to gather confidential information. Whether or not they are gathering confidential information at a lesser or higher level than in the pre-Branzburg period is not precisely determinable, however, most journalists will probably argue that some sources have "dried up" because of the uncertainty over the privilege issue. However, we could not find any evidence which showed conclusively that law enforcement efforts to compel disclosure had substantially increased in the post-Branzburg period. Also, we could not determine one way or the other, whether or not news sources had indeed "dried up" or whether or not the free and open flow of news to the public had been restricted. Therefore, at least in our minds, the issue of whether or not newsmen should have a testimonial privilege in order to protect society's "right to know" is still an open-ended question.

II. PRESCRIPTION: PRIVILEGE OR PLACEBO?

Do newsmen really need a testimonial privilege which would readily limit all or most prosecutorial attempts to compel disclosure of confidential sources and/or information? Unquestionably, there are relatively few instances where newsmen are actively compelled to disclose their confidential sources, and, presently, there is little or no pressure to establish broad testimonial privileges for newsmen. Over the years, support for newsmen's privilege has fluctuated widely and rapidly among the general public and within the media. Irrespective of the historical discontinuity in issue saliency and the fact that in 1975, only around 35 cases were litigated in both federal and state

courts with varying results, we firmly believe that newsmen should have the privilege to refuse disclosure of confidential sources and information in all but capital cases.

Unfortunately, the Supreme Court refused to recognize a constitutional privilege in 1972, and this set in motion shield law movements in a number of states and at the federal level. Will the establishment of statutory shields provide the necessary and proper protective relief for newsmen? In the months following Branzburg, newsmen in Tennessee and elsewhere concluded that their best chances of escaping subpoenas and possible jail sentences rested within the shield law framework. However, lately, many newsmen forcefully argue that statutory protections are not only inadequate but unnecessary. Those newsmen and others who argue against further expansion of shield laws (unless they are of the so-called "absolute genre"), believe that the First Amendment is a proper defense against government attempts to compel disclosure of confidential sources. Certainly this position represents an attitudinal shift among many members of the press. Many now believe that Branzburg was not intended as an absolute bar to future constitutional privilege claims.

We urge newsmen everywhere to avoid the establishment of statutory shields unless those proposals confer unequivocal testimonial immunity in all but capital cases. Instead we would recommend that newsmen continue challenging attempts to compel disclosure on a First Amendment basis. Such efforts might eventually force an expansion of newsmen's First Amendment rights to encompass a testimonial privilege.

It is difficult to disagree with Gordon's observation regarding newsmen's privilege and the law that "no one--neither newsmen, nor sources, nor the public--can be sure of the extent to which confidentiality is protected, in shield states or elsewhere."[5] However, contentious cases will continue to be resolved at the local level mostly on an informal basis unless there is a breakdown in the normal pattern of mutual cooperation between newsmen and law enforcement authorities. Usually, only after this breakdown in cooperation occurs will prosecutors or grand juries seek to compel disclosure of confidential sources thus signaling an end to the uncertain détente between press and government authority.

Unquestionably, where a proven need exists, government authority has the power to order newsmen to reveal their confidential sources and/or information. However, from all available accounts, this power is infrequently exercised. Yet more infrequent but certainly more spectacular are those cases where newsmen refuse disclosure before grand juries and are subsequently jailed for their silence. Nevertheless, despite the low frequencies of subpoenas and jailings, newsmen's privilege remains a somewhat salient issue in American politics. Juxtaposed to strong press support for a national law and state statutes are insistent claims for judicial recognition of a First Amendment privilege. Hence, judges, prosecutors, grand juries and legislative investigating committees must squarely face the hard question of whether or not an expressed need for confidential information outweighs possible

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[5]D. Gordon, Newsmen's Privilege and the Law 47 (1974).

adverse effects on newsgathering which might accompany compulsory disclosure.

Newsmen also must continue to work "hand in glove" with government authorities in instances where requested information is unavailable from other sources and where voluntary disclosure might serve to safeguard the community against criminal elements. In all probability, newsmen and government authorities will continue to negotiate their mutual information needs at the pre-subpoena stage irrespective of the presence or absence of shield laws. However, when disagreement in a non-shield jurisdiction occurs over whether or not newsmen's confidential sources and/or information ought to be compelled, we recommend that courts adopt a case-by-case approach when determining whether or not a First Amendment privilege applies.

In those states covered by shields, newsmen should attempt to rely on the statute where protections are broad and clearly defined. However, the constitutional attack should not be abandoned in such cases. The constitutional argument should always be established as a primary defense against compulsory disclosure efforts with shield protections serving as a secondary justification for nondisclosure.

