THE LEGAL STATUS OF REPORTER PRIVILEGE IN TEXAS.

by Jens Koepke

A senior thesis for the Texas A&M University Undergraduate Fellows Program.

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INTRODUCTION

The disenchantment of youth with the political and social order of the '60s and early '70s pitted against a reactionary and frightened establishment provided a perfect breeding ground for confidentiality cases. But because the stories about this conflict were often accompanied by actual, threatened, or suspected violations of the law, the apparent incompatibiltiy ot two important social adjectives—the public's interest in an uninhibited flow of information about and an informed analysis of these events, and its interest in apprehending and punishing wrongdoers—came to a head.

To combat what they feel is harassment by grand juries and law enforcement agencies, journalists have continually plied the judicial system for an absolute reporter privilege. They have asked the courts for an exemption from having to disclose the information gained from and identity of confidential sources. But reporters and judges often have been at odds on this question.

The courts, and the grand juries and law enforcement agencies that work with them, have said that journalists should be treated like any other citizen—they should be compelled to disclose any information relevant to a case.

Journalists, however, counter that they should have an absolute privilege based both constitutionally on the First Amendment and on a common law principle similar to the attorney-client privilege. They point out that they have an ethical duty not to identify their sources and that compelled disclosure would have a "chilling effect" on the flow of information in this country—that it would "dry up" their sources, especially those dealing with controversial or investigative stories.

My research concentrates on how Texas courts and the Fifth Circuit of

Appeals have decided in reporter privilege cases. But before one can understand the cases at the state and federal appellate levels, one must first explore the nature of the source-reporter relationship and then examine the opinions of the United States Supreme Court.

THE NATURE OF REPORTER-SOURCE RELATIONSHIPS

Journalists rely on sources for almost all their stories. The majority of the time they deal with willing sources who go on the record with their comments. Most people find the prospect of press coverage quite exciting and will cooperate any way they can. In fact, a great amount of information comes to journalists unsolicited. When the information the reporter is dealing with is controversial, however, the number of sources willing even to talk to the writer dwindle and those ready to be quoted and identified is minimal and sometimes nonexistent. This has spawned the existence of confidential relationships between reporters and their sources.

University of Michigan Law professor Vince Blasi conducted an empirical study of this relationship, the effects subpoenas have on it and what changes a newsman's privilege would exert on it.[1] Blasi's study has often been used by courts to help understand the relationship. He gathered his information from interviews with 47 metropolitan reporters and editors, and 67 qualitative and 975 quantitative questionnaires sent to reporters. Interestingly, it included an interview with Earl Caldwell, a New York Times reporter and one of the plaintiffs in the landmark Supreme Court case, *Branzburg v. Hayes*.[2] I believe it gives a fairly representative description of how confidential relationships are initiated and maintained.

> When reporters are seeking to establish contact with particular sources, elaborate rituals of introduction are seldom necessary except with political and entertainment celebrities. Personal recommendations and name-dropping come in handy on occasion, but these seem to be relied upon much less than one might suppose... There are, of course, exceptional situations. On such occasions, newsmen will resort to any number of devices to get information from sources: for example, securing a personal recommendation

> from another reporter who has won the trust of the source; giving the source detailed assurances of confidentiality, sometimes to the extent of promising to go to jail if necessary; paying the source—one instance of a $5,000 payoff was related to me in an interview; offering to trade information with the source; or offering not to print information that might be damaging to the source in return for other information or leads. **For the most part, however, the acquisition of sources is more a function of personality than of any special techniques or contacts.**[3]

However, accurately and comprehensively understanding a person, group or issue takes more than just getting an interview. It is at this task that many reporters fail and a few succeed. Blasi recounted what Wallace Turner, chief of the New York Times San Francisco bureau, had told him to illustrate this point.

> He gave me a lengthy feature story that he had written on the Black Panthers before Earl Caldwell joined the bureau to specialize in Panther coverage. The story, which included an in-depth interview with Eldridge Cleaver, seemed to present a rather detailed and insightful analysis of the Panthers. 'It's not worth a damn,' Turner told me after I had read the story. He noted that he had to print essentially what the Panther leaders told him, that he was not able to get to the rank-and-file members of the party or to observe the Panther's daily routine. In short, he could not verify the information that was given him, and his analysis of trends and tensions was of necessity based almost exclusively on what the leaders told him.[4]

Getting a source to relax and speak expansively or persuading a group to allow its operations to be observed in an unstructured fashion is vital, but even more important is the reporter's ability to inspire in his sources the feeling of confidence that he will understand the information and report it accurately. When covering some of the most polarized elements in society—radicals, minorities, police—this may only be possible by convincing the source that the reporter is "on his side." The reporter must at least appear not to have any involvement with "the other side." These demands often make it difficult for reporters to maintain a clearly

objective journalist's role and not be manipulated as an advocate for that person or group.

"No matter how these problems of role definition are resolved, 'confidentiality' in these relationships often takes the form of an unspoken trust that the reporter will treat the information with care and will know what to use and what not to use. Frequently there is not an explicit agreement about what is on and off the record."[5] In a few situations the identity of the source will remain unknown even to the reporter.

In most confidential relationships, even those with rigid rules, the reporter is not barred from sharing his information with his editors and fellow reporters, although in some instances he feels bound to keep the information entirely to himself. Material obtained in confidence also is often shared with competitors—a common practice, especially in trial reporting.

Sources may "dry up" for many reasons, the most common being that they are unhappy with the way the reporter is writing the stories. This can cause the reporter to feel great pressure to write favorably about regular sources. "When coupled with the tendency of reporters to identify with their sources, there exists the possibility that fairness as well as neutrality may be sacrificed. All newsmen are aware of this danger, and most fight very hard to resist it."[6]

There appears, according to Blasi, to be one other common pattern in source relationships—threats to cut the reporter off are made far more frequently than they are carried out.

Reporters use confidential sources in a variety of ways. The most significant way has been for not-for-attribution quotations, which convey information or opinions that would not be available to the readers but for the promise not to attribute. Blasi describes some of the other uses:

> Other uses are less obvious but, according to some respected

> newsmen, even more important for quality reporting. Information received in confidence is regularly used to verify [corroborate] printable items received from other sources on the record. Off-the-record information is also important in deciding what emphasis to give certain printable facts in writing up a story; in determining what stories to cover with what commitment of resources; in persuading editors to run a particular story or to give it a certain prominence; and in assessing for the reader the significance of recent developments and the alternatives and probabilities for the future. Confidential information is also helpful in eliciting on-the-record information from other sources. Confidential tips often lead reporters to these other sources; newsmen sometimes get reluctant sources to talk either by establishing a rapport by means of name-dropping or fact-dropping, or else by convincing the source that the cat is already out of the bag.[7]

How often do journalists use confidential sources? Blasi says average reporters rely on confidential sources in anywhere from 22.2% to 34.4% of their stories.[8] More experienced reporters tend to use more confidential sources probably because they have acquired more regular sources on important regular beats. Blasi, however, believes it is because younger reporters believe there has been too much reliance in the past on off-the-record briefings and blind quotes and that it is too easy for reporters to be "taken in" by their sources. "Many of the young newsmen I interviewed, and some of the more experienced reporters as well, are now deeply suspicious of all confidential information. They say, for example, that sources are more willing to lie in off-the-record or not-for-attribution statements because their lies will not be exposed via the news media to those who know differently."[9]

Newsweeklies seem to rely on confidential sources the most, while local broadcast media use them the least. The government and investigative beats were the most likely to use these sources, while sports was the least likely. The latter statistic has probably changed in light of all the recent drug and booster scandals in sports. Also, about a

quarter of all stories written about radical-militant or minority groups use confidential sources.

About 19% of the reporters had been served with a subpoena and about half of those, in the end, had turned over all the information requested. This latter statistic has consistently decreased throughout the '70s and '80s as the press has won more cases on appeal and has been more willing to spend time in jail if necessary. This statistic also reflects more a disclosure of confidential information than the identification of a confidential source.

> What infuriates many newsmen is not so much the principle of press subpoenas, nor even the increased volume in recent years, but rather the frequency with which subpoenas are issued in what reporters view as unnecessary circumstances. The reporters I interviewed, particulary those who have built their careers around in-depth coverage of radicals, say that the government vastly overestimates the quantity and quality of the information that is given to the press.[10]

More recently, from 1982-84, at least 80 journalists and news organizations have opposed subpoenas seeking disclosure of information and confidential sources, with at least 13 journalists having been sentenced to jail for not complying with various disclosure orders.[11]

Similarly, between January 1981 and June 1982, 46 reporters and news organizations fought subpoenas, resulting in 18 contempt citations and 13 jail sentences. Three reporters actually served time in jail and five newspapers were fined.[12]

Comments from reporters addressed why they felt so many subpoenas were being served:

> Laziness, inept investigative procedures and a disrespect for the press and a misunderstanding of its role....Embarrassment and paranoia. Law enforcement officers do not like me to publicize things they did not know or did not want anyone to know they knew.

> Resentment that a good reporter is as good and, in many cases, a better investigator than many enforcement people.[13]

Some reporters, however, felt that the authorities' motives were more sinister—that they were trying to drive a wedge between the journalist and his sources.

> The primary concern of reporters is not that they will lose their sources by being made to turn over highly sensitive and secret information—newsmen are almost never privy to such information. Rather, the worry is that their mere cooperation with fact-finding tribunals will alienate sources who demand to know of reporters 'whose side are you on?' To these sources it may make no difference that the newsmen's 'cooperation' with the tribunal is involuntary, perfunctory and unhelpful. It is the principle that counts.[14]

Interestingly, there is at least one positive result for reporters from a subpoena—it gives them a chance to prove their credibility to their sources by remaining firm.

