

NEWSMEN'S PRIVILEGE:
A FIRST AMENDMENT CONTROVERSY

Thesis for the Degree of M. A.
MICHIGAN STATE UNIVERSITY
FLORESTA DELORIS JONES
1975



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ABSTRACT

NEWSMEN'S PRIVILEGE: A FIRST AMENDMENT CONTROVERSY

By

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The journalist's claim to a newsman's privilege under the First Amendment was first considered a constitutional issue by the Supreme Court in 1972. The Supreme Court, on June 29, rejected the claimed privilege of journalists to refuse to answer grand jury questions relating to confidential sources. Controversy surrounding the recent increase of subpoenas served on journalists in this country culminated in this decision. A federal shield law to protect newsmen is being considered by Congress in light of the Supreme Court's ruling. Alarm among countless number of legislators and journalists suggests that the decision has threatened the public's right to freedom of the press. The issue remains unresolved in Congress, and courts in this country have continually refused to recognize a privilege for journalists. Yet historically, and since the landmark Branzburg decision, journalists continue to stand in defense of their right to refuse disclosure of confidential sources.



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The study here is based on historical and legal research on newsmen's privilege. Landmark historical cases of the pre-shield law era as well as cases arising since 1972 are discussed. Views of newsmen and legislators are based on recent survey findings, congressional transcripts and personal interviews by the author. Background information is largely based on unpublished research papers written by the author at Michigan State University in preparation for this study. Other findings are based on articles in newspapers, periodicals, and law review reports.

Chapter I introduces the background of the issue and explains the importance of the topic. Chapter II provides definitions and a brief review of the literature used in the study. Chapter III discusses the historical background of the struggle for a free press, from the early American printer and the story of John Peter Zenger to the drafting of the First Amendment. This chapter also notes the significance and meaning of the freedom of press clause in the First Amendment as viewed by legal scholars and the framers of the Constitution.

Early landmark newsmen's privilege cases are discussed in Chapter IV, and Chapter V evaluates the Supreme Court's 1972 Branzburg decision and the interpretations of the Court on privilege under the First Amendment. Chapter VI describes the social climate surrounding the sudden rise of press subpoenas during the late 1960's and early 1970's under the Nixon Administration. Chapter VII compares various arguments for and against newsmen's privilege in

current debates on shield laws, while Chapter VIII assesses the value of confidential sources, state shield laws, and the effect of the Branzburg decision on newsmen's confidential relationships and newsgathering processes. The issue is also viewed as to the threat of the subpoena problem to sources and to the public in abridging full and free flow of information.

Chapter IX consists of conclusions of the author. Solutions offered here are based on the findings of this study. They are suggestions and opinions that stem from a thorough examination of the problems encountered in legislating privilege for journalists, the dilemma of attempts to define a First Amendment right through legislation, the historical background of newsmen's privilege, and developments since the Supreme Court's Branzburg decision.

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A THESIS

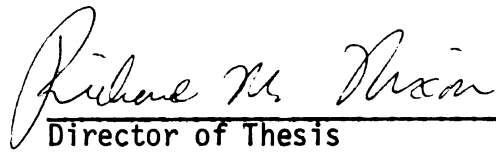
Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER OF ARTS

School of Journalism

1975

Accepted by the faculty of the School of Journalism,
College of Communication Arts, Michigan State University, in
partial fulfillment of the requirements for the Master of Arts
degree.



Director of Thesis

TABLE OF CONTENTS

Chapter	Page
I. IMPORTANCE OF THE PROBLEM	1
II. DEFINITIONS AND REVIEW OF LITERATURE	14
III. THE HISTORICAL SETTING	27
A First Amendment Mandate	31
IV. EARLY NEWSMEN'S PRIVILEGE CASES	39
V. THE SUPREME COURT ON NEWSMEN'S PRIVILEGE	47
VI. NEWS COVERAGE IN AN AGE OF CONTROVERSY	57
VII. PROBLEMS IN LEGISLATING NEWSMEN'S PRIVILEGE	66
VIII. THE LEGAL SETTING SINCE THE BRANZBURG DECISION	78
The Courts' View Since Branzburg	84
IX. CONCLUSIONS	98
 APPENDICES	
A. ATTORNEY GENERAL'S SUBPOENA GUIDELINES	105
B. PRIVILEGE CASES SINCE BRANZBURG	107
C. NEWSMEN'S PRIVILEGE BILLS	111
BIBLIOGRAPHY	119

PREFACE

The fairly widespread use of confidential sources in developing news of a complex and controversial nature makes this study useful and timely. The subject of newsmen's privilege today involves the subpoena question as well as the matter of government suppression of unpublished information. Although journalists have consistently acted by their code of ethics over the decades, recent court developments on professional secrecy for journalists have pressured journalists to suffer harsh legal encounters for refusing to divulge confidential sources. Furthermore, the increasing complexity of society indicates further reliance by newsmen on confidential information.

Effects of the controversial Earl Caldwell case and the subsequent Supreme Court ruling on the Paul Branzburg cases have been detrimental to investigative reporting. Contempt charges and arrests of journalists across the country in recent years drew national attention to the issue. Fear and alarm of the news media since this landmark decision stem from beliefs that undue pressure on the newsman may lead to restraints on the news itself. The alarm, as this study reveals, is not entirely unnecessary. With the chilling effects of Branzburg decision of 1972 still in existence, the study is appropriate and valuable. It is a subject that also

evolves around the importance and meaning of a free press.

The writer attempts to view the issue historically and assess developments since the Branzburg ruling. The purpose is to present a brief overview of the topic through historical and legal accounts and to evaluate arguments for and against a newsmen's privilege federal law.

Several people have made this study possible. They have contributed in various ways. General thanks go to Maurice R. Cullen who directed this thesis and to George A. Hough III for his support and guidance during the preparation for this study.

My deep and sincere appreciation and thanks go to my parents, Vernon and Florine Martin, for their love, support, and encouragement during this entire academic project. Special thanks go also to Sarah, Sylvia, and William Jones and to Ruth Maness for their assistance, encouragement, and confidence which enabled me to complete this study.

CHAPTER I

IMPORTANCE OF THE PROBLEM

Recent controversy over the issue of a journalist's claim to refuse disclosure of confidential sources climaxed with the June, 1972 Supreme Court decision on the *Branzburg*, *Caldwell*, and *Pappas* cases. The decision barred a reporter's claimed privilege to refuse to answer grand jury questions relating to information gathered on a confidential basis. Though vague in meaning at certain points, the decisions did give leeway to state legislatures and the Congress to pass legislation granting legal privilege to journalists through shield laws. The court also ruled against First Amendment protection for "newsmen's privilege" or "professional secrecy" for journalists, which some states had previously allowed as a defense for privilege protection.¹

Although this decision and the issue of testimonial privilege for journalists sparked widespread discussion by journalists,

¹The Supreme Court ruled on privilege for journalists as a Constitutional issue on June 29, 1972, in the *Branzburg v. Hayes, et al.*, *United States v. Caldwell*, and *In re Pappas* cases. At the time of the decision, at least nineteen states had some type of shield laws protecting journalists. The Court had declined to review cases involving privilege for journalists in earlier cases.

legal scholars, and legislators in recent years, very little had previously been written on the subject, even though the first reported case of a newsman refusing to disclose a source of a news story dates back to 1848.² As true with the battle for an unbridled press in this country, the issue of newsmen's privilege has usually been controversial whenever it has come up. The controversy, in fact, has most often centered around the meaning of the freedom of the press clause of the First Amendment and the role and importance of the press in exercising this right in society.

As far as revelation of sources by journalists who are subpoenaed by courts and other investigative bodies, journalists have chosen to live by their own code of ethics in most cases. They have refused to disclose their confidential sources under such circumstances, regardless of the consequences. The results have usually been the occasional jailing of journalists or fines for contempt of court. Furthermore, as society has become more complex, there has been wide recognition of the need and importance of confidential sources, particularly in developing and presenting news of controversial or sensitive nature.

The subpoena issue and arguments for a newsman's privilege drew national attention with the Supreme Court's 1972 decision on the

²David A. Gordon, "Protection of News Sources: The History," Ph.D. dissertation, University of Wisconsin, Madison, Wis., 1971, p. 2. This Gordon study is the most recent definitive historical study of cases involving journalists and testimonial privilege. The two-part study traces from 1848 to 1970. Further references to the Gordon study are from this source.

Branzburg, Caldwell, and Pappas cases. The cases primarily involved confidential information. The importance of the decision concerned not only a privilege for the newsman or newswoman but also the public's right, as exercised by the news media, to be informed of the happenings in society. The credibility of the journalists as viewed by sources and by the public in general was also a paramount issue in the landmark decision.

The Supreme Court, by a 5 to 4 vote, ruled that the power of a grand jury took precedence over the presumed protections of the First Amendment. The Court held that Earl Caldwell of the New York Times, Paul Branzburg of the Louisville, Kentucky Courier-Journal, and Paul Pappas of WTEV-TV in New Bedford, Massachusetts, had been without legal right in refusing to provide grand juries with confidential source data.³ Since 1969, the sudden increase in the number of subpoenas served on reporters threatened to drive away all types of confidential news sources. So it was that the cases of Caldwell, Branzburg, and Pappas caught the attention of journalists across the country.

Caldwell, who worked for the New York Times San Francisco news bureau, had gained sufficient confidence of the Black Panthers and other black militants on the West Coast to complete outstanding reporting on the controversial groups. Summoned to appear before a federal grand jury and to bring notes and tapes of interviews on the militants, Caldwell refused to appear on the ground that even

³Branzburg v. Hayes, et al., 408 U.S. 665 (1972). Further references to the Branzburg cases are from this source.

his entry into a closed grand jury room would destroy credibility with his sources. Although he argued that he had a First Amendment right to protect his confidential information, the U.S. District Court held that he had to answer the subpoena. This decision was overruled by the Court of Appeals, which declared that the First Amendment did provide a qualified privilege to newsmen and that such a broad subpoena was too vague in demanding that Caldwell reveal all his confidential data.⁴

Branzburg had written two stories about drug abuse in Louisville and Frankfort, Kentucky. The sources he used for both stories were confidential. He was allowed to report on the drug users and their lifestyles with their permission only after he promised them anonymity. The Kentucky state court and a grand jury investigating drug abuse subpoenaed Branzburg following publication of each story. He unsuccessfully invoked the state shield law and was held in contempt of court when he refused to divulge his sources. Branzburg appealed the decision.

Pappas had gained access to a Black Panther headquarters by agreeing to protect all confidential information he learned while inside the headquarters. He was not to reveal anything he saw or heard while inside. The Bristol County, Massachusetts, grand jury demanded to know all he had witnessed at the headquarters, but Pappas refused to tell. His case went to the Supreme Judicial Court of Massachusetts,

⁴Caldwell v. United States, 408 U.S. 665 (1972).

which ruled in favor of the grand jury.⁵ The three cases were linked in the final appeal to the Supreme Court when the court ruled against a newsman's privilege.

Those who argue for professional secrecy for newsmen have asserted that journalists should be granted privilege as part of the First Amendment's basic guarantee of press freedom. Other proponents of evidentiary privilege say they favor state or federal shield legislation in order to guarantee privilege under law.⁶ Proponents of privilege under the First Amendment have generally surmised that if a journalist is forced to disclose confidential sources, particularly in reporting controversial or sensitive news, his capacity to gather full information to disseminate news to the public is limited or even stifled. Therefore, freedom of access to news is denied for both the reporter and the public. Any coercion of newsmen to disclose their sources, in other words, is viewed as an impairment to the news-gathering process and to the free flow of information.

A survey made in 1962 by the International Press Institute called the issue of professional secrecy for newsmen " . . . possibly the most important problem of a juridicial nature now

⁵In re Paul Pappas, 408 U.S. 665 (1972).

⁶Statements here based on the author's personal interview with journalists in the state of Michigan in preparation for a research paper, "Shield Laws in Michigan," completed in Spring, 1972, at Michigan State University for Journalism 823, Government and Mass Communications. Also, several opinions of journalists were included in Congressional hearings on "Newsmen's Privilege" and transcripts of conference proceedings of various journalistic organizations.

confronting the press of the free world."⁷ Moreover, in recent years, journalists across the country have been subpoenaed by various investigative bodies to reveal their confidential sources. American courts up to the Branzburg decision in 1972 had consistently refused to recognize newsmen's claims of privilege both at common law and under the First Amendment. However, there has been increasing support for testimonial privilege in recent years. Nineteen states have at various times in the past provided some statutory protection to a newsman's confidential sources.⁸ A constitutional privilege for newsmen has received almost unanimous approval from commentators and has been extended by a number of courts.⁹

The Supreme Court attempted to determine if there existed clear and accurate evidence that press subpoenas deterred sources from confiding in newsmen. It characterized survey research introduced in Branzburg cases as "speculative" and "divergent" and suggested reasons why some informants might continue to divulge information to reporters. The Court also argued that the traditional absence of a newsman's privilege had not historically dampened the

⁷International Press Institute, Professional Secrecy and the Journalist, IPI Survey No. 6 (Zurich, Switzerland: International Press Institute, 1962), p. 16.

⁸Twentieth Century Fund Task Force on the Government and the Press, Press Freedoms Under Pressure (New York: Twentieth Century Fund Task Force on the Government and the Press, 1972), appendix of state shield law statutes.

⁹Briefs filed by Earl Caldwell including affidavits from several newsmen in Caldwell v. United States, 408 U.S. 665 (1972).

free flow of news. The Court made two principle points in its 1972 decision on the issue: (1) the First Amendment does not give newsmen the right to decline to testify before grand juries and disclose whatever information is sought; (2) Congress may provide such protection by law if it considers such legislation necessary or desirable. After the decision, members of Congress and representatives of the news media pushed to accept the Court's invitation for enactment of a strong federal shield law. Originally, there was a push for a qualified shield law which most considered as a more reasonable approach to solving the problem. Then came arguments for an absolute federal shield law in order that there be no loopholes to protection of news sources.

When the avalanche of subpoenas began in the late 1960's, there was widespread concern about the consequences. A survey taken in 1971 by Vince Blasi, then of the Stanford University Law School and now a professor of law at the University of Michigan, gave some indication of how journalists view the issue of privilege.¹⁰ The survey was published in the Michigan Law Review in 1971. It went out to 1,300 newsmen from 50 largest daily newspapers and personnel of network radio and television and local radio and television stations.

Nearly half of the reporters responding from all media do not know whether the states in which they work have shield laws or

¹⁰Vince Blasi, "The Newsmen's Privilege: An Empirical Study," Michigan Law Review, Vol. 70: 229-284. Findings of survey cited here are from this source.

not. Slightly more than seven per cent of the respondents said that in the past 18 months coverage of a story had been adversely affected by the possibility of subpoena. More than 65 per cent of the respondents estimate that zero to ten per cent of the stories they covered depended on confidentiality.

After the Branzburg decision, however, an increasing number of journalists were faced with subpoenas and some went to jail as the courts began to narrowly interpret the First Amendment and existing shield laws in various states. Countless shield bills were drafted in Congress though none to date has passed, mainly because a lack of consensus in Congress and even among newsmen and news organizations.¹¹ Three courses of action have been considered: an absolute federal shield law; a qualified shield law; or no law at all. The first solution seems virtually impossible with the wide divergent opinions expressed by Congressmen and journalists and with the lingering possibility of veto by the President. The second, some argue, would be worse than no law at all since such a bill attaches certain limitations. The third possibility leaves the news media with the choice of each case being fought out in the courts, on its individual merits, to be judged by interpreting First Amendment guarantees.

¹¹U.S. Congress, House, Committee on the Judiciary, News-
men's Privilege Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives on privilege bills, 1972; U.S. Congress, Senate, Committee on the Judiciary. Newsman's Privilege Hearings before a subcommittee on Constitutional Rights of the Committee on the Judiciary Senate on privilege bills, 93rd Congress, 1st session, 1973.

A large part of the controversy in the last two decades has existed because of the tense social climate and critical clashes between the Nixon Administration and the press. Some argue that the several reported cases involving journalists' claims to testimonial privilege occurring in the last five years (particularly those where reporters were jailed for not revealing sources) were merely part of repeated attacks on the news media by the Nixon Administration. Whether fact or speculation, the issue is real and one of the most pressing for the news media today.