The public policy analysis framework has provided us with the proper focus for our study dealing with the impact of Supreme Court decision-making. We suggest that post-analysis of institutional decision-making is a proper focus for the political scientist who actively seeks an understanding of how decisions are made, as well as why and what are their consequences. For those who share an interest in the scholarly analysis of institutional decision-making processes

and systems, we suggest that the following questions might provide a base point of reference for future research: (1) Since many institutional decisions have little, if any, visible effects on social behaviors in the short-range, do such decisions have any noticeable long-range effects on human behavior, and, if so, what are those effects? (2) What relationships exist, if any, between decision-making which has little or no effects on human behavior and public support for the institutions making those decisions. (3) Are unanimous or nonunanimous Supreme Court decisions likely to produce chiefly symbolic rather than chiefly substantive impacts? (4) Are lower courts more likely to follow Supreme Court decisions which have little likelihood of altering behaviors at the local level rather than decisions which more than likely, if followed, will result in widespread behavioral changes? And finally, (5) Is decision-making which produces palpably few changes in human behavior generally by design or happenstance?

Despite Branzburg's refusal to recognize a constitutional newsmen's privilege, apparently, reporters continue to gather confidential information at the pre-Branzburg level. Also, for the most part, prosecutors and other law enforcement officials have not egregiously abridged newsmen's claimed right to a privilege through compulsory process. Evidently, Branzburg has had little effect on long-standing press relations with either confidential sources or government authorities. Successful investigative journalism has long depended on law enforcement authorities' recognition that newsmen must generally protect their confidential sources most of the time, and Branzburg has not appreciably altered this situation.

Since prosecutors, on the one hand, generally receive the information they desire from reporters, there is usually no reason to resort to compulsory process. Only rarely do newsmen refuse to cooperate with prosecutors, police investigators or grand juries, and it is rarer when formal subpoenas are issued to compel testimony. In some cases, prosecutors may informally request a newsman to appear and testify before a grand jury, and, depending upon the newsperson, he or she may or may not request a formal subpoena for whatever reasons.

Were legislative actions which focused on establishing shield laws in Tennessee, Congress and elsewhere, attempts toward compliance or reversal with respect to Branzburg? In a strict sense, we think that none of these actions were directed at reversal. The flurry of shield law activity in Congress and several states was prompted ostensibly by either newsmen who thought they could capitalize on the decision for varying political reasons or those who actually feared that law enforcement authorities might read the decision as an open invitation to annex the press as an investigative arm of government. The movement toward establishment of shield laws clearly was not, as some have concluded, an attempt to reverse the Supreme Court.[6] The Court's decision plainly stated that the legislature was the proper forum for establishing shield laws if they were to be established at all. Post-decisional legislative activity aimed toward erecting statutory shields must not be viewed as an attempt to override the Court. Compliance,

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[6]Green, Schmidhauser and Berg, Variations in Congressional Responses to the Warren and Burger Courts, 23 Emory L.J. 725-43 (1974).

implementation or reversal involve reckoning with some judicially formulated standard of behavior.[7] In the wake of Branzburg, we found no recognizable attempts to comply, implement or evade judicially formulated standards or guidelines with respect to construction of any state or federal statutes.

Arguably, post-Branzburg efforts to enact the Tennessee shield law or any other shield were actions directed toward reversing the Supreme Court. However, the term reversal connotes circumstances other than what occurred in Tennessee and elsewhere. Branzburg did not lay down judicial commands and accompanying standards for newsmen, legislators or prosecutors defining appropriate or inappropriate behaviors. Therefore, we refrain from labeling a post-Branzburg rise or appearance of legislative activity as an attempt to reverse Supreme Court decision-making.

Uniform lower court application of the Branzburg principle which refused to recognize a constitutional newsmen's privilege, on the other hand, suggests a deliberate judicial effort toward compliance with both the letter and spirit of Supreme Court decision-making. However, as noted previously, most federal courts have not construed Branzburg as an absolute bar to future First Amendment claims in all criminal cases. Recent state decisions also indicate growing acceptance of Justice Powell's ad hoc balancing test when deciding whether or not to compel disclosure.

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[7] O. Stephens, The Supreme Court and Confessions of Guilt 168 (1973).

Our survey of recent newsmen's privilege cases uncovered no significant lower court decisional patterns deviating from the rule which requires everyman to produce his evidence before grand juries. There were, predictably, some decisions which upheld a limited constitutional privilege in civil cases under the Garland v. Torre doctrine.[8] This latter condition in the common law is unrelated to the meaning of Branzburg (because Branzburg applies to criminal cases only), but the rationale supporting a constitutional privilege in civil cases should prove significant if and when courts begin moving on a case-by-case basis toward recognition of a First Amendment privilege for newsmen involved in criminal proceedings. Admittedly, this is conjectural and highly speculative, but prescriptively speaking, we think there ought to be a constitutional newsmen's privilege which would have application in criminal cases.