But subpoenas do have several negative effects. They take a considerable time commitment from the reporter—worrying about the case, meeting with lawyers, sitting in court, and maybe serving time in jail. This is a considerable hassle for reporters which makes it difficult for them to effectively cover their beats. The possiblity of a subpoena exerts an intangible tension on the quality of source relationships, making it difficult for the source to cooperate and speak expansively. This is difficult to measure because the tension also could be caused by variety of other factors—the source's dissatisfaction with the way the stories are being written, a tactical decision by the source to "lower its profile," or the source's desire to exercise more control over press coverage.

When sources **are** aware of a subpoena threat and conveys their doubts to the reporter, the impact of press subpoenas on the newsgathering process can be more reliably determined. Sources will impose tighter

restrictions on the reporter, such as not allowing any tape recording. They will also drag their feet, delaying an interview until they've "checked out" the reporter through the grapevine. John Kifner, who probably had as extensive and as long-standing a network of "movement" sources as anyone, says as a result of the threat of a subpoena it took him six weeks to do a story on the Berrigans that should have been a two-day assignment.[15]

Finally, the fear of subpoena sometimes causes the source to completely cut off the reporter—refuse to grant an interview or even give the reporter any information. One reporter recounted the following instance to illustrate this.

> Once, in covering a bank failure, a teller who was worried that any information he would give me would eventually expose him refused to come through at the last moment, even though he really wanted to make the information public. The information itself could not be traced to him. He was fearful though that I would be forced to identify him in court as my news source.[16]

William Sack, in a law review article, made an interesting point in describing the effects of a subpoena threat, "[There is an]...apparent inability of journalists to explain to their readers, listeners and viewers the implications of a press unable to protect the confidentiality of its sources. Perhaps this inability is inherent in the subject matter. It may be impossible, because of the very confidentiality involved, to describe persuasively the extent to which confidential sources play in the daily accomplishment of sound journalism."[17]

However, law professor Anthony Lewis says, "My guess is that most confidential sources talk to the press for their own compelling reasons of conscience or ideology or personal animus—and will continue to do so even if an occasional case demonstrates that reporters may come under legal pressure to name their sources."[18]

Blasi's quantitative questionnaire showed that 8% of the respondents believed the possiblility of a subpoena adversely affected their coverage, with 17% of these reporters covering trials and 15% covering radical-militant groups.[19] The underground press and newsweeklies seemed to feel most adversely affected by the subpoena threat probably because they work under less deadline pressure than other reporters, compile fairly extensive files using many different sources, and use an interpretive reporting style.[20]

Blasi concluded that for a distinct subpopulation of reporters, which appear to be characterized as much by reporting techniques as by type of beat, the subpoena possiblity unmistakeably had caused **some** losses of stories, parts of stories, and opportunities for corroboration.[21]

Blasi's study is filled with interesting and useful information that is difficult to summarize, but we can draw some conclusions from it. (1) Good reporters use confidential sources mainly to assess or corroborate information rather than to gain access to highly sensitive, newsworthy information. (2) The understanding of confidentiality between the source and the reporter are often unstated and imprecise. (3) Newsmen regard the protection of the **identity** of a source as more important than the **contents** of the confidential information. (4) Reporters feel strongly that they should make the ethical decisions balancing the sources' needs against society's rather than the courts and are willing to testify voluntarily and spend considerable time in jail to support their view. (5) Journalists object most to the growing frequency with which they are served subpoenas in cases in which they consider their input to be frivolous and unimportant. (6) The adverse impact of the subpoena threat has been primarily in "poisoning the atmosphere" so as to make insightful, interpretive reporting more difficult rather than in causing sources to "dry up" completely. (7) Press subpoenas damage source relationships mainly by

compromising the reporter's independent or compatriot status in the eyes of sources rather than by forcing the revelation of sensitive information. (8) Only one segment of the journalism profession, characterized by certain reporting traits—emphasis on interpretation and corroboration—more than the type of beat, has been adversely affected. (9) Newsmen prefer a flexible ad hoc qualified privilege to an inflexible per se qualified privilege.

FEDERAL CASE BACKGROUND

The earliest reported case of a journalist's refusal to disclose his sources occurred in 1848.[22] In *Ex parte* Nugent, a New York Herald reporter had obtained a secret copy of a treaty the U.S. Senate was negotiating to end the Mexican-American War. After the reporter refused to reveal his source, the Senate held him in contempt and ordered him jailed.[23] The D.C. Circuit later denied the newsman's petition for habeas corpus.

From *Nugent* until the mid-1940s, the issue did not surface with any frequency. As a matter of fact, from 1911 to 1968, only 17 cases involving a reporter's confidential sources were reported.[24] In 1958, however, the Second Circuit Court of Appeals established the framework by which subsequent privilege cases would be decided.[25] In *Garland v. Torre*, actress Judy Garland brought a libel action against columnist Marie Torre. Garland sought the name of a CBS network executive who referred to the actress as being overweight. After Torre refused to reveal the name of her source, she was held in contempt.[26]

Then-Judge Potter Stewart wrote the Circuit's decision, holding that Torre must identify her source because the claim went "to the heart of" the plaintiff's case.[27] The court wrote, "We accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news....But freedom of the press, precious and vital though it is to a free society, is not absolute."[28] Because the information sought was central to the plaintiff's case and there were no alternative means of obtaining the information, the court ruled that Torre was without First Amendment protection and her contempt citation was upheld.[29]

The court summed up its decision with the following:

> Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press...one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned....Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears...we hold that the constitution conferred no right to refuse an answer... [w]e find no reason to depart from the precedents, federal and state, refusing to recognize such a privilege in the absence of a statute creating one....To recognize a privilege would poorly serve the cause of justice.[30]

In an important 1972 case the Second Circuit further illucidated its feelings on these types of cases:

> "Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis....The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting, the dividends of which are revealed in [published] articles...threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected . . .."[31]

Beginning in the early '60s and peaking at the end of the decade, there was a flurry of subpoenas served to newsmen. For example, the Nixon administration served 30 subpoenas in as many months on two Chicago newspapers to gain access to unpublished information following the 1968 Democratic National Convention.[32] This trend also continued on both the state and local levels.

BRANZBURG V. HAYES

The conflict between reporters and the courts culminated in 1972 when the Supreme Court finally considered a reporter privilege case[33] after denying certiorari in three earlier cases.[34]

Branzburg is actually a collection of three cases considered together by the Court.

A. Branzburg

The first of the cases, *Branzburg v. Hayes*, concerned two news stories written by Paul Branzburg, a reporter for the Louisville Courier-Journal.[35] The first article dealt with the production of hashish from marijuana, titled "The Hash They Make Isn't To Eat," and was illustrated with a photograph. The article said the newspaper had promised not to reveal the names of the hashish producers.[36] The second article detailed drug use in a small Kentucky town, including interviews with many local drug dealers and users.[37]

These articles, written at a time of heated debate about the legalization of marijuana, named places inside and outside Kentucky where marijuana grew; they described the extent of and reasons for marijuana use, the absence of intelligent discussion among government officials concerning the apprehension and prosecution of drug law violators; and revealed the belief of some natives that local officials condoned the use of hard drugs in ghetto areas to keep the inhabitants passive.[38] Branzburg informed the community, including law enforcement and educational leaders, that drug use was more pervasive than they had imagined, and he

warned that government officials, by giving distorted and often false information about marijuana use, were encouraging widespread distrust of law enforcement and education. He also reported that some government officials and employees were themselves engaging in illegal drug activity.[39]

After both articles had been published, two separate grand juries subpoenaed Branzburg to answer questions about his articles. In the first case, he appeared before the grand jury but refused to identify who he had seen making the hashish.[40] A state trial judge ordered Branzburg to identify his source and rejected his argument that he was protected by Kentucky's reporter's privilege statute. The statute, in pertinent part, reads:

> Newspaper, radio, or television broadcasting station personnel need not disclose sources of information.
>
> No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the general assembly, or any committee therof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.[41]

On appeal, the Kentucky Court of Appeals held that the state shield law protects reporters from having to reveal their sources, but not when they witness the commission of a crime.[42]

In the second case, Branzburg again refused to identify who gave him the information about drug trafficking. Although Branzburg's motion to quash the grand jury summons failed,[43] a protective order was issued so Branzburg did not have to testify about his sources. Branzburg then sought a writ of prohibition against his appearing before the grand jury, arguing

such an appearance, in itself, would damage his credibility as a journalist.[44] The Kentucky Court of Appeals, however, held that Branzburg must comply with the subpoena and appear before the grand jury, saying:

> The speculation that the mere appearance of a news reporter before a grand jury might jeopardize his rapport with the segment of society known as the drug culture, causing its loss of confidence in him and thereby inhibiting his ability to obtain information, is so tenuous that it does not . . . present an issue of abridgement of the freedom of the press within the meaning of the terms as used in the Constitution of the United States.[45]

B. *United States v. Caldwell*

Earl Caldwell, a New York Times reporter, had interviewed leaders of the Black Panther Party and written a series of articles about them in 1969. Caldwell's articles described the ideological evolution of the Black Panther Party, the development and content of its program, and the expanding basis of its suport in both the black and white communities. These articles included statements by Black Panther leaders threatening to kill President Nixon, and other statements advocating the forceful overthrow of the government.[46] A federal grand jury investigating the Panthers issued a subpoena to Caldwell, ordering him to appear with all his notes and tape recordings dealing with the "aims and purposes" of the Panthers.[47] After the Times objected to the broad scope of the subpoena, a second one was issued simply ordering him to appear before the grand jury.[48] The paper moved to quash the second subpoena and sought a protective order against forcing Caldwell to reveal his sources. The Times argued that reporters are privileged not to disclose confidential sources unless a compelling state interest in the testimony is shown.[49]

The district court denied the motion to quash, saying that "every person within the jurisdiction of the government" must testify when properly

summoned,[50] but granted the protective order saying:

> ...[Caldwell] need not reveal confidential associations that impinge upon the effective exercise of the First Amendment right to gather news . . . until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the Court.[51]

Despite the protective order, Caldwell still refused to appear, claiming that his disappearance behind the closed doors of the grand jury room would in itself dry up his Panther sources and destroy his ability to do more than merely reprint their press releases. He was held in contempt.[52] The Ninth Circuit Court of Appeals reversed the contempt citation and held that Caldwell need not appear before a grand jury unless the government demonstrates a "compelling need" for his presence.[53]