Unfortunately, the subpoena problem could be most damaging for the public. The situation could limit certain types of coverage by the news media, especially controversial stories or stories critical of the government, which would make valid the argument that the freedom of press is in jeopardy. The Supreme Court's decision and arguments for and against a newsman's privilege inevitably focus back on the real intentions of the First Amendment and the freedom of press clause.

The scope of the problem is broad. It encompasses congressional, grand jury, and court subpoenas issued to members of the underground, collegiate, and establishment press, national television networks, national magazines, and free lance journalists. Subjects of subpoenas have ranged from articles involving housing frauds, murder, dissident or militant groups to coverage critical

of governmental officials such as the Watergate stories.¹² There have also been instances where law enforcement personnel have leaned on journalists to get at sources involved in their own criminal investigation, even to the extent of posing as journalists.¹³ Members of the news media have argued that law enforcement officials are attempting to use the media as an investigative arm of the law through press subpoenas.

Over 50 shield law bills have been introduced in Congress since the Branzburg decision. The long-debated subject has failed to lead to a consensus among journalists and legislators even on the definition of "newsman" so as to encompass all news media, per se. Other discussion has concerned the exception of cases where the journalist is an eyewitness to a crime. Congressmen and journalists argued, vehemently in some sessions, that an absolute shield law would hurt the press because it would promote irresponsibility and lack of accountability.

Pulitzer Prize-winning newsman Clark Mollenhoff said,

An absolute shield law would hurt the press . . . It would create total chaos in these governmental bodies that must

¹²For example, in Branzburg v. Hayes et al. the stories involved the drug-taking community and in U.S. v. Caldwell, the case centered around the controversial Black Panther Party.

¹³Press Freedoms Under Pressure, Police Impersonation of Newsmen, pp. 86-97.

use the power of the subpoena to obtain witness and documents in an effort to elicit the truth. It would be a greater boon to organized crime than the Fifth Amendment.¹⁴

Another investigative reporter of the Detroit Free Press expressed the views of many other newsmen when he said of the issue, "Either give us an absolute privilege with an absolute shield law or let us take our chances with the First Amendment."¹⁵

Katherine Graham, publisher of the Washington Post, described her own paper's operations and those of others such as the New York Times and the Los Angeles Times, which had done intensive investigative reporting on the Watergate stories: "We could never, never have reported Watergate without the use of anonymous sources." Yet she pointed out that courts, grand juries and the government did try to subpoena sources until the story broke much later and the subpoenas were dropped. Mrs. Graham also said that the Post had come out editorially against a federal shield law of any type and emphasized that "any bill that would get through Congress" would perhaps have so many limitations that the news media would be better off without any law at all.¹⁶

¹⁴"Freedom of Information Report" of the American Society of Newspaper Editors. Conference proceedings, The Shoreham Hotel, Washington, D.C., May 2-4, 1973, pp. 245-258; Session on "Newspapers and the First Amendment," pp. 184-185.

¹⁵Panel on Shield Laws, program for Lansing district Democratic Party, Michigan State University, Spring, 1972.

¹⁶"Newspapers and the First Amendment," Proceedings of the American Society of Newspaper Editors, 1973, p. 181; Press Conference, April 27, 1974, Cobo Hall, sponsored by Detroit Economic Club, Detroit, Michigan, 1974.

Charles Bennett of the Oklahoman and Times commented at a special panel discussion on shield laws during the 1973 proceedings of the American Society of Newspaper Editors. Bennett noted that the Watergate case could not have been broken had it not been for the confidential sources, but he was quick to add that the story was done without any shield law. He pointed out three notable points about shield legislation to give journalists privilege. His first objection is that despite adverse actions and decisions of recent years, he is not convinced that new legislation is needed to protect the newsman's--and thereby the public's--vital interest in confidential sources.

Second, he noted that newspapers, individually and collectively, would do more to protect confidentiality of sources than any federal shield law. Finally, he suggested that passage of shield legislation at the federal level could open the door to federal legislative power over the press and would be far more damaging to both the newsmen and public's interests than are present conditions under which journalists operate.¹⁷

Opinions of Bennett and other newsmen reflect the diversity of solutions which have been posed to the press. The press, unfortunately, has not done an adequate job of presenting its own case to the public, but the public's right to a free press is more threatened by the subpoena problem than are professional

¹⁷Ibid., ASNE Conference, 1973, pp. 186-187.

The Oklahoma and Texas Supreme Courts
shield laws for the 1911
Newspaper Editors. However, they
have been broken and the courts
were quick to act against them.
He pointed out the privilege of
journalists and declared that
legislation is needed
to protect the public's vital interest

individually and
the safety of sources
that passage
the door to
for more
the pre-

newsmen. Implications for the press, the public, and the sources need to be examined in order that the issue is placed in full perspective. The role of the press remains as important as it has always been, with or without privilege. An accurate account of an event is more important in terms of public awareness than identities of the sources. Yet if the public can learn of crime and wrongdoing in high places by means of a journalist's reliance on confidential sources alone, it will ultimately have to be decided if the press does indeed merit privilege. For this reason, the issue of "newsmen's privilege," as the problem will be called in this study, will remain a controversial subject with real and constant implications for the role of the press and the meaning of a free press in a democratic society.

CHAPTER II

DEFINITIONS AND REVIEW OF LITERATURE

The issue of testimonial privilege under judicial, legislative, or administrative examination has a 125-year history in American legal proceedings.¹⁸ When courts in this country have examined the issue at various times, all have decided that there is no such right as "newsmen's privilege" in the absence of shield laws and lack of protection under Anglo-American common law. As this study examines "testimonial privilege" for journalists, the term privilege will be used in relation to laws and statutes involving privilege in situations where a journalist's information is sought in testimony as a subpoenaed witness or as evidence in certain investigations.

Here, the topic focuses on what is generally called "newsmen's privilege" although the term should not be considered one that denotes a certain gender as the issue involves journalists, both male and female. Briefly defined privilege is an "immunity

¹⁸David A. Gordon, "Protection of News Sources: The History," dissertation, University of Wisconsin, 1971, p. 2. According to this study, the first privilege case occurred in 1848.

or exemption conferred by special grant to an individual or a certain class in derogation of common rights."¹⁹

At length and in more legalistic terms, privilege is defined as:

A particular and peculiar benefit or advantage enjoyed by a person, company or class, beyond the common advantages of other citizens A right, power, franchise, or immunity held by a person or class against or beyond the course of law.²⁰

Courts have also defined the term as:

That which releases one from the performing of a duty or obligation, or exempts one from a liability which he would otherwise be required to perform, or sustain in common with all other persons.²¹

In addition to a firm rejection that the First Amendment grants newsmen a privilege to withhold confidential information from grand juries, the Supreme Court implied even broader limitations against the press in the *Branzburg* decision by stating repeatedly that reporters have no more rights than "all other citizens." Justice Byron R. White wrote:

We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information

¹⁹Webster's New World Dictionary (1955), p. 1160.

²⁰Black's Law Dictionary, p. 1359, citing Waterloo Water Co. v. Village of Waterloo, 193 N.Y.S. 360, at 362, 200 App. Div. 718; Colonial Motor Coach Corporation v. City of Oswego, 215 N.Y.S. 159, at 163, 126 Misc. 829; State v. Betts, 24 N.J.L. 557.

²¹Ibid., pp. 1359-1360.

that may help the grand jury in arriving at its initial determinations. . . . Newsmen have no constitutional right of access to the scenes of crimes or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.²²

In the same opinion the Court said state and federal legislatures are free to enact a privilege statute for journalists in the form of shield laws.

Shield law statutes, those laws which protect journalists from forced disclosure of sources, give journalists privilege under law. A statute is " . . . a particular law enacted and established by the will of the legislative department of government."²³ Shield statutes are state laws in at least nineteen states at this writing. They are designed to provide for journalists what is called evidentiary privilege of a specific kind. Since the Supreme Court decision on privilege, many states have sought to enact shield laws or expand the protection of present statutes. Congress has considered numerous shield law bills since 1972 even though proposed legislation on newsmen's privilege has been introduced to Congress since 1929.²⁴

²²Branzburg v. Hayes et al., 408 U.S. 665 (1962).

²³Black's Law Dictionary, p. 1581.

²⁴U. S. Congress, Senate, Committee on the Judiciary, News-men's Privilege, Hearings, before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Senate, on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 917, S. 1128 and S.J. Res. 8, 93rd Congress, 1st session, 1973, opening statement of Chairman Senator Sam Ervin, p. 1.

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²²Branzburg v. Hayes et al., 408 U.S. 665 (1962).

²³Black's Law Dictionary, p. 1581.

²⁴U. S. Congress, Senate, Committee on the Judiciary, News-men's Privilege, Hearings, before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Senate, on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 917, S. 1128 and S.J. Res. 8, 93rd Congress, 1st session, 1973, opening statement of Chairman Senator Sam Ervin, p. 1.

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Shield statutes confer upon the journalist the privilege of not giving a particular type of evidence--identity of confidential sources--even in instances when that evidence is considered relevant and material to a court, legislative, or administrative proceeding. In the absence of the privilege as protected by shield statutes, journalists could be made to testify in trials or grand jury investigations. This type of privilege is similar to certain other evidentiary privilege established by either law or custom. Shield laws exist for the purpose of enabling the newsman " . . . more easily to live up to his promise of secrecy . . ." and is the only available alternative to achieve this goal as long as the courts continue to hold against this privilege.²⁵ The study here concentrates on the arguments for legal recognition of professional secrecy for journalists as a right inherent within the guaranteed rights of the First Amendment--the right of a free press.

Although the study here does not focus on written confidential information, some cases mentioned do involve instances where all confidential information is subpoenaed. A privileged communication is one which falls under the scope of various evidentiary privileges. One legal scholar defines it this way:

Any communication made to counsel, solicitor, or attorney, in professional confidence, and which he is not permitted to divulge; otherwise called a "confidential communication."²⁶

²⁵Oregon Law Review, 99 at p. 101 (1966).

²⁶Burr W. Jones, The Law of Evidence, 4th ed., Vol. III, p. 1531.

A broader look at the definition comes under confidential communication. It is defined as:

. . . certain classes of communications, passing between persons who stand in a confidential or judiciary relation to each other (or who, on account of their relative situation, are under a special duty of secrecy and fidelity), which the law will not permit to be divulged, or allow them to be inquired into in a court of justice, for the sake of public policy and the good order of society. Examples of such privileged relations are those of husband and wife and attorney and client.²⁷

Legal writers define confidential relationships in narrow terms and judge them to be invalid unless specifically validated for the sake of proper public policy and general benefit to society.

While common law offers privilege for other confidential professional relationships as mentioned above, no such right is recognized between journalists and their source of information. The precedent on early privilege cases of the pre-shield law era stems from Anglo-American common law.²⁸ Common law is defined variously as unwritten law, the remains of customs and sanctions which served society from the day when men first lived together and judge-made law, called a "blend of abstractions, expediency, and articulated customs."²⁹

²⁷John Wigmore, Evidence In Trials At Common Law, Pt. III, Sec. 2255 (Boston: Little, Brown and Co., 1940); and Ex parte Lawrence, 116 Cal. 298 (1897); In re Grunow, 84, N.J.L. 235 (1913).

²⁸Walter A. Steigleman, The Newspaper and the Law, (New York: The MacMillan Co., 1964), pp. vii, 2.

²⁹Ibid., p. 19.

A more precise, legal definition traces the background of common law as that body of law and juristic theory which was originated, developed, and formulated and is administered in England has obtained recognition among most of the states and people of Anglo-Saxon stock.³⁰ Most court decisions involving journalists and their sources from the first reported case in the nineteenth century up to the present have been based on common law custom or personal consideration of judges in approaching each case legally.

Journalists have stated in congressional hearings, editorials, and newspaper and magazine articles that the subpoena problem of recent years has caused undue pressure in reporter-source relationships. They argue that any impairment to channels of information used by journalists threatens the public's right to freedom of the press. Walter Cronkite, one of the most respected newsmen in the country, commented on the danger the press and public face without sources:

Confidentiality of sources is really an important issue, more than most people realize. Without news sources we would eventually have a dictatorship. It's as simple as that. If clear access to sources is denied or if there's harrassment or undue pressure in source relationships at all, that tampers with a free press. And if there's no free press, there's no free speech. If there's no free speech, there's no free assembly. No freedom of assembly means no freedom of religion and it all leads back to a dictatorship.³¹

³⁰Black's Law Dictionary, pp. 345-346.

³¹Walter Cronkite, comments to interviewer Dick Cavett at Martha's Vineyard, Mass., Wide World of Entertainment, "The Dick Cavett Show," Oct. 18, 1974.

As this study will focus on that First Amendment right to a free press, a final definition--liberty of the press--is in order for full consideration of the topic of newsmen's privilege. In legalistic terms, it is defined as:

The right to print and publish the truth, from good motives and for justifiable ends . . . The right to print without any previous license, subject to the consequences of the law.³²

This definition is somewhat restrictive when compared to the broader definition of confidential communication. It also reflects some of the tensions that have arisen between bar and press over whether a journalist should be granted evidentiary privilege.

As Frederick S. Siebert noted in 1934, in the interpretation of the constitutional guarantees of freedom of the press, the courts have been unanimous in one aspect alone--that the "constitutional provisions do not permit the free and unlimited publication of anything at any time."³³ The Supreme Court of the United States has stated:

It is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for private injury, are not abolished by the protection extended in our Constitution. Near v. Minnesota ex. rel. Olson, 283, U.S. 697 (1931).³⁴

³²Black's Law Dictionary, p. 1066.

³³Frederick Seaton Siebert, The Rights and Privileges of the Press (New York: D. Appleton-Century Co., 1934), p. 7.

³⁴Near v. Minnesota ex. rel. Olson, 283 U.S. 697 (1931).

The limitations placed on the absolute right to print and publish permitted by the First Amendment is derived from such eighteenth century jurists as Blackstone, Mansfield, and Kenyon who expressed the view that liberty of the press means freedom from any restriction before publication but complete liability under the common law after publication. As Blackstone wrote:

. . . . The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.³⁵

The evident purpose of the framers of the Constitution in including the free press clause in the First Amendment was to outlaw the rules of seditious libel which were not changed in England until after the adoption of the Federal Constitution.³⁶ Also, many of the battles for freedom of the press have centered around the right to criticize the government, which enunciated the adversary roles of the press and government. Courts have also further limited the freedom of press clause by certain legal tests, namely, the "clear and present danger" test, a measure of whether certain publication endangers the security of the country and/or government; and

³⁵Commentaries on the Laws of England, IV, 151; for a statement by Lord Mansfield see Dean of St. Asaph's Case, 4 Douglas 73, 170 (1784).

³⁶Irving Brant, Bill of Rights: Its Origin and Meaning (New York: The New American Library, 1965), pp. 163-257, passim.

the balancing test, a test to reach a wise balance of social interests with the interests or rights of the individual to be informed. The Fourteenth Amendment is viewed by the Supreme Court as a means to attempt to draw the line between conflicting social and individual rights, as noted in the Near v. Minnesota case in 1931.

In the few scattered cases found in law reports prior to the Branzburg decision in 1972, judges allowed journalists to protect their sources on unspecified grounds, without deciding on the privilege claim. It was not until the Marie Torre case in 1958 that a journalist claimed immunity from revealing confidential sources on the basis of evidentiary privilege granted to certain professions under law. Marie Torre, a reporter for the New York Herald Tribune, was jailed for contempt of court when she failed to reveal the source of an allegedly libelous story that appeared in her column. Miss Torre appealed her case to the Supreme Court on the grounds that the court subpoena demanding she break confidentiality of a source abridged her First Amendment freedoms.³⁷ The Torre and Branzburg precedents deny a newsmen's privilege under the First Amendment.

³⁷Garland v. Torre, 259 F 2d. 545, cert. denied, 358 U.S. 910 (1958). Marie Torre wrote a story in which she stated that the contract of actress Judy Garland with the Columbia Broadcasting System was to be terminated. She attributed statements to "unnamed network executives" who implied that the contract termination had to do with Judy Garland putting on more weight. Miss Garland filed a libel suit against Miss Torre who refused to identify her source of information.

