AN EXAMINATION OF THE JOURNALIST'S CLAIM TO TESTIMONIAL PRIVILEGE 1874-1971

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ABSTRACT

AN EXAMINATION OF THE JOURNALIST'S CLAIM
TO TESTIMONIAL PRIVILEGE, 1874-1971

By

Mary Morrice Bogin

Newsmen have been claiming the right to keep silent about their confidential sources and information before judicial bodies since the days of Benjamin Franklin, but until 1968, no widespread national recognition had been given to their claim.

No support for the journalist's testimonial privilege is found in common law, federal statutory law, or in the United States Constitution. However, when the United States Supreme Court granted a writ of certiorari to journalists Earl Caldwell, Paul Pappas, and Paul Branzburg in 1971, the journalist's testimonial privilege was deemed a constitutional question.

Over the past one hundred years, journalists have refused to testify on the grounds of betrayal of ethics, loss of business, self incrimination, and loss of sources. They have also based their refusal on state statutes protecting the journalist from forced disclosure of sources in seventeen states and on the First Amendment to the

United States Constitution. This constitutional argument contends that a forced disclosure of confidential sources or information inhibits the free flow of news which is guaranteed to the public under freedom of the press.

Judicial response to the journalists' claims has been inconsistent. Some judges have recognized the constitutional grounds as valid and granted the journalist his claim of silence, while other judges have found the journalist in contempt, ruling that there is no basis for a journalist's privilege. In a number of cases, judges have refused to recognize the claim of silence even under a state shield law, usually finding some technical point of legislative interpretation that exempts the case in question.

The fact is, that despite the growing number of protective statutes and the more liberal attitude on the part of many judges toward the journalist's claim of privilege, the serving of subpoenas on journalists has increased since 1968.

The resistance of journalists to subpoenas has also increased since 1968 with whole news organizations and broadcasting networks coming out to publicly condemn the practice. Hostility between the press and the government has heightened and the press attitude toward government investigators is distrustful and guarded.

This thesis argues for an unwritten solution to the subpoena problem, and contends that legislation is not the answer to the current increase in subpoenas. It argues that the United States Supreme Court should recognize the privilege under the First Amendment's guarantee to freedom of the press and that it should guard this First Amendment freedom against encroachment of law enforcement investigations. However, it contends that where a compelling need for the evidence has been shown by the summoning party at a separate hearing, the journalist could be forced to disclose his sources or confidential information.

Chapter I describes the cases of Earl Caldwell, Paul Pappas, and Paul Branzburg which are coming up for review before the United States Supreme Court in Spring, 1972.

Chapter II summarizes where the journalist's privilege stands in terms of common law, the law of evidence, and state statutory law. It also states the different interpretations of the law of privilege which are put forth by proponents and opponents of the journalist's privilege.

Chapter III documents the actual cases of journalists who have refused to testify before courts and grand juries since 1874. It points out the changes that have occurred in these cases over the one hundred period

in the reasons for refusing testimony, in the subject of the confidential source or information, and in the degree of cooperation between journalist and law enforcement officials.

Chapter IV documents the judicial decisions on the journalist's privilege over the past one hundred years with a discussion of the balancing test and the constitutional question, in particular.

Chapter V argues for a general change in practice and attitude concerning the subpoenaing of journalists, and contends that this "unwritten solution" would be more effective than federal legislation or individual state legislation. It suggests that the most crucial action to influence the attitude of defense attorneys, prosecuting attorneys, grand juries and the general public will be the decision of the United States Supreme Court on Caldwell v. United States, In re Pappas, and Branzburg v. Pound. It argues that the Supreme Court should recognize privilege under the First Amendment and set up standards to guard the functioning of a free press from unnecessary law enforcement investigations.

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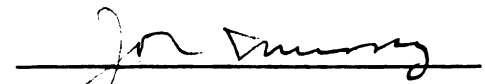

Director of Thesis

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By

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CHAPTER I

THE PROBLEM OF THE JOURNALIST'S PRIVILEGE

Part of a journalist's job throughout the history of the United States and of a libertarian press has been to investigate in order to find out facts about which to write stories for publication, to understand situations more clearly so as not to print a misleading or false account, and to develop contacts that may prove valuable for future stories. Max Frankel, veteran reporter for the New York Times believes that in a journalist's dealings with people who figure in the news

> reporters obtain not only on the record comments, but also confidential judgments and facts that they then use to appraise the accuracy and meaning of other men's words and deeds. Without the access and without such confidential relationships, much important information would have to be gathered by remote means and much could never be subjected to cross examination.[1]

The fruit of these investigations is usually revealed in some form of public journal, however, sometimes, the journalist does not divulge the source of his information or a part or the information or even, in some cases, the whole of the information. Throughout the past

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[1]Max Frankel, "Mitchell and Press Problems," New York Times, Feb. 6, 1970, p. 40.

one hundred years, the investigative arm of the law has tapped journalists for this unpublished information in the official arena of trial courts, grand juries, legislative committees, police commissions, and at pretrial depositions.[2] Unofficially, a give and take relationship between federal and local law investigators and journalists has existed at times.[3]

In some cases law enforcement has been successful in the questioning of journalists, but over the past century there have been many cases of resistance, with a tremendous increase since 1968.[4] Although the first recorded case of a journalist refusing to answer questions before a grand jury occurred in 1874,[5] Benjamin Franklin wrote of a newsman who "was taken up, censur'd, and imprison'd for a Month by the Speaker's Warrant . . . . Because he would not discover his Author."[6]

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[2]See Table 1, Chapter III.

[3]Frankel, "Press Problems," New York Times, Feb. 6, 1970, p. 40.

[4]U.S., Congress, Senate, Committee on the Judiciary, Free Press Hearings, before a subcommittee of the Committee on the Judiciary, Senate, on S. 16658, 92nd Cong., 1st sess., 1971, p. 1.

[5]People ex rel v. Fancher, 2 Hun 226 (1874).

[6]Carl Van Doren, ed., Benjamin Franklin's Autobiographical Writings, (New York: Viking Press, 1945) p. 229.

The reason for refusing to testify have ranged from a denial to break an office regulation which forbade disclosure of names of writers[7] to the contention that testimony would convert the journalist into a "police spy."[8]

The scope of the problem encompasses Congressional, grand jury, and court subpoenas issued to members of the underground[9] and collegiate[10] press, national television networks,[11] the establishment press,[12] national magazines,[13] and free lance journalists[14] on subjects ranging from the firing of a civil service employee in Honolulu, Hawaii,[15]

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[7] People ex rel v. Fancher, 2 Hun 226 (1874).

[8] Abraham S. Goldstein, "Newsmen and Their Confidential Sources," New Republic, March 21, 1970, p. 13.

[9] State v. Knops, 49 Wis. 2d 647 (1971).

[10] State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

[11] U.S., Congress, House, Interstate and Foreign Commerce Committee, Statement of Chairman Staggers before a subcommittee of the Interstate and Foreign Commerce Committee, House of Representatives, on H.R. 6642, 92d Cong., 2d sess., 1971.

[12] For example Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971), involved the Louisville Courier Journal and In re Taylor, 193 A2d 181 (Pa.S. Ct. 1963), involved the Philadelphia Bulletin.

[13] Alioto v. Cowles Communications, Inc. (unreported) (C.A. 52150 N.D. Calif. Dec. 4, 1969) involved Look.

[14] Ex Parte Sparrow (1953 D.C. Ala.) 14 FRD 351.

[15] In re Goodfader's Appeal, 45 Hawaii 317 (1961).

to the murder of five Latin American youths in San Francisco, California.[16]

After one journalist was cited in contempt of court he purged himself immediately afterwards and not only revealed the identity of his secret source but personally delivered the source to testify before the grand jury.[17] On the other hand, one journalist recently spent nearly six months in jail rather than reveal his sources.[18]

The problem of journalists being tapped for information by law enforcement is particularly pertinent now because it has just been deemed a constitutional question by the United States Supreme Court.[19] Not until 1958 did the courts recognize that the right of a journalist to refuse to divulge information before a court or grand jury jeopardized the First Amendment to the United States Constitution,[20] adopted in 1791, which prohibits the Congress from passing any law abridging free speech or free press. The United States Supreme Court had denied certiorari in

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[16] People v. Rios, (Super. Ct. San Francisco Cty., Cal., July 15, 1970).

[17] In re Wayne, 4 Hawaii 475 (U.S.D.C. 1914).

[18] State v. Knops, 49 Wis. 2d 647 (1971).

[19] The U.S. Supreme Court granted writs of certiorari in the cases of Caldwell v. United States, Branzburg v. Pound, and In re Pappas.

[20] Garland v. Torre, 259 F2d 545, cert. denied, 358 U.S. 910 (1958).

three previous cases in 1958,[21] 1961,[22] and 1968,[23] involving journalists who refused to reveal a confidential source of information.

The United States Supreme Court is scheduled to hear the cases of Caldwell v. United States, In re Pappas, and Branzburg v. Pound early this year. All three cases involve the refusal of journalists to reveal information before a grand jury, and the so-called protection of "sensitive" confidential sources, specifically, the Black Panther Party and the drug-taking community.[24] Each case concerns the weighing of forced revelation of facts, leading to a possible conviction of criminals, against the right of journalists to keep their sources confidential so as to maintain the flow of news to public. Law enforcement claims that it is in the public interest to have each citizen give evidence to aid the administration of justice while the journalists contend that the public is better

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[21] Ibid.

[22] Murphy v. Colorado, (unreported) cert. denied, 365 U.S. 843.

[23] State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

[24] Caldwell v. United States involves the reporter's relationship with the Black Panther Party, In re Pappas the relationship with the Committee to Combat Facism, a Panther-related group, and Branzburg v. Pound the relationship with two drug sellers in Louisville, Kentucky.

served by a free press and an unimpaired flow of news. The arguments of law enforcement are stated in the following excerpts from two judicial decisions which were quoted in the brief of the United States Government against Earl Caldwell, reporter in the San Francisco bureau of the New York Times:

> He [the witness] is not entitled to set limits to the investigation that the grand jury may conduct . . . . It is a grand inquest, a body with power of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety and forecasts of the probable result of the investigation.[25]

> When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular problem area, . . . [or] a particular individual, society's interest is best served by a thorough and extensive investigation.[26]

The journalists, on the other hand, argue that the public interest is better served by the free flow of news and that if confidential sources and information are not protected

> . . . that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy, and other crimes committed or possibily committed by public officials or by powerful individuals or organizations, . . . It is vitally important that this public shield . . . be preserved from piercing and erosion.[27]

More recently it was argued that a newsman "cannot be expected to learn what the Black Panthers or Weathermen or

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[25] Hendricks v. United States, 223 U.S. 178 (1920).

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

[27] In re Taylor, 193 A2d 181 (Pa. S. Ct. 1963).

heroin users are doing unless he operates in an atmosphere of reciprocal confidentiality."[28]

Earl Caldwell

In a December, 1969 issue of the New York Times, the following paragraph appeared in a story with the byline of Earl Caldwell.

> "We are special," Mr. Hilliard said recently. "We advocate the very direct overthrow of the Government by way of force and violence. By picking up some guns and moving against it, because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle."[29]

Two months later, on February 4, 1970, Earl Caldwell, a thirty-two-year-old black reporter for the San Francisco bureau of the New York Times received a subpoena from a federal grand jury in San Francisco investigating a broad range of Black Panther activities.

Not only did the subpoena request Caldwell's presence before the grand jury, but it called for

> . . . notes and tape recordings of interviews covering a period of Jan. 1, 1969, to date Feb. 4, 1970, relating statements made for publication by officers and spokesmen for the Black Panther Party concerning aims and purposes of said organization, its officers, staff,

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[28]Goldstein, "Newsmen and Their Confidential Sources," New Republic, March 21, 1970, p. 13.

[29]New York Times, Dec. 5, 1969, p. 4.

> personnel, and members, including specifically but not limited to, interviews with David Hilliard and Raymond "Masai" Hewitt.[30]

Caldwell refused to answer the broad scope of the federal subpoena. His attorney Anthony Amsterdam, professor of law at Stanford University and civil liberties lawyer, moved to quash the subpoena and appealed to Judge Alphonso J. Zirpoli of the United States District Court for the Northern District of California to exempt Caldwell from appearing before the secret grand jury proceedings.[31]

Caldwell's counsel argued that his "mere appearance . . . before the jury would infringe upon his rights and jeopardize his ability to function effectively professionally." The Caldwell brief emphasized the black reporter's "understanding" that had developed with the Black Panther Party which he'd covered "almost since the Party's beginning." Because of his relationship with the Black Panther Party, the brief said that Caldwell had been able to write lengthy stories about the "Panthers" that other reporters were unable to write and that these stories had

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[30]"News Media Heads Cite Their Concern on U.S. Subpoena," New York Times, Feb. 4, 1970, p. 1.

[31]Wallace Turner, "Times Reporter Wins Jury Delay," New York Times, Feb. 11, 1970, p. 18.

appeared in up to 50 or 60 other newspapers around the country.[32]

> The benefit the public has received from this relationship has been enormous . . . . [The] articles about the Black Panther Party, its activities and philosophy . . . have been invaluable in informing the public concerning an organization about which there has been so much public controversy. . . . had Mr. Caldwell not developed this relationship with the officials of the Black Panther Party, that information would not been forthcoming at all.[33]

The brief also emphasized the extreme sensitivity of the Black Panther Party as a source of the news and said that if Caldwell were "to disclose their confidences to governmental officials, the grand jury, or any other person" that the Black Panthers would refuse to speak to him.[34]

> . . . they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of militants.[35]

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[32]Brief for Appellant, Caldwell v. United States, 434 F2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

[33]Amici Curiae Brief of the American Civil Liberties Union of Northern California and Southern California and a group of reporters, writers, and editors, Caldwell v. United States, 434 F2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

[34]Brief for Appellant, Caldwell v. United States, 434 F2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

[35]Ibid.

The brief pointed out that Caldwell's privileges under the First Amendment would be abridged if the Government forced his testimony.[36]

Two decisions were handed down as a result of Caldwell's appeals, each one declaring that the case went to the heart of his First Amendment rights. The first, a protective order written on April 4, 1970, by Judge Zirpoli provided Caldwell with the right of counsel at all times during his testimony before the Federal grand jury, and gave him the right to refuse all questions asked of him except those dealing with information given him for publication or public disclosure.[37] However liberal this protective order might have been, Caldwell sought a complete excusal from appearing before the grand jury. On November 17, 1970, the United States Court of Appeals for the Ninth Circuit ruled that Caldwell's First Amendment rights would be jeopardized by his appearance before the federal grand jury and said that the Government must show a "compelling need for the witness's presence" before he must appear.[38]

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[36] Ibid.

[37] "Judge Puts A Limit on Disclosure Subpoenaed Writer Must Make," New York Times, April 4, 1970, p. 1.

[38] Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970) cert. granted, 402 U.S. 942 (1971).

First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a "wide range of information about the nature of protest and heterodoxy," the court ruled. It said that mere public addresses and press releases about the Black Panthers were not enough to preserve an "untrammelled press." The Court recognized that the unusual relationship Caldwell had established with the Black Panther Party was "a very tenuous and unstable one."[39]

The court concluded that the effect of the subpoenas would be to "suppress vital First Amendment freedoms of Mr. Caldwell, of the New York Times, of the news media, and of militant political groups by driving a wedge of distrust and silence between the news media and the militants."[40]

However much of a victory the decision seemed for journalists who want to keep their sources and information confidential, the court did place qualifications upon its ruling. Judge Charles Merrill who wrote the decision stressed that the rule was "a narrow one" in that not every news source was as sensitive as the Black Panther Party "respecting the performance of the 'establishment' press or the extent to which the performance is open to view."[41]

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[39] Ibid.