C. *In re* Pappas

Television reporter Paul Pappas had spent several hours inside Black Panther headquarters in New Bedford, Massachusetts. He was allowed inside the headquarters to witness a planned police raid. Pappas agreed not to dislcose anything he witnessed except that which related to the anticipated police raid.[54] Although the raid never occurred and Pappas did not broadcast anything about the Panthers, he was nevertheless subpoenaed two months later in a grand jury investigation into the Panther's activities. Pappas appeared but refused to answer questions about anything that had taken place inside Panther headquarters, arguing that the First Amendment gave him a privilege not to reveal confidential sources of information.[55]

A second subpoena was issued and Pappas moved to quash it.[56] The trial judge ruled that Pappas did not have a constitutional privilege based on

the First Amendment to refuse to disclose what he observed, especially because Massachusetts did not have a shield law.[57] On appeal, the Supreme Judicial Court of Massachusetts affirmed, holding that newsmen must respond to grand jury subpoenas and answer "relevant and reasonable inquiries."[58] The court expressly rejected the Ninth Circuit's holding in *Caldwell.*

D. Majority Opinion

In a five to four decision, with Justice White writing for the majority the subpoenas were upheld in all three cases. White was joined in his majority opinion by Chief Justice Burger and Justices Blackmun and Rehnquist. White noted that, initially, the newsmen did not argue for an absolute privilege precluding any appearance and testimony before a grand jury, but rather a qualified privilege.[59] The majority narrowed the scope of the cases, saying they didn't involve prior restraint, nor mandates to publish. "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as any other citizens do and to answer questions relevant to an investigation into the commission of crime."[60] Indeed, the Court gave newsgathering some First Amendment protection. "The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request."[61] "Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas."[62]

At the same time, however, the Court indicated that press confidences were not entitled to protection in any criminal proceeding[63] and rejected a

proposal that a grand jury be required to demonstrate that a journalist has information relevant to its investigation of criminal activity before it can compel disclosure of a journalist's confidences.

By limiting the scope of its decision, the Court expeditiously knocked down the press position that requiring reporters to testify or even appear before a grand jury, without some showing of an overriding need, would unduly hamper their First Amendment function of gathering and disseminating news since informants would refuse to divulge newsworthy information without a firm pledge of confidentiality. The Justices in the majority engaged in a balancing approach, saying the "public interest in law enforcement" and the importance of "effective grand jury proceedings" outweighed any burden in newsgathering and First Amendment freedoms.[64] However, they took the position that the degree of protection given news sources would vary in each circumstance.[65]

The Court stressed the oft-cited principle that journalists have no special immunity from subpoena and are subject to the same laws that affect the general public.[66] Justice White said the power to subpoena witnesses is "essential" to the grand jury function of determining whether probable cause exists to believe that a crime has been committed and protecting citizens from improper criminal prosecutions, noting that grand juries have broad investigative powers to assure that only well-founded indictments are returned.[67]

The majority admitted that the threat of subpoena would inhibit news sources and stories, but felt that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen."[68] The Court had before it several affidavits from noted journalists as to the deterrence to news-gathering relationships from enforcement of subpoenas.

Walter Cronkite observed:

> In doing my work, I . . . depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and equally important in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements.[69]

However, the Court found insufficient evidence of potential harm to journalists in the record.[70]

> The Court even engaged in some speculative behavioral predictions of its own. It observed, first, that the news media had flourished in this country for nearly two centuries without a privilege to honor their confidences; second, that the relationship between some sources and the press is symbiotic and therefore would not be affected by its ruling; and third, that not all grand juries will ask journalists to disclose the identities of confidential sources having information about the illegal activities of others. Moreover, if a journalist is asked to reveal his confidences and he resists, the grand jury may not necessarily insist. Finally, the Court found it difficult to believe that confidential sources who are sincerely interested in aiding in the apprehension of criminals but who fear physical, economic, or social reprisal if their identities are disclosed would not be willing to place their trust in the very persons charged with the administration of the criminal justice system.[71]

Professor Wigmore has backed up the Court saying, "The vital processes of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution."[72]

The Court was most disconcerted that the proposed privilege could cause the possible concealment of criminal conduct. "The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."[73] The majority also argued that the boundaries of a qualified privilege would be difficult to define[74] and administer, but admitted that it was "powerless" to restrict

state courts from construing their own constitutions to erect a qualified or absolute privilege. The Court specifically acknowledged the existence and viability of state shield laws. [75] Finally, the Court made it clear that the grand juries must act in good faith. "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."[76]

The Court reversed the decision in *Caldwell* and affirmed the decisions in the two *Branzburg* cases and in *Pappas*.

E. Concurring Opinion

Justice Powell took a more flexible approach than the majority and as the swing vote in the 5-4 decision his concurring opinion assumes added significance. Powell stressed that the majority opinion did not strip the press of its First Amendment protections. If a grand jury investigation were conducted in bad faith, if the reporter were asked questions "bearing only a remote and tenuous relationship to the subject of the investigation," or if reporters believed their testimony implicated a source without a legitimate need of law enforcement, the reporter could ask for a motion to quash or for a protective order.[77] He asserted that a court in viewing a claim of privilege should employ on a case-by-case basis a balancing test to compare the fundamental values secured by the First Amendment with "the obligation of all citizens to give relevant testimony with respect to criminal conduct."[78]

F. Dissenting Opinion

Interestingly, though, the elegant dissenting opinion, authored by Justices Stewart, Brennan and Marshall, has been the one most closely followed by lower courts. They embraced a constitutional right for a reporter to maintain a confidential source relationship, stemming, in Stewart's view, "from the broad societal interest in a full and free flow of information to the public."[79] Stewart accepted the press position that allowing governmental authorities "unchecked power" to compel testimony would "clearly" result in deterring both sources from providing newsworthy information and reporters from writing and publishing these facts.[80] He outlined a three-part test that the government must satisfy in order to overcome a reporter's qualified privilege:

(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;

(2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and

(3) demonstrate a compelling and overriding interest in the information.[81]

The government would be required to make this showing during a court's consideration of the reporter's motion to quash a subpoena. Justice Stewart would have affirmed *Caldwell* and vacated the judgments in the *Branzburg* cases and in *Pappas*.

This type of balancing test had been first proposed by a district judge in the U.S. Southern District Court of New York in 1952, who outlined a four-part test:

> Good cause, in my opinion, requires a showing by the defendant:
> (1) That the documents are evidentiary and relevant;
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;

(3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;

(4) That the application is made in good faith and is not intended as a general fishing expedition.[82]

F. Concurring Dissent

Justice Douglas, in his dissent, voiced a more vehement defense of the press. Douglas expressed his consistent view of the First Amendment that a reporter has an absolute right **not** to appear before a grand jury.[83] This immunity could be pierced only if the reporter were implicated in the crime. Since the reporter, in that case, could invoke the Fifth Amendment to refuse to answer any questions, Douglas said a reporter's appearance would be a futile exercise.

He rejected a balancing test, saying that the balancing was "done by those who wrote the Bill of Rights." Justice Douglas even assailed the press for its urging of a *qualified* privilege. "By casting the First Amendment in absolute terms, (the Founding Fathers) repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case."[84]

He emphatically espoused the view that denial of a reporter's privilege would severely undermine the reporter's function of investigating events, informing people, and exposing both the harmful and the advantageous influences at work.

> A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended.[85]

Justice Douglas would have reversed the judgments in *Branzburg* and *Pappas*, and would have found a more expansive privilege than that of the Ninth Circuit in *Caldwell*.

G. Conclusions

The various opinions in *Branzburg* are less than clear. Four Justices concluded that reporters could be compelled to disclose their sources; four Justices said they could not be so compelled; and Justice Powell took a middle road by allowing compelled disclosure in some cases and not in others. This left the lower courts to decide on a case-by-case basis whether a privilege exists in various situations extending beyond the facts of *Branzburg*.

However, in the wake of the decision two points were fairly clear: (1) a reporter does not have an absolute, constitutional right to refuse to disclose information obtained in newsgathering and (2) a reporter must appear before a grand jury and answer relevant questions similar to those posed in the *Branzburg* cases. At the same time, the reporter was not stripped of all rights to protect the identity of sources or the substance of unpublished information. The pivotal concurring opinion of Justice Powell sounded a well-articulated theme echoed in numerous state and federal court decisions:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[86]

Justice Rehnquist restated it in another context:

> While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in` favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented.[87]

Most courts have confined their use of *Branzburg* to its precise precedence—grand jury investigations—**but in most other criminal contexts and most civil cases, the courts have adopted the three-part test originally suggested by Justice Stewart in *Garland v. Torre* and later urged by the dissenters in *Branzburg.***

Despite this decision, journalists still risk going to jail to protect their souces' identities; news organizations face staggering fines and contempt citations; and the sources themselves may be more reluctant to come forward with important information if they suspect that their confidence will be betrayed.[88]

Craig Newman, a professor at the University of Detroit School of Law, warns:

> Cases such as *Farber* [a criminal case sparked by articles written by New York Times reporter Myron Farber, who spent 40 days in jail for refusing to disclose his sources] are far too dangerous to the spirit of the First Amendment to be viewed as simple anomalies. The Supreme Court must distinguish *Branzburg* as a case limited to its facts. Grand jury proceedings are historically rooted in secrecy and serve a function different from other criminal proceedings. A clear standard that recognizes, at absolute minimum, a qualified privilege for reporters in criminal cases must be articulated by the Court. Without this standard, courts may accede to precedent like *Farber* which compromises the Court's own long-standing commitment to the principle that dissemination of information from diverse sources is in the public interest.[89]

Respected legal scholar Donna Murasky is even more critical of the Court's decision:

In *Branzburg* the Supreme Court departed from the principles that it had previously followed in adjudicating claims of impermissible government restraint on the flow of information from the press to the public. Its former emphasis on the protection of full and robust debate on matters of public importance gave way to an emphasis on society's right to protect itself from criminal activity....The Court failed to acknowledge and proceed from the premise that the information published by the press in the *Branzburg* trilogy was protected speech disseminated at an appropriate time and place and in an appropriate manner....Accordingly, the Court failed to consider whether government action or press fear of possible action would generate a chilling effect on the press' willingness to publish newsworthy information critical of government....It appears that regardless of whether the press, depending as it does on confidential sources of information, obeys or refuses to obey a subpoena to testify before a grand jury, the flow of information to the public will be diminished. This decreased flow will adversely affect the people's right to receive information necessary to intelligent self-government and uninhibited public debate.... Undoubtedly, society has an important interest in detecting and punishing criminal behavior....[B]ut the Court never explained why the grand jury's interest in securing the journalist's testimony in each of the cases before it was sufficiently compelling to justify the consequent intrusion of First Amendment rights.[90]

FIFTH CIRCUIT AND TEXAS COURTS' INTERPRETATIONS

So how have Texas courts and the Fifth Circuit Court of Appeals interpreted a ruling as multi-faceted and far-reaching as *Branzburg*? In answering that question it is necessary to look at the dichotomy between criminal and civil cases.