Although the Supreme Court determined the importance of confidential sources a minor necessity for newsmen, this study will cite two major studies that prove otherwise. A 1969 article in the Northwestern University Law Review provided the first overview of confidentiality in daily media operations. Written by James A. Guest and Alan L. Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources," included results of a survey of thirty-seven daily newspaper editors throughout the United States.³⁸ The dailies surveyed ranged in circulation of 10,395 to over two million. Asked for a rough estimate of the number of stories published annually in their papers which were based on confidential information, the editors' answers ranged from "one or two" to "350 to 1,000". The authors concluded that arguments against newsmen's privilege on the grounds that very few stories involve confidential sources was "of dubious weight and questionable accuracy." Similar conclusions can be drawn from the affidavits filed by various journalists in the Caldwell case and statements and testimony of journalists in congressional hearings on proposed federal shield laws.

In a similar study done by Vince Blasi, a professor of law at the University of Michigan, reporters from a wide range of media

³⁸James A. Guest and Alan L. Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources," 64 Northwestern University Law Review, 18, 57-61 (1969). Further reference to the Guest and Stanzler findings are from this source. This study was the first national survey research on the subpoena problem.

were included. Those surveyed also reached a comparatively large number of readers, viewers, or listeners. The study included 208 newspapers with a minimum circulation of 50,000. Published in the Michigan Law Review in 1971, the study is entitled "The Newsman's Privilege: An Empirical Study." Blasi's study concluded that the average newsman in the population surveyed relies on some kind of confidential source in anywhere from 22.2 per cent to 34.4 per cent of his stories.³⁹ Both the Guest and Stanzler and Blasi studies will be cited periodically in this study.

Journalists contend that forced disclosure of their confidential information as a constant threat hampers the news gathering process. Also impaired is the public's right rather than privilege, to a free press, a First Amendment protection. Here consideration of this argument will be based on three major studies by scholars of constitutional law: The Bill of Rights by Irving Brant; Toward a General Theory of the First Amendment by Thomas I. Emerson; and Freedom of Speech and Press in Early American History by Leonard Levy. These writings and opinions of legal scholars will be discussed in light of arguments suggesting what the framers intended by the freedom of press clause of the First Amendment.

Case studies involving newsmen's privilege will be based on law review articles, court reports, and findings of two recent

³⁹Vince Blasi, "The Newsman's Privilege: An Empirical Study," 70 Michigan Law Review, 237, 247 (1971). Further reference to findings of Blasi study are from this source.

historical studies on privilege. Both are unpublished theses. An extensive research paper, "Protection of News Sources: The History," written by David A. Gordon at the University of Wisconsin in 1970 traces the historical development of newsmen's privilege. A second historical study, "The Journalist's Claim to Testimonial Privilege," cited in this study was written in 1971 by Mary Morrice Bogin at Michigan State University.

As shown in these two studies, journalists who argued in defense of stories important enough for confidentiality have proven their factual reporting was of considerable value to the public. Many of the stories that brought about press subpoenas exposed criminal activities and valuable information about radical or dissident groups. Moreover, reporters faced with subpoenas were seldom challenged about the accuracy of their stories or the substantive, newsworthy revelations acquired by the public and law enforcement agencies.

Since the Supreme Court has denied a testimonial privilege for journalists, appeals have been made to Congress for federal legislation on privilege. As the debate continues at this writing in congressional hearings, Congress has yet to pass a federal shield law. Transcripts of Congressional hearings from 1972 and 1973 are a major source of reference used in this study. However, it is unfortunate that the role of the press as a public media is at times overlooked in these debates. The press in this country has always played the role of the transmitter of information to the public.

That is its duty, its obligation and its sole purpose for existing. Therefore, a news gathering process unhampered by subpoenas and other judicial or legislative pressures is of primary benefit for the public, rather than the newsman alone.

CHAPTER III

THE HISTORICAL SETTING

The struggle for a free press began sometime before John Peter Zenger, a German immigrant and printer, came to this country. The story began as early as the Fifteenth and Sixteenth centuries in England when there was a struggle for freedom of expression under the rule of the English monarchs.⁴⁰ The right of an individual to speak his opinion was considered dangerous and in some cases, disrespectful to authority. There were many who were severely punished for printing objectionable materials, whether their sources were named or unnamed.

As the situation of the early printer was described by one author:

. . . authorities looked broodingly on the notion of any individual being free to speak his piece whether in print or from a rostrum. A ruler was lord and master in those times and his actions and those of his ministers were held to be above criticism. Anyone who took exception to the rule found himself facing charges of treason. Yet some noble souls made the effort.⁴¹

⁴⁰Lawrence C. Wroth, The Colonial Printer (Charlottesville, Va.: Dominion ed., 1964), p. 59.

⁴¹Maurice R. Cullen, Jr. "Bulwark of Liberty: The Struggle for Freedom of Expression in Early America," unpublished manuscript, 1973, p. 2.

The "noble souls" were men like William Carter who was hanged and quartered for high treason after printing pro-Catholic pamphlets. John Twyn, a printer, had to account to authorities when in 1664 a corrected proof of a book, A Treatise on the Execution of Justice, was found in his house.⁴² Among the revolutionary notions it contained was the assertion that the supreme magistrate was accountable to the people and that the people had the right to revolt and seize the government should it fail them. Twyn refused to identify the author. He was hanged, drawn and quartered for the crime of printing someone's opinion. His "revolutionary" suggestions seem identifiable with those of this country's founding fathers, particularly the tenets of the Constitutional protections guaranteeing rights for the people, of the people, and by the people.

In the early American colony life, precedents in English law came along with the other social and political institutions of England. Printing came, too, and spread slowly along the Atlantic Seaboard, but even in the new country, printers were restricted by government officials who continued to view this trade as dangerous and detrimental to the King's representatives.

Sir William Berkely, Governor of Virginia for thirty-eight years said of printing in 1671:

But I thank God we have not free schools nor printing and I hope we shall not have (them) these hundred years. For

⁴²Ibid.

learning has brought disobedience and heresy and sects into the world; and printing has divulged them and libels against the government. God keep us from both.⁴³

Yet as printers courageously toed the line to stay in business and stay alive, the growth of the press slowly progressed during the Colonial period. Direct criticism of government was often avoided or disguised through brilliant language of the pamphleteers and freedom essays of colonists. Thus the conflict between outspoken citizens and government began. Today outspoken reporters who fail to fear or shrink from controversial subjects or anti-government news reporting continue the adversary roles between government and the press.

This early conflict between the press and government during the Colonial period served as the blueprint for the John Peter Zenger case. Zenger was jailed when he allowed his newspaper, the New York Weekly Journal, to be used by those who were critical of the regime in power at the time. In 1734 the Journal published a number of articles that were critical of the governor of New York, William Cosby. Governor Cosby had provoked considerable controversy by prosecuting the interim governor and by removing the chief justice from office.⁴⁴

⁴³Leonard Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (New York: Harper Torchbook ed., 1963), pp. 24-25.

⁴⁴Wroth, pp. 16-18. Edwin Emery, The Press and America (Englewood Cliffs: Prentice Hall, 1962), pp. 38-42.

Zenger was arrested and charged with criminal libel. Unable to post bond, he waited nine months in jail before his trial on August 4, 1735. He was represented by Andrew Hamilton after Governor Cosby disbarred Zenger's original lawyer. Hamilton, a distinguished trial lawyer in the colonies, made a moving appeal to the jury to acquit Zenger of the libel charge. The verdict was "not guilty."⁴⁵

Although the concept of a testimonial privilege was not at issue during the trial, the case has long been considered a landmark case for the press. During Zenger's trial there was no ruling made on a reporter's right to shield confidential sources of information. However, during his long imprisonment and trial, Zenger did not reveal the names of the individuals who wrote articles for his paper even though the governor offered a reward for the identity of the author. Thus Zenger's silence did serve to establish as a part of a journalist's "code of ethics" a prohibition against revealing sources of confidential sources. Zenger's personal sacrifices were heroic and he took the crucial risk of refusing to reveal the identities of his editorial contributors. Zenger rightly became the symbol of those constitutional guarantees rooted in the First Amendment, namely, free speech and free press. Journalists today, faced with controversial subpoena problems, continue the struggle to keep both.

⁴⁵Emery, p. 45.

A First Amendment Mandate

The principle of freedom of the press has roots far older than the John Peter Zenger case. It began in this country with the spread of printing and later with a "Bill of Rights." The American Bill of Rights was written by men who knew of the English Bill of Rights of 1689. The English document, however, provided no guide for Colonial Americans except in pointing the directions and furnishing the format for self-protective action. It was devoted to immediate protective purpose. The English Bill of Rights was also narrow in scope and repealable by law.⁴⁶ It failed to cover rights, privilege, and immunities of the people. The framers of the American Bill of Rights attempted to avoid these weaknesses.

Two centuries before the framers attempted to draft the Constitution, there was no legal distinction between spoken and printed slander in England, until a century after the invention of printing. Based on the wider circulation of the printed word and the greater presumption of malice, written slander became "libel" or "seditious libel" where the words concerned the government or public officials.⁴⁷ Later affiliation of seditious libel with common law developed from the court of Star Chamber, the most vicious

⁴⁶Frederick S. Siebert, Freedom of the Press in England 1476-1776 (Urbana: University of Illinois Press, 1965), pp. 88-95; Irving Brant, Bill of Rights: Its Origin and Meaning (New York: The New American Library, 1965), p. 68.

⁴⁷Siebert, pp. 193-197.

tribunal of English history. This court was dedicated to stifling criticism of the government and freedom of political opinion.⁴⁸ Seditious libel as judged in early English tribunals became almost synonymous with treason and heresy and was eventually injected into the common law.

This doctrine of punishment for seditious libel and for political opinions critical of the government was transferred to the common law practices of Colonial America. According to Irving Brant in his Bill of Rights, this idea was transferred mainly through Sir William Blackstone's Commentaries on the Laws of England, published 1765 to 1769. Blackstone's treatise became the legal equipment of early America. Blackstone, who Brant calls a "false guide," was nonetheless the recognized guide in the early colonial courts. Therefore, Brant stated that the framers of the First Amendment had Blackstone's definition in mind when they drafted the freedom of press clause. Blackstone defined freedom of press as follows:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he published what is improper, mischievous, or illegal, he must take the consequences of his own temerity.⁴⁹

⁴⁸Brant, p. 40.

⁴⁹William Blackstone, Commentaries on the Laws of England, IV, New York, 1836, p. 151.

The British press had experienced restraints first by kings, then by the Star Chamber courts, and finally by Parliament. The limited number of printers and presses were further restrained by licensing policies and execution of the libel laws. Colony governors, loyal to crown, continued some of these restraints. The colony courts maintained Blackstone's common law definition of liberty of the press. A free press meant only freedom from prior restraint, nothing more. Even after the Zenger case, there still remains the threat of punishment under the common law of seditious libel and under the power of a legislature to punish for contempt.

It was against this background and history of England that the framers sought to draft the First Amendment. They wanted a Bill of Rights that carried freedoms beyond English common law, beyond the English Bill of Rights, and beyond the control of an abusive and tyrannical regime or federal government. A main element which the framers insisted on was the personal guarantees of free speech, free press, and religion. George Mason and James Madison, two framers of the Constitution, called these freedoms, the bulwark of liberty. As James Madison observed, "The state of the press under the common law cannot . . . be the standard of its freedom in the United States."⁵⁰

The framers of the Constitution intended that nothing should interfere with the guarantee of freedom of the press. They were quite

⁵⁰VI Writings of James Madison 1790-1802, 387 (Cited in In re Goodefader, 45 Hawaii 317, 352, 1961).

familiar with government restraints which occurred in England. After much discussion and debate, the framers decided on the First Amendment mandate: "Congress shall make no law . . . abridging freedom of speech or of the press." The First Amendment, moreover, was demanded by the citizens as protection against government encroachment upon a free press. There was no guarantee of freedom of speech, press or assembly in the original draft of the Constitution of the United States.

Charles Pinckney, a delegate to the Constitutional Convention from South Carolina, attempted to insert a clause to specify such freedoms, but his recommendation was rejected.⁵¹ Most delegates felt it was unnecessary since the powers of Congress did not extend to the press. Alexander Hamilton, for example, supported the omission believing that the people and the government naturally would protect such freedoms without their having to be guaranteed.

Yet Colonial American citizens of the late 1780's were not pleased with an omission of protections for the rights of speech, press and assembly. This omission aroused anger at state conventions among delegates. The push for an enumeration of rights and liberties in the new Constitution was so tremendous that the Bill of Rights, originally consisting of ten amendments, was ratified in 1791.⁵²

⁵¹Levy, pp. 85-89.

⁵²Mott, p. 367.

The first of these amendments has since become familiar to virtually every American:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁵³

From the very beginning of this amendment, there has been a special recognition of the importance of free speech and free press. As Thomas Jefferson observed:

The way to prevent these irregular interpositions the people is to give them full information of their affairs through the channels of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.⁵⁴

Such rhetoric, however, has not protected the free press of this country from jeopardy of new laws and court decisions. After this nation's independence from England with her courts and colonial governors, the principle of free press was tested with the Alien and Sedition Acts of 1798. These laws sanctioned jailing anyone who wrote or spoke with "intent to defame" the government. They lasted a little over two years and helped defeat the Federalist Party in this country.⁵⁵ As late as the 1940's and 1950's there

⁵³U. S. Constitution, 1st Amendment.

⁵⁴The Papers of Thomas Jefferson, XI, 49 (1955).

⁵⁵The Federalist, No. 84, 574 (Rossiter ed., 1961).

were suggestions that journalists be licensed. In the 1960's and under the Nixon Administration, the press was under siege by criticisms from a hostile administration and by pressure from numerous press subpoenas. Arguments and opinions in favor of press freedom was seemingly an open rejection of the Nixon Administration.

Supreme Court justices and legal scholars continue the debate over the meaning of the words "Congress shall make no law abridging freedom of the press." Some judges, like the late Supreme Court Justice Hugo Black, have taken an absolutist view of the First Amendment. The mandate to them means exactly that Congress shall make no law. Others say the words mean that Congress shall make no law unless balancing the needs of the country against the command of the Constitution that such a law shall not be made, legislators conclude that the reasons for making a law outweigh the reasons for not making it. Under this balancing test, a law abridging freedom of press is valid unless the Supreme Court finds a compelling reason that the judgement of Congress is incorrect.

The Supreme Court's decision on June 29, 1972, alarmed the press that the highest court in the country narrowly interpreted the principle of freedom of press. This principle, it was decided, did not include a journalist's claimed right to protect confidential sources and information. It was assumed before this decision that the First Amendment grants the broadest type of protection to press, especially in news-gathering processes. To strip journalists of this valuable tool--confidentiality--is viewed as a threat to full and free flow of information.

According to Leonard Levy's Legacy of Suppression: Freedom of Speech and Press in Early American History, the framers did not intend that the First Amendment be absolute.⁵⁶ Thomas Emerson's theory on the First Amendment, as expressed in Toward a General Theory on the First Amendment, argues the "balancing test" in interpreting the meaning of the guarantees included in this amendment.⁵⁷

Two leading constitutional scholars of this century, the late Judge Learned Hand of the United States Circuit Court of Appeals in New York and the late Roscoe Pound, dean of the Harvard Law School, opposed views on the First Amendment. Yet both were equally dedicated to the objectives of the Bill of Rights. Judge Hand called all the amendment guarantees "fundamental canons," that are not "jural concepts in the ordinary sense." In application, he said, freedom of speech and of the press, like other amendment rights "turn out to be no more than admonition of moderation" with varying and contradictory interpretations as made by judges. Dean Pound stated the Bill of Rights are "precepts of the law of land backed by the power of the courts to give effect to legislative or executive acts in derogation thereof." Any violation of these secured liberties amounts to "a revolution in order to overthrow them."⁵⁸

⁵⁶Levy, pp. 84-198, passim.

⁵⁷Thomas Emerson, Toward a General Theory on the First Amendment (New York: Harper, Inc., 1964), p. 23.

⁵⁸Learned Hand, address before New York State Board of Regents, Oct., 1952 (Cited in Brant's Bill of Rights, p. 70); Roscoe Pound, The Development of Constitutional Guarantees of Liberty (New York: MacMillan Co., 1957, preface.