[40] Ibid.

[41] Ibid.

On December 17, 1970, United States Solicitor General Ervin N. Griswold filed a petition for the United States Justice Department claiming that the Caldwell decision endangers the power of a grand jury to investigate crimes.[42] The appeal, accepted for review by the United States Supreme Court, argues that the Government does not need to show "a compelling need" before it can call on Earl Caldwell as a witness and that the grand jury has "specific constitutional sanction."[43]

The Black Panther Party is trying to limit the probe of a grand jury, the brief contends, by threatening the press with cutting off their communications to them, if the press reveals confidences before the secret body.

> What appellant is saying in essence is that his desire to keep contact with the Black Panther organization in order to be able to write articles about them in the future makes it imperative that the courts recognize what he believes the Black Panthers will demand as conditions of cooperation, no matter whether their conditions are reasonable or unreasonable.[44]

The brief of the United States Justice Department does not question the ruling of the United States District Court for the Northern District of California that granted

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[42] "U.S. Sees Danger in Court Decision on Press Subpoenas," New York Times, Dec. 17, 1970, p. 26

[43] Brief for the United States, Caldwell v. United States, 434 F2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

[44] Ibid.

Caldwell the right to counsel and the right to refuse all questions except those dealing with information already published or information intended for public disclosure. Rather it asks the United States Supreme Court to require that journalists must substantiate the accuracy of their published stories and "non-confidential" information when required to appear before a grand jury.[45]

Paul Pappas

New Bedford, Massachusetts, had been a hotbed of racial disturbances for three weeks during the month of July, 1970, that had resulted in the killing of one black youth, injuries to scores of others, and the destruction of dozens of cars and several buildings.[46]

Paul Pappas, a forty-six-year-old newsman and cameraman for WTEV-TV, a broadcasting station in New Bedford, had been sent out to report on the disturbances. On July 30 at 3 p.m. a spokesman for a Black Panther affiliated party, The Committee to Combat Facism, gave out a public statement that the group would allow police to enter the headquarters, an old boarded variety store, in order to search for weapons. But the police could only enter on the following

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[45] Ibid.

[46] "Charges Dropped in New Bedford," New York Times, March 28, 1970, p. 64.

conditions: (1) that they had a search warrant; (2) that they were gentlemanly in their search; (3) that they were accompanied by the news media. It was under this final condition that Pappas was allowed to enter the headquarters at 9 p.m. that night after he had promised that he would not report anything he saw or heard unless the police searched the building. The Black Panther group had expected the search that night, and they complained that the press always covered situations from the side of the police. The search did not take place, however, and as he promised, Pappas reported nothing about what he saw or heard in the party headquarters that night.[47]

One month later the television newsman received a subpoena to appear before a Bristol County grand jury investigating the disturbance in New Bedford.[48] Pappas had published no story about the information that the grand jury sought; therefore, testimony could not be limited to information intended for publication or in fact, published. Like Caldwell, the newsman was called upon to testify about the Black Panther Party group, however, unlike Caldwell, Pappas had no long standing relationship of mutual trust and confidence with it. His knowledge

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[47]Brief for Appellant, In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

[48]Ibid.

of the militant group was limited to one night spent inside their headquarters. The Panther party had wanted news media present at a certain time, and Pappas had just happened to be in the right place at the right time to be chosen as a representative of the media by the group.

Pappas appeared before the county grand jury and answered all questions asked of him, except those concerning what he saw or heard during that night in headquarters. Neither would he identify anyone inside the headquarters when asked to do so.[49] Although Pappas based his refusal largely on the Caldwell decision, his case differed in several areas. First, the scope of the subpoena was more specific in the Pappas case, demanding only his presence. Caldwell's subpoena constituted a government "fishing expedition" asking for all his notes and tape recordings that he had accumulated over a one year period.[50] Secondly, Caldwell had been covering the Black Panther Party in the Bay area since their inception; Pappas had covered them for one night. Thirdly, Caldwell's numerous stories on the Black Panther Party had been published in 50 or 60 newspapers at a time; Pappas had filed no stories on the New Bedford group as yet.

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[49] Ibid.

[50] Brief for Appellant, Caldwell v. United States, 434 F2d 1081 (9th Cir. 1970) cert. granted, 402 U.S. 942 (1971).

Despite these differences, Pappas defended his right of privilege on similar grounds as Caldwell's, that to disclose the confidential information would (1) dry up these same sources in the future and impair his livelihood as a journalist; (2) violate his rights under the First and Fifth Amendments; (3) constitute a breach of promise between him and the underground group. He relied on the Caldwell decision that a newsman does not have to reveal confidential sources until a compelling and overriding national interest, which can not be alternatively served, should be established.[51]

The Supreme Judicial Court for the Commonwealth of Massachusetts specifically rejected the Caldwell ruling as applicable in the Pappas case and, finding no basis for the journalist's privilege in common law, in Massachusetts state law nor in the United States Constitution, they said that Pappas had to testify before the grand jury.[52]

Communications made in express confidence are not necessarily privileged, the court said. First Amendment guarantees are limited by the co-existing rights of others and "by demands of national security and public decency." The public welfare of New Bedford was viewed as paramount

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[51]Brief for Appellant, In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

[52]In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

to First Amendment guarantees. In an opinion totally unlike that of the United States Court of Appeals for the Ninth Circuit, the Superior Judicial Court of Massachusetts said that the news media function is to "monitor the processes of justice--not to interfere with its administration."[53]

In rejecting the newsman's argument, Chief Justice of the Superior Judicial Court of Massachusetts, G. Joseph Tauro said that the "reporter's obligation is to publish the news after he has gathered it." "What right does he have to hold it? How can he exercise censorship and decide what he will or will not disclose to the public?" Chief Justice Tauro asked. Justice Paul C. Reardon described the newsman's argument of having the grand jury show a compelling need as "a new wrinkle that would put the burden on the government to waltz around and show that a reporter has some relevant information." Justices Jacob J. Spiegel and Francis J. Quirico said that the restrictions suggested by Pappas would hamper a grand jury.[54]

Pappas filed his appeal to the United States Supreme Court on March 27, 1971, and was granted a writ of certiorari.

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[53] Ibid.

[54] Ibid.

Paul Branzburg

Paul Branzburg, a young reporter for the Louisville Courier-Journal had developed a relationship of confidence with members of the drug taking and drug selling community of Louisville and nearby Frankfort, Kentucky. Branzburg had written several articles based on his journalistic association with dope sellers, members of the "hippie" community, and young Frankfort professionals and state officials who admitted to their use of illegal drugs.[55]

On November 15, 1969, Branzburg had published a story entitled "The Hash They Make Isn't To Eat, Could Be A Pot of Gold" telling how two local drug sellers made commercially salable hashish from marijuana in the kitchen of an old abandoned house. Exactly ten days later, on November 25, the Jefferson County Grand Jury called the reporter to appear and answer questions about the particular persons and their activities that were described in the article.[56]

Branzburg refused to divulge the names of the dope sellers before the county grand jury on the grounds that a 1935 Kentucky state law protects "newspaper, radio and

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[55]Brief for Appellant, Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.), cert. granted, 402 U.S. 942 (1971).

[56]Ibid.

television" personnel from disclosing their sources of information before any grand jury or petit jury.[57] Branzburg's case is the only one of the three to be reviewed by the United States Supreme Court that hinges on an interpretation of a state law protecting journalists from revealing their source.

The Kentucky Court of Appeals in a 5 to 1 decision ruled that the state's statute covering a newsman's sources does not apply in instances in which a newspaper reporter witnesses the commission of a crime. It made a distinction between shielding a news source and cloaking someone who had committed a crime.[58]

> The reporter was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpretration of a crime and he refused . . . .[59]

The court said that the identity of the hashish makers, as well as the activity in which they were engaged, was a part of the information obtained by him, but that their identity was not the source of the information.

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[57] Kentucky, Revised Statutes (1962) Sec. 421.100.

[58] Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.), cert. granted, 402 U.S. 942 (1971).

[59] Ibid.

Branzburg had argued that the source of information covers all knowledge received by a newspaper reporter, not merely "hearsay evidence delivered by an informant."[60]

However, the Kentucky Court of Appeals directed its decision to the fact that Branzburg had observed a crime and stated the following hypothesis:

> Suppose a newsman or a reporter should see the President of the United States or the Governor of the Commonwealth assassinated in the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by petitioner, such a reporter could not be compelled to identify the perpretrator of the crime. We do not think the legislature ever intended such a result.[61]

The court concluded that the purpose of the law rather was "the alleged public benefit in encouraging the ferreting out of dishonest and corruptible public officials . . . not to aid murderers, burglars, and sellers of narcotics."[62]

Branzburg based his appeal, in addition to the rights under the state statute, on (1) the need for protection of expression of unpopular, unconventional and even heretical beliefs and ideas; (2) the need for discussion about a controversial issue; (3) the fact that his

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[60]Brief for Appellant, Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.), cert. granted, 402 U.S. 942 (1971).

[61]Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

[62]Ibid.

disclosure would destroy the confidence he enjoyed with the drug taking community and cut off from the public any communication with this faction.[63]

Summary

The three cases are similar in the following respects: (1) all involve subpoenas of newsmen by grand juries; (2) all the newsmen had promised their source absolute secrecy about certain information obtained; (3) all contended that his future news gathering ability would be impaired; (4) all possessed information which they had obtained from an underground group about which relatively little news was published; (5) all contended that the public had a right to a free flow of news about the underground groups on which they were reporting.

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[63]Brief for Appellant, Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

CHAPTER II

THE HISTORY OF THE JOURNALIST'S CLAIM TO PRIVILEGE

The claim that journalists have the right to refuse testimony before a grand jury, a court, or any official investigative body, finds little support in law. Although attempts have been made, in Congress, there is no federal law granting them the privilege. No constitutional basis for refusal has been recognized by the United States Supreme Court. And there is no protection from the duty of testifying in thirty-three states. In only seventeen states are statutes found that grant journalists testimonial privilege in varying degrees,[1] most limited to granting the right not to reveal a confidential source.

A testimonial privilege may be defined as

> . . . certain exemptions from attending or giving testimony recognized by . . . courts, each exemption being grounded in a substantial individual interest which has been found, through centuries of experience to outweigh the public interest in the search for truth.[2]

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[1]The seventeen states are Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, New York, New Mexico, New Jersey, Louisiana, Maryland, Michigan, Montana, Nevada, Ohio, Pennsylvania.

[2]U.S. v. Bryan, 339 U.S. 323 (1950).

The theory is that the advantage society accrues in preserving secrecy, in the majority of instances and in the long run, outweighs the disadvantages and hardships caused by the necessity of deciding a particular case without the knowledge of all relevant materials.[3] The theory of weighing the public interest in preserving secrecy against the public interest in the administration of justice is the basis for the balancing test, which is used in cases where the exercise of First Amendment rights conflicts or impinges upon other constitutional or legal rights.

There are two kinds of privilege, privileged topics and privileged communications, according to John Wigmore, a legal scholar and former professor of the law of evidence at Northwestern University. The privilege claimed by journalists falls under the latter type. Privileged topics include trade secrets, political votes, theological beliefs, self-incriminating facts, and irrelevant matters, among others.[4]

Privileged communications include confidential information between doctors and their patients, attorneys and their clients, husbands and wives, priests and

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[3]Edmund M. Morgan, Basic Problems of Evidence (Philadelphia: Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association, 1954), I, p. 43

[4]John Henry Wigmore, Evidence in Trials at Common Law (Boston: Little, Brown, and Company, 1940) VIII, Sec. 2210-2224, pp. 148-219.

penitents, and between petit jurors and between grand jurors.[5] In some states privileged communications are recognized between psychologist and patient, psychiatrist and patient, social worker and client, and journalist and source.[6]

History of Privilege

The history of the testimonial privilege can best be discussed in the context of the history of "everyman's testimony." It has been a fundamental general rule of law for more than three centuries that the public has a right to every man's evidence.[7] The rule that all men, regardless of class, profession, wealth, or property, must testify when called upon is illustrated in the following excerpt from the writings of Jeremy Bentham, eighteenth century English legal philosopher and author.

> Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples and the chimney-sweeper or the barrow-woman

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[5] Roy D. Weinberg, Confidential and Other Privileged Communications, (New York: Oceana Publications, Inc., 1967) p. 55.

[6] Ibid., pp. 40-72.

[7] Wigmore, Evidence, VIII, Sec. 2192, p. 64.

> were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly.[8]

The rule of everyman's testimony was stated in 1919 by United States Supreme Court Justice Mahlon Pitney

> as in the general law upon the subject it 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.[9]

It is clear from the above definitions that the duty of testimony is part of the fabric of American democracy. "When the court of justice requires the investigation of the truth, no man has any knowledge that is rightly private," Wigmore wrote.[10]

The exact date at which the exception to everyman's testimony, the privilege, was introduced, is not known. However, in the trials of the 1600's, the obligation of honor among gentlemen was often put forward as grounds for maintaining silence.[11] The practice became known as the "oath of honor" in 1700, and served to protect certain

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[8] The Works of Jeremy Bentham (Bowring Edition, 1843) p. 320 as cited by James A. Guest and Alan L. Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources," Northwestern Law Review, LXIV (1969), 18.

[9] Blair v. United States, 250 U.S. 273 (1919).

[10] Wigmore, Evidence, VIII, Sec. 2192, p. 65.

[11] Ibid., Sec. 2286, p. 535.

professionals who had a "moral obligation" not to reveal a confidence.[12]

The "oath of honor" did not exist to protect the communicant, but rather to protect the professional and his reputation for honor. The idea behind it was that certain professionals, such as doctors, lawyers, and clergymen, were of a special utility to society and should be entitled to legal sanction in their promise of secrecy to a communicant.[13]

However, in 1776 it was decided that the moral obligation of the "oath of honor" must yield to the need for "everyman's testimony," the reasoning being that "in certain situations no blame may attach to a man who violates a confidence under judicial compulsion."[14] The following anecdote illustrates how the courts at that time justified such a breach of confidence.

> In answer to a physician who asked whether he was required to disclose professional confidences, Lord Mansfield said: "If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of breach of honor and of great indiscretion; but to give that information in a court of justice, which by law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.[15]

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[12] "A Compromise Proposal," Northwestern University Law Review, LIV, (159), 243.

[13] Ibid.

[14] Duchess of Kingston's Case, 20 How. St. Tr. 573 (1776).

[15] Ibid.

It was after the 1776 Duchess of Kingston case that the current type of testimonial privilege came about--belonging to the communicant, the privilege can be waived at his will; it does not belong to the person receiving the communication.[16]

In general, the rules of privilege have been determined, along with the other rules of evidence, by the common law.[17] The confidential communications between attorney and client, husband and wife, between petit jurors and between grand jurors are among those privileges recognized under the common law. Those recognized only by statute are communications between doctor and patient, journalist and source, and social worker and client, among others.[18]

Contempt and the Power of Compulsory Testimony

The power to compel "everyman's testimony" is granted to grand juries, legislatures, administrative bodies, courts, and to the taking of depositions.[19] The

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[16]"A Compromise Proposal," p. 249.

[17]Federal Rules of Criminal Procedure (St. Paul, Minn.: West Publishing Company, 1968) Rule 26, p. 44.