Currently, when a newsman refuses to give evidence before a grand jury claiming a constitutional privilege, both state and federal courts may compel disclosure despite the presence or absence of shield laws. The few judicial decisions which have deviated from the general rule requiring disclosure have a common logic, and perhaps forecast a future trend toward judicial acceptance of a First Amendment privilege in criminal cases.

While Branzburg did not foreclose the constitutional privilege, the weight of available case law shows no significant judicial

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[8]259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

resistance to the common law standard requiring disclosure. Undoubtedly, it will be some time before courts begin moving toward acceptance of a limited privilege for newsmen in criminally related cases. In our opinion, judicial recognition of a constitutional newsmen's privilege must come eventually, and when such recognition becomes a widely accepted constitutional law principle, protection for newsmen's confidential sources and/or information will be much more substantial than provided by current statutes.

Judicial recognition of a constitutional newsmen's privilege will serve to undercut attempts toward establishing absolute privilege laws which, in our opinion, are not only an unreasonable method of regulating behavior but portend harmful consequences for society. In any event, recognition of a First Amendment privilege clearly will not solve the problem of deciding whether or not newsmen should be compelled to disclose their confidential sources and information. However, this principle, if applied judiciously, should provide a more uniform and less ambiguous framework for the proper adjudication of newsmen's privilege cases.

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Time. January 21, 1974, page 88, column 4.

Time. March 5, 1973, page 65, column 2.

Time. October 22, 1973, page 71, column 2.

VIII. LETTERS, INTERVIEWS, NEWSPAPER ARTICLES AND MISCELLANEOUS MATERIALS

Interview with Dana-Ford Thomas, President, Tennessee Capitol Hill Press Corps, in Nashville, Tennessee, March 7, 1974.

Interview with Dozier Cade, Director, School of Journalism, The University of Tennessee, in Knoxville, Tennessee, January 16, 1974.

Interview with Gentry Crowell, Chairman, Democratic Caucus and Calendar and Rules Committee, 88th Tennessee General Assembly, in Nashville, Tennessee, March 5, 1974.

Interview with Keith Bissell, Member, House Judiciary Committee, 88th Tennessee General Assembly, in Nashville, Tennessee, March 5, 1974.

Interview with Ned McWherter, Speaker of the House, 88th Tennessee General Assembly, in Nashville, Tennessee, March 5, 1974.

Interview with Ralph Millet, Editor, Knoxville News-Sentinel, in Knoxville, Tennessee, May 9, 1973.

Interview with Tom Jensen, House Minority Leader, 88th Tennessee General Assembly, in Knoxville, Tennessee, February 9, 1974.

Interview with Wayne Sargent (telephone), Publisher, Nashville Banner, in Nashville, Tennessee, December 15, 1973.

Interview with William Peeler, Senate Majority Leader, 88th Tennessee General Assembly, in Nashville, Tennessee, March 5, 1974.

Knoxville News-Sentinel. November 9, 1972, page 12, column 2.

_____. November 30, 1972, page 41, columns 5-6.

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_____. January 21, 1973, page 2, columns 3-6.

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_____. March 14, 1973, page 7, column 2.

Knoxville Journal. March 20, 1973, page 1, column 8.

Letter from Bob Poe, Political Writer, Chattanooga News-Free Press, to Michael William Sunner, April 1, 1974.

Letter from Georgiana Vines, Reporter, Knoxville News-Sentinel, to Michael William Sunner, April 5, 1974.

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APPENDICES

APPENDIX A

APPLYING Q TECHNIQUE TO TENNESSEE

In this appendix, we report a study using Q Technique,[1] an instrument designed to reconstruct attitudes empirically, that sampled the perceptions of a small population of newsmen and state legislators regarding a number of issues relating to newsmen's privilege. One of the main issues dealt within the study concerned the perceived relationship between the United States Supreme Court decision, Branzburg v. Hayes,[2] and the subsequent rise of political activity in Tennessee which led to the adoption of a shield law.[3]

Q Technique is regarded "as a set of procedures and instructions by way of which individuals can produce for themselves a replica of their own attitudes toward particular matters."[4] In proceeding with this operation, we requested 37 Tennessee newsmen and state legislators to perform a Q sort which involved a rank ordering of statements according to their agreement or disagreement. Statements presented various issues relating to newsmen's privilege and the role of the press in today's society. The statements were selected from a Fisher Factorial

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[1] W. Stephenson, The Study of Behavior 1-29 (1953).

[2] 408 U.S. 665 (1972).