Irving Brant calls the Bill of Rights guarantees not "admonitions" but "unqualified commands." The framers intentionally wrote the First Amendment as an unqualified command.

As Brant points out in his Bill of Rights:

The clear and mandatory wording. "Congress shall make no law," was applied to all the guarantees of the First Amendment--on religion, speech, press, assembly and petition--when these were revised to fit the decision that all amendments be appended to the Constitution. Madison and his colleagues knew what they were doing. English history had demonstrated to them that without complete religious liberty, without freedom of conscience and separation of church and state, there could be no freedom of speech, or of the press, or the right of assembly. Both English and American experience had taught them that without all these freedoms there could be no free government. And they had learned that even in a country where the people are sovereign, no words of lesser force than "shall not"--enforceable in independent courts of law--could restrain the servants of the people from acting as if they were the masters.

Brant further emphasized the danger of attempting to legislate First Amendment guarantees.

When no abridgement becomes abridgement at the discretion of Congress and the courts, freedom becomes a degree of freedom, and the degree varies with the temper of the time and the varying insight and stamina of the judges. Let the wording of the Bill of Rights be accepted as its true meaning and every deviation from it will be recognized for what it is.⁵⁹

⁵⁹Brant, pp. 67, 71.

CHAPTER IV

EARLY NEWSMEN'S PRIVILEGE CASES

The occurrence of press subpoenas did not begin with the Nixon Administration, yet only a few cases and a few shield laws existed prior to that time. Until recently, in fact, court had given little thought to the legal protections that might be necessary to prevent government or law enforcement from infringing on press freedom. The brief history of privilege for journalists is scattered throughout both newspaper and magazine files and law reports. In fact, the most thorough, scholarly investigation of the history of newsmen's privilege was not written until 1971.

The study, written by David A. Gordon as a doctoral dissertation at the University of Wisconsin, emphasizes the lack of historical information on newsmen's privilege and attempts to correct faulty accounts on the topic. According to Gordon, law review reports are the "most certain" sources of cases involving evidentiary privilege for journalists.⁶⁰

Reported cases were listed in various state law reports and, therefore, became part of permanent legal files on newsmen's

⁶⁰The Gordon Study, 1971, vii.

privilege. Of course, it is not known how many cases of subpoenaed reporters went unreported. In these cases, reporters perhaps cooperated with investigative agencies while privilege remained dormant as a legal issue by courts. However, those cases that were reported and left in court's annals left to attorneys, judges, and journalists precedents for later cases. Circumstances surrounding these few individual cases can be considered indicative of how the issue would be viewed in later decades. Here, a few of the typical landmark cases will be discussed.

The first reported privilege case involving a reporter dates back to 1848. As with all early cases in this pre-shield law era, cases were decided according to common law as interpreted and applied by the judge in each case. As apparent in these cases, there was no common law recognition of professional privilege, except in cases involving lawyer-client or doctor-patient confidentiality.

In the 1848 case, Nugent v. Beal, a New York Herald reporter, John Nugent, was jailed for contempt by the United States Senate for publishing a treaty then under consideration by the Senate in executive session. The case was the first of three cases within 23 years that involved journalists and Congress.⁶¹

Nugent refused to tell the Senate how he had obtained a copy of the treaty for the Herald even though he was directed to do so. He did answer questions which established the fact that he had

⁶¹Nugent v. Beal, 342 N.Y. 4d App. Ct. 582 (1848).

copied the document and forwarded it to his paper. But he refused to disclose the sources of the original material. The reporter claimed he could not reply to all of the questions with complete accuracy since he could not recall all the facts.

He indicated immediately, however, that he would not answer questions dealing with the identity of his source. The District of Columbia Circuit Court held in his case that the Senate could punish anyone for contempt under common law principles. The court rejected Nugent's argument that the Senate could not issue a contempt citation at a secret session.

In 1874, W. F. G. Shanks, city editor of the New York Tribune refused to reveal to a grand jury the identity of the author of an allegedly libelous story. The story was entitled "Brooklyn Ring's Method" and appeared August 30, 1873. Shanks indicated that Tribune regulations forbade disclosure of such names. He also refused " . . . on the principle that the paper, and not the editor, is responsible."⁶² Shanks was convicted of contempt and placed in jail until "he may answer the questions propounded to him." He was later discharged by the Supreme Court on a writ of habeas corpus. The Supreme Court held that the "commitment was illegal because the sentencing was indefinite in duration, when it should have been for thirty days or less."⁶³

⁶²People ex rel Fancher v. Phelps, 2 Hun 226 (1874). Further facts on the Shanks case are from this source.

⁶³The Gordon Study, pp. 50-51.

The ruling in the Shanks case was appealed in People ex rel. Phelps v. Fancher, and it was decided that the ruling was proper since it was left to the legislature and not the courts to establish any rules that only the editor or publisher could be held liable for the contents of a newspaper. The court said in the Shanks case:

As the law is, and has for ages existed, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reasons that the rules of a public journal forbade it. That some other party assumes the responsibility of a crime, and is willing to suffer its consequences, can never prevent an inquiry as to each and every person concerned therein, and the holding of all such equally responsible with the one avoiding it. The admission of such a principle, if carried to its logical conclusion, would shield him who hires an assassin to strike a fatal blow, so long as the slayer avowed himself to be solely responsible for the act. This extreme case is put for the purpose of showing the impolicy of the reason, and its worthlessness in a court of justice. He who writes a libelous article for publication in a newspaper, is certainly guilty of a crime, and that guilt cannot be taken away by the readiness of another to meet its consequences.⁶⁴

The court's holding in the Fancher case upheld this ruling and emphasized that in the absence of a statute, there is no legal basis for such a refusal to testify. This precedent was followed in nearly two dozen cases in subsequent years. Most of these cases also dealt with the newsman's privilege to protect a confidential source. The Fancher case is often cited as a precedent against protection of confidential sources rather than against anonymous publication. All of the cases to follow Fancher will not be discussed here; however, many cases which examined various aspects of the journalist's claim

⁶⁴Ibid., p. 56.

to privilege indicate inconsistency on how the courts viewed the problem since 1848.

More than ten years after the Fancher case, in 1886, A. W. Burnett, publisher of the Atlanta (Ga.) Defiance, was convicted of contempt and fined \$50.00 and imprisoned for ten days because of an alleged libelous article published in his paper.⁶⁵ Burnett was asked to reveal the name of the author of an article which had quoted a real estate agent as objecting to a black tenant. The reporter urged readers to take their real estate business elsewhere, and to ". . . leave this old 'skunk' to himself, to 'stink' himself to death." The reporter, publisher, and editor of the Defiance were indicted for libel. Burnett refused to testify or to name the author of the article on the grounds of self-incrimination.

The first congressional press subpoena case occurred in 1894 when several newspapers carried articles charging that senators had been offered or had accepted bribes to support tariff amendments favorable to the "Sugar Trust".⁶⁶ An appointed senate committee proceeded to investigate charges made by the Philadelphia Press and The (New York City) Sun that campaign contributions would be made to the Democratic Party in return for votes on the bill. Two reporters were subpoenaed and both refused to disclose sources

⁶⁵Pledger v. State, 77 Ga. 242, 245, 2 S. E. 320 (1886).

⁶⁶Senate Miscellaneous Document No. 278, 53rd Cong., 2nd sess., 1894, 103.

of their information. The District of Columbia Supreme Court upheld a grand jury indictment against the reporters adding that:

. . . a rule privileging newsmen would be contrary to a sound public policy . . . and the greatest possible temptation created to use the public press as a means of dissenting scandal, thereby tending to lessen, if not destroy, its power and usefulness.⁶⁷

In this congressional case, the court also refused to recognize privilege for journalists where there was no such protection by law. Again the courts noted in this case and the Burnett case that there was no common law protection or privilege for journalists. Although tribunals recognized common law protection or privileges for confidential relationships between doctors and patients, lawyers and clients, and clergymen and confessors, judges considering privilege cases involving journalists usually argued that working relationships between journalists and sources did not merit such protections. As a result, there was an implied underestimation of the role of the press in society.

Prior to the Twentieth century privilege cases involving journalists, which eventually led to the 1972 Supreme Court decision, the battle for freedom of press undoubtedly reflected on the importance of an unbridled press in a democratic society. The changing social climate of early privilege cases indicates the increasing importance of the press and the growing need of its existence over the centuries. Newspapers were the major source of widespread public

⁶⁷Ibid., pp. 105, 115.

information in pre-electronic media days. Therefore, all early privilege cases involved newspaper reporters who in some cases complied with press subpoenas.

Nevertheless, in those cases where reporters did not comply with subpoenas and refused to reveal confidential sources, the public received information about political scandals, crime, discrimination, and so forth. In fact, many of the events surrounding the development of early privilege cases became interspersed with what is now considered history of the American press. The atmosphere of the American press was one of competition as most major cities were not one-newspaper cities prior to the Twentieth century. Confidential sources were considered valuable for newsmen, particularly if it meant getting leads to stories involving popular issues or well-known public figures.⁶⁸

For example, the Nugent case of 1848 involved a controversial political issue at the time: a peace treaty between Mexico and the United States. The case came about only two years after the United States declared war on Mexico, a war which Americans followed through the only available media--newspapers. The Fancher case involved an exposé of a Brooklyn, New York, crime ring. In the Burnett case, the public became aware of discriminatory practices of a real estate company. The first congressional case involved two newspaper reporters who revealed facts of illegal campaign

⁶⁸Frank Luther Mott, American Journalism (New York, 1951), p. 89.

contributions made in exchange for votes to support tariff amendments in Congress.

Reporters courageously stood in defense of their controversial stories refusing to identify sources. Their stand demonstrated the social responsibility role of the press, a stand which often meant personal risks that, in fact, had begun centuries before the Nugent case.

CHAPTER V

THE SUPREME COURT ON NEWSMEN'S PRIVILEGE

Since the Colonial Period, the cases of harrassment or legal action against newsmen for their published news stories developed a more specific dimension: forced disclosure of sources of information. A historical trace of this issue and the individual cases indicates that the controversy often involved clashes between the press and government.⁶⁹ Like John Peter Zenger in Colonial America, reporters who came after him and wrote stories that were embarrassing or highly critical of the government were likely to face personal harrassment and contempt charges in court. With recent revelations of the Watergate scandals during the Nixon Administration, government harrassment of the press took the form of the press subpoena. The Watergate stories revealed instances of illegal wiretapping by the government, burglary, selling ambassadorships, illegal campaign contributions, and payoffs to impede Watergate investigations among other things.

⁶⁹Mary Morrice Bogin, "The Journalist's Claim to Testimonial Privilege," unpublished thesis, Michigan State University, 1971.

These revelations were critical to the government, and as the story of Watergate unfolded the Nixon Administration responded to the news media's reports by serving countless subpoenas on journalists and publications who covered the crucial events. The complex train of events would undoubtedly have been impossible to report fully without the use of confidential sources.

When the press lost its appeal to the Supreme Court for a newsman's privilege under the First Amendment, the number of subpoenas served on the news media increased. In the Branzburg-Caldwell-Pappas cases, the Court basically used the balancing test in determining whether a journalist merits a testimonial privilege under the First Amendment guidelines. The court decided that grand jury investigation, a judicial process, outweighed the news media's right to gather information and use confidential sources.

The Court stated:

There is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation.⁷⁰

The plaintiffs claimed that in order to gather news it is often necessary to agree either not to identify the sources of information published or to publish only part of the facts revealed, or both. If reporters are forced to reveal confidences to a grand

⁷⁰Branzburg v. Hayes et al., Caldwell v. United States, In re Paul Pappas, 408 U.S. 665 (1972). Further reference to the Supreme Court's decision on newsmen's privilege is from this source.

jury, they argued, the sources so identified and confidential sources of other reporters will be "measurably deterred" from furnishing "published information and all to the detriment of free flow of information," a First Amendment guarantee. The Court rejected this argument.

Nonetheless, the Court failed to clarify several implications in the decision. Who is to decide when a newsman is subpoenaed whether information sought is "relevant and material"? What is a "good faith" grand jury? Also, the ambiguity and tentativeness of the opinion was expressed when the Court added that it was "powerless" to erect any "bar" to state courts who wished to construe their own constitutions to recognize a newsman's privilege, "either absolute or qualified."

What the Court failed to recognize was a means of determining when the public is deprived of information by restraints, such as press subpoenas. However, the Court did note that newsmen still have a remedy in the courts for over-reaching by grand juries or harrassment by prosecutors. As Justice White pointed out, they need only move to quash the subpoena as other subpoena witnesses can. Yet when Earl Caldwell of the New York Times moved to quash his subpoenas, his attempts failed. The majority opinion emphasized that only where a reporter's news sources themselves are implicated in crime or the reporter possesses information relevant to the grand jury's task need there be fear of subpoenas or harrassment. However, since the Court's decision, major newspapers and broadcast stations

have been issued sweeping subpoenas for demands of all collected data by investigative bodies. In many cases, these agencies did not prove the relevancy of the confidential or unpublished information to subpoenaed newsmen.

The dissenting opinion, written by Justice Potter Stewart, who was joined by Justice William J. Brennan and Justice Thurgood Marshall, vocalized serious objection to the court's narrow interpretation of the First Amendment. Justice Stewart called the court's majority opinion a "crabbed view of the First Amendment" that reflected a "disturbing insensitivity to the critical role of the independent press in our society." He added:

The court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex to journalistic profession as an investigating arm of government The reporter's constitutional right to a confidential relationship with his source allows a full and free flow of information to the public.

Justice William O. Douglas also dissented in the Court's decision. Refusing to use the balancing test in the cases, he stated that all the balancing was done by those who wrote the Bill of Rights. Douglas argued for a "blanket" immunity from testifying before a grand jury. He indicated that the privilege should extend to any person involved in researching and reporting findings-- professors, political pollsters, lecturers, or researchers. Justice Douglas concluded that with the court's ruling that:

. . . when the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment as I read it was designed precisely to prevent that tragedy.

In each of the three Supreme Court cases, the journalists claimed privilege under the First Amendment's freedom of press clause. The crux of the issue lay, in part, in defining exactly what freedom of the press means. The court has ruled that none of the First Amendment freedoms are absolute and for some 125 years the concept of an ethical legal basis for newsmen's privilege has been confusing. As expressed by one legal scholar, the debate over the boundaries of the First Amendment and liberty of the press has long been an issue of democracy, older than the Constitution.

In the Federalist Papers, Alexander Hamilton wrote:

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two . . . I contend that whatever has been said about it . . . amounts to nothing. What significance a declaration that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.⁷¹

As First Amendment cases have arisen, the Supreme Court has found it necessary to confront the difficulty of defining boundaries of the freedom of press clause, among other First Amendment protections. The constitutional limitations placed upon the right to freedom of press include three major tests often applied by the Supreme Court: the clear and present danger doctrine; the

⁷¹Federalist Papers, No. 84, p. 514.

test of reasonableness; and the balancing test.⁷² The first test is one applied in every case concerning First Amendment freedoms. It is considered wherever there is possible threat to the national security of this country.

In the test of reasonableness, the court decides if that action involved is a "reasonable" alternative given the facts of the case. However, the court has emphasized that no test of reasonableness can save a state law from invalidation where there is a violation of the First Amendment. The balancing test, most frequently used in First Amendment cases, is determined as the court balances or weighs the importance of an activity to the exercising of First Amendment rights. The questionable and problematic aspect of these tests is inherent in the conflicts encountered by the courts in determining curtailment of the news media's activities when it outweighs the right of the press to obtain information and the public's right to know.

Even though journalists argue that the right to gather information freely, including collecting confidential information, is inherent in the freedom of press guarantee, this argument has not been interpreted as such by the Supreme Court. The Court has not directly confronted the issue of whether freedom of press gives

⁷²William A. Hatchen, ed., The Supreme Court on Freedom of the Press: Decisions and Dissents (Ames, Iowa: Iowa State University Press, 1968), pp. 15-60, passim.

the information media a right to gather information. Only three Supreme Court decisions in the last decade have indirectly touched upon the issues--Zemel v. Rusk (1965), Estes v. Texas (1965), and Sheppard v. Maxwell (1966).