[18]Weinberg, Privileged Communications, pp. 20-64.

[19]Guest and Stanzler, "The Constitutional Argument," p. 25.

right of a defendant to compel testimony in a criminal proceeding is granted under the Sixth Amendment, which reads,

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .

In situations not covered by the Sixth Amendment, the power to compel testimony is found in an English common law principle adopted by the American judicial system.[20]

Any person who refuses to testify before one of the aforementioned bodies and who is without a testimonial privilege, may be cited in contempt of that respective body. Contempt is defined as "an act of disobedience or disrespect toward a judicial body or a legislative body of government or interference with its orderly process, for which a summary punishment is usually exacted."[21]

Punishments for contempt by journalists have varied widely. W. F. G. Shanks, editor of the New York Tribune in 1874 was sentenced to be placed in jail until "he may answer the questions propounded to him."[22] The periods of imprisonment for journalists who were found in contempt

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[20] Ibid.

[21] Ronald L. Goldfarb, The Contempt Power (New York: Columbia University Press, 1963) p. 1.

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

ranged from five days[23] to a period of five months and seven days.[24] Fines also varied, from $500 when George Burdick, city editor of the New York Herald Tribune, refused to testify before a federal grand jury,[25] to $25 when Julius Grunow, reporter for the Jersey (N.J.) Journal refused to reveal his sources of information before a Hudson County grand jury.[26]

Opinions of Legal Scholars on Privilege

A sampling of the opinions of legal scholars on the advisability of privilege and its extension to new occupational groups, such as accountants, social workers, and journalists, reveals a cautious attitude.

Zechariah Chafee, Jr., eminent legal scholar on freedom of the press and free speech, wrote that a reporter's claim to "silence" is less persuasive than that of the doctor and that "the physician-patient privilege has produced many unfortunate results." He believed, therefore, that "judges should retain their present power

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[23] Hamilton v. Plunkett, 70 S.E. 781 (1911).

[24] State v. Knops, 49 Wis. 2d 647 (1971).

[25] Burdick v. United States, 236 U.S. 79 (1915).

[26] In re Grunow, 84 N.J.L. 235 (1913).

to order a reporter to testify or else go to jail for contempt."[27]

James Beaver, professor of law at the University of Washington, called the tendency to create "indiscriminate privileges" of new occupational groups "unhealthy." "Enactment of recognition of the privilege might make some journalists feel more important, more powerful, or more secure," Beaver wrote, "but it would be bad policy and miserable law."[28]

Wigmore not only warned against extending the privilege to new occupational groups, but he criticized the present boundaries of the privilege laws, especially as it applied to the physician-patient relationship. He was firmly against its extension to clerks, bankers, commercial agencies and journalists, grouping them all together as professions equally undeserving of the testimonial privilege law. He commented upon the passage of the first journalist's privilege law in 1898 saying that law was "as detestable in substance as it is crude in form" and that it would probably "remain unique."[29]

Generally, Wigmore regarded the privilege as a necessary evil and he wrote that the only reason for it is

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[27]Zechariah Chafee, Jr., Government and Mass Communications, Commission on Freedom of the Press (Chicago: University of Chicago Press, 1947) p. 496.

[28]James E. Beaver, Granting of Special Privileges Questioned," Quill, August, 1966, p. 15.

[29]Wigmore, Evidence, VIII, Sec. 2285-2286, p. 532.

that its abolition would tempt prosecutors to be slack in procuring ample evidence.[30] As an illustration Wigmore gave the following story about an English official, Sir James Stephen, serving in India:

> Sir Stephen observed that native officials in India sometimes applied torture to the accused. An experienced British official explained to Sir Stephen that "there is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence.[31]

Wigmore wrote that the privilege should be recognized only "within the narrowest limits" and that every step beyond these limits helped to provide "an obstacle to the administration of justice."[32]

Wigmore set up four conditions that a relationship must satisfy in order for privileged communications to be accorded to it: (1) the communication between the two parties of the relationship must be intended to be confidential; (2) the relationship must be one to which public opinion merits careful consideration; (3) the relationship must be one to which confidentiality of communication is essential; (4) any injury to the relationship by disclosure of confidence must be greater than the injury to justice by withholding the confidence.[33]

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[30] Ibid., VIII, Sec. 2251, p. 312.

[31] Ibid.

[32] Ibid., VIII, Sec. 2192, p. 67.

[33] Ibid., VIII, Sec. 2285, p. 531.

Wigmore emphasizes that mere confidentiality between two parties in a relationship does not merit a testimonial privilege based on that confidentiality. It must be further shown that there is some extrinsic policy of protecting from injury an important social relationship.[34]

Does the journalist-source relationship, recognized as privileged in seventeen state statutes, satisfy these four conditions of Wigmore's? Typical of the argument of those who believe that the four conditions are satisfied in the journalist-source relationship is that of Fred S. Siebert, professor emeritus of mass communications at Michigan State University.

"If one is to apply Dean Wigmore's standards to the relationship . . . it can readily be established that protection against compulsory disclosure should be recognized by law," Siebert said.[35] He stated that the relationship satisfies Wigmore's conditions in the following way: (1) the relationship is a confidential one based on mutual trust and respect; (2) confidentiality is essential to the relationship because if the journalist violates the trust of his source, the relationship is destroyed and

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[34] Ibid., VIII, Sec. 2286, p. 532.

[35] Fred S. Siebert, "Professional Secrecy and the Journalist," Journalism Quarterly, Winter, 1959.

the source no longer continues to supply information; (3) the fact that public opinion merits careful consideration of the relationship is not so readily established, according to Siebert, but the public does depend on the journalist for information and to the extent that this information should be full and complete, the public benefits by the relationship. In many cases, full and complete information cannot be obtained without having the confidential source protected; (4) an injury to this relationship would harm the tasks of decision-making on the part of legislatures and on the part of the public in general elections, which is of far greater importance than the court knowing the name of the journalist's informant.[36]

However, the United States Senate Subcommittee on Administrative Practice and Procedure in 1966 found the journalist-source relationship lacking in all four conditions. The subcommittee wrote that (1) the communication between the journalist and his source is not intended to be confidential since the communication is intended to be disclosed; (2) the element of confidentiality of the communication is not essential to the relationship for the same reason; (3) although public opinion cannot be exactly determined, the privilege has never been generally accepted either at common law or in the United States; in the period

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[36] Ibid.

from 1898 to the present (1966) only twelve states have adopted it and another twelve have considered it but rejected it; (4) the injury to the relationship rests on a disclosure of a confidence, and for the same reason given in the first conditions, that the communication is intended to be disclosed, this last condition cannot be met either.[37]

In considering the two opposing arguments of Siebert and of the United States Senate Subcommittee on Administrative Practice and Procedure, it can be said that Siebert interpreted Wigmore's four conditions less literally than did the subcommittee. In the first, second and fourth conditions, Siebert rests his argument for the journalist's privilege upon his interpretation that the identity of the source is an integral part of the communication itself. In other words, Siebert regards the communication between journalist and his source as confidential, because the identity of the source must be kept confidential. He thus proceeds to the second condition arguing that the confidentiality of the source of communication is essential to the relationship, not the confidentiality of the communication itself. And finally, Siebert argues in the

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[37]U.S., Congress, Senate, Committee on the Judiciary, The Newsman's Privilege, 89th Cong., 2d sess. (Washington D.C.: Government Printing Office, 1966) pp. 15-17.

fourth condition that "injury to this relation," meaning that a disclosure of the source of communications and not the communication itself, would be injurious to the relationship.

The United States Senate Subcommittee on Administrative Practice and Procedure, however, construes Wigmore's term "communication" to mean the words, expressions or observations of the informer that are made to the journalist. It does not include the identity of the source in the term "communication." The subcommittee then proceeds to show how the relationship between the journalist and his source does not satisfy any of the four conditions, because the "communication," as defined above, is, in fact, usually revealed by the journalist in publication. The failure of the journalist-source relationship to satisfy the first, second and fourth conditions rests on this interpretation of the word "communication." Siebert maintains, on the other hand, that even though the communication itself was intended to be disclosed, the first, second, and fourth conditions were satisfied because the source of the communication was intended to be kept confidential. In conclusion, the question of whether the journalist-source relationship satisfies Wigmore's four conditions for privileged communications seems to rest on the definition of the term "communications."

Arguments for a Journalist's Privilege

Each privileged communication has been justified by lawmakers and by the courts as existing to promote some social good.[38] The theory of privilege is that the particular social good outweighs the obstruction to justice brought about by the lack of evidence. Thus, the privilege between lawyer and client is considered more of an aid to the administration of justice than a hindrance.[39] The privileged communications between physician and patient, psychologist and patient, and social worker and client are said to promote the public health.[40] Proponents of the journalist's privilege argue that it promotes the social good to a far greater degree than do other more widely accepted privileges.

> The attorney-client privilege can . . . be equated in importance with the right to compel testimony . . . . The priest-penitent privilege may . . . be justified as protecting freedom of religion. But the physician-patient privilege, the husband-wife privilege, the accountant-client privilege and the registered psychologist and certified social worker privileges, though designed to protect relationships to which States ascribe social importance, can hardly be deemed on a parity, . . . with the preservation of a free press.[41]

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[38] Morgan, Basic Problems of Evidence, I, 43.

[39] Brief for Appellant, Caldwell v. United States, 434 F 2d 1081, (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

[40] Ibid.

[41] Ibid.

Another reason for deeming certain communications as privileged is the general principle that society should not be deprived of expert advice and counsel because it fears disclosure of confidential facts in a public court. Legal, spiritual, financial, and psychiatric advice and counsel are protected. All of the professionals concerned perform a service to the person seeking them out. However, proponents of the journalist's privilege argue that the person seeking out a journalist gets nothing by sharing his information with the journalist. Therefore, the argument states, the least a reporter can do is to protect this source from any injury which would result from a forced disclosure of his confidences. The reporter should be able to accede to the practical demands of his profession without going to jail, the argument states in conclusion.[42]

> The persons who made such communications (to attorneys, doctors, social workers,) probably know very little about the degree to which their confidences may be disclosed in the future, but if they did the immediate interest in getting good advice would probably prevail, the communication would be made, and the professional relationship would remain viable.
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> In the case of the journalist's privilege, the informant does not risk his health or liberty or fortune or soul by withholding information. . . . His communication, more than others, is probably the result of a calculation and more likely to be affected by the risk of exposure.[43]

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[42]"A Compromise Proposal," p. 243.

[43]Abraham Goldstein, "Newsmen and Their Confidential Sources," New Republic, March 21, 1970, p. 13.

A third argument is that the journalist shares with the physician, the attorney, the accountant and the psychiatrist, an adherence to a professional canon, which says, in effect, that confidences heard while working in a professional capacity, must not be disclosed.[44]

A fourth argument draws similarities between the police "informer" and the press "informer," saying that the press source should be accorded the same privilege as the police source. The United States Supreme Court has recognized the police informer "as a vital part of society's defense arsenal."[45] The basic rule of the courts is to protect the police informer's identity. However, the United States Supreme Court has recognized no fixed rule with regard to the police informer, calling for a

> balancing of the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether the proper balance renders non-disclosure erroneous must depend upon the particular circumstances of each case . . . .[46]

Proponents maintain that it would be inconsistent to hold that identically premised claims are to be given different judicial treatment, especially when the government claim

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[44]Guest and Stanzler, "The Constitutional Argument," p. 29.

[45]Brief of Amicus Curiae of Sigma Delta Chi, State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

[46]Roviaro v. United States, 353 U.S. 53 (1957).

to privilege has only a common law basis, and the claim of freedom of the press is based on the First Amendment.[47] It is yet to be seen how the United States Supreme Court will regard the journalist's "informer."

Arguments Against the Journalist's Privilege

Opponents of the journalist-source privilege also support their arguments by comparing it with other existing privileges. First, the opponents argue that the journalist is not a member of a disciplined profession like the physician, the accountant, the psychiatrist, and the attorney.[48] All four of these professions must pass a state-administered examination, and some of them must be licensed by the state. Whereas, there is no licensing or control of journalists. Thus, the opponents argue that the privilege could be taken advantage of by unscrupulous and unqualified writers who wished to remain silent as to their sources of irresponsible articles,[49] or who wished to invent "sources."

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[47]Brief of Amicus Curiae of Sigma Delta Chi, State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

[48]U.S., Congress, Senate, Committee on the Judiciary, The Newsman's Privilege, 89th Cong., 2d sess. (Washington, D.C.: Government Printing Office, 1966) p. 17.

[49]Robert B. Frazier, "Oregon Doesn't Need Privilege Statute," Quill, August, 1966, p. 16.

Opponents also argue that the need for granting the privilege to journalists is lessened by the fact that a privilege already exists between law enforcement and police "informers." This argument assumes that the police "informer" and the journalist's "informer" are one and the same person.[50] Finally the fact that the journalist's privilege differs from the basic principles of other privileges makes it invalid, opponents argue, because (1) the informant is unknown and confidential while normally both parties are known--the identity of neither is confidential; (2) the privilege belongs to the journalist and only he can waive it, whereas, normally, the privilege belongs to the person making the communication, i.e., the client or patient alone can waive it; (3) the journalist may assert the privilege in connection with any information furnished him, whether confidential or not, while in the normally privileged relation, the privilege may be asserted with respect to confidential communications only.[51]

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[50] U.S. Congress, Senate, Committee on the Judiciary, The Newsman's Privilege, 89th Cong., 2d sess. (Washington D.C.: Government Printing Office, 1966) p. 17.

[51] Ibid., p. 15.

State Statutes Granting a Journalist Privilege

State statutes granting a journalist privilege are found in seventeen states. However, because they vary widely from state to state and because the courts often interpret them strictly, the statutes fall far short of providing journalists with complete protection from forced disclosure of confidential information or sources.

Sixteen of the statutes grant the right to refuse naming the source[52] but leave the journalist with no legal protection if he refuses to disclose the confidential information itself before a court or a grand jury. The distinction has been made by at least one state court, where a journalist appealed a contempt citation, between the source of information and the information itself.[53]

In seven states only published information is considered under the statutes, that is, the source of information is protected only if the information that he imparted to the journalist was published.[54] In at least one case where a journalist appealed a contempt citation, the court

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[52]These statutes are in Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, New Mexico, New Jersey, Louisiana, Maryland, Michigan, Montana, Nevada, Ohio, Pennsylvania.

[53]See Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

[54]These states are Arkansas, Alabama, Arizona, California, Kentucky, Maryland, and New Jersey.

ruled that the source had to be disclosed because the journalist had never published the information concerned.[55] However, in the remaining ten states, the sources of published as well as unpublished information are protected from being divulged before a court or grand jury.

In two states, Indiana and New York, professional standards are set up for newspapers and broadcasting stations, whose employees can receive protection under the statutes. These standards exempt the collegiate press and underground press as well as newspapers which are less than one year old.[56] The New York privilege law does not cover free newspapers, and specifies that they must be "printed and distributed ordinarily not less frequently than once a week." Magazines in New York must comply with similar standards.[57] In Indiana the newspaper must have a circulation of at least 2 per cent of the population of the county in which it is published.[58] Employees of radio and television stations in New York can be protected under the

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[55]See Editor and Publisher, March 24, 1967, p. 8.

[56]See Indiana, Statutes Annotated (1968) sec. 2-1733, and New York, Civil Rights Law (McKinney Supplement, 1970), sec. 79-h(a) (6). Note: In Indiana, newspapers that are less than five years old are not covered by the protective statute.