[3] 27 Tenn. C. Anno. § 24-113 (1973).

[4] Brown and Ungs, Representativeness and the Study of Political Behavior: An Application of Q Technique to Reactions to the Kent State Incident, in Political Attitudes and Public Opinion 129 (D. Nimmo and C. Bonjean 1972).

Design out of a population of about 350 statements of which 48 were sampled.[5] Our population of statements was selected from interviews with both newsmen and state legislators along with newspaper, magazine and scholarly journal articles spanning a three year period. Our design consists of two main elements, the issues and valences. We drew statements from six major issue areas which expressed either positive or negative valences. Eight statements (four positive and four negative) were selected representing each issue area for a total of (N) = 48. (See Table 1.)

TABLE 1. Balanced Design Representing Political Effects of Judicial Decision and Press Role.

Independencies	Levels	N	df
A. Issues	(a) Substance of judicial decision; (b) General reactions to decision; (c) Tennessee press lobby efficacy; (d) Intra-press conflict over shield; (e) Reportorial influence on legislature; (f) Role of press in society.	6	5
B. Expressive Valence	(g) Positive (h) Negative.	2	1
X = 4 statements per combination.	(X) (A) (B) = (4) (6) (2) = 48		

[5] R. Kirk, Experimental Design: Procedures for the Behavioral Sciences (1968).

For example, we selected statements supportive of the Court's decision ("The Supreme Court's decision in Branzburg v. Hayes which refused to recognize a constitutional privilege was a correct interpretation of the First Amendment") as well as nonsupportive statements ("Branzburg v. Hayes which refused to recognize a constitutional privilege was an incorrect interpretation of the First Amendment"). Likewise, there were statements expressing the pro and con positions of the other issues under consideration.

The 48 statements were printed on small slips of paper and arranged in Q sort packets which were mailed to selected respondents from throughout the state. In order to assist our respondents in modeling their viewpoints regarding newsmen's privilege, we constructed an 11 category opinion continuum ranging from -5 (least agree) to +5 (most agree) with 0 in the middle of the value range. The following schema illustrates this procedure:

	(least agree)										(most agree)
NUMBER OF STATEMENTS	2	3	4	5	6	8	6	5	4	3	2
RAW SCORES	-5	-4	-3	-2	-1	0	+1	+2	+3	+4	+5
CODED SCORES	1	2	3	4	5	6	7	8	9	10	11

By requesting a forced distribution of choices or a forced quasi-normal distribution we hoped to expedite the sorting process.

According to Brown and Ungs, in Q, 40 to 50 respondents "are typically quite sufficient--since the major relationships tend to stabilize with just a few cases and are little changed with additional

observations."[6] In the Tennessee study, 37 respondents representing three different occupational roles (reporters, editors/publishers and state legislators) participated in the sorting procedure. We had an uneven distribution of responses among classes or occupational roles with 14 reporters, 8 editors/publishers and 15 legislators completing the sorting process.

In order to determine the existence of behaviorally defined attitudes toward newsmen's privilege held by different types of persons, the 37 sorts were intercorrelated, Q-factor analyzed, and rotated to simple structure by the Varimax method with the use of the QUANL program. The factors obtained represent people who clustered together as a consequence of similar ranking patterns in response to the 48 item newsmen's privilege sort. We requested a four factor solution, factors one and three had a correlation of .48 and the total four factor solution accounted for 50.9 percent of the total variance.

Analysis of variance procedures applied to the 37 completed Q sorts of newsmen's privilege issue statements measured the statistical significance of the effects of different occupational roles and the six types of newsmen's privilege issue statements upon the way in which subjects sorted and ranked all 48 statements. Different types ranked the issue statements in differing ways. The F test adjudged a significant statistical relationship between role types and subjects' scores which confirmed our expectation that people tend to view issues such as newsmen's privilege in terms of its effects on their role occupations.

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[6]Brown and Ungs, supra note 4.

Each individual factor was analyzed and three of the four showed statistical significant relationships. The results appear in Table 2.

Table 3 presents Q factor types and the detail of their composition. Subjects are arranged according to their occupational roles and the highest loading for each person is underscored. The final column of the matrix (h^2) lists the communalities for each person, the proportion of his/her individual variance which is explained through the use of all four factors.

We now turn to a consideration of determining the composition of our factors as they have described themselves through the sorting operation. The behavior of each factor (or what is descriptive of the persons comprising that factor) appears in quantitative form in the following table which presents the typal arrays for each factor. The 48 newsmen's privilege statements are listed and grouped according to the theoretical issues that each reflects. For each factor, the typical score given to each statement by the subjects, weighted to give most emphasis to the scores of those with higher loadings on that factor, is listed after each statement. The following factor descriptions are general summaries of each factor and scores for each specific statement can be found in Table 4.