In Zemel v. Rusk, the Court said that the "right to speak and publish does not carry with it the unrestrained right to gather information."⁷³ However, in this case, the plaintiff, a private citizen who had no connection with the press, requested that his passport be validated for travel to Cuba. His request denied, he took the issue to court saying his purpose for the trip would be "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."⁷⁴ Here, the important differential factor is that Zemel did not represent the press. His position would have been quite differently analyzed by the court had he been a newsman seeking to satisfy his curiosity alone.

In Estes v. Texas, the free press fair trial issue was prevalent. The court held that while maximum freedom must be allowed the press in carrying on the important function of informing the public in a democracy, its "exercise must necessarily be subject to

⁷³"Notes: The Right of the Press to Gather Information," Columbia Law Review, LXXI, p. 838; Donald M. Gillmer and Jerome A. Barren, Mass Communication Law: Cases and Comment, "Fair Trial, Free Press," (St. Paul: West Publishing Co., 1971), pp. 52-68.

⁷⁴"Notes," p. 839; Estes v. Texas, 381 U.S. 532 (1965).

the maintenance of absolute fairness in the judicial process." The dictum in the *Estes* ruling stated that all media are entitled to the same right as the general public overlooks one important aspect of the issue. The question ignored is whether the general public when engaged in gathering news information through the press may claim constitutional protection for its activities.

In the Sheppard v. Maxwell case, a lower court's decision was reversed because of pre-trial publicity. In these cases, the court used the balancing test in determining that an individual's right to fair trial outweighs the media's right to gather information. Newsmen and legal scholars are likely to agree that freedom of press, at some point, must give way to the judicial process of fair trial, but the conflict frequently debated is at what point is the public deprived of information by judicial restraints placed upon the press. The Supreme Court has yet to determine at what point exactly should limitation to news-gathering be drawn.

The Supreme Court has not set clear precedents protecting news-gathering under the First Amendment in the same way that it has in holdings protecting publication and dissemination of news. Apparently, the court failed to understand the importance of confidential sources to the news-gathering process in today's society despite the evidence presented during the *Branzburg* case. Also, the court unfortunately dwelled on theoretical principles of the First Amendment without considering existing circumstances of each case. It would seem that the importance of a story based on a



confidential source should be considered by the court along with the importance of the name of the source to the judicial proceeding.

At any rate, if news-gathering processes must depend upon confidentiality in order to be complete, it would seem logical to allow it protection under the First Amendment. Although the Supreme Court has not strongly considered news-gathering under First Amendment guidelines, it would seem that the guarantee of freedom of the press to publish news is really meaningless without the freedom to gather the news.

The Supreme Court has yet to clarify this aspect of defining freedom of the press. However, some state courts have implicitly expressed the special role of the press in society and what freedom of the press means today. The late Justice Michael Musmanno of the Supreme Court of Pennsylvania clearly expressed the principle when he said:

Freedom of the press is not restricted to operation of lino-type machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any of these integral operations is interdicted, freedom of the press becomes a river without water.⁷⁵

What is explicitly stated here is that freedom of the press is an expansive freedom including not only the right to disseminate

⁷⁵In re Mack, 386 Pa. 251, 126 A. 2d, 679 (1956).

information as determined in the Shenck v. United States case in 1919, but also the right to publish it, circulate it, and in turn to first gather it. In any instance where the press is restrained against fulfilling these tasks, such as through court subpoenas and forced disclosure of confidential sources, there is abridgement of the freedom of press clause. The undue burden placed upon newsmen to reveal sources hampers access to news-gathering processes. As a result, the public is not informed of certain news and denied access to full and free flow of information.

CHAPTER VI

NEWS COVERAGE IN AN AGE OF CONTROVERSY

The "Age of Paranoia" was the name given to era of 1960's by editors of the youth-oriented tabloid newspaper called Rolling Stone. The young editors gave this title to their book which developed into a historical chronicle of events in the 1960's as they appeared in the Rolling Stone. The book is a written documentary of student riots, student protest at major colleges and universities, Vietnam, black militants, the rock music movement, urban race riots and youth rebellion against representing the so-called "establishment". The authors of Age of Paranoia note that the book developed from clippings and notes of stories covered in Rolling Stone during the late 1960's.⁷⁶ It depicts the trends of a new counter-culture and the national shock of a youth rebellion against traditional establishments.

Events were controversial, violent, and sensitive coverage for all news media, including the underground and establishment

⁷⁶Editors of Rolling Stone, The Age of Paranoia: How the Sixties Ended, (New York: Straight Arrow Publishers, Inc., 1972), preface.

press. It was undoubtedly a time when reporters witnessed all kinds of events that often wound up in litigation. It was also a time when a flood of subpoenas started from government and law enforcement agencies. Reporters were sought as witnesses or leads to information necessary for legal prosecution by courts, grand juries, or investigative bodies. Then came the enormous burden involving protecting the confidential and unpublished source.

The sharply increasing use of press subpoenas in the late 1960's came about when the issue of newsmen's privilege had remained almost untouched in the courts. Prior to the 1960's, the press and prosecuting officials co-existed on the uncertain grounds that there was no common law privilege recognized in state or federal courts; no federal statute or rule recognizing the privilege and there were only a few states with varying degrees of statutory protection. Occasionally, a case would focus on privilege for journalists, but even in these infrequent court cases none went beyond state court rulings. In fact, it was not until 1958, that a journalist based refusal to reveal sources upon the First Amendment, in the case of Garland v. Torre.

Two cases in the 1960's also briefly focused public attention on the problem. In re Cepeda, the star first baseman for the San Francisco Giants sought to discover the sources for allegedly defamatory statements about him in a magazine article. The applicable California newsmen's privilege statute expressly covered only those journalists employed by newspapers, wire services, press

associations, and radio and television stations. Since the statute was in derogation of the common law, the court held it should not be construed to extend a privilege to magazine writers.⁷⁷

However, the problem of privilege for journalists took on new dimensions in the late 1960's. The new development was perhaps best traced by a study completed by the New York City Bar Association. The study suggests that several social factors have contributed to the growing tendency to use journalists as an evidentiary source. The general political and cultural fragmentation of American society today had led journalists to cover dissident groups whose activities were likely to be of interest to investigative agencies. Also underground newspaper and partisan organs began to devote themselves extensively to reporting activities of alienated groups, the study noted.

In addition to official corruption, bureaucratic secrecy which has consistently given impetus to confidential information passed on to journalists, the report mentioned functional developments within the media that have also led to more journalists collecting information of interest to law enforcement authorities. The electronic media have become the source of information about immediate clear-cut events while the print media have turned

⁷⁷In re Cepeda, 233 F. Supp. 465 (S. D. N. Y.), 1964.

increasingly to investigative reporting. In the process, print journalists have adopted extensive use of confidential informers.⁷⁸

According to the Blasi study, police reporters have always had a "friendly rivalry with law enforcement officials to see who could solve a case first."⁷⁹ Investigative reporters, in fact, have often been eager to help a grand jury follow up their exposes, and this type of press cooperation with law enforcement has sent many to jail on the basis of evidence originally acquired by journalists. Even in the early 1960's in the South, as found in the Blasi study, reporters often turned over information to FBI agents concerning civil rights violations. However, in most of these instances, reporters were not violating confidences made in the line of their profession. It was also during this era that the relationship between the press and law enforcement officials changed. Blasi described reasons surmised by many reporters across the country as to why this relationship began to deteriorate.

There can be no doubt that, quite apart from any fears about losing sources, reporters today are far more reluctant to cooperate with law enforcement officials. There are several reasons for this change of attitude. First, most newsmen share a general disillusionment with the process of government as a result of the Vietnam war, the collapse of the

⁷⁸The Association of the Bar of the City of New York, Committee on Federal Legislation. "Journalists' Privilege Legislation," submitted to the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, Feb. 1, 1973, pp. 700-701.

⁷⁹The Blasi Study, p. 253.

civil rights and poverty efforts, and the various government attempts to suppress dissent. Second, the journalism profession feels a special sense of indignity at the way it has been manipulated by the past three presidential administrations; Sander Vanocur put it to me most poignantly: "I have served as a conduit for lies." Third, the special hostility that has grown up between the Nixon Administration and the press has generated a spirit of non-cooperation that carries over even to local government institutions. Fourth, the beatings that newsmen received at the hands of the Chicago police during the 1968 Democratic National Convention have left a legacy of hate throughout the journalism profession. Fifth, and in some ways most important, the technique adopted by some police departments of having their undercover agents pose as reporters has so embittered newsmen that things may never be the same even though most police departments quickly abandoned the practice and offered apologies to the press. The increased use of the subpoena power by law enforcement officials, while in many ways a result of the reduction in voluntary press cooperation, has only exacerbated the situation.⁸⁰

Coverage of controversial events as well as the strained relationship between the Nixon Administration and the press may have added to pressures caused by press subpoenas. The dissidence engendered by the Vietnam war, the emergence of a new "counter-culture" generation and the new consciousness of minorities found expression in radical militancy, drugs, and social shock in the latter 1960's.⁸¹ The news media was caught in the wave of heat to serve as witness and reporter in this "Age of Paranoia". In order to carry out their role to inform the public of these events, journalists could not join hands with law enforcement nor government and remain free to fulfill their difficult tasks.

⁸⁰ Ibid., pp. 254-255.

⁸¹ Editors of Rolling Stone, The Age of Paranoia, pp. 20-80, passim.

At the same time, journalists had to guard against being used by government as witnesses. They also had to prevent their freedom from becoming a compromise by infringement on its confidentiality. Any presumed immunities journalists assumed in the past were sure to become challenged in a time of such social crises in the 1960's. It was an age of confrontation when reporting news had reached a massive scale and developed national impact almost instantaneously. News reporters, it seemed, were perhaps the best and only source to assessing the radical era and the people who made it radical.

The atmosphere was a crucial one for the press, one that led into the early 1970's. A report by the Twentieth Century Fund Task Force on government and the press noted the tensed relations between these two institutions during the Nixon Administration.

There was a rising national distaste for radicals and dissent. Vice-President Spiro Agnew began to make verbal attacks against the press on behalf of what was called "the silent majority." As the apparent spokesman for the Nixon Administration, Agnew became a frequent critic of the news media. Although some media representatives saw justice in various charges made against them, more feared attempts to intimidate the press after a series of events. As the nation moved to deal with radical elements of society, the news media were in danger of being caught in the middle.

The series of events referred to were those defensive actions taken by the government and law enforcement officials who

seemed intent on proving that militant and dissident groups were intent on overthrowing the government or assassination of the President because of their anti-government protests. Government prosecutors subpoenaed notes, tapes and files of a number of journalists and publications on militant groups.⁸² The Senate Permanent Subcommittee on Investigations subpoenaed the records of a California underground publication to learn the identity of the pseudonymous author of a number of anti-police articles. A number of federal and local intelligence agents were discovered posing as newsmen to collect information about militants, which in turn caused incidents where legitimate journalists were assaulted or excluded from meetings by militants.⁸³

⁸²Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971). Facts here are also based on findings of numerous articles dealing with press subpoenas and pressures between the Nixon Administration and the news media as covered by the New York Times and Washington Post during 1968 to 1970.

⁸³The editor of the West Coast publication Black Politics was subpoenaed in order that the Senate Permanent Subcommittee on Investigations could acquire the name of the reporter who wrote several anti-police articles in the publication. There were several instances during this period when college and underground reporters were subpoenaed for anti-government and anti-war articles as well as for leads to information on militants.

In one instance, press credentials were issued to policemen who photographed individuals spoofing Vice-President Agnew's speechmaking while he was in Wichita, Kansas in October, 1970. The New York Times, December 31, 1970, p. 2.

Another group of army intelligence agents received press credentials from the New York City Police Department to cover activities of black militants H. Rap Brown and Stokeley Carmichael in New York during the summer riots of 1967. Ron Dorfman, "Watching the Watchers," The Chicago Journalism Review, January, 1971, p. 3.

Then came Attorney General John N. Mitchell's guidelines on press subpoenas in 1970.⁸⁴ The guidelines were issued to prosecutors and designed to limit press subpoenas, for the incidence of these subpoenas had mushroomed since 1969 and spread to state and local law enforcement agencies.

Federal authorities subpoenaed confidential and unpublished data of news media as the Justice Department began investigating members of several radical groups. The tapes and film of a Columbia Broadcasting System (CBS) news program on the Black Panther party was subpoenaed. Material was sought for use in a Justice Department case against David Hilliard, a national officer of the party. A second subpoena demanded a complete record of all correspondence, memoranda, notes and telephone calls made by CBS producers in connection with the Black Panther program.⁸⁵

In another case, the unedited files and unpublished pictures of Time, Life and Newsweek magazines dealing with the Weatherman faction of Students for a Democratic Society were subpoenaed by federal authorities. The data was sought for a grand jury investigation of disturbances in Chicago during the fall of 1968.⁸⁶

⁸⁴The entire text of the guidelines is included in the Appendix A of this study.

⁸⁵The New York Times, Feb. 4, 1970, p. 10.

⁸⁶Ibid., p. 5.

During this same year of 1971, Earl Caldwell, who was covering the Black Panther Party in the San Francisco Bay area, received a federal subpoena to appear before a grand jury in California to reveal tapes and notes collected on the Black Panthers. The grand jury was investigating possible violations of law against threatening the President and against advocating violent overthrow of the government. In the case of Caldwell, the information he had acquired from Black militants was given him on a professional confidential basis. His refusal to comply with the subpoena drew national attention to his case and the dispute over press subpoenas.

Briefs filed in the United States Supreme Court in the Caldwell case revealed that in the first two and a half years of the Nixon Administration, 124 subpoenas were served on the National Broadcasting System and the Columbia Broadcasting System including stations owned by both companies. During the same period, thirty subpoenas were served on the Chicago newspapers published by Field Enterprises, Incorporated. Two-thirds of these were initiated by federal prosecutors.⁸⁷ Since 1969 the number of press subpoenas increased in variety as well as volume, and information sought went beyond the identity of a single confidential source.

⁸⁷Caldwell v. United States, 408 U.S. 665 (1972). Figures on the number of subpoenas served on the news media are from the briefs filed with this case.

CHAPTER VII

PROBLEMS IN LEGISLATING NEWSMEN'S PRIVILEGE

"A newsman without sources is a newsless man. A public without news is a blind and ignorant public . . ." Thus concluded the testimony of William C. Payette, a national president of Sigma Delta Chi, before a U. S. Senate subcommittee in 1972 during hearings on newsmen's privilege.⁸⁸ Like Payette, most journalists and legislators, if not all, agree that a newsman has to have sources in order to report the news. The news sources, whether published, unpublished or confidential, are essential in presenting full and accurate accounts to the public. Forced disclosure of confidential sources can impair a full and accurate news account, and perhaps prevent any account at all.

During the congressional hearings on newsmen's privilege, legislators and journalists considered the full scope of privilege and legislation of federal shield law. The move for a federal bill

⁸⁸U. S., Congress, Senate, Committee on the Judiciary, Newsmen's Privilege, Hearings, before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Senate, on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 879, S. 917, S. 1128, and S. J. Res. 8, 93rd Cong., 1st sess., 1973, p. 300. Hereinafter cited as "Senate Hearings, 1973."

came after the Supreme Court's ruling on the Branzburg and Caldwell cases in 1972. The Court recognized in the decision that there was merit in leaving the task of drafting a newsmen's privilege statute to legislative branches of state and federal government. The specific guidelines such a statute would provide are desirable, the Court implied in the majority opinion, providing the legislatures take into account the conditions prevailing within their respective jurisdictions and refashion those guidelines from time to time as experience may dictate.⁸⁹

In legislating privilege for newsmen, Congress had debated the issue in several sessions since 1971. Over fifty bills have been drafted in Congress in the last two years. The first statutory recognition of newsmen's privilege was granted in Maryland in 1896. A 1939 amendment to this statute extended protection to radio reporters.⁹⁰

Nineteen other states now have shield laws, and since the Supreme Court's decision on Branzburg, several states have sought to broaden protection or draft new shield law bills.⁹¹ Some states have approved new statutes that journalists have supported. Congress has not been successful in drafting a federal shield law.