[57]New York, Civil Rights Law, (McKinney Supplement, 1970) sec. 79-h(a) (6).

[58]Indiana, Statutes Annotated (1968) sec. 2-1733.

statute only if the stations' records are open for inspection for a period of at least one year from the date of the actual broadcast or telecast in question, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast must be present.[59]

Other conditions limit the scope of the privilege laws. In Arkansas the statute is granted to journalists unless it can be shown that the article was "written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare."[60] In Alaska it may be denied if the withholding of testimony will result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege or if it is "contrary to the public interest."[61]

The law in New Mexico is the lengthiest in its standards for revoking the privilege for journalists. It lays down the following guidelines for a court to consider in granting or refusing the privilege to journalists: (1) the nature of the proceeding; (2) the merits of the

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[59]New York, Civil Rights Law (McKinney Supplement, 1970) sec. 79-h(a) (6).

[60]Arkansas, Statutes Annotated (1964) sec. 43-917.

[61]Alaska, Compiled Laws Annotated (Supplement 1970) sec. 09.25.150.

claim or defense; (3) the adequacy of the remedy otherwise available; (4) the relevancy of the source; (5) the possibility of establishing by other means that which the source is offering to prove.[62]

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[62]New Mexico, Statutes Annotated, (1970) sec. 20-1-12.1B

CHAPTER III

CASE STUDIES OF JOURNALISTIC PRIVILEGE

The reported cases of newspaper and magazine journalists who have refused to testify before judicial or grand jury investigatory bodies span the last one hundred years of American history, from a libel case in 1874[1] to the bombing of a university building in 1971.[2] Certain changes can be noted in the study of the thirty-eight cases during this period: (1) the reasons for journalists refusing to testify have become more complex with an increase in refusals on constitutional grounds; (2) judicial decisions have changed from disfavor to favor toward the journalistic privilege; (3) subpoenas to journalists with confidential information or sources about underground dissident groups have increased since 1968;

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

[2] State v. Knops, 49 Wis. 2d 647 (1971).

(4) resistance by journalists to subpoenas has increased since 1968.[3]

Other characteristics in the one hundred year span of case studies have remained fairly constant: (1) the frequency of refusals to testify in libel suits against news companies or against individual journalists; (2) the frequency of refusals to testify in cases concerning the improper conduct of public officials or public institutions; (3) the frequency of refusals to testify before grand jury investigations.

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[3]Although thirty-nine cases of journalists refusing to testify are reviewed in this chapter, it should be pointed out that these are only a part of a number of cases in which journalists have been called to testify over this period of one hundred years.

"In actuality, legislators, prosecutors, and civil litigants have tried to compel newsmen to divulge sources in a substantial number of cases . . . . But dozens of cases involving contempt proceedings were not appealed and are therefore unreported. In addition, there are numerous times when newsmen were threatened with contempt proceedings but no such action was carried through by the moving party, and there are other situations when newsmen actually have talked in response to the pressure of contempt proceedings." James A. Guest and Alan L. Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources," Northwestern University Law Review, LXIV (1969), 44.

The thirty-nine cases discussed here are limited to newspapermen and to magazine writers, excluding television and radio employees. Another limiting factor is the inclusion of only those cases in which a journalist refused to testify before a court or grand jury or in the taking of a deposition, which excludes all legislative and administrative subpoenas.

Increase in Journalistic Resistance

In examining the cases over this period one of the most obvious findings is the increase in the number of journalists who refuse to cooperate with grand juries and judicial bodies. Within the first 50 years, only nine cases of journalists refusing to testify were recorded. Whereas, in the next 35 years, from 1936 to 1971, 30 cases were reported, half of these occurring in the three years from 1968 to 1971.

Legal scholars and journalists alike have given reasons for this increase in resistance among journalists.

Don Reuben, legal counsel to the Chicago Tribune attributes the increase in refusals to testify to the increase in the issuance of subpoenas to journalists. Reuben believes the use of subpoenas began to accelerate with the Sheppard v. Maxwell decision in 1966 which made pre-trial publicity an issue relevant to whether or not a defendant received a fair trial.

> It therefore became relevant from the defendant's side to look at what had been printed . . . . So we started shortly after . . . receiving subpoenas asking for files--all news stories, pictures, editorials . . .[4]

Statistics compiled by the New York Times lend support to Reuben's contention that subpoenas issued to journalists have, in fact, increased. Reporters on the

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[4]Robert Brown, "Shop Talk At Thirty," Editor and Publisher, May 2, 1970, p. 52.

New York Times received a total of only five subpoenas from 1964 to 1967, three were received in 1968, six in 1969, and twelve in 1970. The National Broadcasting Company network and the Columbia Broadcasting Company network and their wholly owned afilliates were served with more than 123 subpoenas in the period from 1969 to July 1971.[5]

Both Reuben and New York Times' reporter Max Frankel maintain that the United States Justice Department first began its practice of subpoenaing journalists during the civil rights controversy in the South in the early 1960's. The Justice Department usually wanted data on "Klan-type elements" that the reporters had observed. Because the reporters had little sympathy with the Ku Klux Klan suspects, the information was given to Justice Department officials "with or without subpoenas, but always in a casual, amiable spirit."[6] One government official recently accused journalists of offering cooperation when it suited them in civil rights cases but resisting it now out of

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[5]U.S., Congress, Senate, Committee on the Judiciary, Free Press Hearings, before a subcommittee of the Committee on the Judiciary, Senate, on S. 16658, 92nd Cong., 1st sess., 1971, p. 1.

[6]Max Frankel, "Mitchell and Press Problems," New York Times, Feb. 6, 1970, p. 40.

partial sympathy for the Black Panthers in their contest with the police.[7]

The National Democratic Convention in Chicago in 1968 chronicled a turning point in the serving of subpoenas upon news organizations, according to Reuben and Vince Blasi, associate professor of law at the University of Michigan and director of the Field Foundation on the study of press subpoenas.[8]

> By 1968 . . . there wasn't a newspaper or a television station in Chicago that wasn't visited by many people and on very short notice to "screen" the files . . . F.B.I., the local Justice Department attorneys, the Washington Justice Department attorneys, and everybody else who had an interest in the convention disorder.[9]

Although Blasi credits this increased use of the subpoena as a prime factor in reducing the cooperation between journalists and law enforcement officials, he cites five other reasons for the upsurge in refusals to testify by journalists since 1968: (1) most newsmen are disillusioned with the process of government as a result of the Vietnam war, the collapse of civil rights, and poverty efforts,

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[7] Ibid.

[8] Vince Blasi, as director of the Field Foundation study, funded by a $27,000 grant, personally interviewed 47 reporters and editors in New York City, Washington, D.C., Chicago, Detroit, Los Angeles, San Francisco, and Denver in 1971, as well as conducting an extensive mail survey of over 1,000 newsmen.

[9] Brown, "Shop Talk," p. 52.

and various government attempts to suppress dissent; (2) newsmen feel indignant at the way they have been manipulated since the Kennedy administration by professional press secretaries; (3) the special hostility that has grown up between the Nixon administration and the press has spread a spirit of non-cooperation even to local government levels; (4) the beatings that newsmen received at the 1968 Democratic Convention in Chicago have left a "legacy of hate"; (5) the technique used in several recent cases whereby police agents pose as reporters to gain confidential information has horrified the press.[10]

One reporter attributed the increase in subpoenas to

> Pure politics. When I do a story about "criminal activity"--based on interviews with the "criminals"

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[10]Vince Blasi, "The Newsman's Privilege: An Empirical Study," University of Michigan Law Review, LXX (December, 1971) 254-255.

Regarding police agents posing as reporters, there have been fourteen verified reported cases including: U.S. agents in Saigon in 1969 infiltrating the press corps; Army intelligence agents posing as television cameramen during the presidential inauguration activities in Washington in January, 1969; in Albuquerque, N.M., a city policeman posing as an Associated Press photographer at the University of New Mexico campus during demonstrations in the spring of 1970; a Detroit policeman posing as a news photographer to observe a General Motors stockholders' meeting in May 1970; and a member of the Chicago police department's intelligence division discovered in March 1971 posing as a reporter to gain intelligence from black students at a protest rally. Press Freedom Under Pressure, A Twentieth Century Fund Task Report on the Government and the Press (New York: Twentieth Century Fund, November, 1971) pp. 18-19.

> themselves--it embarrasses law enforcement types. So they subpoena me. Invariably my testimony would be insufficient to justify indictments of my sources.[11]

Remarks made by newsmen about reasons for the increase were recorded by Blasi in his study and they ranged from "laziness and inept investigation" on the part of police investigators to "embarrassment and paranoia" to "resentment that a good reporter, in many cases, is a better investigator than many enforcement people."[12]

The attacks on the press of Spiro Agnew, Vice President of the United States and United States Attorney General John N. Mitchell's reputation as a stern prosecutor of left wing radicals have generated a protective attitude on the part of some journalists toward their dissident group sources, according to Max Frankel.[13]

Another reason given for the lack of cooperation is the state of the nation--its deep divisions between "a younger generation which accuses its elders of enshrining materialism . . . and contaminating the atmosphere, between minorities, . . . between rich and poor, the city dweller and the suburbanite, the hawks and the doves."[14]

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[11] Blasi, "The Newsman's Privilege," p. 261.

[12] Ibid., p.

[13] Frankel, "Press Problems," New York Times, Feb. 6, 1970, p. 40.

[14] Press Freedom Under Pressure, p. 3.

> The nation's press reflects these divisions. Its coverage is frequently apocalyptic; dwelling on crime, drugs, violence, corruption, welfare scandals, pollution, financial crisis--and the prolonged war in Indochina. It should come as no surprise that there has been increasing hostility and a widening credibility gap between the government and the press and between the press and the public.[15]

Still another reason given for the increase in journalistic resistance to subpoenas is the belief among some newsmen and news executives that the Nixon Administration is deliberately trying to disrupt the access of newsmen to the Black Panthers, so as to cut off all publicity about this dissident group.[16]

Change in Reasons for Refusing Testimony

Over the one hundred year period, the most often heard reason for refusing to testify has been the First Amendment.[17] Marie Torre, a television columnist for the New York Herald Tribune was the first journalist to claim constitutional protection from testifying[18] as to the name of the Columbia Broadcasting Company executive

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[15] Ibid.

[16] Frankel, "Press Problems," New York Times, Feb. 6, 1970, p. 40.

[17] "Privilege of Newspaper or Magazine Persons Connected Therewith Not to Disclose Communications To or Information Acquired By Such Person," Annotated American Law Reports, VII (1966), 591.

[18] Ibid.

who had told her the following information about movie star Judy Garland:

> She doesn't want to work. She won't make up her mind about anything. She has an inferiority complex and doesn't "want to work because something is bothering her," which is that "she is terribly fat."[19]

Judy Garland, suing C.B.S. for libel for the statement printed in Miss Torre's column, attributed to an unnamed C.B.S. executive, asked for the executive's name in a deposition of Miss Torre. She refused and gave as her defense the First Amendment.

> . . . to disclose confidential sources . . . would encroach upon the freedom of the press guaranteed by the First Amendment, because it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish pro tanto the flow of news to the public.[20]

Since Miss Torre stated her defense in 1958, ten other cases have recorded journalists refusing to testify on the grounds that it would violate the freedom of the press under the First Amendment.

In the first three recorded cases in the nineteenth century, the reasons for not testifying were simply stated. In People ex rel Phelps v. Fancher, W. E. G. Shanks, editor of the New York Tribune, refused to give the name of the author of an allegedly libelous article because of an

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[19]Brief for Appellant, Garland v. Torre, 259 F. 2d 545, cert. denied, 358 U.S. 910 (1958).

[20]Ibid.

office regulation forbidding it. In the other two cases in the 1800's People v. Durrant and Pledger v. State, the newsmen involved refused to testify because they believed the information was privileged. They gave no reason why the privilege should be accorded to them.[21]

However, in 1911, Thomas Hamilton was the first journalist to explain why the information given to a journalist was privileged. He refused to reveal information before the Richmond County Police Commission because: "It would ruin my business. It would cause me to lose my position as a newspaper reporter for the Augusta Herald, and would prevent me from ever engaging in the occupation of newspaper reporting again."[22] This same defense of loss of business was used by Reubin Clein, editor of Miami Life in 1950, when he was asked to disclose the source of his articles on gambling before a Dade County Grand Jury:

> If I was to reveal the source of information I may as well go out of business. That has been moot question for years, as to whether a newspaperman when he does not do anything wrong, don't [sic] obstruct justice, has been generally granted a privilege . . .[23]

The defense used by journalists in four cases, that the evidence is unnecessary to the investigation at hand,

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[21]People v. Durrant, 116 Cal. 179 (1897) and Pledger v. State, 77 Ga. 242 (1886).

[22]Hamilton v. Plunkett, 70 S.E. 781 (1911).

[23]Clein v. State, 52 So. 2d 117 (1950).

was first used by Julius Grunow, reporter for the Jersey (N.J.) Journal in 1913. Grunow maintained before a Hudson County grand jury that there was no proceeding pending which made his testimony "relevant and material."[24]

The first journalist to plead the Fifth Amendment was George Burdick, city editor of the New York Herald Tribune in 1915. He had published information on employee dishonesty and internal corruption at the customs house in New York City. He refused to give the source of his information before a federal grand jury and was fined $500 for contempt. He refused to reveal the source on three following occasions. Finally, the case aroused such public concern that Woodrow Wilson, United States President, granted Burdick a pardon if he would testify. Burdick refused to accept the pardon and was released after the United States Supreme Court ruled that the acceptance of a pardon was voluntary.[25] Paul Pappas, cameraman and reporter for WTEV-TV in New Bedford, Massachusetts, is the only other journalist reported to have pleaded the Fifth Amendment as grounds for not testifying.[26]

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[24] In re Grunow, 84 N.J.L. 235 (1913).

[25] Burdick v. United States, 236 U.S. 79 (1915).

[26] In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

Three journalists who used the common law as a basis for not testifying were W. Wayne, city editor of the Honolulu Advertiser, in 1914; Martin Mooney, reporter for the New York Herald Tribune, in 1935; and Reubin Clein, editor of Miami Life in 1950. Wayne refused to name the person who prematurely released the verdict of a grand jury to him because "same . . . as the reason for any gentleman of the jury against giving his private business affairs publicity . . . it is matter of honor, aside from the newspaper standpoint."[27] Clein based his refusal on an "unwritten law." "Newspapermen have more or less taken it for granted that they would be accorded this courtesy," Clein said.[28] Mooney urged the court to recognize the reporter's confidential communications as being like those communications between attorney and client, and certain others recognized under common law. All three journalists were adjudged guilty of contempt; the journalist's privilege has never been recognized at common law.[29]

W. Wayne was the first journalist to describe the drying up of sources phenomenon as a result of forced disclosure of confidential sources. Used in four

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[27] In re Wayne, 4 Hawaii 475 (U.S.D.C. 1914).

[28] Clein v. State, 52 So. 2d 117 (1950).