FACTOR DESCRIPTIONS

The factor I person is best described as a liberal crusader or one who fears government interference in the operation of the "free press." This individual views the Court's decision in Branzburg as an incorrect interpretation of the First Amendment press guarantees, and

TABLE 2. Analyses of Variance Between Reporters, Editors/Publishers and Legislators Within the Four Factors.

Source of Variation	SS	df	MS	F
FACTOR I				
Between Samples $(SS\ bet)_1$	.702	2	.351	6.75
Within Samples $(SS\ within)_2$	1.766	34	.052	
Total Variation	2.468	36		
	$F = \frac{MS_1}{MS_2} = 6.75$		$p < .01$	
FACTOR II				
Between Samples $(SS\ bet)_1$	1.424	2	.712	8.68
Within Samples $(SS\ within)_2$	1.35	34	.082	
Total Variation	2.774	36		
	$F = \frac{MS_1}{MS_2} = 8.68$		$p < .01$	
FACTOR III				
Between Samples $(SS\ bet)_1$	.654	2	.327	6.673
Within Samples (SS within)	1.678	34	.049	
Total Variation	2.332	36		
	$F = \frac{MS_1}{MS_2} = 6.673$		$p < .01$	

TABLE 2. (continued)

Source of Variation	SS	df	MS	F
FACTOR IV				
Between Samples (SS bet)	.064	2	.032	.533
Within Samples (SS within)	2.055	34	.060	
Total Variation	2.119	36		

$$F = \frac{MS_1}{MS_2} = .533$$

TABLE 3. Q Factor Types: Newsmen's Privilege Issues (Four-Factor Solution).

Person	Occupational Role Type: Reporter	Editor/Publisher	Legislator	I	II	III	IV	h^2
1	X			53	12	08	35	.43
2	X			71	-22	32	20	.70
3	X			07	08	30	25	.16
4	X			87	-04	12	-18	.82
5	X			57	-02	19	39	.53
6	X			52	02	15	08	.31
7	X			50	10	58	-04	.61
8	X			22	18	71	-01	.60
9	X			70	11	01	-29	.60
10	X			42	-08	50	25	.51
11	X			55	-14	08	20	.37
12	X			31	04	03	65	.53
13	X			-63	05	0	-03	.41
14	X			07	-30	0	58	.44
15		X		40	-23	67	-07	.68
16		X		-05	39	77	03	.75
17		X		31	10	49	06	.36
18		X		0	12	18	12	.70
19		X		33	-10	55	30	.52
20		X		64	0	25	05	.48
21		X		23	-06	77	-13	.69
22		X		38	11	67	11	.63
23			X	08	46	33	42	.52
24			X	-28	45	-11	-26	.37
25			X	18	25	28	64	.60

TABLE 3. (continued)

Person	Occupational Role Type			I	II	III	IV	h^2
	Reporter	Editor/Publisher	Legislator					
26			X	-13	37	-08	17	.20
27			X	-21	11	08	20	.11
28			X	15	78	-03	02	.64
29			X	-17	04	-22	58	.43
30			X	63	25	20	18	.55
31			X	02	45	36	-01	.34
32			X	23	76	17	03	.67
33	X		X	61	34	18	11	.54
34			X	18	56	15	13	.40
35			X	15	79	-17	74	.69
36			X	-10	71	19	-17	.59
37			X	17	-15	-55	-17	.40

NOTE: Cumulative percent of total variance explained by each factor: 25.3 37.0 44.5 50.9; Respondents' saturations exceeding $\pm$ 36 are significant at $p < .01$.

TABLE 4. Typal Array Scores: Newsmen's Privilege.

Q Statements	Q Factor Type I	II	III	IV
SUBSTANCE OF JUDICIAL DECISION				
1. Reporters should be protected against compulsory disclosure of news sources even where the sources are ciminals or perhaps involved in some illegal activity.	+4	-5	-2	+4
2. If the reporter-source relationship is not protected most of the time, people will stop talking to reporters, and if they stop talking, the public will be denied its right to information.	+4	-1	+5	+5
3. Few people outside journalism understand the newsgathering process which often involves prying information out of people. Consequently, reporters must frequently offer anonymity to their sources and suffer the possible hardships of jail if the courts refuse to honor a pledge of confidentiality.	+3	0	+3	+4
4. The media should not have automatic immunity from revealing their confidential sources, but only after they have proven that the public's "right to know" exceeds the demand for the "fair and effective administration of justice."	-5	+1	0	+1
5. Most members of the legislature rejected the proposal of the Capitol Hill Press Corps (who represented the working press) because their absolute shield law proposal was far too radical.	+1	+2	+1	-3