A. Criminal Cases

The Texas Court of Criminal Appeals—the highest state court for criminal cases in Texas—followed *Branzburg* in a 1984 criminal proceeding, ruling that a photographer had to provide negatives of unpublished photographs.[91]

Randy Grothe, a photographer for The Dallas Morning News, took photographs of a protest demonstration outside the Dallas Power and Light offices in downtown Dallas and the resulting arrests and removal of certain demonstrators.[92] Mavis Belisle, one of the demonstrators, was arrested and charged with obstructing a public passageway for chaining herself to a doorway.[93]

During discovery proceedings at her subsequent trial, Belisle asked the court to force Grothe to testify as to his personal observations. After an extensive hearing, he agreed to testify, but limited his testimony to his personal observations and did not answer questions he felt encroached upon his status as a reporter. After testifying that he wasn't sure if Belisle had actually been chained and that his negatives would probably refresh his memory, Belisle asked that he be forced to turn over, or at least review, all unpublished negatives he shot at the demonstration. The court subpoenaed Grothe to provide his negatives—which he refused and filed a motion to quash the subpoena, claiming the First Amendment

created a privilege for newspaper reporters and that Belisle had not shown that she had met the balancing conditions for disclosure outlined in *Branzburg* .[94]

The court responded: "We decline to adopt any combination of the dissenting and concurring opinions. The four justice plurality opinion in which Justice Powell concurred quite clearly found that no balancing was required."[95]

"This application presents a very narrow question, to wit: whether the First Amendment to the U.S. Constitution or Article I, Sec. 8 of the Texas Constitution create a privilege whereby photojournalists are excused from testifying and from producing photographs of alleged criminal activity witnessed in a public place. To this narrow question we answer in the negative and deny relief."[96]

The court argued that the facts in *Grothe* were much more limited and less constitutional in nature than the facts in *Branzburg*. [97] The court felt that the facts in *Zurcher v. Stanford Daily* [98] were more similar to this case and cited that Supreme Court decision:

> We finally note that if the evidence sought by warrant is sufficiently connected to the crime to satisfy the probable cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash.[99]

The Texas court concluded, "Thus, implicitly, the Supreme Court has recognized that the press is not immune from subpoena."[100]

Furthermore, the court maintained that the defendant had the right to confront and fully cross-examine all persons who have testimony relevant to her criminal charges.[101]

In a concurring opinion, Judge Clinton said that even if the court did balance the defendant's Sixth Amendment rights against the plaintiff's First Amendment assertions, it could find no compelling reason to

recognize even a qualified privilege for Grothe.[102] Clinton went on to cite the majority in *Branzburg* :

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but *uncertain*, burden on newsgathering that is said to result from insisting that reporters, like any other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[103]

Interestingly, though, the 105th Texas District Court ruled in favor of a journalist in a 1979 criminal case, styled *In re Grand Jury Subpoena*.[104] Television reporter Charles Duncan had obtained an exclusive taped confession from a suspect in a county jail and aired a portion of it. The police asked the court for a subpoena requiring Duncan to turn over all his unpublished "outtakes." Duncan refused and filed a motion to quash the subpoena, citing First Amendment reporter privilege.[105]

The district court ruled that even though reporters have no absolute constitutional testimonial privilege, the state hadn't shown a compelling need for the information and quashed the subpoena.[106]

An interesting sidelight to the case surfaced four years later when the criminal defendant in the case, Harry Smalley, asked the U.S. District Court for the Northern District of Texas for a subpoena for the same unaired tapes.[107] Duncan again claimed First Amendment protection and filed a motion to quash. Smalley tried to establish that "news reporter Duncan acted as an agent of the government and thus lost whatever First Amendment privileges he may have had."[108] The court rejected his contention and quashed the subpoena.

B. Civil Cases

The civil decisions by the Fifth Circuit and by Texas courts, however, are more diverse, and most vary from *Branzburg* . The Texas courts had decided one reporter privilege case before the *Branzburg* decision.

In 1969, the U.S. District Court for the Southern District of Texas compelled a reporter to divulge his sources in a story about marijuana use in a junior high school.[109] Televison reporter Lee Horr had learned in November 1968 that San Benito, Texas public school officials were conducting an investigation into marijuana use by their students. School administration sources had told Horr that 51 students had been expelled but that the police weren't called in on the investigation because the son of a prominent city official and the daughter of a county official were involved.[110] The Associated Press picked up the story and, using Horr's information, ran the story throughout the southern region of the state. The city official, William Adams, filed a libel suit against Horr and the AP, and in discovery procedures asked the court to compel Horr to reveal the identity of his confidential source because Adams was trying to show that his son wasn't even involved. Horr refused to comply with the subsequent subpoena.[111]

Since the court could find no precedent-setting Texas cases and Texas was one of 37 states that at the time didn't have a shield law, it used a rule of Federal Civil Procedure, which stated, "A news reporter has no privilege to withhold identifying source of news,"[112] to compel Horr to reveal his sources.[113]

In post-*Branzburg* decisions the rulings in civil cases have varied depending on whether the reporter was the defendant in a libel suit or a third party in a civil suit.

1. Libel Cases

In civil cases where the journalist is being sued, the Texas courts and the Fifth Circuit have varied their decisions based on the type of plaintiff and the circumstances surrounding the case, but they have always used a version of the three-part test in the *Branzburg* dissent. The Fifth Circuit compelled a magazine to disclose its confidential sources in a libel suit filed against the magazine by a union leader in a 1980 case.[114] Murray "Dusty" Miller, Secretary-Treasurer of the International Brotherhood of Teamsters, sued Transamerican Press and Mike Parkhurst, its editor and publisher, for libel. Transamerican published *Overdrive*, a magazine with national distribution to truckers.[115] In its June 1972 issue, the magazine published a nine-page article entitled "Central States Pension Fund—How Your Sweat Finances Crooks' Cadillacs." One passage in the article alleged that Miller swindled the pension fund out of $1.6 million through a fraudulent loan:

> The money doesn't all go to the employer segment of trucking. Take Murray 'Dusty' Miller, 4th Vice-President of the International and Director of the Southern Conference. Dusty was a trustee of the Fund from its formation in 1955 until 1968. Before he left, Dusty borrowed $1.6 million in 1965 from the Fund to buy Trinity Sand & Gravel in Dallas. Almost immediately, the Fund foreclosed on the company without a single penny having been paid on the loan. Almost as instantly, a new corporation was formed which borrowed another $1.4 million from the Fund....(This does not include the $1.6 million. That is gone. Just ask Dusty.)[116]

Discovery began, and after learning from Parkhurst and the article's author, James Drinkhall, that the source of the information was a confidential informant, Miller filed three motions to compel disclosure—all of which were denied by the U.S. District Court for the

Northern District of Texas because Miller had not exhausted alternative means in proving Transamerican was reckless.[117] After Miller had tried some other sources and the judge had held an *in camera* examination, the court ordered the defendants to produce the unpublished notes. The order provided that the notes were only for the use of Miller's attorneys and strictly for litigation.[118] Miller once again asked for disclosure of the informant's identity, which the judge ordered, concluding that the informant's identity went to the heart of the matter. Transamerican appealed to the Fifth Circuit.[119]

The Circuit Court first determined that Miller was a public figure and, using *New York Times v. Sullivan,*[120] said that in order to recover damages he must prove Transamerican acted with actual malice.[121]

It then addressed Transamerican's claim of a First Amendment privilege. "We hold that a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential information, however, the privilege is not absolute and in a libel case as is here presented, the privilege must yield."[122]

The court noted that it was the first to consider this type of case since *Herbert v. Lando* [123] [which allowed discovery relating to the mental processes of journalists], but said the case for privilege in *Miller* was stronger than in *Herbert* or *Branzburg.* The *Herbert* decision would have no chilling effect and there is less interest in protecting confidentiality in grand jury proceedings [*Branzburg*] than in libel cases [*Miller*].[124] The court added: "In a libel case, the plaintiff and the press are on opposite sides. And a defamed plaintiff might relish an opportunity to retaliate against the informant."[125]

The Fifth Circuit adopted the three-part test first outlined in *Garland* [and later used in the *Branzburg* dissent and by several other circuits]: (1) is the information relevant, (2) can the information be obtained by

alternative means, and (3) is there a compelling interest in the information?