[29] People ex rel Mooney v. Sheriff of New York County, 269 N.Y. 291 (1936).

subsequent cases, Wayne first described it in 1914 as "our source of news that we rely on to enable us to get out a newspaper and if we break confidence with [him] . . . [we] would lose all our sources and would have no newspaper."[30] Fifty-six years later, in the case of Earl Caldwell, New York Times reporter, the same defense was used:

> If . . . [he] disclose[d] Black Panther confidences . . . they would refuse to speak to him . . . and the news media would thereby be vitally hampered in their ability to cover the views and activities of militants.[31]

Table 1. Reasons for refusals to testify by journalists.[32]

Reason	Times Used
First Amendment protection	11
Statutory protection	10
Sources are privileged, confidential, a business secret	5
Evidence unnecessary or irrelevant to case	5
Sources would dry up	4
Ethical reasons	3
Common law protection	3
Loss of business would result	2
Fifth Amendment protection	2
Societal benefit of free flow of news	2
Fourth Amendment protection	1
Office regulation would forbid it	1
Information gained illegally by electronic surveillance	1

[30] In re Wayne, 4 Hawaii 475 (U.S.D.C. 1914).

[31] Brief of Appellant, Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970).

[32] In some of the cases, the journalists gave more than one reason for refusing to testify.

Types of Cases in Which Journalists Refused to Testify

The body before which journalists have most often refused to testify is the grand jury. Nearly one-third of the cases reviewed in Table 1 occurred at county or federal grand jury investigations on subjects ranging from customs fraud[33] to marijuana smoking.[34] These cases of refusing to testify before grand juries are evenly spaced throughout the one hundred year period, the first in 1874, the second in 1913, and the latest in 1971. Although the issuance of grand jury subpoenas to journalists has not changed, the subject of the investigations has altered over the one hundred years. The seven grand jury investigations before 1968 dealt with misconduct of public officials, customs fraud, violation of gambling laws and libel; while the five grand jury investigations after 1968 dealt with violation of the narcotics laws and the activities of dissident political groups.

> . . . the nature of confidence and the relationship that inspires it have been undergoing an almost organic change . . . . The traditional confidential source, the person who knows of some instance of public or private wrongdoing . . . is still a factor. Increasingly, however, individuals and groups who are estranged from

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[33] Burdick v. United States, 236 U.S. 79 (1915).

[34] State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

> American society and who are often militantly hostile to it are important factors in news gathering because of their involvement in political and social development.[35]

Fred Graham, United States Supreme Court reporter for the New York Times explains this change in the subject of subpoenas as a "move against the radicals" by the Nixon Administration and local prosecutors. Time magazine credits the increase in grand jury subpoenas about dissident groups to the increased activities of these groups.

> The subpoena splurge began after the riotous 1968 Democratic Convention . . . and was repeated after the Weathermen staged their window-breaking "wargasm" in Chicago in October, 1969. Last December's gun battle between police and Black Panthers set off another round. . . .[36]

Ten of the cases in which journalists refused to testify involved libel suits. Among the parties suing for libel were an Alabama governor,[37] a movie star,[38] a chief justice of the Colorado Supreme Court,[39] a San Francisco

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[35]Brief of Amici Curiae of N.B.C., A.B.C. and Radio-Television News Directors Association, In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

[36]"Reporting for Court Duty," Time, Feb. 9, 1970, p. 52.

[37]Ex parte Sparrow, 14 F.R.D. 351 (1953).

[38]Garland v. Torre, 259 F. 2d 545, cert. denied, 358 U.S. 910 (1958).

[39]Murphy v. Colorado, (unreported) cert. denied, 365 U.S. 843 (1960).

Giant football player,[40] and a San Francisco mayor.[41] The earliest case in which a journalist refused to reveal the writer of an allegedly libelous article was that of A. W. Burnett, publisher of the Atlanta Defiance whose paper published the following:

> After the Honorable H. A. Rucker lost his position in the revenue business for no other reason than that he was a negro, he commenced the business of a confectioner . . . this young man was forced to sell out at a loss. Now let colored men, when they want to rent houses go to . . . somebody else, and leave this old skunk to stink himself to death. Don't forget that it is Adair, the real estate agent.[42]

Burnett "refused stubbornly . . . to testify at all" and was convicted of contempt for not revealing the source of the alleged libel of G. W. Adair.[43]

Nearly a third of the cases reviewed in Table 1 were criminal trials in which journalists refused to testify, four of them involving murder. In two of the murder trials journalists were asked information that had bearing on the guilt or innocence of the accused. In People v. Durrant in 1897, Paul Durrant, the accused murderer of a young girl named Blanche Lamont, had allegedly made statements to a woman reporter, Carrie Cunningham

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[40] In re Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

[41] Alioto v. Cowles Communications, Inc., (unreported) (C.A. 52150 N.D. Calif., Dec. 4, 1969).

[42] Pledger v. State, 77 Ga. 242 (1886).

[43] Ibid.

about where he had seen the victim immediately before her death. Durrant's defense counsel objected to the question addressed to the reporter and said the communication, if, in fact, made, was privileged.[44] The second case concerned the murder trial of Charles Manson, Leslie Vanhouten, Patricia Krenwinkle and Susan Anthony in 1971 in which William Farr, then a reporter for the Los Angeles Herald Examiner, was asked the source of his report that Manson's gang had planned to kill other Hollywood celebrities.[45]

The subjects of litigation and grand jury investigation over the one hundred year period is worthy of notice. A third of the thirty-nine cases reviewed in Table 1 involved the question of misconduct of public officials. A fourth of the cases concerned the activities of dissident or underground groups, and four involved "victimless" crimes. "Victimless" crimes are defined as those crimes in which there is "free and voluntary participation by the actors in the conduct which is criminal, which conduct does not cause serious harm to any unwilling and nonparticipating victims."[46]

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[44] People v. Durrant, 116 Cal. 179 (1897).

[45] In re Farr, Crim. No. A253-156 (Cal. Super. Ct., Los Angeles County, 1971).

[46] Brief of Amicus Curiae of Sigma Delta Chi, State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

The fact that a major theme running throughout these cases is misconduct of public officials lends credence to the claims of several journalists and journalistic publications that maintain that subpoenaing newsmen threatens the "watch dog" function of the press to uncover dishonesty and corruption in public office.

> Honest officials, and occasionally dishonest persons who can furnish the necessary information, cannot afford to jeopardize their freedom or their jobs by permitting their names to be used. No community can afford to shut off these channels of information.[47]

The argument states that expose stories, such as those dealing with graft in government, would not be written unless the tipsters were assured that their identity would not be revealed.

> . . . to force reporters to reveal news sources is to slip a tranquilizer to an alert watchdog--for that's what the press is: a watchdog protecting the public welfare.[48]

The journalist's privilege has been defended on the grounds that channels of communication with dissident groups must remain open. In the nine cases involving dissident groups in Table 1, the groups specifically concerned were the Black Panthers; Students for a Democratic Society; the Weathermen; anti-war GI's; negroes in

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[47]Brief for Appellant, State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

[48]Ibid.

Atlanta, Georgia, in 1886; marijuana users; marijuana and hashish sellers; and those persons who claimed responsibility for bombing a building at the University of Wisconsin, killing one person in the explosion. Some proponents of the journalist's privilege argue that newsmen should not be subpoenaed to reveal facts about these dissident groups, because any disclosure of confidence will cut off the communication to the public.

> The fragile nature . . . is particularly acute where the sources of news are political militants constantly preoccupied with government surveillance and repression. Just last week, F.B.I. Director J. Edgar Hoover branded the Black Panther Party the country's "most dangerous and violence prone of all extremist groups."[49]

These proponents contend that the First Amendment protects the expression of unpopular, unconventional, and heretical beliefs and opinions. Thus, they argue that the subpoena served upon Paul Pappas to testify as to what went on in the Black Panther Party headquarters in New Bedford, Massachusetts, during the night of July 19, 1969, "violates the rights of groups to associate together and to express their views via the media to the public." These proponents quote United States Supreme Court Justice Hugo Black: "Liberty, to be secure for any, must be secure

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[49]Brief of Amicus Curiae of the American Civil Liberties Union of Northern California and Southern California and a group of reporters, writers, and editors, Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970) cert. granted, 402 U.S. 942 (1971).

for all--even the most miserable merchants of hated and unpopular ideas."[50] The proponents argue that those who advocate popular views have "little to fear from the disclosure laws" whereas the "rebels and heretics" must bear the "full brunt of disclosure and the concomitant community disapproval."[51] In his opening statement before the Constitutional Rights Subcommittee hearings on freedom of the press, Sam J. Ervin, Jr., United States Senator, said

> Our historic commitment to freedom of the press means that we must tolerate absurd, misleading, and vindictive reports which sometimes appear in newspapers and magazines and on radio and television. It means that these thoughts and ideas which we hate and despise will appear in print and be broadcast across the land.[52]

Mark Knops, editor of the underground newspaper Kaleidoscope published in Madison, Wisconsin, is one of the foremost contenders of this argument. After printing in the underground paper an anonymous letter, written by persons who claimed responsibility for bombing the University of Wisconsin Mathematics Research Center on August 18, 1970, Knops was asked to testify before a Walworth County

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[50] Braden v. United States, 365 U.S. 431 (1960).

[51] Zechariah Chafee, Free Speech in the United States, (1941) as cited by Hugo Black, "The Bill of Rights," New York University Law Review, XXXV, (1960), 880.

[52] U.S., Congress, Senate, Committee on the Judiciary, Free Press Hearings, before a subcommittee of the Committee on the Judiciary, Senate, Vol. 117, No. 147, 92nd Cong., 1st sess., 1971, p. 1.

Grand Jury. He refused to reveal the names of the anonymous letter writers basing his appeal to the Wisconsin Supreme Court on the argument that disclosure would actually result in a dimunition of the free flow of news that the public is entitled to read. He specifically contended that if his sources could not be kept confidential, the public would be unable to read the radicals' point of view, i.e., how property destruction was a necessary step en route to a higher goal--the restructuring of society.[53]

Proponents of this argument also refer to the importance of anonymity throughout American history arguing that "persecuted groups and sects from time to time have been able to criticize oppressive practices and laws either anonymously or not at all."[54]

Other proponents of the privilege for journalists rest their arguments on the last category of cases reviewed, the four involving "victimless crimes." The four cases dealing with victimless crimes in Table 1 specifically concern drug use and gambling.

> . . .press subpoenas have been usually issued in two situations: When radical groups are being investigated and reporters are known to have some knowledge of the radical affairs; and when reporters have published articles publicizing the existence of such consensual--or victimless crimes as marijuana use, prostitution or

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[53] State v. Knops, 40 Wis. 2d 647 (1971).

[54] Talley v. California, 362 U.S. 60 (1960).

> gambling. In dealing with [these] crimes, prosecutors may be tempted to use press subpoenas either because evidence is difficult to obtain elsewhere or because they are chronically short of investigative and prosecutorial resources.[55]

The reasoning behind this argument is that "victimless" crimes and the laws against them, they argue, must be presented in a public forum of discussion, therefore publicity is necessary. It is argued that because laws against these crimes legislate against individual freedoms and moral behavior, the laws should be subjected to rigid public scrutiny.

The major case that rested on this defense was that of Annette Buchanan, editor of the University of Oregon Emerald newspaper in 1968. She refused to name the seven marijuana users that she had interviewed in a published article. Miss Buchanan included the other following crimes in the category of "victimless": gambling, performing or submitting to an abortion, sale or use of contraceptives, frequenting a "bawdy house," consumption or use of alcoholic beverages, certain forms of sexual relations between spouses, homosexual acts between adults, and the operation of businesses on Sunday. Miss Buchanan contended in her brief that legislation against these crimes needed to be discussed, and that the effect of subpoenas on journalists who write about these subjects is to stifle any

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[55] Press Freedom Under Pressure, p. 10.

public discussion. Since Miss Buchanan was found in contempt of court in 1968, legislation has changed against some of the "victimless" crimes that she cited in her brief, specifically, laws have become more liberal in certain states regarding marijuana possession, prostitution, abortion, and consumption of alcoholic beverages.

Table 2. Chronological history of reported legal cases in the United States involving journalists' refusals to testify before courts or grand juries.

Name	Position	Place of Refusal	Year	Reason for Refusal
W. F. G. Shanks	Editor, New York Tribune	Kings County, N.Y. Grand Jury	1874	Office regulation forbidding editor to disclose names of writers.
A. W. Burnett	Publisher, Atlanta (Ga.) Defiance	Atlanta, Ga. Court	1886	No reason given.
Carrie Cunningham	Reporter, San Francisco Chronicle	San Francisco, Calif. Court (Murder trial)	1897	Communications with reporter are privileged.
Thomas Hamilton	Reporter, Augusta (Ga.) Herald	Richmond County Police Comm.	1911	Would result in loss of business, loss of respect in community, subjection to ridicule and contempt.
Julius Grunow	Reporter, Jersey (N.J.) Journal	Hudson County (N.J.) Grand Jury	1913	(1) a journalist's sources are confidential, (2) his testimony would be irrelevant and immaterial.

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

[b] Pledger v. State, 77 Ga. 242 (1886).

[c] People v. Durrant, 116 Ca. 179 (1897).

[d] Hamilton v. Plunkett, 70 S.E. 781 (1911).

[e] In re Grunow, 84 N.J.L. 235 (1913).

Information And/or Source Involved	Sentence/Outcome
Alleged libel of Alexander McCue in "Brooklyn Ring's Method."	Convicted of contempt, placed in jail until "he may answer the questions propounded to him."[a]
Alleged libel of G. W. Adair, realtor, calling him "an old skunk" who can go "stink himself to death."	Convicted of contempt, $50 fine, 10 days in prison.[b]
If the defendant had told Miss Cunningham that he saw the victim at a certain place.	Miss Cunningham testified.[c]
Source of information about a murder, source believed to be member of police department	Convicted of contempt, $50 fine, prison sentence until fine paid, not to exceed five days.[d]
Source of information that a village trustee was guilty of misconduct in office	Convicted of contempt, $25 fine.[e]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
W. Wayne	City editor, Honolulu Times	Honolulu Court	1914	(1) business secrets should be kept private, matter of honor; (2) his sources would dry up.
George Burdick	City editor, New York Tribune	U.S. Federal Grand Jury, N.Y., N.Y.	1915	He pleaded Fifth Amendment, testimony might tend to incriminate him.
Joslyn	Owner, Labor News	Colorado Springs, Colo. Court	1919	Source of information is his private business.
Martin Mooney	Reporter, New York American	New York County Grand Jury	1936	Reporters should have right to refuse to testify under common law.
Donavan	Editor, Hudson County, N.J. newspaper	New Jersey Supreme Court	1943	N.J. State privilege statute.

[f] In re Wayne, 4 Hawaii 475 (U.S.D.C. 1914).

[g] Burdick v. United States, 236 U.S. 79 (1915).

[h] Joslyn v. People, 67 Colo. 297 (1919).

[i] People ex rel Mooney v. Sheriff of New York County, 269 N.Y. 291 (1936).

[j] State v. Donovan, 129 N.J.L. 478 (1943).

Information And/or Sources Involved	Sentence/Outcome
Source of leak who told a grand jury's finding before it was officially announced.	Convicted of contempt, but he purged himself by giving the desired information and producing source before grand jury.[f]
Which customs employee had leaked information that there was fraud in customs department.	U.S. President Woodrow Wilson granted him a pardon if he would testify. He refused, and U.S. Supreme Court upheld it. Source never revealed.[g]
Source of accusation that a grand jury investigating City Hall was a "farce."	Convicted of contempt, sentence unrecorded.[h]
Source of information on alleged violation of gambling and lottery laws.	Convicted of contempt, sentence unrecorded.[i]
The identity of the person who delivered certain press releases that were critical of public officials under indictment, in Bayonne, N.J.	Convicted of contempt, despite N.J. privilege statute.[j]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Reubin Clein	Editor, Miami (Fla.) Life	Dade County Grand Jury	1950	Would result in loss of business, claimed that journalist's privilege is an "unwritten law."
Leonard Lyons	Syndicated columnist	Habeas Corpus proceedings of Ethel Rosenberg, convicted of espionage	1951	Communications made to a journlaist are privileged.
Hugh Sparrow	Free lance writer	Alabama Court	1953	Alabama State privilege statute.
Jack Howard	Reporter, S.F. Chronicle	California Court	1955	California State privilege statute.
Allen W. Smith	Managing editor Passaic Herald (N.J.) News	N.J. Court	1956	New Jersey State privilege statute.