⁸⁹Branzburg v. Hayes et al., 408 U.S. 665 (1972) at 706.

⁹⁰The Blasi Study, p. 5.

⁹¹Senate Hearings, 1973, p. 723.

Congressmen are left with the difficult task of trying to wisely strike a balance between three major aspects of the problem. First, creation of a national shield law, if absolute, means granting immunity to the press to prevent its agents from being forced to give any information concerning any situation, regardless of the function and purpose of the acting investigative body. Of course, any federal bill with such wide protection must cite the dimensions of privilege. Guidelines are necessary to prevent abuse of such a broad shield law.

Secondly, the First Amendment of the Constitution states that Congress shall make "no law" abridging freedom of the press. Congressmen must consider whether a shield law, even if it were "qualified" law, would limit the press from fulfilling its news gathering process. Under the realm of the press, the Supreme Court has ruled in cases concerning pamphlets, leaflets, signs, motion pictures, and books as well as newspapers, magazines, and television.⁹² A federal shield law would have to define which media is protected under the law.

The challenge is a considerable one. Although Justice White's majority opinion stated that Congress and state legislatures are free to "determine whether a statutory newsman's privilege is

⁹²Donald M. Gillmor and Jerome A. Barron, Mass Communications Law: Cases and Comment (St. Paul, Minn.: West Publishing Co., 1971. See cases involving specific court definitions of the press, chapters 1-2.

necessary and desirable", the opinion noted the difficulty involved in legislating privilege. Justice White wrote:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photo composition methods The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources, and that these sources will be silenced if he is forced to make disclosures before a grand jury The courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws.⁹³

The Branzburg Court held that the First Amendment does not grant newsmen a privilege to withhold from grand juries either confidential information or sources obtained during legitimate news gathering activities. Justice White implied even broader limitations against the press when he stated that reporters have no more rights than "all other citizens". The court, in that same opinion, recognized that the public has a right to "everyman's evidence before a grand jury except for those persons protected by a constitutional, common law, or statutory privilege.

⁹³Branzburg v. Hayes, 706-707. Further references to the Supreme Court's June 29, 1972 ruling on the Branzburg, Caldwell, and Pappas cases are from this source.

Hearings on some newsmen's privilege bills were held in the fall session of Congress, 1972, by a subcommittee of the House Judiciary Committee. Chaired by Representative Robert W. Kastenmeier of Wisconsin, the hearings proved educational for the press and for Congress as legislators, as legal scholars, and journalists debated the legal and social perspectives of the issue. Unfortunately during the Kastenmeier hearings, the news media displayed lack of unity as various news organizations supported different bills.

Senator Sam Ervin of North Carolina, then chairman of the Constitutional Rights Subcommittee of the Senate Judiciary, led hearings on newsmen's privilege bills in the spring of 1973. During these hearings, the news media presented a more unified approach to the problem. Davis Taylor, publisher of the Boston Globe and chairman of the American Newspaper Association, invited major news media organizations to participate in an Ad Hoc Drafting Committee to prepare a bill which could be used as a model.

The operative language of the bill reads:

Section 2: No person shall be required to disclose in any federal or state proceeding either (1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public, or (2) any unpublished information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.⁹⁴

⁹⁴S. 158, 93rd Cong., 1st sess., sec. 3 (1973).

Since there are numerous bills of such wide variety, discussion here will be limited to certain bills that have been introduced in Congress. They are of two basic types: absolute and qualified. The privilege bill introduced in the spring of 1973 by the American Newspaper Publishers Association is considered most typical of the absolute shield law bill. Two widely supported qualified privilege bills are the ones introduced by the Joint Media Committee and the Ervin bill, which is perhaps the most restrictive of those bills that appear to have won wide support.

There has been virtually unanimous support from legislators, reporters, commentators, and interested groups that some legislation is needed.⁹⁵ From that perspective, the only question is what type of legislation should be passed. Then there are some opinions that no legislation is the best solution for the press. The most recent position of the Justice Department opposes any federal law which trusts the self-discipline of the Attorney General in administering the department guidelines. The guidelines, included in Appendix A, issued in 1970 was a federal attempt to abate the use of subpoena in connection with grand jury proceedings.

Further opposition to legislation comes from two groups with different political perspectives. First, there is a minority

⁹⁵Senate Hearings, 1973, testimonials of legislators and journalists.

of Congressmen who feel that no legislation should be passed.⁹⁶ They accept the view that if journalists cannot secure an absolute privilege, then a preferable approach is for journalists to continue to raise the point of First Amendment protection. The preferable strategy here is to secure either a Supreme Court limitation of a newsman's privilege or a reversal of the Branzburg decision.

Others who oppose any privilege legislation believe the very act of congressional definition of a shield privilege acknowledges that a later Congress can limit this right. Newspaper columnist James J. Kilpatrick and Clark Mollenhof, Washington Bureau Chief of the Des Moines Register support no legislation.⁹⁷ Katherine Graham of the Washington Post Company agrees that the news media are in a safer position without a federal shield law than with one "that could possibly get through Congress."⁹⁸

Yet there are others such as the Citizen's Right to News Committee (CRNC), a non-partisan, non-profit association, who are not content to wait for the slow process of another case to serve as a vehicle to vindicate the significant First Amendment rights.⁹⁹

⁹⁶U.S., Congress, House, Committee on the Judiciary, News-men's Privilege, Hearings, before Subcommittee No. 3 of the Committee on the Judiciary, House on H. R. 717, 93rd Cong., 1st sess., 1973. Hereinafter cited as "House Hearings, 1973."

⁹⁷Senate Hearings, 1973, pp. 79-85.

⁹⁸Katherine Graham, comments at a press conference before Detroit journalists, sponsored by the Detroit Economic Club, Cobo Hall, Detroit, Mich., April 27, 1974.

⁹⁹Senate Hearings, 1973, Appendix, p. 689.

CRNC is a national citizen's committee dedicated to insuring that the public's right to news not be vitiated by requiring newsmen to disclose confidential sources and confidential information. Another test case like Caldwell, as CRNC and many journalists pointed out during the hearings before Congress, would mean following and supporting a case through the long and uncertain judicial process.

CNRC believes that development of a meaningful newsman's privilege is essential not as a special interest legislation designed only to protect reporters. As the group states in its position paper presented to Congress:

At bottom, it is not the publication's interest, but the public's, which is affected. As stated by one active journalist: "Terms such as "reporter's privilege" and "newsman's shield," although technically accurate descriptions of the legislation being considered, fail to cover the importance of such legislation to the public. It ought to be called "the public's right to know law."¹⁰⁰

Like CRNC, many newspapers have taken a stand for an absolute privilege because they agree with the conclusions of the constitutional scholar, Professor Paul Freund of Harvard University. Freund has stated, "It is impossible to write a qualified newsman's privilege." Any qualifications create loopholes which will destroy the privilege.¹⁰¹

¹⁰⁰Ibid.

¹⁰¹House Hearings, 1973, p. 708.

The Ervin bill provides for a qualified privilege available when information was received with an explicit or implicit understanding of confidence. A newsman must also disclose the identity of a person who committed a crime in his presence.

A second bill, introduced by Senator Alan Cranston of California, has been supported by the ANPA. An absolute privilege bill, it extends to confidential sources, confidential information and work product. This bill broadly defines persons protected by the privilege, and it creates presubpoena procedures which would be forced to court to defend their decisions, not to produce confidential information. Congressional testimony so far has shown that a qualified privilege will be vexing to define for a number of reasons.

The scope of protection is one major problem involved. Which members of the press should qualify for a federal shield law privilege were at least the sources and content of confidential information are protected? Does a newsman's privilege extend to members of the underground press, freelance news writers, researchers, lecturers, and book authors? The operative language most commonly used in several state shield laws grants protection only to newspaper, radio, or television personnel.

Obviously the privilege should cover those regularly employed in a news gathering or disseminating capacity by any newspaper, periodical, wire service, broadcasting station or network. Coverage should also include freelance professional journalists

with some tangible connection with one of the above news media operations. In most state statutes, persons protected are a more limited group than those in federal bills and proposed bills.

Definitions are usually limited by three techniques. Some statutes define the relationship between the person protected and the various media. Others define the scope of protection by listing the media to be protected. A third form within state statutes emphasizes that the relationships between the media and person protected be "regular" and "legitimate."

Congressional legislation is quite a bit more expansive. Shield law bills range from those which protect "persons directly engaged in gathering of news" to the broadest possible definition of "any person who gathers information for dissemination to the public."¹⁰² The latter definition could be interpreted to include even novelists and playwrights. However, extending the statute to cover all freelancers, authors, scholars, pamphleteers, etc., would complicate the administration of a federal shield law. Such a broad law would also involve Congress and courts in making findings on First Amendment claims that are beyond those involving professional journalists and the news media.

Some argue for the broadest possible definition that would include researchers and authors as members of the press. They

¹⁰²Senate Hearings, 1973, Appendix, proposed Senate shield law bills, pp. 406-462, passim. House Hearings, 1973.

present a strong constitutional and historical case that the First Amendment was not written against a background of multi-national communication and large news empires but against one of individual pamphleteers, letter writers, and committees of correspondence.

Justice White in the Caldwell opinion also emphasized a broad definition of members of the press when he noted:

Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph machine just as much as of the largest metropolitan publisher who utilizes the latest photochemical methods.

The Authors League noted in its testimony before Congressmen that many major political scandals of recent years were discovered by individual authors working alone rather than investigative reporters for major newspapers, magazines, or broadcast stations.¹⁰³

Arguments for a narrower definition have come from most journalists during hearings. They argue that too broad a privilege may mean protection for any person interested in public events and invite fraudulent claims of privilege.

Also it is the newsman who has been engaged in coverage of the most controversial events in recent years. It was the work of two young investigative reporters of the Washington Post that unearthed the Watergate scandal of the Nixon Administration. It

¹⁰³U.S., Congress, House, Committee on the Judiciary, Newsmen's Privilege, Hearings, before Subcommittee No. 3 of the Committee on the Judiciary, House, on H.E. 837, H.R. 1084, H.R. 15891, H.R. 15972, H.R. 16527, H.R. 16713, and H.R. 16542, 92nd Cong., 2nd sess., 1972, pp. 128-129. Hereinafter cited as "House Hearings, 1972."

was Earl Caldwell, a New York Times reporter, who wrote the excellent features on the controversial Black Panther Party and other militant groups. Moreover, it is the news reporters who have been served subpoenas and jailed for refusing to disclose confidential information. It is the news reporter who needs the coverage of protection more than any other identifiable group. The most apparent solution to this problem of legislating privilege would be to allow protection specifically to recognized members of the press, including the underground, minority, and student press.

Evans Witt, editor of the Daily Tar Heel at the University of North Carolina, noted the importance of the student and "irregular" press in his testimony before a congressional subcommittee last year:

The struggle of the irregular and student press for recognition has been hampered by the failings and irresponsibility that have undeniably been a part of the experience. Both the irregular and students press have been crucial to the information flow in this country. Many of the atrocities of the Vietnam war were first revealed by such underground and college press services as the Liberation News Service and the College Press Service. Student and underground newspapers in some areas have been instrumental in revealing injustice, corruption and stupidity where the local regular press was afraid to move. College newspapers in the South were in the forefront of publicizing and keeping the public aware of the legitimate grievances of the black man and woman. The college press has served as both a training ground for journalists and a primary center for the forward-looking experimentation that pressures the commercial press toward constant improvement.¹⁰⁴

¹⁰⁴Senate Hearings, 1973, p. 399.

CHAPTER VIII
THE LEGAL SETTING SINCE
THE BRANZBURG DECISION

Confidential sources allow journalists to present to the public news that is unavailable or inaccessible to the average citizen. The vigorous investigative role the press has played in the past has often led to revelations about criminal activities of individuals, groups, and official public agencies. Journalists have found their work impeded in recent years because of subpoena threats served in federal and state proceedings. State courts, in fact, have narrowly interpreted state shield laws in cases involving newsmen who were subpoenaed to reveal confidential or unpublished information.

As the matter stands at present, only nineteen states have some type of shield law. They are Alabama, Alaska, Arizona, Arkansas, California, Illinois, Indiana, Kentucky, Louisiana, Maryland, Pennsylvania, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Rhode Island.¹⁰⁵ Each varies in the scope and type of protection. The focus of state legislation is

¹⁰⁵Senate Hearings, 1973, p. 721.

different in certain key areas than proposed federal legislation. State statutes seemingly grant a broader privilege than federal proposals since most state statutes do not have any qualifications on the protection granted. However, only sixteen of the eighteen state statutes protect the newsman from forced disclosure of a "source" of information. Federal bills, on the other hand, grant protection from disclosure of a "source" and the "information" as well. Also, none of the state statutes state that the source must be a confidential one. The vast majority of the statutes lack essential definitions, unlike federal bills, as to who and what type of information is protected under the privilege.

The Twentieth Century Fund study on freedom of the press noted in its report that some of the state shield laws fail to cover classes of journalists who frequently need protection most, such as the broadcast media, magazine writers, the collegiate and underground press.¹⁰⁶ Although a few include magazine reporters, none include authors of books within the scope of those who may invoke the privilege. (This so-called "scholar's privilege" has been denied in federal courts. See United States v. Doe, 460 F. 2nd 328 (C.A., 1972)). The task force study also noted that most state shield laws are absolute since they protect journalists only from forced disclosure of the names of their sources.

¹⁰⁶Press 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.

Moreover, state statutes have failed to prevent the adverse reactions of contempt and incarceration of journalists caused by the subpoena threat in those states with shield laws. In a survey taken by the Reporters Committee for Freedom of the Press in January, 1973, state attorneys general reported a slight increase of confrontation between the press and state governmental investigative bodies.¹⁰⁷ There were at least six state court cases involving subpoenaed newsmen. Two of these cases were widely publicized and involved newspaper reporters William Farr, formerly of the Los Angeles Herald-Examiner in California, and Paul Branzburg, formerly of the Louisville Courier-Journal in Kentucky.

The Branzburg case was one of the three cases linked in an appeal to the Supreme Court. William Farr refused to disclose to a county court judge the confidential source who supplied him with a confession obtained by the prosecution in the celebrated Manson-Tate murder case. Jailed for 46 days, Farr lost an appeal to the Supreme Court and was fined for contempt this year. Maryland's attorney general reported the case of Lightman v. State, 294 A. 2d 149 (Md. Sup. App., 1972). David Lightman of the Baltimore Evening Sun refused to disclose the information he collected about drug abuse at a seashore resort. He is presently appealing his case to the Supreme Court. Maryland's courts held that Lightman could not

¹⁰⁷ Arthur B. Hanson, general counsel, American Newspaper Publishers Association, "Poll of State Attorneys General," March 27, 1973.

invoke the state privilege law because he obtained the information by posing as a casual shopper, not by informing his source that he was a newsman.

The case of State v. Buchanan, 250 Or. 244, 436p. 2d. 729 (1968) was reported from Oregon's attorney general. The Supreme Court of Oregon held that freedom of the press did give a newspaper reporter the constitutional right to preserve anonymity of an informer before a grand jury investigating the use of marijuana. Annette Buchanan, a student reporter at the University of Oregon, wrote a story where she interviewed students who used drugs. Miss Buchanan was fined and held in contempt of court for refusing to divulge her informants.

In Tennessee, a news reporter, Harry Thornton of WDEF-TV in Chattanooga was cited for contempt and jailed for refusing to disclose a confidential source. The source was a grand juror who accused a grand jury of conducting a "whitewash" as to their investigation of a local judge. He lost an appeal this year to a higher court. Two episodes involving attempts to block free flow of information were reported in 1972 in Texas. One episode involved a reporter and editor who were ordered by a judge not to publish the story that the first of two men being tried in a rape case had been found guilty. The editor printed the story and he and the reporter were given a suspended sentence of 60 days in jail and a \$250 fine. In a second case, an attorney for a person found guilty of killing a policeman filed a motion for a new trial and requested

negatives of photographs taken around and outside the courts by a newspaper reporter. The newspaper answered the subpoena.¹⁰⁸

In three of the six cases mentioned here, state shield statutes were unsuccessfully invoked as protection by newsmen. All these cases occurred during a period when there was an increasing number of subpoenas served on journalists from 1968 to 1973. With these cases and the Branzburg decision in 1972, several states have expanded the privilege bills. New Jersey, California and Michigan have passed legislation to change their newsmen's privilege statutes.