The court found the information was relevant, said the district court had showed that alternative means had been exhausted but took more care in proving that the third prong was satisfied.[126] The court concluded:

> Like the defendant in *Garland,* Transamerican's only source for the allegedly libelous comments is the informant. The only way Miller can establish malice and prove his case is to show Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity.[127]

The Fifth Circuit compelled disclosure, but said the district court should protect the informant by restricting the information to strictly litigative use by counsel.[128]

However, in 1979 the U.S. District Court for the Southern Distrcit of Texas, used the three-part test adopted in *Miller* and refused to compel disclosure of a confidential source used in a magazine article.[129] Doyle Mize had sued McGraw-Hill for libel about an article in *Business Week* entitled "The Tangled Valhi Affair" that he claimed contained libelous material.[130]

Mize asked the court to compel the magazine to reveal the identities of the confidential sources used in the article. The defendants refused, claiming the First Amendment protects a reporter from forced disclosure.[131]

The court found that the *Branzburg* decision did not provide a very useful precedent because it involved a criminal proceeding and the integrity of the grand jury,[132] but nonetheless cited the advice on handling the constitutional conflict arising in these cases given by Justice Powell in his concurring opinion:

> The asserted claim...should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony....[133]

The court felt that the three-part test outlined in *Garland* and later adopted in *Miller* was more applicable to this case and concluded: "A common thread in these cases is the extent to which pretrial discovery had been conducted, the fruits of that discovery, and the resulting demonstrated need or lack of need for compelling disclosure of the news reporter's confidential source."[134]

The court found that Mize had done little in the way of discovery both before and after McGraw-Hill had refused discloure and was using this subpoena "as a preliminary discovery matter rather than as a last resort."[135]

The court noted that "[n]one of the courts which have ordered disclosure of a confidential news source have done so on the basis of a relatively barren record such as this...Such paramount competing interests as freedom of the press and a plaintiff's fight to develop his case cannot be weighed and balanced in a vacuum."[136]

The court said quite emphatically that because Mize's case didn't satisfy **any** of the three conditions of the *Garland* test it would not be justified in overriding the reporter's First Amendment protection:

> There has been no showing of necessity, as required by *Garland* , only plaintiff's unsupported protestations of need which clearly do not justify so drastic an incursion into First Amendment processes as the compulsory disclosure of a news reporter's confidential source. Furthermore, there has been no showing that the identity of the news source goes to the heart of the plaintiff's claim or that alternative sources have been exhausted.[137]

Mize was granted a rehearing a year later to reconsider his case in

light of the Supreme Court decision in *Herbert v. Lando,*[138] but the court again denied his motion to compel disclosure, saying: "The Supreme Court's decision in *Herbert v. Lando* does not undermine the standard applied by this court or this court's decision denying Mr. Mize's motion to compel disclosure of confidential sources."[139]

2. Third-party Cases

Journalists are often subpoenaed as third parties during discovery in civil suits. Both the Fifth Circuit and the Texas courts have almost always ruled for journalists against disclosure. Most of these cases involve articles written by reporters using information gained from the result of a government investigation of the plaintiff.

The Fifth Circuit in 1976 considered a third-party case involving a state investigation.[140] A Louisiana businessman, Leon Poirier, filed a suit against five employees of the Louisiana Department of Public Safety and Revenue, including Charles Carson, and against Bill Lynch, a newspaper reporter in Baton Rouge for the New Orleans States-Item. Poirier claimed that the six defendants conspired to have him arrested and prosecuted for alleged violations of the State Revenue Code, which were clearly inapplicable, to embarrass, humiliate and harass him. Lynch's part of the alleged conspiracy deals with his publication of several articles dealing mainly with Poirier's financial transactions, the information for which was obtained from confidential reports prepared by Carson for the legislative Anti-Mafia Committee, and an article on Poirier's arrest which was based on a police report.[141]

Poirier based his conspiracy allegation on a Federal Rule of Civil Procedure that the Supreme Court had cited in 1966:[142]

> [A] private party involved in . . . conspiracy, even though not an

> official of the State, can be liable under S 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant* in joint activity with the State or its agents....[143]

Poirier asked the court to compel Lynch to identify who gave him the report. Both the district court in New Orleans and the Louisiana Court of Appeals rejected compelled disclosure and granted a summary judgment to Lynch.[144]

Although Lynch refused to divulge his source's identity, he stated in his deposition that he had not received the report from any of the defendants, including Carson, that he had not discussed the contents of the articles with any of the defendants prior to the filing of the case and that he had never met, spoke or communicated with Carson prior to the lawsuit.[145]

The court pointed out that there was no allegation that the news stories contained untrue material as this was not a libel action, but rather a conspiracy allegation.[146] The court found that Poirier had never established a link between Lynch and the other defendants which would justify disclosure:

> This suit was filed on June 30, 1972, some two years and four months ago, and during all this time with the aid of extensive discovery, plaintiff has not been able to come up with one shred of evidence that would link Lynch, as a newspaper reporter, to the alleged conspiracy....There is nothing in all of the facts now available which would indicate, even if plaintiff could prove these allegations [of defamation], that Lynch published his articles at the behest of or with an eye to aiding any of the other defendants in their alleged concerted actions against plaintiff....Lynch was prepared to be, and was in fact, deposed as to all of his knowledge surrounding the facts which form the basis of this suit. He was, and the Court so believes, unaware of any facts which would prove or tend to prove that any of the defendants were involved in any kind of a conspiracy to deprive plaintiff of his constitutional rights.... Plaintiff asserts that without this information [informant's

identity] he can never prove that Lynch was a part of the conspiracy. However, we found that Lynch has carried his burden of showing that he was not involved in a 'conspiracy' with the named defendants.[147]

The Court further addressed the alleged link between the defendants:

> The coincidental circumstance of the publication of news articles in conjunction with the investigative activity of government employees alone is not sufficient to create an issue of fact when all the direct evidence is to the contrary....But a court would need to ignore the realities of everyday news gathering of government information to submit this coincidence alone to the jury as evidence that the newsgatherer had acted in concert with the named government agents....[148]

The Fifth Circuit described the case as a good example of reporter privilege cases:

> This case contains the potential head-on conflict between a defendant newsman's claimed First Amendment right to keep secret his news sources and a plaintiff's claimed due process right in civil litigation to take full advantage of the discovery procedures. The conflict does not quite come off...the refusal of the district court to compel a disclosure of the source of the news articles in question did not deprive the plaintiff of any procedural right to which he would otherwise have been entitled, even if the newsman's privilege had not been involved.[149]

The court cited a Second Circuit decision to conclude that disclosure could threaten freedom of the press:[150]

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis....The deterrent effect of such disclosure is likely to have upon future 'undercover' investigative reporting...threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.[151]

The court refused to compel disclosure and sent the case back to the district court to be decided without the informant's identity.

The Texas Court of Civil Appeals considered a very similar third-party case in 1976 and also ruled against compelled disclosure.[152] The plaintiff, Dallas Oil & Gas, Inc., claimed that five consecutive stories by Dallas Morning News reporters Ed Golz and John Cranfill were defamatory and false and that they were the result of a conspiracy by the defendants, several state securities investigators, to drive the plaintiffs out of business. They said the effect of the stories, which included information from state investigations, was "to cast a cloud of suspicion on all Schedule D oil and gas operators because of the inaccuracies, misrepresentations, illegal leaks and disclosures of selected portions of confidential material which were in the custody of some of the defendants."[153] They asked the court for damages and an injunction against the disclosing or publishing of any further information.[154]

The court replied that injunctive relief is not available as a prior restraint of defamatory publications, however false and damaging, because it violated the guarantees of freedom of the press in Article I of the Texas Constitution. Therefore, the plaintiffs would have to rest their injunction claim on their allegations of unlawful disclosures by defendants.[155]

However, the court felt that the stories did not show affirmatively that they were based on any disclosures of confidential information **by the defendants** but rather attributed the information "to various sources in the usual journalistic style. . . . The record contains no evidence that any of the information . . . was obtained by defendants from plaintiffs or any other Schedule D operators in the course of an investigation of their affairs."[156]

The plaintiffs also complained that the district judge denied them the

opportunity to develop such "evidence" through more extensive discovery—specifically his denial to compel the newsmen to divulge their sources. The defendants responded that a newsman is privileged to protect the identity of his confidential sources by the First Amendment. The court skirted the issue saying, "We need not determine the existence and scope of this alleged constitutional privilege because we find that the constitutional issue is not squarely presented in this record."[157]

The only newsman actually called as a witness by the plaintiffs was Dallas Times Herald reporter Bill Waldrop, not one of the authors of the articles in question. Waldrop had written a story which appeared the day before the temporary injunction hearing began, which reported that Guy Wynn, an officer of one of the plaintiffs, who was expected to appear at the hearing, was under guard by Texas Rangers after several threatening calls were made to him and his family—all attributed to "an informed source."[158] Plaintiff's counsel called Waldrop to the stand and asked him who the "informed source" was; Waldrop refused to answer the question, claiming First Amendment protection.[159]

The district judge ruled against disclosure because the testimony was not relevant to the issues at the temporary injuntion hearing and then announced that this ruling would apply "to any other newspaper reporters presented to this court concerning confidentiality of their sources for the limited purpose of this hearing."[160]

As a result, the plaintiffs never called the two Morning News reporters to the stand, and the appeals court found that "whether plaintiffs are entitled to disclosure of the newsmen's sources in their suit for damages for defamation is a question not presented on this appeal from denial of a temporary injunction.[161]

The court did, however, examine the plaintiff's claim that the district judge made overly "narrow evidentiary rulings," by commenting:

> The judge was confronted with a claim of constitutional privilege. Although a newsman may not have a general privilege against disclosure of confidential sources in civil cases, even those courts which have denied the privilege have done so on considerations of balancing the public interest in the free flow of information against other important interests.[162]...In order to weigh properly the interests of plaintiffs in the disclosure sought in the present case against the public interest in full information, the judge was justified in requiring a strict showing that the testimony would be relevant and admissible before requiring the disclosure. No such showing appears in this record.[163]

In another third-party case in 1982 the U.S. District Court for the Northern District of Texas used the three-part test outlined in *Miller* and determined not to compel disclosure.[164]