[k] Clein v. State, 52 So. 2d 117 (1950).

[l] Rosenberg v. Carroll, In Re Lyons, 99 F. Supp. 629 (1951).

[m] Ex parte Sparrow, 14 R.F.D. 351 (1953).

[n] In re Howard, 136 Calif. App. 2d 816 (1955).

[o] Brogan v. Passaic Daily News, 22 N.J. 139 (1956).

Information And/or Source Involved	Sentence/Outcome
Source of information on illegal gambling and the failure of sheriff, D.A. to prosecute.	Convicted of contempt, 30 days in prison.[k]
Source of information that the court had the right to alter Miss Rosenberg's death sentence within 60 days if she would "talk."	Not compelled to answer. Source of information ruled irrelevant to proceedings.[l]
Source of information of alleged libel of Alabama governor concerning bad administration of state prison system, parole board.	Not compelled to answer. Statute upheld.[m]
If he had had a conversation with a labor official in question.	Not compelled to answer. Statute upheld.[m]
Source of alleged libelous article about misconduct of city official.	Convicted of contempt, sentence unrecorded.[o]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Name not mentioned in case.	Undisclosed reporter, Boston Herald Traveler	Massachusetts Court	1957	No reason given.
Marie Torre	Television columnist, New York Herald Tribune	Deposition taken before New York court trial.	1958	(1) First Amendment protection, (2) societal benefit in preserving free press, (3) Federal Rules of Criminal Procedure No. 30.
Vi Murphy	Reporter, Colo. Springs Gazette Telegraph	Colorado court	1960	First Amendment protection.
Alan Goodfader	Reporter, Honolulu Advertiser	Deposition taken before a civil suit.	1961	(1) First Amendment protection, (2) court must show a more compelling societal need. (3) case was exceptional because it concerned private litigation over govt.

[p] Brewster v. Boston Herald Traveler, 188 F. Supp. 565 (D. Mass. 1957).

[q] Garland v. Torre, 259 F. 2d 545, cert. denied, 358 U.S. 910 (1958).

[r] Murphy v. Colorado, (unreported) cert. denied, 365 U.S. 843 (1960).

[s] In re Goodfader's Appeal, 45 Hawaii 317 (1961).

Information And/Or Source Involved	Sentence/Outcome
To give name of writer of a memo and to produce memo itself which was basis of alleged libel.	Convicted of contempt, because there was no Massachusetts state privilege law.[p]
Source of comment that Judy Garland had a tendency to gain weight and was difficult to work with, allegedly libelous statement.	Convicted of contempt. 10 days in prison.[q]
Source of information of a bribery charge involving disbarment of attorney who had filed a petition with defamatory remarks about a Colorado Supreme Court Chief Justice, given copy to reporter before court.	Convicted of contempt. 30 days in prison.[r]
Source of information that the city civil service personnel director was going to be fired on a certain night.	Convicted of contempt. Sentence unrecorded.[s]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Robert L. Taylor	President, Philadelphia Bulletin	Philadelphia County Grand Jury	1963	(1) First Amendment protection, (2) Penn. State privilege statute.
Timothy Cohane	Writer, Look magazine	Deposition taken before U.S. District Court, S.F.		California State privilege statute.
Jack Baker, Michael B. Smith.	Arkansas Gazette, Pine Bluff (Ark.) Commercial	Arkansas County Grand Jury	1967	Arkansas State privilege statute.
Annette Buchanan	Editor, University of Oregon Emerald	Lane County Grand Jury	1968	(1) First Amendment protection, (2) that a journalist's privilege is "professionally desirable and socially beneficial."
Lance Brisson	Writer, Look magazine	California Court	1969	(1) Urged compliance with earlier ruling of Federal District judge who gave him right to refuse; (2) First Amendment protection.

[t] In re Taylor, 193 A. 2d 181 (1963).

[u] In re Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

[v] New York Times, March 24, 1967, p. 8.

[w] State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

[x] Alioto v. Cowles Communications, Inc. (unreported) (C.A. 52150 N.D. Calif. Dec. 4, 1969).

Information And/Or Source Involved	Sentence/Outcome
Documents and records of all conversations with a former Philadelphia Democratic Ward leader.	Not compelled to answer or disclose documents. Statute upheld.
Names of certain San Francisco Giants officials who had given allegedly libelous information.	Convicted of contempt. Sentence unrecorded.[u]
Which state legislators had taken bribes to pass a certain gambling bill.	Convicted of contempt. Statute does not apply because material hadn't been published.[v]
Names of seven people who admitted in an interview to smoking marijuana.	Convicted of contempt. $300 fine.[w]
Source of information linking Joseph Alioto, mayor of S.F. with Mafia, alleged libel.	Not compelled to answer. First Amendment protection upheld.[x]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Donald Giese	Reporter, St. Paul Dispatch and Pioneer Press.	Minnesota Court (Murder trial)	1969	(1) Drying up of sources, (2) would violate journalistic ethics, (3) deprive him of property without due process of law.
Jerry Sullivan	Reporter, Hudson (N.J.) Dispatch	Contempt trial of striking high school teachers	1970	New Jersey State privilege statute.
Robert Lindsay	Reporter, New York Times	Contempt trial of Professional Air Traffic Controllers Association.	1970	First Amendment protection.
Paul Branzburg	Reporter, Louisville Courier-Journal	Jefferson County	1970	Kentucky State privilege statute.

[y]"SDX Supports Reporter Sentences for Contempt," Editor and Publisher, May 10, 1969, p. 68.

[z]"Reporter's Immunity Upheld in New Jersey," Editor and Publisher, March 21, 1970, p. 30.

[aa]Air Transport Association, et al and United States v. Professional Air Traffic Controllers Organization, et al, U.S.D.C., E.D.N.Y., Nos. 70-C-400-410, transcript of April 6 and April 7, 1970.

[bb]Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

Information And/Or Source Involved	Sentence/Outcome
Source of leaks to press during a 1963 murder trial that was allegedly prejudicial to jury.	Not compelled to answer.[y]
Attitude of teachers during strike to find out if they were guilty of violating a court ordered injunction.	Not compelled to answer. Statute upheld.[z]
Notes on conversations with air traffic controllers, who claimed to be sick, to find out if they were in contempt.	Not compelled to answer or produce notes. First Amendment protection upheld.[aa]
Identification of two persons who were making hashish out of marijuana.	Convicted of contempt. Appeal accepted by U.S. Supreme Court.[bb]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Earl Caldwell	Reporter, New York Times	U.S. Grand Jury	1970	(1) First Amendment protection, (2) government must show compelling need, (3) subpoena based on information gained by electronic surveillance.
Reporters names not reported	Chicago Tribune, Chicago Sun-Times, Chicago Daily News, Chicago Today	Chicago, Ill. Court	1970	First Amendment protection.
Donald Janson	Reporter, New York Times	Military Court, Columbia, S.C.	1970	Alternate sources could be subpoenaed for same material.
John Kifner	Reporter, New York Times	Federal Court	1970	Alternate sources could be subpoenaed for same material.

[cc] Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970) cert. granted, 402 U.S. 942 (1971).

[dd] People v. Dohrn, (Cir. Ct., Cook Cty., Ill. No. 69-3808) (1970).

[ee] Brief of Amicus Curiae of New York Times, Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

[ff] Ibid.

Information And/or Source Involved	Sentence/Outcome
Verification of article written on the Black Panther Party of S.F.	Not compelled to answer. First Amendment protection upheld. Appeal accepted by U.S. Supreme Court.[cc]
Unpublished and published materials relating to events which gave rise to criminal charges at Democratic National Convention in Chicago in 1968.	Not compelled to answer or produce material. First Amendment protection upheld.[dd]
Verification of article quoting statements made about an anti-war GI coffeehouse.	Not compelled to answer.[ee]
Verification of article on destruction of draft records in Chicago Selective Service bureau.	Not compelled to answer.[ff]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Walter Waggoner	Reporter, New York Times	New Jersey Court	1970	(1) First Amendment protection, (2) New Jersey State privilege statute.
Mark Knops	Editor, Kaleidoscope Madison, Wisc.	Walworth County Grand Jury	1971	(1) First Amendment protection, (2) drying up of sources.
William Farr	Reporter, Los Angeles Herald Examiner	Los Angeles Court (Murder trial)	1971	California State privilege statute.
Jared Stout	Reporter, Newhouse News Service	Federal Court (A.C.L.U. suit against U.S. Army)	1971	No reason recorded.

[gg]"Two on Times Called in Panther Case," New York Times, June 20, 1970, p. 17.

[hh]State v. Knops, 49 Wis. 2d 647 (1971).

[ii]In re Farr, Crim. No. A253-156 (Cal. Super. Ct., L.A. Cty., 1971).

[jj]"Court Abides by Reporter Shield Rule," Editor and Publisher, Jan. 9, 1971, p. 88.

Information And/or Source Involved	Sentence/Outcome
Names of police officers he spoke to about machine gun attack on police station by three Black Panthers.	Not compelled to answer.[gg]
Source of anonymous letter from persons who admitted bombing University of Wisconsin building, killing one person.	Convicted of contempt. Five months, 7 days in prison. Constitutional protection upheld but ruled it was in conflict with public's overriding need to know.[hh]
Source of report that Charles Manson's group planned to kill other Hollywood celebrities. Article written during Manson trial.	Convicted of 17 counts of contempt.[ii]
How he determined that U.S. Army 113th Military Intelligence Group was keeping undercover surveillance of Chicago civilians.	Not compelled to answer.[jj]

Table 2.--Continued

Name	Position	Place of Refusal	Year	Reason for Refusal
Arthur E. Rowse	Syndicated columnist	Federal Trade Commission hearing against Hearst Corp.	1971	(1) First Amendment protection, (2) drying up of news sources.
Paul Pappas[11]	Reporter, cameraman, WTEV-TV, New Bedford, Mass.	Bristol County Grand Jury	1971	(1) First Amendment protection, (2) Fifth Amendment protection, (3) Impairment of livelihood by drying up of sources, (4) Breach of promise.

[kk]"F.T.C. Subpoena of Writer Voided," New York Times, Sept. 28, 1971, p. 36.

[11]Case involved a television journalist, but it is included because it is one of the three cases to be decided by the U.S. Supreme Court.

[mm]In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

Information And/or Source Involved	Sentence/Outcome
Documents and notes used for article on deceptive magazine sales practices of Hearst Corp.	Not compelled to produce material. Constitutional question avoided. Ruled that material unnecessary for instant case.[kk]
What went on in the headquarters of the Committee to Combat Facism on the night of July 30, 1970.	Convicted of contempt. Constitutional protection not recognized. Appeal accepted by U.S. Supreme Court.[mm]

CHAPTER IV

JUDICIAL DECISIONS ON JOURNALIST'S PRIVILEGE

Over the one hundred year span from 1874 to 1971, most courts refused to recognize communications made to a journalist as privileged. Twenty-three of the thirty-eight judicial decisions reviewed in Table 2, Chapter III, are against the journalist's privilege, and one-third of these decisions were handed down in the face of state statutes providing for a journalist's privilege. The major reasons given for refusing to recognize the privilege in the cases were (1) no foundation in common law, state law, or federal law; (2) the strict construction of statutes granting privilege to journalists; (3) the superior public interest in administration of justice; (4) the journalist's evidence deemed necessary and relevant to the litigant's case; (5) the granting of special constitutional rights to journalists found in conflict with the equal protection concepts under the United States Constitution.

Judicial Reasons for Denial of the Privilege

Over this period judges have most often denied journalists privilege because it is unfounded in law. In

People ex rel Phelps v. Fancher in 1874 the Supreme Court of New York said:

> As the law now is and has for ages existed, no court could possibly hold that a witness could legally refuse to give the names of the author of an alleged libel . . . .[1]

This same conclusion, that there is no legal basis, was reached again in 1897, 1931, 1936, 1950, 1957, 1958, 1968, and most recently in 1971. In re Pappas in 1971 the Supreme Judicial Court for the Commonwealth of Massachusetts ruled that there was no basis for a newsman's privilege in common law, in the Massachusetts legislative code, or in the United States Constitution.[2]

Newsmen have been denied the privilege in seven cases because courts maintained a strict construction of state statutes allowing a journalist's privilege. In both In re Cepeda and State v. Donovan, the judicial decisions emphasized the need to interpret state shield laws strictly, because they were "in derogation of the common law." In the former case the United States District Court in San Francisco refused to extend the California journalist's privilege to Timothy Cohane, writer for Look magazine, because the statute specifically applied to persons employed by or connected with newspapers, press associations, wire

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

[2] In re Pappas, 266 N.E. 2d 297, cert. granted, 402 U.S. 942 (1971).

services, radio or television, but not magazines.[3] The Supreme Court of New Jersey in State v. Donovan ruled that the New Jersey statute protected the source of information, but did not protect the means by which the information, in the form of press releases, was conveyed to the paper.[4]

In other cases where state privilege statutes have been strictly construed, courts have ruled that a journalist waives his privilege if he testifies that he received his information from a "reliable source,"[5] that the source of information about material that has not been published is not privileged;[6] that the source of information is privileged, but not the information itself;[7] that reporters are not privileged where verification of published articles is concerned;[8] and that a reporter must remain in the journalistic profession after claiming the privilege, because if he changes his career, he may be recalled and forced to testify as an ordinary citizen.[9]

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[3] In re Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

[4] State v. Donovan, 129 N.J.L. 478 (1943).

[5] Beecroft v. Point Pleasant Printing Company, 82 N.J. Super. 269 (1964).

[6] New York Times, March 24, 1967, p. 8.

[7] Branzburg v. Pound, 461 S.W. 2d (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

[8] "Reporter's Immunity Upheld in New Jersey." Editor and Publisher, March 21, 1970, p. 30.

[9] In re Farr, Crim. No. A253-156 (Cal. Super. Ct., L.A. Cty., 1971).

Of the twenty-three cases decided against the privilege, eight involved libel actions. In four of these libel cases, the journalist involved was protected by state statute, and in the other four, he was not.

The Balancing Test

Lack of foundation in law, strict construction of state statutes, and involvement in libel actions have been found to be major reasons for denial of the journalist's claimed right to refuse testimony. Other judicial considerations, based on a weighing of the journalist's right to silence against the public's right to have "everyman's evidence" have produced decisions that have sometimes favored the journalist and other times gone against him.

The balancing test was first used, in cases where journalist's refused to testify, in 1911. In Hamilton v. Plunkett, the Supreme Court of Georgia addressed itself to a reporter's claim that to testify would ruin his business.

> What he really meant no doubt was that his employer would discharge him if he states the source . . . . Neither can the wishes or even the commands of employers be allowed to outweigh the commands of the law.[10]

In 1914 In re Wayne the court ruled that "a canon of journalistic ethics forbidding disclosure" should yield to the "interests of the public."[11] In 1958 in

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[10] Hamilton v. Plunkett, 70 S.E. 781 (1911).

[11] In re Wayne, 4 Hawaii 475 (U.S.D.C. 1914).