TABLE 4. (continued)

Q Statements	Q Factor Type I	II	III	IV
6. I had reservations about supporting <u>any</u> shield law because I felt that the adoption of such a law would be an admission by the press that newsmen could no longer rely on the First Amendment for protection of news sources.	+2	-1	-1	-2
7. Newsmen need absolute protection of their sources if the public's "right to know" is to be preserved.	+4	-5	-1	-2
8. There are valid grounds for absolute protection of newsmen's sources, but our qualified law here in Tennessee best serves the interests of the public.	-3	-1	+2	+1
<u>REPORTORIAL INFLUENCE ON LEGISLATIVE BEHAVIOR</u>				
9. Legislators were not so much concerned with the reporter-source relationship as they were with attempting to curry favor with a press that might or might not support them for reelection.	+2	-1	0	-4
10. Most legislators respond to the appeals of their local media--press, T.V. or radio--more readily than to appeals from statewide or national pressure groups.	+2	+2	-1	+2
11. Legislators in Tennessee, as everywhere, are extremely sensitive to the demands of the news media since their very political lives depend on media support.	-1	0	-1	+5

TABLE 4. (continued)

Q Statements	Q Factor Type I	II	III	IV
12. The legislator-reporter relationship is a two-way street. Legislators use newsmen (publicity) and newsmen use legislators (news sources), and this reciprocal relationship benefits the public.	+1	0	+1	+5
13. The Tennessee Press Association is a powerful organization. Newspapers are the source of that power and, or course, legislators want and need that backing.	0	+2	0	+1
14. The Tennessee Press Association urged editors and publishers of affiliate newspapers throughout the state to "buttonhole" their respective legislators while influencing them to vote for the TPA shield proposal. This strategy worked to perfection.	0	+2	+1	+1
15. Since publicity is so important to legislators, it is fair to say that most legislators "go out of their way" to court the press most of the time.	-1	0	-1	+5
16. Legislators are excellent sources of information and are usually eager to disseminate any and all information that will get them exposure. Consequently, there are few secrets between our legislature and the press.	-2	0	-2	-1
ROLE OF THE PRESS				
17. Our mass media is slowly being absorbed into an industrial commercial system which accents the marketing functions of the media while diminishing their roles as information and education agencies.	-2	+1	-3	+2

TABLE 4. (continued)

Q Statements	Q Factor Types I	II	III	IV
18. It is the media's job to reflect as accurately as possible to the public, a "mirror image" of what goes on in our government.	+2	+4	+4	+5
19. Owners of the media always endeavor to give the public what it wants because the media sense that their power is in the medium and not the message.	-2	-2	-5	-2
20. In my opinion, of the most respected professions, reporters usually rate somewhere down around pickpockets.	-4	+5	-4	-3
21. The jailing of press and other media persons for their refusal to disclose sources has become a "badge of courage" used to gain sympathy for the media's cause.	-2	-2	-1	+1
22. The press has distorted the newsmen's privilege issue into a confrontation between the "free press" and government prosecutors.	-3	0	-4	+4
23. Since the media is rather monopolistic, it can report the news pretty much as it chooses while emphasizing those aspects of the news which will "sell" the most copy.	-2	+2	-4	+1
24. In cities throughout the State, the local media establishes their own policies to that city newspapers and radio stations are fairly independent of one another in terms of how and what they pass off as news.	+2	-2	+2	+3

TABLE 4. (continued)

Q Statements	Q Factor Types I	II	III	IV
PRESS SHIELD CONFLICT				
25. I think that, in general, Tennessee's "Freedom of Information" Act is acceptable to most of the "working press" now that they have had time to think about it.	-2	-2	+4	+1
26. The "Freedom of Information" Act as it presently reads, is exactly what the Tennessee Press Association wanted--a qualified shield law.	+1	+1	+3	+2
27. The disagreement between the working press and the Tennessee Press Association over the content of Tennessee's shield law (absolute v. qualified) was just another manifestation of the everpresent tension that exists within the ranks of the press.	-1	-1	-4	0
28. The working newsman is the life-giving sustenance of any news producing organization, and they are accorded high status by their editors and publishers.	0	-2	+3	-2
29. When the smoke settled, I think that, generally, the FOI Act was acceptable to everyone in the press.	-3	-1	+4	-1
30. In spite of working press support, the majority of state legislators sincerely believed that an absolute privilege law would not be in the best interests of the people of Tennessee. Instead, they supported the TPA qualified shield law proposal.	0	+2	+1	+1

TABLE 4. (continued)