Dr. Paul Trautman, a professional school administrator, was hired on a one-year contract by the Dallas Independent School District and appointed acting assistant superintendent. Soon after his appointment, a DISD custodial employee, Anita Horton, reported derogatory information about Trautman.[165] Bruce Selcraig, education reporter for the Dallas Morning News, learned of Horton's report and after getting confirmation of most of the information from DISD superintendent Linus Wright and another DISD officer, Robby Collins, and after confronting Trautman with the information, he wrote an article giving a detailed account of the allegations and quoting Trautman's denial.[166] The article reported that DISD had forwarded an affidavit executed by Horton to the local district attorney, that Wright had asked Trautman to take a polygraph test to which Trautman hadn't responded, and that Wright declined to comment on the specifics of the investigation. The story also attributed additional information to "sources close to the investigation" and to "individuals familiar with the district's internal investigations."[167]

Two days later Wright placed Trautman on administrative leave with

pay until the investigation was completed. After three months had passed without any resolution, Trautman wrote to Wright, offering to resign when his contract ended some seven months later. Wright responded with a letter stating that he was recommending Trautman's immediate termination and advising Trautman of his right to appeal termination.[168] Trautman then made a written demand on DISD for a due process hearing so that he would have a chance to clear his name and now contends that although he was informed a hearing would be accorded him, none was scheduled.[169]

Five months later another DISD official, John Santillo, negotiated a deal with Trautman. They agreed that DISD would provide Trautman with letters of recommendation and acknowledgments of his good character and capable performance of his duties, if he would waive the anticipated due process hearing and resign.[170]

Trautman filed a Civil Rights Act suit against DISD, Wright and Santillo, claiming the defendants deprived him of due process when they "caused to be made public in an official and/or intentional way, false and stigmatizing allegations against him" and by failing to afford him a name-clearing hearing. He also contended that his resignation was procured by fraud—that DISD did not intend to keep its deal, and never did.[171] He accused the two school officials of disseminating the defamatory charges by secretly imparting them to a newspaper reporter and that, as a result, the reporter made open inquiries that resulted in publication of the charges.[172]

In discovery proceedings Trautman asked the court to compel Selcraig to divulge the identity of his sources, who refused citing the qualified reporter's privilege recognized in *Miller.*[173] Although Wright and Collins in depositions denied giving Selcraig information before the interview in Wright's office and interrogatories to DISD had not yielded a source in the

school administration, the court ruled that Trautman had shown that whether the school officials were the reporter's sources was central to his claim, that evidence pointed to the probability that the officials were his sources, and that he had exhausted alternative sources. The court ordered an *in camera* proceeding to determine if the identities were necessary to Trautman's claim, noting: "It bears repeating that we are here engaged in a sensitive and important balancing exercise of competing needs and interests rooted in constitutional values. In doing so, I am here attempting to mitigate any invasion of the newsman's privilege."[174] But Selcraig still refused to identify his sources and was held in contempt. Selcraig appealed and the Fifth Circuit Court heard his case in 1983.

The court reaffirmed its decision in *Miller* to grant reporters a qualified privilege:

> The privilege, we held, is not absolute, but qualified. In libel cases, it can be overcome, but only if the party who seeks disclosure of the identity of a confidential informant establishes by substantial evidence that the statement attributed to the informant was published and is both factually untrue and defamatory; that reasonable efforts have been made to learn the identity of the reporter's informant by alternative means; that no other reasonable means is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.[175]

Selcraig contended that his qualified privilege ought to be upheld, even if Trautman can show that his testimony is relevant, because he was simply a witness trying to protect his sources; not a party invoking the qualified privilege to protect himself or his publication in a libel suit, like in *Miller*.[176] The court, however, disagreed:

> He [Selcraig] is not being asked to divulge his sources to locate other witnesses or to get on the scent of evidence. He is a percipient witness to a fact at issue: the identity of the informants.

> Manifestly, then, his testimony is relevant and necessary to the resolution of Trautman's claim....[177]

The court felt that Trautman had not yet adequately shown the relevance of the disclosure request to his due process claim and thus did not stand up to the three-part *Miller* test. It vacated the district judge's contempt order and sent the case back to the district court, but ominously warned:

> In these circumstances, if Trautman can satisfy the district court that he can make out a prima facie case that he has not waived the right to, and has not been afforded, a hearing, **Selcraig's qualified privilege must succumb to Trautman's discovery needs.** If Selcraig is called to testify in further proceedings, the district court's carefully structured request for information might well serve as a model for any other inquiries.[178]

COMMON LAW PRIVILEGE

Journalists have also tried other defenses to try to protect their confidential sources. Newsmen, until the late-1950s, primarily relied on the common law to recognize a privilege against disclosure. The Supreme Court had made it clear that all citizens would be required to testify:

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.[179]

Although the Court required that all witnesses testify, courts and legislatures realized that some evidence which was the product of a special relationship should be accorded a privilege against disclosure.[180]

Reporters have asked the courts to grant them the same common law privilege that attorneys and physicians have with their clients, claiming that the unrestricted flow of information was in the public interest and that such a weighty interest justified the recognition of a privilege.

Although the 5th Circuit or Texas courts have never considered it, other courts have categorically denied it.[181] The courts have said that the relationship doesn't satisfy all four conditions necessary to establish a testimonial privilege:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The inquiry that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[182]

STATUTORY DEFENSES

Statutory defenses also exist, Maryland in 1896 becoming the first of what now number 26 states having shield laws which prevent reporters from being held in contempt for refusing to divulge their sources, but since Texas isn't one of those states, these defenses aren't important in Texas cases.

The statutes can be characterized as either absolute or qualified.[183] In California, for instance, the statute declares that the reporter "cannot be adjudged in contempt...for refusing to disclose, in any proceeding...the sources of any information...."[184] Similarly, the Indiana law indicates that the journalist "shall not be compelled to disclose in any legal proceedings . . . ths sources of any information procured or obtained...."[185]

The Illinois Code provides for a qualified privilege, stating that the reporter need not disclose the information unless "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."[186] New Mexico also created a qualified privilege, but a somewhat more ambiguous version—the privilege was lost where "disclosure [is] essential to prevent injustice."[187]

Illinois defines a reporter as "any person regularly engaged in the business of collecting, writing, or editing news for publication through a news medium."[188] News medium in this statute includes, among many others, any newspaper, periodical, news service, radio station, television station, etc. The approach in other states is more limited.[189] Alabama extends the privilege only to persons employed by newspapers and radio and television stations, thus excluding magazine reporters.[190] New Jersey includes radio and television reporters, but only if the station keeps open for inspection exact recordings or transcripts of the news presentations

in question.[191]

Many statutes provide no exemptions at all—if the statutory conditions are met, the source or information will be privileged. California, which is the only state where the statute is part of the state constitution,[192] follows this rule and applies the privilege in "all proceedings of whatever kind in which testimony can be compelled by law to be given."[193] In other states, however, some specific proceedings are excluded from the coverage of the statute. In Illinois, the legislators provided that the privilege rules are "not available in any libel or slander action in which a reporter or news medium ia a party defendant."[194] A far more defensible exclusion is present in New Jersey, where the privilege may not be claimed in "any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage."[195]

Many jurisdictions do not distinguish between the privileged source and the privileged information. Some protect all types of information, such as notes and outtakes, while others protect just the identity of confidential sources.[196] The New York statute, to give one illustration, states that a journalist cannot be required to disclose "any news or the source of any such news...."[197] In some other states including Alabama and Indiana, however, the privilege extends only to the source.[198]

Even in the states that have them, the laws are at best an inconvenient obstacle for the plaintiff to get around rather than a legitimate "shield." A perfect example of this and an interesting sidelight—is that several of the *Branzburg* defendants came from states with fairly tough shield laws.

A state trial judge ordered Branzburg to identify his source and rejected his argument that he was protected by Kentucky's reporter's privilege statute. The statute reads:

> Newspaper, radio, or television broadcasting station personnel need not disclose sources of information.

> No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the general assembly, or any committee therof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.[199]

On appeal, the Kentucky Court of Appeals held that the state shield law protects reporters from having to reveal their sources, except when they witness the commission of a crime.[200]

CONCLUSIONS

What can we can conclude from all this? Again we must analyze criminal and civil cases separately to comprehensively answer that question.

In *Ex parte* Grothe, the Texas Court of Criminal Appeals clearly said that it interpreted the *Branzburg* plurality as not requiring any balancing. The judges maintained, though, that the facts in *Grothe* were much more limited and less constitutional in nature than the facts in *Branzburg.* The court said this case presented a very narrow question—whether a photojournalist has a privilege to refuse to testify and produce photographs of alleged criminal activity witnessed in a public place—and ruled unequivocally that he does not. Although a Texas District Court did refuse to compel disclosure in *In re Grand Jury Subpoena*, the subpoena in that case had so little merit that we can still conclude that reporters are likely to have to divulge their confidential sources in Texas criminal cases, especially if they witnessed the crime.

In civil cases, however, the rulings are much more varied, but generally the courts have recognized a qualified privilege and relied more on the three-part balancing test espoused by the dissenters in *Branzburg* and overall have been loathe to compel disclosure. In cases where the journalist was a third-party to the suit, both Texas courts and the Fifth Circuit have refused to compel disclosure. The Texas Court of Civil Appeals came close to settling the privilege issue in third-party suits in *Dallas Oil & Gas,* but because the reporters were never actually asked to divulge their souces **on the stand**, the court did not have to consider the issue squarely. The Fifth Circuit further muddied the waters in *In re Bruce Selcraig* saying that if the facts satisfy the three-part test the reporter's

privilege must always succumb to the plaintiff's right to due process.

The courts also used the three-part test in libel cases, but allowed more variance in the decisions depending on the type of plaintiff and the circumstances of the case. The Fifth Circuit established the balancing test for this region of the country in *Miller,* but also ruled that because public figure plaintiffs must prove actual malice on the part of the journalists, the standards for satisfying the three-part test should be lower in these cases. However, a Texas court in *Mize* made it clear that no matter what type of plaintiff, the facts in the case would still have to satisfy the *Miller* test.