Garland v. Torre, Potter Stewart, Circuit Court Judge of New York County, now a justice of the United States Supreme Court, said that

> what must be determined is whether the interest to be served by compelling the testimony of the witness . . . justified some impairment of his First Amendment freedom . . . . The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in history as does the guarantee of a free press . . . .[12]

The balancing test was used further in 1961, 1963, 1969, and four times in 1970. In four cases the scales tipped in favor of the journalist's right to refuse testimony; in two of them the court placed upon the summoning party, the burden of proving a need for the journalist's testimony. Journalists have been compelled to testify when the right of refusal was weighed against (1) "the interests of justice";[13] (2) "A paramount public interest in the fair administration of justice";[14] (3) "The apprehension and conviction of persons who committed a major criminal offense resulting in the death of an innocent person";[15] (4)"the necessity to maintain the court's

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[12] Garland v. Torre, 259 F. 2d 545, cert. denied, 358 U.S. 910 (1958).

[13] In re Wayne, 4 Hawaii 475 (U.S.D.C. 1914).

[14] Garland v. Torre, 259 F. 2d 545, cert. denied, 358 U.S. 910 (1958).

[15] State v. Knops, 49 Wis. 2d 647 (1971).

fundamental authority to compel the attendance of witnesses and to ask for their testimony."[16]

In re Taylor in 1963 it was decided that "the gathering and the protection of sources of the news" was "of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime of the alleged criminal."[17] Whereas, in 1970, the Kentucky Court of Appeals ruled that the right of a reporter "to remain silent as to the identity of criminals" was a "harm . . . to society."[18]

The other three cases in which the testimonial privilege for journalists outweighed the necessity of evidence occurred in 1969 and 1970. In People v. Dohrn, Louis Garippo, Circuit Court Judge of Cook County ruled that a subpoena could not be issued to a newsman unless there is a probable cause to believe that he has information relevant to the subject of the investigation, that the subpoena is the only way to obtain the evidence, and that there would be a miscarriage of justice if the information sought was not provided.[19] In Caldwell v. United States,

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[16] In re Goodfader's Appeal, 45 Hawaii 317 (1961).

[17] In re Taylor, 193 A. 2d 181 (1963).

[18] Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

[19] People v. Dohrn, (Cir. Ct., Cook County, Ill. No. 69-3808) (1970).

the United States Federal Court of Appeals for the Ninth Circuit required "the sacrifice of First Amendment freedoms . . . only where a compelling need for the particular testimony . . . was demonstrated."[20] And in Alioto v. Cowles Communications Co. the claim of privilege was sustained by the United States District Court of Northern California because it outweighed any "necessity to insist upon an answer to those questions at this time." The court also ruled that there "are other available methods of handling the situation."[21]

The courts who have employed the balancing test to determine if the journalist's privilege should be granted in a particular case have relied upon past cases involving conflicts with constitutional rights. In Barenblatt v. United States, the United States Supreme Court ruled that

> Where the alleged abridgement of First Amendment rights occurs as a by-product of otherwise permissable government action not directed at the regulation of speech, or press, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[22]

Courts deciding on the journalist's privilege also have found precedent in Schneider v. State:

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[20] Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970) cert. granted, 402 U.S. 942 (1971).

[21] Alioto v. Cowles Communications Inc. (unreported) (C.A. 52150 N.D. Calif. Dec. 4, 1969).

[22] Barenblatt v. United States, 360 U.S. 109 (1959).

> Whenever valid claims to protection of freedom of speech or press are asserted which directly clash with other constitutional public or private rights of the people . . . , the courts have the duty to weigh in the balance the conflicting rights and interests and to arrive at a decision which best accommodates the competing interests on the basis of their relative importance to attainment of the many different goals of our governmental system.[23]

Relevancy of Journalist's Testimony to Proceeding

A second judicial consideration, that has been used in seven cases of journalists refusing to testify, is the relevance of the evidence sought to the instant case. In Garland v. Torre, Circuit Court Judge Stewart noted that it was not "a case where the identity of the news source is of doubtful relevance or materiality. The question asked of (Miss Torre) . . . went to the heart of the plantiff's claim."[24] In re Goodfader's Appeal three years later the Supreme Court of Hawaii ruled that the reporter's testimony was "of extreme value"[25] in the case of the plantiff. In Brewster v. Boston Herald Traveler and in In re Cepeda, the evidence of the reporters was deemed necessary to decide the question of malice in a libel action.

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[23] Schneider v. State, 308 U.S. 147 (1939).

[24] Garland v. Torre, 259 F. 2d 545, cert. denied, 358 U.S. 910 (1958).

[25] In re Goodfader's Appeal, 45 Hawaii 317 (1961).

In three cases reporters were not compelled to testify because the evidence sought from them was deemed irrelevant and unnecessary.[26] None of the three reporters were protected by a state statute; the main reason for not forcing a disclosure was on grounds of irrelevancy.

Other Influential Factors in Judicial Decisions

Other peripheral factors that were influential in judicial decisions, but which did not constitute reasons for swinging a decision one way or another, were recognition by the court that (1) disclosure of the journalist's testimony abridges the First Amendment; (2) disclosure can create an atmosphere of self-censorship of the news; (3) that disclosure can cause the newsman's sources to dry up; (4) that the importance of news about dissident groups is affected by a period of societal disorder.

Of the eleven cases in Table 1 in which newsmen claimed that a forced disclosure of information would constitute an abridgement of freedom of the press under the First Amendment, six were recognized by the courts as having this constitutional protection.[27] However, in two

[26] Leonard Lyons, syndicated columnist; Arthur Rowse, syndicated columnist; and Lance Brisson, writer in Look magazine.

[27] Alan Goodfader, Marie Torre, Earl Caldwell, Lance Brisson, Robert Lindsay, and the reporters concerned in People v. Dohrn, (Cir. Ct. Cook County, Ill. No. 69-3808) (1970).

cases, Garland v. Torre and In re Goodfader's Appeal, the courts' recognition did not change its verdict against Marie Torre, columnist for the New York Herald Tribune, and Alan Goodfader, reporter for the Honolulu Advertiser. Although First Amendment protection was claimed in In re Taylor, State v. Buchanan, Branzburg v. Pound, State v. Knops, and In re Pappas, the respective courts refused to accept the journalists' claims. In re Taylor the Supreme Court of Pennsylvania said:

> The language of the United States Constitution is clear and by no stretch of language can it protect or include under "freedom of the press" the non-disclosure of sources of information. It is an often overlooked truism that neither freedom of the press nor freedom of speech is absolute and unlimited.[28]

And in State v. Buchanan the Supreme Court of Oregon gave its argument:

> It has been held that those claiming to be news gatherers have a constitutional right to information which is not accessible to the public generally. . . . It is difficult to rationalize a rule giving reporters special constitutional rights which wouldn't conflict with the equal privilege and protection concepts found in the Constitution.[29]

The possibility that forced disclosure of a journalist's confidential information might lead to a censorship of the news was first presented in a judicial decision in 1915 in Burdick v. United States. Eugene Burdick, city editor of the New York Tribune had claimed

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[28] In re Taylor, 193 A. 2d 181 (1963).

[29] State v. Buchanan, 250 Ore. 244, cert. denied, 392 U.S. 905 (1968).

the right to refuse testimony before a grand jury under the Fifth Amendment. Woodrow Wilson, President of the United States, granted the reporter a pardon which he refused to accept. In deciding that the acceptance of a pardon was voluntary, the United States Supreme Court said the pardoning power could

> tend to destroy some of the most essential safeguards of a free government for the purpose of throttling the free and wholesome criticism of the actions of public officials . . . . It would inevitably create the possibility of putting into effect a system of censorship of the news concerning the acts of public officials . . . .[30]

The phrase "self censorship" was used fifty years later in the decision of Cook County Circuit Court Judge Louis Garippo in People v. Dohrn:

> The indiscriminate serving of such subpoenas necessarily has a chilling effect upon the operation and functioning of media . . . members of the media necessarily become conscious in their news gathering activities of a potential later questioning concerning their conduct and the contents of their stories . . . In sum, the necessary consequences of indiscriminate subpoenaing could result in the evils inherent in self censorship.[31]

The phenomenon of drying up of news sources as a result of forced disclosure of those sources was first recognized in the judicial decision delivered in In re Taylor in 1963. In Caldwell v. United States, the court

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[30] Burdick v. United States, 236 U.S. 79 (1915).

[31] People v. Dohrn, (Cir. Ct. Cook County, Ill. No. 69-3808) (1970).

explained the relationship between a reporter and a sensitive news source as dependent

> upon a trust and confidence that is constantly subject to reexamination and that depends in turn on actual knowledge of how news and information imparted have been handled and on continuing reassurances that the handling has been discreet.[32]

The influence of today's society was mentioned in two decisions: Caldwell v. United States and State v. Knops, but the two different courts came to opposite conclusions in their consideration of societal influence on the free flow of news about dissident groups. In Caldwell v. United States the court emphasized the importance of maintaining a free flow of news about the Black Panthers and other dissident groups saying that the Black Panthers press releases and public announcements were not enough.

> The need for an untrammelled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.[33]

On the other hand, the Supreme Court of Wisconsin in State v. Knops considered the "disorderly society" a reason for curtailing the free flow of information

> if such curtailment will serve the purpose of restoring an atmosphere in which all our fundamental

freedoms can flourish . . . . If the public were faced with the choice between learning the identity of the bombers or reading their justification for anarchy, it seems safe to assume that the public would choose to learn their identities.[34]

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[34] State v. Knops, 49 Wis. 2d 647 (1971).

CHAPTER V

CONCLUSIONS

It is the opinion of this author that legislation is not the answer to lessen the number of subpoenas being served on journalists. Rather what is needed is an atmosphere of judicial respect for the journalist's privilege, a feeling of reluctance among prosecutors and defense attorneys to tread on the ground of confidential press relationships, and the establishment of general public knowledge that to subpoena a journalist would be a difficult process. The solution is one of "unwritten law" that could be fostered by the following actions: (1) United States Supreme Court recognition of the right of journalists to keep communications with their sources confidential as a guaranteed part of freedom of the press under the First Amendment; (2) continued adherence to the United States Department of Justice Guidelines for issuing subpoenas; (3) adoption of a system whereby journalists would be subpoenaed only if the summoning party could prove a need before a judge at a separate hearing.

Protective legislation for journalists in all fifty-one states is not the answer, nor is a general federal law.

Any particular law, no matter how well phrased and all-inclusive, can be found lacking in some way, if not at the time it is proposed, then in the future when new media are developed and present media continue to change.

The Twentieth Century study on freedom of the press noted in its preliminary report that some of the state laws "fail to cover classes of newsmen who often need protection most" such as the broadcast media, magazine writers, the underground press, and the collegiate press.

> . . . most [shield laws] are already obsolete because they protect journalists only from having to reveal the names of their sources. The current subpoena controversy has underscored the inadequacy of the law in most jurisdictions . . . .[1]

Harding F. Bancroft, executive vice president of the New York Times, emphasized the "pressing need for uniformity in the law on the subject" of journalistic privilege, when he testified before the Constitutional Rights Subcommittee hearings on freedom of the press conducted by United States Senator Sam J. Ervin, Jr. Federal legislation is not needed at this time, he said, rather

> judicial resolution of difficult constitutional questions involving the Bill of Rights, is more desirable. There is the danger that legislative attempts

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[1] Press Freedom Under Pressure--A Twentieth Century Fund Task Force Report on the Government and the Press, (New York: Twentieth Century Fund, Nov. 1971) p. 10.

> to define rights under the First Amendment may raise more problems than are put to rest . . . .[2]

Furthermore, in the study of Table 2, Chapter III, it is shown that state statutes granting a journalist's privilege have proved ineffective in a number of cases. In only four of the twelve cases in which journalists refused to testify, based their rights on a state statute, did the state courts rule in favor of upholding the protective statute. In the other eight cases courts found the journalists in contempt, the judicial interpretations of the statutes centering on technical points such as the definition of the work "source,"[3] the fact that magazine writers were not included in the statute,[4] or the contention that a reporter can be recalled and forced to testify if he ceases to be a professional journalist.[5]

Vince Blasi, as director of the Field Foundation study on press subponenas compiled the results of over 1400 mail-questionnaire surveys sent to journalists, representing the papers of highest circulation throughout

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[2]U.S., Congress. Senate, Committee on the Judiciary, Free Press Hearings, before a subcommittee of the Committee on the Judiciary, Senate, Vol. 117, No. 147, 92nd Cong., 1st sess., 1971, p. 1.

[3]Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App.) cert. granted, 402 U.S. 942 (1971).

[4]In re Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

[5]In re Farr, Crim. No. A253-156 (Cal. Super. Ct., L.A. Cty. 1971).

the United States. He observed that many newsmen believe that "basic recognition, in principle, of a newsman's privilege" is more important than the "precise wording" contained in specific legislative proposals.

> The Caldwell decision, for example, has had a remarkable effect in "clearing the air" despite the fact that the court's holding was sharply defined. The exception-ridden guidelines that were handed down by the Attorney General in the aftermath of the furor . . . have also had a surprisingly salutary effect.[6]

Further evidence to support the belief that an "unwritten solution" is the answer rather than the passage of specific legislation is contained in the following finding in 1969:

> Newsmen at present are not called with great frequency to testify to confidential sources because of "unwritten understandings" with court officers, knowledge by attorneys that reporters will not speak anyway, and concern of public officials to maintain good relations with the press.[7]

The Effect of the United States Supreme Court Decision

Perhaps the most crucial action to have an affect on the journalist's privilege will be the decision of the United States Supreme Court on the cases of Caldwell v. United States, In re Pappas, and Branzburg v. Pound,

[6]Vince Blasi, "The Newsman's Privilege: An Empirical Study," University of Michigan Law Review, LXX (December, 1971) 254-255.

[7]James A. Guest and Alan L. Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources," Northwestern Law Review, LXIV (1969), 48.

tentatively scheduled to be heard in February, 1972. "It is to be hoped that the Supreme Court will set forth ground rules that will clarify this important and perplexing question," Harding Bancroft said.[8] In speaking with reporters on the subject, Blasi found that "nothing, in the opinion of every reporter with whom I discussed the matter, would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit's ruling on Caldwell."

> . . . a Supreme Court declaration that the First Amendment is in no wise abridged by the practice of subpoenaing reporters would . . . set off a wave of anxiety among sources . . . creat[ing] an atmosphere even more uncongenial to source relationships than that which existed two years ago, when the constitutional question remained in doubt.[9]

It is this author's hope that the United States Supreme Court will broadly interpret the First Amendment guarantee of freedom of the press to include the right of all groups to present their views in the media anonymously, and the right of the public to have a free flow of news upon all subjects. Even the views of groups which are feared by a majority of the American public should be

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[8]U.S., Congress, Senate, Committee on the Judiciary, Free Press Hearings, before a subcommittee of the Committee on the Judiciary, Senate, Vol. 117, No. 147, 92nd Cong., 1st sess., 1971, p. 1.

[9]Blasi, "The Newsman's Privilege," p. 283.

represented in the media, such as the views of Students for a Democratic Society, the Black Panther Party, and the Weathermen. One of the major reasons that these views need to be aired is that fear is often born out of blind ignorance and lack of exposure to information.