All three states have recently passed proposals to broaden the scope of protection. These states' legislatures may have reacted in part to the fact that widely-publicized cases involved newsmen from their states. The cases of William Farr of California and Peter Bridge of New Jersey are familiar to those interested in newsmen's privilege legislation. Paul Branzburg, who now works for a large Michigan daily, the Detroit Free Press, testified before that state legislature during hearings on newsmen's privilege in 1973.¹⁰⁹

¹⁰⁸Reporters Committee for Freedom of the Press, Legal Research and Defense Fund Report, "A Subpoena Log: A Compilation of Cases to Date," Columbia Journalism Review, March/April, 1973, pp. 30-33.

¹⁰⁹Michigan Legislature, House, Hearings on Newsmen's Privilege Shield Statute, March, 1973.

In addition to nineteen states which presently have a shield law, nine other states' legislatures have shown unsuccessful efforts to pass similar legislation. Most efforts have been in recent sessions after the Branzburg decision.

A federal shield law is perhaps the better solution to the subpoena threat. At present, states have viewed the issue of type of protection differently. Some state statutes are absolute, others are qualified. Many newspapers and broadcast stations cross state lines in circulation and transmission power. If a newsman is protected from subpoena in one state by a shield law, an investigative body in a state without a statute could still legally request information from this newsman. Federal guidelines could remedy this problem. A standard national shield law that is very broad in nature, if wisely written by Congress, could prevent clashes between state and federal proceedings involving a newsman and his source.

Privilege, in fact, should apply to both state and federal proceedings to prevent violation of the constitutional doctrine of federalism. Also, Congress could once and for all decide who exactly should be able to claim the privilege. Congress must try to balance the interests of two major aspects of the problem. First, the legislative body must decide whether a qualified privilege, if legislated, could adequately protect newsmen and give assurance to sources. Secondly, in view of competing interests in the administration of justice, Congress must decide whether an absolute privilege

is the best answer for the public, the source, and the newsman.

The Courts' View Since Branzburg

A number of reporters have been subpoenaed to testify before judicial and legislative proceedings since the ruling in the Branzburg case. By the end of 1972, in fact, at least six courts had handed down written decisions on cases in which the issue of testimonial privilege was raised. Three of these cases were decided in federal appellate courts where the facts sought pertained to a criminal investigation. The Branzburg court had emphasized that in such a proceeding, a reporter is under the same obligations to testify as any other citizen. In three cases occurring in the federal courts, judges refused to compel testimony from reporters. Two, however, were in civil cases in which the broad societal interest set forth by the Branzburg Court in investigating criminal activity was inapplicable.

In Cervantes v. Time, Inc. (1972), Alfonso J. Cervantes, mayor of St. Louis, Missouri, instituted a libel action at district court against Life magazine owned by Time, Incorporated. The magazine had published an article accusing the mayor of maintaining "business and personal ties with the gangsters that operate in his city." The article was entitled "The Mayor, The Mob and the Lawyer" and captioned with a comment explaining that both the mayor and crime commissioner "have personal ties to the underworld."¹¹⁰

¹¹⁰Cervantes v. Time, Inc. 464 F. 2nd 986 (C. A. 8, 1972). All facts on this case are from this source.

The article, which appeared in May, 1970, also described in detail the relationship said to exist between the mayor, a St. Louis lawyer, and the newly-appointed commissioner.

Mayor Cervantes named the publisher and the reporter whose investigative reporting produced the article. He charged that the articles contained false statements which were authored, published and circulated with a reckless disregard as to their truth. The defendants argued a defense of truth and constitutional privilege not to reveal sources. The reporter revealed that information was based on informants from the Federal Bureau of Investigation and the United States Department of Justice, as well as confidential reports from the informants. He refused to identify the names of his informants on three principles--disclosing his sources would subject his informants to retaliation and physical danger; forced disclosure would violate the First Amendment's freedom of press by impeding the dissemination of news which can be obtained only through anonymity of the source; and as a professional journalist of New York, he invoked a statutory reportorial privilege to withhold sources of news. The court ruled that the defendants had acted in good faith in publishing the article and that both believed all of the allegedly defamatory statements to be true. Neither the publisher or reporter, based on affidavits, depositions and other documentary evidence, had acted with reckless disregard for truth or falsity, the court said. This holding was reaffirmed in an appeal.

In the Bursey v. United States case, two newspaper reporters who were members of the staff of The Black Panther were acquitted of contempt charges handed down when they refused to answer certain questions requested of them by a federal grand jury.¹¹¹ The reporters refused to answer any questions concerning the internal management and operations of the newspaper and about the identification of persons who worked on the paper.

The Bursey court held that:

Questions about the identity of persons who were responsible for the editorial content and distribution of a newspaper, and pamphlets . . . cut deeply into press freedom.¹¹²

The court also stressed that the Branzburg Court was concerned with news-gathering and that news-gathering was not involved in the Bursey case. The government's petition for rehearing was rejected.

In Baker v. F. & F., Investment, a circuit court held that a reporter could not be compelled by civil discovery to reveal a confidential source. A Chicago reporter had learned of discriminatory practices by real estate businessmen in the city of Chicago through a confidential source. The reporter was named in a libel suit charging defamation.

¹¹¹Bursey v. United States, 466 F. 2d 986 (C. A. 9, 1972). reh. den., 406 F. 2d 1090 (C. A. 9, 1972).

¹¹²Ibid., at 1084.

The Baker court stated:

The Supreme Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguished Branzburg from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.¹¹³

In Cervantes, Bursey, and Baker, the limited nature of the Branzburg holding was stressed. In all three cases the important First Amendment issues under these cases' circumstances prevailed. However, in at least three other cases since Branzburg the results were quite the opposite. These cases are: In re Bridge, Farr v. Superior Court, and U.S.A. v. Liddy, et al.

Peter Bridge, a reporter for the Newark Evening News, was required to testify before a grand jury investigating an alleged bribe attempt about which he had written in a newspaper article. Bridge disclosed his source in the story. The court held that Bridge had waived the privilege he was afforded by state law by disclosing his source in the published article, but the reporter argued that compelling his appearance before a grand jury abridged his rights under the First Amendment.¹¹⁴ The court further held

¹¹³Baker v. F. & F. Investment Co. (C. A. 2, 1972). All facts on the Baker case are from this source.

¹¹⁴In re Bridge, 128 N. J. Super. 460, 295 A. 2d 3 (1972).

that granting of a privilege in this area is a matter for the legislature and not for the courts to establish. In rejecting the reporter's argument that his First Amendment rights were abridged, the court stated:

. . . the Branzburg court laid down a broad rule that the First Amendment accords a newspaperman no privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence.

In a second case, the California Court of Appeals affirmed a contempt citation against a reporter, William Farr, for publishing a story which contained information which had been obtained by violating a court order which barred the divulging of that information. At the time he was sentenced for contempt, Farr was not employed as a reporter. Therefore, the court concluded that the California newsman's privilege statute was inapplicable to Farr. Farr admitted that he had been provided information by two persons who were bound by a court order or "gag order" against revealing information surrounding the controversial Manson murder trial.¹¹⁵ The six attorneys bound by the "gag order" denied that they had given information to Farr.

When Farr refused to identify his sources, he was cited for contempt and jailed. The Court of Appeals held that the court's interest in insuring a fair trial outweighed the potential injury of the inquiry on the free flow of information.

¹¹⁵Farr v. Superior Court, 22 C. A. 3d 60, 99 Cal. Rptr. 342 (1972). All facts on this case are from this source.

In December, 1972, in U.S.A. v. Liddy, et al., a Washington, D. C., District Court Judge ordered the Washington Bureau Chief of the Los Angeles Times jailed for refusing to produce tape recordings subpoenaed by the defendant in a criminal case.¹¹⁶ The defendant attempted to determine whether those tapes would produce evidence that could be used to impeach a key government witness at a Watergate trial. The judge held that no First Amendment privilege sanctions a newspaper's refusal to produce evidentiary material in its possession which is relevant to a criminal trial. Relying heavily on the Branzburg decision, the court stated:

The present proceeding is linked to a criminal trial as opposed to a grand jury investigation. Where Branzburg denied a privilege in favor of the public interest in law enforcement, this court denied a privilege in favor of the rights of an accused to a fair trial. The Court believes that while the public has a crucial interest in the investigation and punishment of criminal activity, it must have an even deeper interest in assuring that every defendant receives a fair trial . . . If impeachment evidence is available, it is critical that the defendants have access to it.

From the six cases above, it is clear that civil suits, such as Baker and Cervantes, do not involve that same urgent interests as grand jury investigations. Also, court rulings indicate that information as to the operation of a newspaper, as noted in Bursey, is not as urgent as information obtained from news-gathering, such as in the Bridge and Caldwell cases. Yet it is important

¹¹⁶U.S.A. v. Liddy, et al., Civil Action No. 1827-72 (1972). All facts on this case involving the Watergate trials and the arrest of reporter John Lawrence are from this source.

to note that the results in these cases would not necessarily follow in every case.

In libel actions of civil courts, evidence involving confidential information might be as material to court proceedings as subpoenaed information of grand jury investigations. Furthermore, operation and organization of a newspaper or news media operation merit protection under the First Amendment as does news-gathering operations. As obvious from this confusion of interests, courts have yet to arrive at some means of assuring consistency on the subpoena problem. These cases also indicate little or no consistency on when a journalist can and cannot invoke privilege under a state statute.

Cases occurring since the controversial Branzburg-Caldwell-Pappas decision indicate the numerous instances where subpoenas threatened and denied full access to a free press. A partial list of such cases included in Appendix B of this study also indicate press subpoenas were served on cameramen, broadcast news reporters, student reporters, underground newsmen, and minority newspaper reporters. The information sought by prosecutors involved a wide divergency of topics valuable to the public.

In Buffalo, New York, television newsmen of WGR-TV were subpoenaed to reveal what they witnessed inside Attica Prison during the widely-publicized riot in 1971. In Los Angeles, reporters were subpoenaed about confidential sources used in stories about corrupt bail bond practices, political dissidents, and a murder

list of popular entertainers. Other confidential information sought through subpoenas ranged from housing frauds and blockbusting practices to abuses in jails and mental hospitals.¹¹⁷

In addition to the cases across the country, there have been lingering effects of the Branzburg decision on the news media. There have been numerous instances of cancelled stories as well as attempts by courts to bar publication of certain information.¹¹⁸ Because television news directors and newspaper editors could not promise confidentiality, the public lost access to information about welfare, drug abuse, and official corruption.

In the first case, Columbia Broadcasting System (CBS) news station set up an interview with a woman in Tennessee who said she would disclose how she cheated on welfare if her identity could be kept secret. Ike Kleinerman, a CBS news producer, took a camera crew through the South to develop material for a documentary on the problems of children in America. He had hopes that from an interview with the woman, a welfare client and mother, she could vividly describe how the welfare system, with its prohibitions against payments to families with working fathers, has encouraged the breakup of homes. When CBS learned from their

¹¹⁷Reporters Committee for Freedom of the Press, pp. 32-33.

¹¹⁸Senate Hearings, 1973, pp. 755-757.

lawyers that they could not assure the source of confidentiality, the story was cancelled.¹¹⁹

In a second case, the American Broadcasting Company (ABC) news declined the opportunity to conduct filmed interviews of the Black Panthers in their Oakland headquarters because the network reportedly believed it was unable to make a firm promise of confidentiality. After Paul Branzburg was subpoenaed because of his stories on drugs, the Louisville Courier Journal cancelled further stories about drug abuse. The Boston Globe was unable to pursue investigations on corruption because sources told the award-winning Spotlight Investigative Team they were afraid of being identified. A Baton Rouge State Times reporter was unable to pursue a similar story because a key informant said he was afraid of the reporter being subpoenaed.¹²⁰

In the majority opinion, in Branzburg, Justice Byron K. White wrote:

. . . We cannot accept the argument that the public interest in possible future news about crime from undisclosed unverified sources must take precedence over the public interest in prosecuting these crimes reported to the press by informants.¹²¹

Justice Potter Stewart argued in the dissenting opinion that the Court,

¹¹⁹Ibid., p. 755.

¹²⁰House Hearings, 1973, p. 68.

¹²¹Branzburg v. Hayes, et al., 408 U.S. 665 (1972).

invites state and Federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of Government . . . when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it because the uncertainty about the exercise of power will lead to "self-censorship."

Justice Stewart's predictions, unfortunately, fit the setting of the many cancelled stories since the Branzburg decision. Individual journalists commented on the chilling effect the ruling had had on their work. A Washington freelance writer whose work has appeared in the New York Times Magazine said he abandoned the idea of writing a story about a friend whom he discovered was deeply involved in soft-drug traffic.¹²² This friend, he said, had strong philosophical, rather than financial, reasons for his activity. Therefore, the writer felt his story would be interesting; that is, until the Branzburg decision.

Earl Caldwell said the long court battle has left him uneasy.

When the Government issued the subpoenas they asked for more than just my testimony. They wanted documents, tapes and notes. Since then, I have destroyed other tapes and notes and papers that I might have been able to use for stories. In some cases, I did taped interviews where I promised not to use the material until some future time. Now I've destroyed these kinds of things--things that might have been invaluable to me.¹²³

¹²²Sam J. Ervin, Jr., U.S. Senator, Remarks before the North Carolina Press Association, Jan. 19, 1973.

¹²³Benno C. Schmidt, Jr., "Beyond the Caldwell Decision-- 'The Decision Is Tentative,'" Columbia Journalism Review, Sept/Oct., 1972, p. 27.

Caldwell added that the decision will be especially trying on newsmen attempting to cover activities of disaffected blacks who already tend to be suspicious of the press.

We could never promise these people that our stories would get in the paper, or even that, if they did, they would come out the way they were written. What we could promise were some things about ourselves--that we could keep confidences. Now we can't even do that.¹²⁴

Caldwell has since left the newspaper business and his job with the New York Times. He has opted for freelance work and book writing.

Ronald Kessler, an investigative reporter for the Washington Post, had gained confidentiality with a government employee before the Branzburg decision. Through his source, Kessler developed a series on conflict of interest and profiteering in land transactions by senior officials of the General Services Administration. The series embarrassed the government. When Kessler asked his source if he would have cooperated before the Supreme Court decision on confidential sources, the answer was no.¹²⁵

Jack Anderson, a syndicated columnist whose revelations have been devastating to the Nixon Administration, said his sources have been affected by the Caldwell case. He noted that government sources he has been dealing with for years now ask cautious questions

¹²⁴Earl Caldwell, Senate Hearings, 1973, pp. 86-88.

¹²⁵Brit Hume, "A Chilling Effect on the Press," New York Times Magazine, December 17, 1972.

about the Branzburg decision. Anderson voiced concerns over the long-term effects of the decision.

Our kind of journalism requires total protections of the sources or we go out of business. For the kind of stories we do, there are no press briefings, no press handouts. I have to rely on unauthorized sources to get secrets, mainly political secrets. You cannot get them from official sources. And you cannot allow the sources to take the risks and now the risks in doing this kind of reporting, which have always been high, have been multiplied.¹²⁶

The risks Anderson mentions are risks of subpoena, jail, a contempt charge, or possible fines. Jack Nelson, an investigative reporter of the Los Angeles Times agrees with Anderson concerns. Nelson argued that he now finds it necessary to promise sources he will go to jail to protect information received from them in confidence. In his comments during the Senate hearings on newsmen's privilege before a subcommittee of the Judiciary Committee, Nelson said his testimony, tapes, and notes were subpoenaed in a related Watergate case in which Alfred Baldwin was a key witness.¹²⁷ Baldwin, a participant in the Republican-financed bugging of Democratic headquarters in 1972, gave Nelson a first-person account of the Watergate espionage only after a firm promise that his identity would be kept secret. Nelson's newspaper subsequently answered a subpoena and contempt charge for nondisclosure of sources.

¹²⁶Jack Nelson, et al., Senate Hearings, 1973, pp. 287-289.

¹²⁷Ibid., p. 286-287.