The future is unclear but two interesting observations can be made. (1) Although the absence of even a qualified privilege in criminal cases—after the *Branzburg* decision—has seemed firm, a recent decision by the Washington Supreme Court has granted a qualified privilege in a criminal case.[201] "With its *Rinaldo* decision...the Washington Supreme Court further developed the qualified journalist's privilege by applying it to criminal cases and by finding that the journalist's relationship with his confidential news source meets the standards of a common law testimonial privilege."[202] (2) In the close to two decades since *Branzburg,* there has been such a wide range of decisions passed down nationwide in civil disclosure cases that many legal scholars, judges, and media lawyers feel the Supreme Court needs to consider a civil disclosure case and clear up the confusion. Willard Eckhardt and Arthur Nickey sum it up well:

> . . .[w]e have been able to conclude that a large number of courts were taking a surprisingly uniform view of how the privilege should be articulated and applied. In short, our conclusion has been that reporter's privilege has arrived and is here to stay. As a description of the state of authority in lower federal and state courts, these conclusions are indeed accurate.. . . But on the basis of *Zurcher, Branzburg* and the opinions of the individual Justices in *Farber,* our best guess is that there are not now five Supreme Court Justices

who would agree with much of what is being done in the lower courts. Thus, it appears that the views of a majority of the Supreme Court are probably markedly different from those of the lower federal and state courts, state legislatures which have passed shield legislation, virtually all of the commentators, and, of course, the media. In short, if there is a 'confrontation,' it is not between 'the law' and 'the media'; it is between a majority of the Supreme Court and a broad section of American society. The fascinating question, then, which makes definitive conclusions impossible, is how this impasse will ultimately be resolved. The Supreme Court has consistently avoided directly addressing the issues since *Branzburg,* and this may well continue. In the meantime, precedents favoring privilege will accumulate apace."[203]

ENDNOTES

1. Blasi, Vince, "The Newsman's Privilege: An Empirical Study," Michigan Law Review, Vol. 70, No. 2, pp. 229-284, Dec. 1971.
2. 408 U.S. 665 (1972).
3. Blasi, p. 240.
4. *Id.* at pp. 240-241.
5. *Id.* at p. 243.
6. *Id.* at p. 245.
7. *Id.* at p. 246.
8. *Id.* at p. 247.
9. *Id.* at pp. 248-9.
10. *Id.* at p. 261.
11. Newman, Craig, "Qualified Privilege for Journalists *Branzburg v. Hayes* : A Decade Later", University of Detroit Journal of Urban Law, Vol. 61, No. 3,
12. News Media & The Law, "Confidentiality: The Court Continues to Steer Clear", News Media & The Law, Vol. 6, No. 2, p. 29, June/July 1982.
13. Blasi, pp. 261-2.
14. *Id.* at p. 264.
15. *Id.* at p. 268.
16. *Id.* at pp. 268-9.
17. Sack, William, "Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press", Hofstra Law Review, Vol. 7, No. 3, p. 629, 1979.
18. Lewis, Anthony, "A Preferred Position for Journalism?", Hofstra Law Review, Vol. 7, No. 3, p. 595, 617, 1979.
19. Blasi, pp. 270-1.
20. *Id.* at p. 272

21. *Id.* at p. 274.
22. 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375).
23. *Id.* at p.483.
24. Comment, "The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation", California Law Review, Vol. 58, No. 9, pp. 1198, 1200, 1970.
25. *Garland v. Torre,* 259 F. 2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).
26. *Id.* at p. 547.
27. *Id.* at p.550.
28. *Id.* at p.548-9.
29. *Id.* at p.549-50.
30. *Id.* at p.553.
31. *Baker v. F & F Investment, Inc.,* 470 F.2d. 778, 782 (1972 2d. Cir.).
32. Protection of News Sources and News Information Act of 1973: Hearings on S.36 Before the Subcomm. on Constitutional Rights, 93d Cong., 1st Sess. 409-11, 542 (1973).
33. *Branzburg v. Hayes*, 408 U.S. 665 (1972).
34. *Garland v. Torre* ; *Murphy v. Colorado* , No. 19604 (Sup. Ct. Colo.), *cert. denied*, 365 U.S. 843 (1961); *State v. Buchanan*, 259 F. 2d 545 (2d Cir.), *cert. denied*, 392 U.S. 905 (1968).
35. *Branzburg,* 408 U.S. at pp. 667-71.
36. *Id.* at p. 667.
37. *Id.* at p. 669.
38. *Id.* at pp. 31, 41-2.
39. *Id.* at pp. 31-4.
40. *Id.* at p. 668.
41. KY. REV. STAT. 421.100.
42. *Branzburg v. Pound*, 461 S.W. 2d 345, 347-8 (Ky. 1970).

43. 408 U.S. at p. 669.
44. *Id.* at p. 670.
45. *Branzburg v. Meigs*, 503 S.W. 2d 748, 751 (Ky. 1971).
46. 408 U.S. 677.
47. *Id.* at p. 675.
48. *Id* at pp. 675-6.
49. *Id.* at p. 676.
50. *In re* Caldwell, 311 F. Supp. 360 (N.D. Cal. 1970).
51. *Id.* at p. 360.
52. *Caldwell v. United States*, 434 F.2d. 1081, 1082 (9th Cir. 1970).
53. *Id.* at p.1089.
54. 408 U.S. 672.
55. *Id.* at pp. 672-3.
56. *Id.*
57. *Id.*
58. *In re* Pappas, 358 Mass. 604, 612, 266, N.E.2d 297, 303 (1971).
59. 408 U.S. 680.
60. *Id.* at p. 682.
61. *Id.* at pp. 681-2.
62. *Id.* at p. 691.
63. *Id.* at pp. 691-2.
64. *Id.* at p. 690.
65. *Id.* at pp. 708-9.
66. *Id.* at pp. 687-8.
67. *Id.* at pp. 686-8.
68. *Id.* at p. 693.
69. *Amicus curae*, Caldwell v. United States (9th Cir.).
70. 408 U.S. 693.
71. Murasky, Donna, "The Journalist's Privilege: *Branzburg* and Its

Aftermath", Texas Law Review, Vol. 52, No. 5, p. 838, May 1974.

72. Wigmore p. 2273.

73. 408 U.S. 692.

74. *Id.* at pp. 703-6.

75. *Id.* at pp. 689, 699, 706.

76. *Id.* at pp. 707-8.

77. *Id.* at p. 710.

78. *Id.*

79. *Id.* at p. 725.

80. *Id.* at p. 731.

81. *Id.* at p. 743.

82. *United States v. Iozia,* 13 F.R.D. 338 (1952).

83. *Id.* at p. 712.

84. *Id.* at p. 713.

85. *Id.* at p. 722.

86. *Id.* at p. 710.

87. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106.

88. Note, "The Rights of Sources—The Critical Element in the Clash over Reporter's Privilege", Yale Law Journal, Vol. 88, p.1202, 1979.

89. Newman p. 487.

90. Murasky pp. 876-8.

91. *Ex parte* Randy Eli Grothe, 687 S.W.2d 736 (Tex. Cr. App. 1984).

92. *Id.* at p. 741.

93. *Id.*

94. *Id.* at p. 738.

95. *Id.*

96. *Id.* at p. 737.

97. *Id.* at p. 738.

98. 436 U.S. 547, 98 S.Ct. 1970 (1978).

99. 436 U.S. 566, 98 S.Ct. 1982.

100. 687 S.W.2d 739.

101. *Id.*

102. *Id.* at p. 741.

103. 408 U.S. at pp. 690-1.

104. 5 Media L Rep (BNA) 1153.

105. *Id.*

106. *Id.* at p. 1154.

107. *United States v. Smalley*, 9 Media L Rep (BNA) 1252.

108. *Id.* at p. 1253.

109. *Adams v. Associated Press*, 46 F.R.D. 439 (1969).

110. *Id.*

111. *Id.*

112. Rule 37 (a) of the Federal Rules of Civil Procedure, S1414.

113. 46 F.R.D. 440.

114. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (1980).

115. *Id.* at p. 722.

116. *Id.* at p. 723.

117. *Id.*

118. *Id.*

119. *Id.*

120. 376 U.S. 254, 84 S.Ct. 710.

121. 621 F.2d 724.

122. *Id.* at p. 725.

123. 441 U.S. 153, 99 s.Ct. 1635.

124. 621 F.2d 725.

125. *Id.*

126. *Id.* at p. 726.

127. *Id.* at pp. 726-7.

128. *Id.* at p. 727.

129. *Mize v. McGraw-Hill, Inc.*, 5 Media L Rep (BNA) 1156, 82 F.R.D. 475 (1979).

130. *Id.*

131. *Id.*

132. *Id.*

133. 408 U.S. 710.

134. 5 Med L Rep 1157.

135. *Id.* at p. 1158.

136. *Id.*

137. *Id.*

138. 441 U.S. 153 (1979).

139. 5 Med L Rep 2615 (1980).

140. *Poirier v. Carson* , 537 F.2d 823 (1976).

141. *Id.* at p. 824.

142. *Id.* at pp. 824-5.

143. *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152 (1966).

144. 537 F.2d 823.

145. *Id.* at p. 824.

146. *Id.* at p. 826.

147. *Id.* at p. 825.

148. *Id.* at p. 826.

149. *Id.* at p. 824.

150. *Id.*

151. *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972).

152. *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70.

153. *Id.* at p. 74.

154. *Id.*

155. *Id.*

156. *Id.* at p. 75.

157. *Id.* at pp. 75-6.

158. *Id.* at p. 76.

159. *Id.*

160. *Id.*

161. *Id.* at p. 77.

162. *Carey v. Hume*, 492 F.2d 631, 636 (1974); *Branzburg.*

163. 533 S.W.2d at pp. 77-8.

164. *Trautman v. Dallas Independent School District,* 8 Med L Rep 1088 (1982).

165. *In re* Selcraig, 705 F.2d 792 (1983).

166. *Id.*

167. *Id.* at pp. 792-3.

168. *Id.* at p. 793.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at p. 792.