Q Statements	Q Factor Types I	II	III	IV
31. The working press as exemplified by the Capitol Hill Press Corps, profoundly disagreed with members of the TPA as to the proper scope of Tennessee's shield law.	+2	+4	+2	-3
32. The Capitol Hill Press people thought that the TPA shield proposal was primarily a bill which would best serve the interests of publishers and editors and not the interests of the working press.	+2	+1	+1	0
PRESS AS A PRESSURE GROUP				
33. Without the press lobby, Tennessee legislators would not have enacted the "Freedom of Information" Act.	+3	+4	+2	+1
34. The Tennessee legislature on its own initiative accepted the invitation of the United States Supreme Court to enact newsmen's privilege law.	-5	-5	-4	-2
35. The Tennessee Press Association was the single most important group in the legislative "push" for a newsmen's privilege law.	+1	+5	+1	-5
36. After newspaper publishers and editors talked to legislators about the implications of the U.S. Supreme Court decision denying a constitutional newsmen's privilege, most legislators became thoroughly convinced that Tennessee needed a shield law.	-3	-4	0	-4
37. Some legislators felt that they were being blackmailed by the press into supporting a "Freedom of Information" Act in Tennessee.	0	+2	-2	0

TABLE 4. (continued)

Q Statements	Q Factor Types I	II	III	IV
38. By yielding to press demands for a newsmen's privilege law, the legislature has given yet another tool to a press that has demonstrated that they are going to write what they want to write.	-2	+2	-4	-2
39. Most publishers and editors made an effort to contact their legislators in an effort to convince them to support the TPA shield law proposal.	+1	+3	+2	0
40. Media concentration on the newsmen's privilege issue following the U.S. Supreme Court decision (which denied newsmen a constitutional newsmen's privilege) created a favorable feeling among legislators in support of a state shield law.	0	0	0	-1
JUDICIAL IMPACT				
41. The Supreme Court has denied newsmen their traditional right to refuse disclosure of news sources before grand juries, courts, and legislative bodies. This decision (Branzburg v. Hayes) was an incorrect interpretation of the First Amendment.	+4	-3	+1	-2
42. It is generally recognized that after the Court rendered that decision in Branzburg v. Hayes, reporters were subjected to governmental harassment with respect to confidential news sources.	0	-4	+2	-1

TABLE 4. (continued)

Q Statements	Q Factor Types I	II	III	IV
43. Because of the Supreme Court decision in Branzburg v. Hayes, newsmen in Tennessee felt compelled to devise a shield law to protect themselves against compelled disclosure of sources and/or information.	+3	+1	+2	-1
44. Tennessee would not have a shield law today if the Supreme Court had not refused to recognize a constitutional newsmen's privilege.	+2	+2	+3	-1
45. The Supreme Court's decision in Branzburg v. Hayes which denied newsmen a constitutional privilege to refuse disclosure of confidential sources and information was a correct interpretation of the First Amendment.	-4	+2	-4	0
46. I don't think most legislators really cared one way or another about the Supreme Court's decision in Branzburg which denied newsmen constitutional protection of their sources.	+2	-2	0	-2
47. Tennessee newsmen became concerned with the need for protection of the reporter source relationship after the adverse decision in Branzburg v. Hayes.	+2	0	+1	0
48. Though we are not indifferent to the dangers to the press from prosecutors and judges, we are equally concerned with the fair administration of justice which may become severely hampered if members of the press are not compelled to disclose their sources before grand juries, courts and legislative bodies.	-4	+1	-2	-2

is strongly convinced that newsmen need absolute protection of their confidential sources and/or information. The liberal crusader is concerned with protecting the public's "right to know" against governmental interference, and concedes that the controversy over whether or not newsmen should have a privilege is partly a result of a general misunderstanding of the newsgathering function by citizens and law enforcement officials alike. This person is likely to view legislators as self-interested and hostile to creation of a strong privilege law which would benefit the newsgathering function.

The largest number of persons associated with this factor are reporters or members of what is commonly referred to as the "working press." Reporters 1, 2, 4, 6, 9 and 11 are all pure for the factor (did not have significantly high loadings on any other factor), and all members of the Capitol Hill Press Corps that sorted our issue statements are associated with Factor I. While not exclusively confined to reporters or members of the working press, this Factor is clearly dominated by that group (one legislator who loaded with this factor is also a reporter for a small local newspaper). Overall, 9 of 11 persons who loaded on this factor have press related jobs and 8 of 11 are reporters. Approximately, 29 percent of all respondents are associated with Factor I.