This author believes that the United States Supreme Court should recognize that the subpoenaing of journalists to seek out information on the aforementioned groups not only cuts off information to the public about these groups, but, in the long run, the courts and grand juries lose out as well because eventually journalists will no longer be entrusted with confidential information. Walter Cronkite said that

> once it's established and believed that news correspondents are to be utilized in grand jury investigations, they will be of precious little value to such investigations because radicals will have stopped talking to them.[10]

Another important group to be represented in the media are those who wish to reform certain laws which they believe to be unnecessary or harmful, such as laws against drug possession, certain sexual practices, gambling, and abortion.

Finally, groups or individuals who have information that is critical of public officials and institutions must

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[10]Brief of Amicus Curiae of the New York Times, Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

be represented in the nation's media. In the opening statement of United States Senator Sam J. Ervin, Jr., before the Constitutional Rights Subcommittee hearing, he quoted James Madison as saying,

> "Some degree of abuse is inseparable from the proper use of everything and in no instance is this more true than in that of the press." . . . the irritating excesses of the press are a small price to pay for a press independent of government control.[11]

United States Justice Department Guidelines

Since United States Attorney General John N. Mitchell issued a group of five guidelines[12] setting up standards for the issuance of subpoenas to newsmen by United States Government attorneys, there has been a marked decrease in the number of subpoenas issued. The announcement of the guidelines also served to relax the atmosphere between journalists and their sources.

> In the year that has passed since Attorney General John N. Mitchell issued the guidelines, . . . only three subpoenas have been issued--a marked decline over the previous years.[13]

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[11] U.S., Congress, Senate, Committee on the Judiciary, Free Press Hearings, before a subcommittee of the Committee on the Judiciary, Senate, Vol. 117, No. 147, 92nd Cong., 1st sess., 1971, p. 1.

[12] The guidelines were issued before the House Delegates of the American Bar Association at St. Louis on August 10, 1970. For the full text of the guidelines, see Appendix II.

[13] Press Freedom Under Pressure, p. 10.

Earl Caldwell Decision

Since the United States Court of Appeals for the Ninth Circuit ruled that the United States Government must show a "compelling need" for Earl Caldwell's testimony before he had to appear before a federal grand jury, the atmosphere of tension surrounding journalists and their sources has lessened. Several reporters told Blasi in his interviews that the decision

> helped them substantially in their dealings with sources . . . . When sources are hesitant to trust the reporter or fearful about the future pressures to which he may be subjected, a mention of the Caldwell ruling can lend to his promises of confidentiality the extra credibility that is necessary to get the sources to talk.[14]

The Process of Issuing Subpoenas to Newsmen

It is this author's hope that the United States Supreme Court will pay close attention to the opinions of several legal scholars and to the decisions of the Cook County Circuit Court in People v. Dohrn and the United States Court of Appeals for the Ninth Circuit in Caldwell v. United States, to set up a process by which the party who summons information from a newsman, must first prove that the information desired is necessary to the case.

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[14]Blasi, "The Newsman's Privilege," p. 275.

Cook County Circuit Court Judge Louis Garippo ruled that a subpoena could not be issued to a newsman except upon a prior hearing. At the hearing the summoning party would have to prove (1) that there is probable cause to believe that the newsman witness has information relevant to the subject of investigation; (2) that the subpoena is the only way to get evidence; (3) that there would be a miscarriage of justice if the information sought was not provided.[15] In Caldwell v. United States the court placed the burden of proving "a compelling need" upon the summoning party, in this case, the United States Justice Department.[16]

Blasi describes a system whereby the "issuance of a subpoena would be a very difficult, time consuming process--too much trouble to be taken lightly."[17] Abraham S. Goldstein, Dean of the Yale University Law School, believes that a judge should be authorized, each time the privilege is asserted to "decide whether or not the investigative or adjudicative interest is great enough to override the public interest in confidentiality and a free press."

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[15] People v. Dohrn, (Cir. Ct., Cook Cty., Ill. No. 69-3808) (1970).

[16] Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970) cert. granted, 402 U.S. 942 (1971).

[17] Vince Blasi, private interview held at the University of Michigan, Ann Arbor, Michigan, September 29, 1971.

> . . . this could be determined by appraising the context out of which the problem arises and the relative importance of the competing interests, without requiring the disclosure of the privileged material to the judge.[18]

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[18]Abraham S. Goldstein, "Newsmen and Their Confidential Sources," New Republic, March 21, 1970, p. 15.

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APPENDICES

APPENDIX A

STATE STATUTES GRANTING TESTIMONIAL PRIVILEGE TO JOURNALISTS

ALABAMA

Ala. Code Ann. tit. 7, Sec. 370 (1960)
Sec. 370. Newspaper, radio and television employees--No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed. (1935, p. 649; 1949, p. 548, effective Aug. 9, 1949.)

ALASKA

AN ACT
Creating a conditional privilege for public officers and reporters as to sources of information.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA

Sec. 09.25.150. CLAIMING PRIVILEGE BY PUBLIC OFFICIAL OR REPORTER. Except as provided in secs. 150-220 of this chapter, no public official or reporter shall be compelled to disclose the source of information procured or obtained by him while acting in the course of his duties as a public official or reporter.

Sec. 09.25.160. CHALLENGE OF PRIVILEGE.

(a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to

question him in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made instanter by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.

(b) The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest.

Sec. 09.25.170. ORDER DIVESTING PUBLIC OFFICIAL OR REPORTER OF THE PRIVILEGE.

...(b) If, in a hearing, a public official or a reporter should refuse to divulge the source of his information, the agency body, person, official, or party seeking the information may apply to the superior court for an order divesting the official or reporter of the privilege. When the issue is raised before the supreme or a superior court, the application must be made to that court.

(c) Application for an order shall be made by verified petition setting out the reasons why the disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest. Upon application, the court shall determine the notice to be given to the public official or reporter and fix the time and place of hearing. The court shall make or cause to be made whatever inquiry the court thinks necessary, and make a determination of the issue as provided for in sec. 160 of this chapter.

Sec. 09.25.180. ORDER SUBJECT TO REVIEW. An order of the superior court entered under secs. 150-220 of this chapter shall be subject to review by the supreme court, by appeal or by certiorari, as the rules of that court may provide. During the pendency of the appeal, the privilege shall remain in full force and effect.

Sec. 09.25.190. EXTENT OF PRIVILEGE. When a public official or reporter claims the privilege conferred by secs. 150-220 of this chapter and the public official or reporter has not been divested of the privilege by order of the supreme or superior court, neither he nor the news organization with which he was associated shall thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court. (1967)

ARIZONA

Ariz. Rev. Stat. tit. 12, Sec. 12-2237 (Supp. 1962)
Sec. 12-2237. Reporter and informant.--A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed. (Sec. 2535, R.S. '01; Sec. 1677, R.S. '13; Sec. 4412, R.C. '28 am., Sec. 1, Ch. 25, L. '37; 23-103, C '39, in part; Sec. 1, Ch. 116, L. '60.)

ARKANSAS

Ark. Stat. Ann. tit. 43 Sec. 43-917 (Supp. 1961)
Sec. 43-917. Newspaper or radio privilege.--Before any editor, reporter, or other writer for any newspaper or periodical, or radio station, or publisher of any newspaper or periodical or manager or owner of any radio station, shall be required to disclose to any Grand Jury or to any other authority, the source of information used as the basis for any article he may have written, published or broadcast, it must be shown that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare. (Init. Meas., 1936, No. 3 Sec. 15, Acts 1937, p. 1384; Pope's Dig., Sec. 3828; Acts. 1949, No. 254, Sec. 1, p. 761.)

CALIFORNIA

Ca. Code Civ. Proc. tit. 2, Sec. 1881 (6) (Supp. 1962)
1881. Privileged communications
There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . .

6. Newsmen. A publisher, editor, reporter or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.
(Enacted 1872. As amended Stats. 1893, c. 217, p. 301, Sec. 1; Stats 1907, c. 68, p. 87, Sec. 1; Stats. 1911, c. 603, p. 1135, Sec. 1; Stats. 1917, c. 611, p. 954, Sec. 1; Stats. 1927, c. 683, p. 1154, Sec. 1; Stats. 1933, c. 536, p. 1423, Sec. 1; Stats. 1935, c. 532, p. 1608, Sec. 1; Stats. 1939, c. 129, p. 1246, Sec. 5; Stats. 1957, c. 1961, p. 3504, Sec. 1; Stats. 1961, c. 629, p. 1797, Sec. 1.)

INDIANA

Ind. Stat. Ann. tit. 2, Sec. 2-1733 (Supp. 1962)
2-1733. Newspapers, television and radio stations--Press associations--Employees and representatives--Immunity.--
Any person connected with a weekly, semi-weekly, tri-weekly or daily newspaper that conforms to postal regulations, which shall have been published for five consecutive years in the same city or town and which has a paid circulation of two per cent of the population of the county in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere

the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station or television station, whether published or not published in the newspaper or by the press association or broadcast or not broadcast by the radio station or television station by which he is employed. (Acts 1941, ch. 44, Sec. 1, p. 128; 1949, ch. 201, Sec. 1, p. 673.)

KENTUCKY

Ky. Rev. Stat. Ann. tit. XXXVIII, Sec. 421.100 (1955)
421.100 (1649d-1) Newspaper, radio or television broadcasting station personnel need not disclose source 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 thereof, 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. (1952 c 121. Eff. 6-19-52)

LOUISIANA

AN ACT

To confer a conditional privilege to reporters owning or employed in connection with news media from compulsory disclosure of the identity of any informant or source of any information in any judicial, administrative or legislative proceeding or anywhere else; and to provide the circumstances and procedure under which this privilege may be revoked.

Be it enacted by the Legislature of Louisiana:

Section 1. Definitions

"Reporter" shall mean any person regularly engaged in the business of collecting, writing or editing news for publication through a news media. The term reporter shall include all persons who were previously connected with any news media as aforesaid as to the information obtained while so connected.

"News Media" shall include

(a) Any newspaper or other periodical issued at regular intervals and having a paid general circulation;

(b) Press Associations;

(c) Wire Service;

(d) Radio;

(e) Television; and

(f) Persons or corporations engaged in the making of news reels or other motion picture news for public showing.

Section 2. Except as hereinafter provided, no reporter should be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter.

Section 3. In any case where the reporter claims the privilege conferred by this act, the persons or parties seeking the information may apply to the district court of the parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the information is sought is pending. The application for such an order shall set forth in writing the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be appealable under Article 2083 of the Louisiana Code of Civil Procedure. In case of any such appeal, the privilege set forth in Section 2 herein shall remain in full force and effect during the pendency of such appeal.

Section 4. If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, the burden of proof shall be on the reporter or news media to sustain this defense. (1964)

MARYLAND

Md. Code Ann., Art. 35, Sec. 2 (1957)
Sec. 2. Employees on newspapers or radio or television stations cannot be compelled to disclose source of news or information.

No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed. (An. Code, 1951, Sec. 2; 1939, Sec. 2; 1924, Sec. 2; 1912, Sec. 2; 1904, Sec. 2; 1896, ch. 249; 1949, ch. 614.)

MICHIGAN

Mich. Stat. Ann. tit. 28, Sec. 28.945 (1) (1954)
Sec. 28.945 (1) Same: confidential and privileged communications.

Sec. 5a. In any inquiry authorized by this act, communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential. Any communications between attorneys and their clients, between clergymen and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergymen, or physician. (C.L. '48 Sec. 767.5a)

MONTANA

Mont. Rev. Codes Ann. tit. 93, Sec. 93-601-2 (Supp. 1961)
93-601-2. Disclosure of source of information when not required.

No persons engaged in the work of, or connected with or employed by any newspaper or any press association, or any radio broadcasting station, or any television station for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting or televising news shall be required to disclose the source of any information procured or obtained by such person in the course of his

employment, in any legal proceeding, trial or investigation before any court, grand jury or petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent or agents, or before any commission, department, division or bureau of the state, or before any county or municipal body, officer or committee thereof. (En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951.)

NEVADA

AN ACT relating to witnesses; providing that certain personnel of news media need not disclose sources of information; and providing other matters properly relating thereof.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter 48 of NRS is hereby amended by adding thereto a new section which shall read as follows:

No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the legislature or any committee thereof.
3. Before any department, agency or commission of the state.
4. Before any local governing body or committee thereof, or any officer of a local government.

Section 2. This act shall become effective upon passage and approval.

NEW JERSEY

N.J. Stat. tit. 2A, Sec. Sec. 2A:84A-21 and 2A:84A-29 (Supp. 1962)

2A:84A-21. Newspaperman's privilege
Rule 27.
Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in said newspaper was procured, obtained, supplied, furnished, or delivered. L. 1960, c. 52, p. 458, Sec. 21. . . .

2A:84A-29. Waiver of privilege by contract or previous disclosure: limitations

Rule 37.

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to a question shall not operate as a waiver with respect to any other question. L. 1960, c. 52, p. 459, Sec. 29.

NEW MEXICO

20-1-12.1. Privileged communication--Reporters.--

A. It is hereby declared to be the public policy of New Mexico that no reporter shall be required to disclose before any proceeding or by any authority the source of information procured by him in the course of his employment as a reporter for a news media unless disclosure be essential to prevent injustice. In granting or denying a testimonial privilege under this act (section), the court shall have due regard to the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove. An order compelling disclosure shall be appealable, and subject to stay.

B. As used in this section:

(1) "reporter" means any person regularly engaged in the business of collecting, writing or editing news for publication through a news media, and includes any person who was a reporter at the time the information was obtained but is no longer acting as a reporter; and

(2) "news media" means any newspaper or other periodical issued at regular intervals and having a paid general

circulation; a press association; a wire service; a radio station or a television station.

C. Any reporter may waive the privilege granted in this section.

NEW YORK

Chapter 615

AN ACT to amend the civil rights law, in relation to contempt became a law May 12, 1970, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Section 1. The civil rights law is hereby amended by adding thereto a new section, to be section seventy-nineth, to read as follows:

Sec. 79-h. Special provisions relating to persons employed by, or connected with, news media.

(a) Definitions. As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains, news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.

(2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.

(3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing or editing of news for a newspaper, magazine, news agency, press association or wire service.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting news by radio or television transmission.

(8) "News" shall mean written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newscasters from contempt.

Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

OHIO

Ohio Rev. Code Ann. tit. 27, Sec. 2739.12 (6319-2a) (1958) 2739.12 (6319-2a). Newspaper reporters not required to reveal source of information.

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the

presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

PENNSYLVANIA

Pa. Stat. Ann. tit. 28, Sec. 330 (Supp. 1961)
Sec. 330. Confidential communications to news reporters.

(a) No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof.

(b) The provisions of subsection (a) hereof in so far as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast. (1937, June 25, P.L. 2123, No. 433, Sect. 1; 1959, Dec. 1, P.L. 1669, Sec. 1.)

APPENDIX B

DEPARTMENT OF JUSTICE GUIDELINES FOR SUBPOENAS TO THE NEWS MEDIA*

I. The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh against that limiting effect the public interest to be served in the fair administration of justice.

II. The Department of Justice does not consider the press "an investigative arm of the government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

III. It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interest of the news media. In these negotiations, where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

IV. If negotiations fail, no Justice Department officials should request, or make any arrangements for a subpoena to the press without the express authorization of the Attorney General. If a subpoena is obtained under such circumstances without his authorization, the Department will--as a matter of course--move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

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*These guidelines were issued by U.S. Attorney General John N. Mitchell on August 10, 1970. They are recorded in Crim. L. Rep. 2461 (Sept. 2, 1970).

V. In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence. The subpoena should not be issued to obtain peripheral, non-essential or speculative information.

C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

D. Authorization requests for subpoena should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, whenever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents. These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.