173. *Id.* at p. 794.

174. *Id.* at p. 795.

175. *Miller,* 628 F.2d 932.

176. *Id.* at p. 798.

177. *Id.* at p. 799.

178. *Id.*

179. *Blair v. United States,* 250 U.S. 273 (1919).

180. *Hickman v. Taylor,* 329 U.S. 495 (1947) [attorney-client privilege]; *Mullen v. United States,* 263 F.2d 275 (D.C. Cir. 1958) [priest-penitant privilege].

181. *People v. Durant,* 116 Cal. 179, 220 (1897) [claim of reporter's

privilege "scarcely merits comment"]; *Ex parte* Lawrence, 116 Cal. 298 (1897) [newsmen not justified in refusing to disclose confidential sources to state senate investigation]; *Plunkett v. Hamilton,* 136 Ga. 72, 81-4 (1911) [confidential communication to a journalist is not privileged from disclosure].

182. Wigmore, John, 8 Evidence 2285-2296.

183. Marus, Paul, "The Reporter's Privilege: An Analysis of the Common Law, *Branzburg v. Hayes* , and Recent Statutory Developments", Arizona Law Review, Vol. 25, No. 4, p. 861, 1983.

184. Cal. Evid. Code 1070(a) (West Supp. 1983).

185. Ind. Code Ann. 34-3-5-1 (Burns Supp. 1983).

186. Ill. Ann. Stat., ch. 110, 8-907(2) (1983).

187. N.M. Stat. Ann. 38-6-7A, C (Supp. 1978).

188. Ill. Ann. Stat. ch 110, 8-902(a) (1983).

189. Marus p. 862.

190. Ala. Code 12-21-142 (1975).

191. N.J. Stat. Ann. 2A:84A-21 (West Supp. 1983-4).

192. Confidentiality, News Media & The Law, p. 31.

193. Cal. Evid. Code 901.

194. Ill. Ann. Stat. ch. 110 8-901 (1983).

195. N.J. Stat. Ann. 2A:84A-21a(h) (West Supp. 1983-4).

196. Confidentiality: The Court Continues to Steer Clear, News Media & The Law, p. 24.

197. N.Y. Civ. Rights Law 79-h(b) (McKinney Supp. 1982-3).

198. Ala. Code 12-21-142 (1975); Ind. Code Ann. 34-3-5-1 (Burns Supp. 1983).

199. KY. REV. STAT. 421.100.

200. *Branzburg v. Pound*, 461 S.W. 2d 345, 347-8 (Ky. 1970)

201. *State v. Rinaldo,* 102 Wn.2d 749.

202. Green, Gary, "In Criminal Law, a Journalist Now Has a Common Law Qualified Privilege to Withhold the Identity of Confidential News Sources and Information Obtained While Gathering News", Gonzaga Law Review, Vol. 20, No. 1, p. 310, Winter 1984.

203. Eckhardt, Willard and Nickey, Arthur, "Reporter's Privilege: An Update", Connecticut Law Review, Vol. 12, No. 3, pp. 463-464, Spring 1980.

BIBLIOGRAPHY

Anderson, John, "Libel and Press Self-censorship", Texas Law Review, Vol. 53, pp. 422-435, 1975.

Blasi, Vince, "The Newsman's Privilege: An Empirical Study," Michigan Law Review, Vol. 70, No. 2, pp. 229-284, Dec. 1971.

Bulger, William, "Reporter's Privilege by Rule of Court: New Approach Fails . . . or Does It?", Suffolk University Law Review, Vol. 19, No. 3, pp. 513-536, Fall 1985.

Cady, Joan Harcourt, "Reporter's Privilege", Denver Law Journal, Vol. 58, No. 3, pp. 681-692, Summer 1981.

Carter, James, "The Journalist, His Informant and Testimonial Privilege", New York University Law Review, Vol. 35, pp. 1111-1134, 1960.

Comment, "Confidentiality of News Sources under the First Amendment", Stanford Law Review, Vol. 11, pp. 541-563, 1959.

Comment, "*Herbert v. Lando* : Reporter's Privilege from Revealing the Editorial Process in a Defamation Suit", Columbia Law Review, Vol. 78, No. 24, pp. 448-472, 1978.

Cronin, Philip M., "First Amendment: Reporter's Privilege to Refuse to Disclose Confidential Sources", Massachusetts Law Review, Vol. 66, No. 2, pp. 103-4, September 1981.

Eckhardt, Willard and Nickey, Arthur, "Reporter's Privilege: An Update", Connecticut Law Review, Vol. 12, No. 3, pp. 435-464, Spring 1980.

Glenchur, Paul, "Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection", Hastings Law Journal, Vol. 33, No. 3, pp. 623-652, January 1982.

Green, Gary, "In Criminal Law, a Journalist Now Has a Common Law Qualified Privilege to Withhold the Identity of Confidential News Sources and Information Obtained While Gathering News", Gonzaga Law Review, Vol. 20, No. 1, pp. 301-312, Winter 1984.

Guest, John and William Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources", Northwestern Law Review, Vol.

64, pp. 18-59, 1969.

Gunther, Dale, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", Harvard Law Review, Vol. 86, pp. 1-48, 1972.

Kuhns, John B., "Reporters and their Sources: The Constitutional Right to a Confidential Relationship", Yale Law Journal, Vol. 80, pp. 317-371, December 1970.

Lewis, Anthony, "A Preferred Position for Journalism?", Hofstra Law Review, Vol. 7, No. 3, pp. 595-623, 1979.

Martin, Michael, "Journalist's Privilege", New York Law Journal, Vol. 191, p. 1, June 8, 1984.

Marus, Paul, "The Reporter's Privilege: An Analysis of the Common Law, *Branzburg v. Hayes* , and Recent Statutory Developments", Arizona Law Review, Vol. 25, No. 4, pp. 815-867, 1983.

Martin, Michael, "Journalist's Privilege", New York Law Journal, Vol. 191, p. 1, June 8, 1984.

Murasky, Donna, "The Journalist's Privilege: *Branzburg* and Its Aftermath", Texas Law Review, Vol. 52, No. 5, pp. 829-919, May 1974.

Napolitano, Andrew, "Newsperson's Shield Law", New Jersey Lawyer, No. 113, pp. 13-17, Fall 1985.

Nelson, Harold, "The Newsman's Privilege Against Disclosure of Confidential Sources and Information", Vanderbilt Law Review, Vol. 24, pp. 667- 681, May 1971.

Newman, Craig, "Qualified Privilege for Journalists *Branzburg v. Hayes* : A Decade Later", University of Detroit Journal of Urban Law, Vol. 61, No. 3, pp. 463-487, Spring 1984.

News Media & The Law, "Confidentiality", News Media & The Law, Vol. 6, No. 2, pp. 29-36, June/July 1982.

News Media & The Law, "Confidentiality: The Court Continues to Steer Clear", News Media & The Law, Vol. 6, No. 1, pp. 24-26, Feb/March 1982.

News Media & The Law, "Confidential Sources & Information: a Practical

Guide for Reporters in the 50 States", News Media & The Law, Vol. 9, No. 3, pp. S1-S12, Fall/Winter 1985.

Note, "News-source Privilege in Libel Cases", Washington Law Review, Vol. 57 pp. 349-375, 1982.

Note, "Source's Protection in Libel Suits after *Herbert v. Lando* ", Columbia Law Review, Vol. 81, pp. 338-363, 1981.

Note, "The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law", UCLA Law Review, Vol. 24, pp.160-178, 1976.

Note, "The Privacy Protection Act of 1980: Curbing Unrestricted Third-party Searches in the Wake of *Zurcher v. Stanford Daily* ", University of Michigan Law Review, Vol. 14, pp. 519-543, 1981.

Note, "The Right of a Newsman to Refrain from Divulging the Sources of his Information", Vanderbilt Law Review, Vol. 36, pp. 61-95, 1950.

Notes, "The Right of the Press to Gather Information", Columbia Law Review, Vol. 71, pp. 838-864, 1971.

Note, "The Rights of Sources—The Critical Element in the Clash over Reporter's Privilege", Yale Law Journal, Vol. 88, p.1198-1223, 1979.

Palmer, Barry, "First Amendment—Defamation—Editorial Privilege: *Herbert v. Lando* ", Boston College Law Review, Vol. 21, No. 5, pp. 1223-1248, July 1980.

Sack, William, "Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press", Hofstra Law Review, Vol. 7, No. 3, p. 629, 1979.

Sangeorge, Robert, "Court Offers Guidelines for Disclosing Sources: Reporters' Rights", Los Angeles Daily Journal, Vol. 94, p. 3, April 15, 1981.

Sherwood, Margaret, "The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation", California Law Review, Vol. 58, No. 9, pp. 1194-1220, October 1970.

Sipos, Richard, "California's 'new' Newsman's Shield Law and the Criminal Defendant's Right to a Fair Trial", Santa Clara Law Review, Vol. 26, No. 1, pp. 219-252, Winter 1986.

Smith, David Joseph, "News-source Privilege in Libel Cases: a Critical Analysis", Washington Law Review, Vol. 57, No. 2, pp. 349-371, Spring 1982.

Sobel, Ken, "The Newsman's Qualified Privilege: An Analytical Approach", California Western Law Review, Vol. 16, No. 2, pp. 331-374, Summer 1980.

Van Dusen, Frank, "The Dimensions of a Journalist's Shield—First Amendment Protection for the Confidentiality of News Sources Against Requests for Court-ordered Disclosure in Civil Cases", University of Puget Sound Law Review, Vol. 6, No. 2, pp. 285-305, Spring 1983.

Walters, Jim, "Sharing the News with Justice", Columbia Journalism Review, Vol. 21, pp. 18-21, Sept./Oct. 1975.

Ward, Susan, "Qualified Common Law Privilege for News Reporters in Criminal Cases", Washington Law Review, Vol. 60, No. 2, pp. 535-541, April 1985.

Wigmore, John, 8 Evidence, (McNaughton rev. ed. 1961).