We describe the Factor II person as a traditional legalist. This individual agrees with the Burger Court decision refusing to recognize a constitutional newsmen's privilege. The traditional legalist is most likely to agree that newsmen's First Amendment rights should not interfere with the state's duty to insure that the criminal

justice system is fairly and properly administered. This person is most likely to strongly disagree with the statement indicating that newsmen need absolute protection of their confidential sources, but is concerned with protecting society from criminal behavior and the necessity in maintaining a high degree of "law and order." Another orientation of the Factor II person is the interest in increased accuracy in presenting news to the public and the growing concern that monopolistic tendencies of the media could in some way have an effect on the newsgathering and news dispensing process.

Regarding the Tennessee shield law, the traditional legalist is likely to believe that the press lobby was an indispensable element in the political equation that led to the passage of the Tennessee Act. This person would agree that the Tennessee Press Association (TPA) played a significant role in lobbying for the Tennessee shield, but also saw the development of an ideological rift within the ranks of the Tennessee press (reporters versus editors/publishers) regarding the proper scope of that law.

The largest number of persons associated with Factor II are state legislators (9 and 10). Respondents 23, 24, 26, 28, 31, 32, 34, 35 and 71 are pure for the factor. Sixty percent of all legislators are associated with this factor while the remaining few are divided evenly between Factors I and IV. Twenty-seven percent of all respondents are associated with this factor.

The descriptive label pragmatic conventionalist best describes the summed qualities of Factor III. This person represents a moderate, conciliatory point of view. The pragmatic conventionalist would like

to have strong protections for newsmen's confidential sources, agrees that there are valid grounds for absolute protection, does not support the Court's Branzburg decision, but concedes that, given the circumstances, the qualified shield law best suits the interests of Tennesseeans.

Another dimension of this person's position regarding press issues reflects the institutional role of the press within society. The pragmatic conventionalist does not see the media as an industry that exploits its position for power and profit and believes that the reporter is a most important element in the newsgathering process. The person associated with this factor believes strongly that it is the job of the press to report news accurately, and that for the most part, the press does this more often than not.

Six editor/publisher types were purely defined on this factor along with one reporter. Consequently, this factor, like Factor I, is heavily media biased, and seven of eight editor/publisher types are associated with Factor III. Overall, 36 percent of media respondents associate with this Factor III, and 29 percent of our total persons locate here.

The ambivalent moderate best describes our fourth factor. Represented by both reporters and legislators only, the ambivalent moderate is ambivalent in his support of a newsmen's privilege law. What is unique about this person is his view that newsmen and lawmakers work in relative harmony with one another, and that legislators are extremely sensitive and responsive to the demands of the press. With respect to supporting newsmen's privilege, this person would

tolerate a shield, but would limit its protective coverage.

The most striking part of the ambivalent moderate factor is the high rankings given to statements suggesting a highly politicized interrelationship between members of the press and legislature. This individual is not likely to recognize the importance of the TPA in the "push" for Tennessee shield law, and sees very little, if any, relationship between judicial decision-making and the adoption of Tennessee's shield. Also, the ambivalent moderate is concerned with accuracy in reporting news to the public, and expresses some alarm at the growing monopolistic tendencies of media which accents commercial functions while diminishing information and education functions. Respondents 12, 14, 25 and 29 are pure for the factor while 14 percent of all respondents load here (five).

The four types of people described here are closely aligned with their role type or occupational category. The newsman as a liberal crusader, legislator as a traditional legalist, editor/publisher group as pragmatic conventionalists and, finally, a group of reporters and legislators who are ambivalent moderates. While this factor grouping is intended as descriptive of those persons sampled in the Tennessee study, the first three factors might provide some clue as to what characteristics might describe a national sample of newsmen and legislators when asked to respond to these particular issue statements. While this is not intended to provide a total range of the possible types within those three classes of persons, the statement scores provide for some interesting speculations on the future of privilege legislation in the United States.

APPENDIX B

TENNESSEE FREEDOM OF INFORMATION ACT

§ 24-113. Persons gathering information for publication or broadcast not required to disclose.--A person engaged in gathering information for publication or broadcase connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the legislature, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast. [Acts 1973, ch. 27, § 1.]

§ 24-114. Application of nondisclosure law to source of defamatory information.--Section 24-113 shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information. [Acts 1973, ch. 27, § 2.]

§ 24-115. Application to Court of Appeals by persons seeking information.--Any person seeking information or the source thereof protected under §§ 24-113--24-115 may apply to the Court of Appeals for an order divesting such protection. Such application shall be made to the Court of Appeals in the grand division of the state of Tennessee wherein the hearing, action or other proceeding in which the information sought is pending. The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that (1) there is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law; (2) has demonstrated that the information sought cannot reasonably be obtained by alternative means; and (3) has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information. An order of the Court of Appeals may be appealed to the Supreme Court of Tennessee. [Acts 1973, ch. 27, § 3.]

Effective Date. Acts 1973, ch. 27, § 24.
April 5, 1973.