As these journalists implied during their testimonies to Congress and in separate interviews, the subpoena problem threatens the sources and the newsman. A typical case where developments were detrimental to a news source involved a Memphis, Tennessee radio reporter, Joe Pennington. In 1973, a subcommittee of the state legislature held hearings to investigate reports, which appeared in the Memphis Commercial Appeal and broadcast on radio, that employees of a local hospital for severely retarded children had been dismissed for abusing patients. The stories originated from confidential sources inside the hospital and were later confirmed as accurate by the hospital administration.¹²⁸ The subcommittee, however, subpoenaed Joe Weiler of the Commercial Appeal and Pennington of WREC radio station. In a closed-door session, Pennington identified a hospital secretary as his source. Weiler was held in contempt for refusing to divulge his source. The secretary subsequently was suspended from her job.

Perhaps the best known news source to suffer consequences of identification by newsmen is Daniel Ellsberg whose release of the Pentagon Papers gained national attention. The incident also sparked one of the major collisions between the press and government. This case, however, involved disclosure of a source of unpublished information. Ellsberg and an associate, Anthony

¹²⁸ Joseph Weiler, Senate Hearings, 1973, p. 241.

Russo, were indicted by a grand jury and tried. The pair was later linked with attempts by Watergate "buggers" to victimize the pair for the anti-government controversy they instigated with the Pentagon Papers. The two were later cleared of the charges.

What lawyers call a "chilling effect" of the Branzburg decision was perhaps best described in a Boston Globe editorial:

. . . . Ever since the Caldwell decision of last June, a lot of those sources have been drying up. This had happened, quite literally and specifically, to sources of the Globe's Spotlight Team, which before Caldwell won a Pulitzer Prize for exposing corruption. We state quite frankly, that if some of this team's sources were publicly identified, human lives would be in jeopardy. And also, there would be in the end no more exposure of governmental corruption. The people would be shafted more and more.¹²⁹

¹²⁹"The Case for a Shield Law," editorial, The Boston Globe, Jan. 27, 1973.

CHAPTER IX

CONCLUSIONS

It is the opinion of this author that legislation is the answer to the subpoena problem. If the American public is to be fully informed, journalists must have legal protection for their sources and information. The courts, in the past, have not provided that protection. The Supreme Court has ruled that such a protection--a newsman's privilege--is not a constitutional right. Therefore, a legal privilege will have to come from the legislative branches of government--through state shield laws or federal shield law.

The executive branch of government has provided its answer to the problem through Attorney General John Mitchell's "guidelines" to press subpoenas. The guidelines, however, failed to lessen the confrontations between the press and prosecutors who continued to issue subpoenas to journalists. The guidelines also allow the government to subpoena unpublished information, even if confidential. Furthermore, in case of "emergencies and other unusual situations" the government could still issue a subpoena "which does not exactly conform to the guidelines."¹³⁰

¹³⁰Attorney General's Guidelines, 39 U.S.L.W. 2111 (August 25, 1970).

H. R. Tatarian, vice-president of the United Press International, noted that the guidelines did not answer the problem but merely "diffused the debate." The rules did not, he said,

change the fact that the degree to which a newsman can honor a confidence depends solely on the courtesy, caprice, or political sensitivity of the prosecutor's office.¹³¹

Although only nineteen states have shield statutes protecting journalists from forced disclosure of sources, other states have strongly considered legislating privilege since the Branzburg decision. Since over half the state shield laws were written before the 1950's, state legislatures with the help of testimony from journalists should seek to revise and pass new shield laws. States without shield laws should draft laws to safeguard information communicated between the source and the newsman. State shield laws would prevent abuse of subpoenaing power by prosecutors, the government, and investigative bodies.

Shield laws should also seek to offer the broadest possible protection to working journalists of both the broadcast or electronic news media as well as the print media. These laws should also determine guidelines for exceptions as to when a journalist can invoke privilege. These exceptions would most likely involve instances when a journalist witnesses a crime or writes a libelous story. However, in such instances where a crime is uncovered or witnessed, journalists have cooperated with law

¹³¹"Mitchell Assures Newsmen on Files," New York Times, Feb. 6, 1970, p. 40.

enforcement. As for defamatory or libelous articles, there are libel laws which are designed to check these instances.

In addition to libel exceptions, a workable standard for divesting privilege under unusual circumstances was suggested in the Branzburg case by the petitioning reporters and by Justice Potter Stewart in his dissent. Privilege, under this standard, would be granted only if all of the following three conditions exist:

(1) There is probable cause to believe that the persons from whom the information is sought have information which is clearly relevant to a specific probable violation of the law; (2) the information sought cannot be obtained by alternative means; (3) there is a compelling and overriding national interest in the information.¹³²

Since most recent cases involving subpoenaed newsmen have occurred in state proceedings, a federal shield law, if passed by Congress, should be applicable to state and federal courts. Although a uniform privilege in the form of a federal shield law would be most desirable, the possibility of such a law passing in Congress is slim. Factors involved in drafting a shield law include: which type of proceedings could privilege be applied; who is entitled to the protection; which types of information are protected; and whether the legislation should be qualified or absolute. It seems unlikely that any law at all will be passed, if not qualified. Yet if legislation is not drafted to ensure that any qualifications are

¹³²Branzburg v. Hayes, et al., 408 U.S. 665 (1972).

both narrow and necessary, the law will not fulfill the purpose of ensuring a free flow of news to the public. On the other hand, if qualifications are too numerous or too broad, the law would sanction and invite press subpoenas instead of protecting journalists. Such a federal law would be worse than no law at all. At this writing, the debate continues over a federal shield law.

Chances are that new and revised state shield laws would offer a better solution for journalists. However, if a federal law is passed it should clearly be as absolute as possible if it is to be effective in ensuring an independent press and in providing a free flow of information to the public. The courts have seemingly abandoned the assumed privilege for newsmen under the First Amendment since the *Branzburg* decision. Nonetheless, a favorable judicial consideration on this constitutional issue would certainly have been a wiser solution than attempts by Congress to legislate privilege. Some journalists still insist that the press is better off without a shield law but safer with a firm recognition of privilege by the courts as an integral part of press freedom under the First Amendment.

The value of confidential information to the working members of today's news media is priceless. The news media have relied on confidential information to educate the public about drugs, drug users, racism, crime, corruption, foreign affairs, radical political groups and other underground subjects. Today, journalists depend on confidential information almost daily in gathering, producing and researching the news.

CBS News anchorman Walter Cronkite emphasized the importance of confidential information:

In doing my work, I (and those who assist me) depend constantly on information, ideas, leads, and opinions received in confidence. Such material is essential in digging out newsworthy facts and equally important, in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast news releases and public statements.¹³³

New York Times managing editor, A. M. Rosenthal, told legislators during hearings on newsmen's privilege:

Not a day goes by but that the Times and other newspapers print stories based on confidential information of one kind or another from confidential sources.¹³⁴

Charles Whipple, editorial-page editor, added that the Boston Globe published articles "based primarily on information from confidential sources very frequently--sometimes daily and at least once a week."¹³⁵

Editors of the Atlanta Constitution and the Chicago Tribune state that their newspapers also frequently rely on confidential information for stories.¹³⁶

¹³³Petition for Writ of Certiorari, United States v. Caldwell, U.S. Supreme Court, Oct. Term, 1970, No. 70-57, Appendix 52-53.

¹³⁴Charles W. Whalen, Jr., "Should Newsmen Keep Secrets?" New York Times, July 24, 1972, p. 36.

¹³⁵Letter to Charles W. Whalen, Jr., U.S. representative and sponsor of H.R. 2230, from Charles Whipple, Aug. 3, 1971 (Cited in House Hearings on Newsmen's Privilege, 1972, 164-165).

¹³⁶Senate Hearings, 1973, p. 595.

According to CBS News reporter Dan Rather,

A reporter can know all the facts and still not know the truth. In order to understand the facts, reporters must constantly appraise the accuracy and meaning of words and the significance of deeds. In that effort, reporters require a background of confidential judgments and observations obtainable only in privacy and in trust.¹³⁷

Al Delugach, a reporter with the Los Angeles Times, won a Pulitzer Prize in 1969 for a series of articles for the St. Louis Globe Democrat in which he exposed fraud and corruption in the St. Louis Steamfitters Union. Delugach testified about his use of confidential sources during congressional hearings on newsmen's privilege:

I cannot over-emphasize the importance to me, in 21 years as a news representative to have confidential sources. Almost any important story involves such sources. Even though it may be that none of the information from such sources is used directly in a story, invaluable leads and background information usually are obtained. The confidential source is usually someone in a rare position to know something significant (from the public standpoint) that is going on inside a government agency or organization.¹³⁸

Therefore, not only does confidential information provide the public with important facts, it also enables journalists to report and interpret with greater clarity and accuracy. The chilling effect of the Branzburg decision has threatened to destroy these values much to the detriment of the news media and the public.

¹³⁷Petition for Certiorari, Caldwell, pp. 59-60.

¹³⁸Senate Hearings, 1973, p. 612.

With the sudden end of the Nixon Administration in August, 1974, direct harrassment of the news media by government press subpoenas has lessened significantly. But there is no guarantee that the government will never again use its subpoena power to abuse the news media and hamper coverage of controversial and anti-government news and opinions. Although fewer journalists have been jailed in the past year, the Branzburg decision, the lack of a federal shield law, and outdated, inadequate state shield statutes leave the lingering possibility of more press subpoenas and more controversy on the issue. Unless the Supreme Court chooses to re-examine the issue under the First Amendment with firm recognition of an "unwritten law" guaranteeing newsmen's privilege, the most immediate solution would be legislating privilege for journalists on the state and federal levels.

A free and unencumbered press is an absolute essential for the American democracy. The framers realized this fact when drafting the First Amendment of the Bill of Rights. Denying journalists of the modern media professional privilege means impairing the news gathering process. Any restraint on the news gathering process is a restraint against full and free access to information. It all leads to an infringement upon the principle of freedom of press. When this principle right is jeopardized, it is the public that is deprived of its right to a free and unbridled press.

APPENDICES

APPENDIX A

DEPARTMENT OF JUSTICE GUIDELINES FOR
SUBPOENAS TO THE NEWS MEDIA

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DEPARTMENT OF JUSTICE GUIDELINES FOR SUBPOENAS TO THE NEWS MEDIA

I. The Department of Justice recognized 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 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.

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 harrassment 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.

APPENDIX B

PRIVILEGE CASES AFTER BRANZBURG

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PRIVILEGE CASES AFTER BRANZBURG

Cases arising since the Branzburg decision of June 29, 1972, are indicative of the type of robust investigative work of journalists in recent years. Arguments still vary on how much impact the decision has had on the free flow of information to the public. Facts concerning ineffectual state shield laws demonstrate the need for further legislation. Pressure placed on newsmen in recent years has not ceased even in states where shield laws exist. There have also been numerous situations where the public has suffered a loss of valuable and useful information because of the subpoena threat that hangs over news operations since the Branzburg decision.

The following list of cases occurring since the controversial Branzburg-Caldwell-Pappas decisions indicate the numerous instances where subpoenas threatened and denied full access to free press. These cases are from the author's findings and those compiled by The Reporters Committee for Freedom of the Press.

1. TV news reporter Stewart Dan and cameraman Roland Barnes of WGR-TV, Buffalo, refused to tell a grand jury what they witnessed inside the Attica prison during the riot. The case

is now on appeal. Dan and Barnes claim they would not have been admitted inside the prison if the inmates thought that the newsmen would testify before a grand jury.

2. Reporter Robert Buyer of the Buffalo Evening News, who was in the prison during the riot, did testify on the grounds that he and other newsmen were asked inside the prison because the inmates wanted the press to tell their side.

3. News reporter James Mitchell of Station KFWB in Los Angeles was served with a subpoena by the county grand jury to disclose the confidential source of information about corrupt bail bond practices. The subpoena was quashed in December, 1972, partially due to the strong public reaction because of the then-jailed William Farr.

4. Reporter William Farr of the Los Angeles Herald-Examiner refused to disclose to a county court judge the confidential source who supplied him with a confession obtained by the prosecution in the Manson-Tate murder case. Farr lost a state court appeal and filed a federal habeas corpus proceeding. After 46 days in jail, Supreme Court Justice William O. Douglas ordered Farr freed from jail. Farr, who now works for the Los Angeles Times, was working for a public relations firm when he was subpoenaed and therefore was told he could not invoke the state shield law in his defense. Farr lost his final appeal and was fined for contempt of court.

5. Thomas L. Miller, a freelance writer for Liberation News Service and several underground papers, refused to disclose confidential information about political dissidents before a federal grand jury in Tucson, Arizona. The Justice Department claimed he was not a news reporter and not entitled to any protection either under the Justice Department guidelines or the Constitution. In December, 1972, the Court of Appeals ruled Miller was a member of the press. Appeal is uncertain.

6. Peter Bridge of the now-defunct Newark News declined to tell a country grand jury unpublished details of an interview with a Newark Housing Commissioner who alleged she had been offered a bribe. He was jailed for three weeks in October. The New Jersey courts ruled that the state newsman's privilege law protecting sources did not protect Bridge because he had named his source.

7. Milwaukee Sentinel reporters Gene Cunningham, Dean Jensen, and Stuart Wilk were ordered to disclose, in a federal civil rights case hearing, the confidential source of information linking the chairman of the county board of supervisors to contractors doing business with the county. In a final appeal to the Supreme Court, the reporters lost their case when the Court declined to review the case.

8. Alfred Balk, who had written freelance articles for the now-defunct Saturday Evening Post, refused to disclose, in a federal civil rights case hearing, the confidential source of information about blockbusting in Chicago. In December, 1972, the U.S. Court of Appeals upheld Balk by ruling that it would not extend the Caldwell decision.

9. Samuel Popkin, Harvard professor and writer on Vietnam affairs, refused to tell a federal grand jury about any confidential discussions he may have had with Daniel Ellsberg involving the Pentagon Papers. He was jailed and held in contempt of court. The Supreme Court denied review and Popkin was not released from jail until after pleas from the Harvard Community were made to its alumnus, former Attorney General Richard G. Kleindienst.

10. Managing editor Robert A. Pierce, city editor Thomas N. McLean and reporter Hugh Munn of the Columbia, S. C. State, refused to give a local district attorney confidential sources of information about abuses in the county jail. Pierce repeated refusal before a grand jury in September, 1972, but no contempt was filed.

11. Reporters Sherrie Bursey and Brenda Joyce Presley of the Black Panthers newspaper refused to disclose to a federal grand jury confidential information about the internal management of the newspaper. The Court of Appeals upheld the reporters in October, 1972.

12. Reporters Jack Nelson and Ronald J. Ostrow and Washington bureau chief John F. Lawrence of the Los Angeles Times were subpoenaed to produce confidential tape-recorded information obtained from a key witness in the Watergate bugging trial. Lawrence, who had possession of the tapes, was held in contempt and jailed briefly on December 19, 1972; the contempt order was upheld by the U.S. Court of Appeals, which ruled the Caldwell decision applies to trials; the tapes were released to the court after the witness released the reporters from their promises to keep the information confidential.

13. Reporter Brit Hume, formerly of the Jack Anderson column, was ordered to disclose in a libel case the confidential source of information about an attorney who allegedly removed files from the United Mines Workers offices. The U.S. District Court declined to give him a newsman's privilege. An appeal is pending.

14. Reporter Denny Walsh of the now-defunct Life magazine refused to disclose in a libel case the confidential source of information linking St. Louis Mayor Alfonso J. Cervantes to gangsters. The Court of Appeals said Walsh was protected because Cervantes had not proved "malice"; the complaint was dismissed. In January, 1973, the Supreme Court denied review.

15. The Wilmington, Delaware News Journal was ordered in January, 1973, by a county superior court to produce the unpublished photographs of an anti-busing demonstration in order to identify a demonstrator who allegedly shouted an obscenity at police. An appeal is pending.

16. Attorneys for five defendants accused of disrupting a police meeting, served subpoenas on the Chicago Tribune, Chicago Today, the Chicago Sun-Times and the Chicago Daily News in an effort to obtain the names and addresses of all reporters and photographers who attended the disrupted meeting. The subpoenas also sought notes of all interviews and the originals of all photos, television film and tape recordings. In January, 1973, a circuit judge quashed the subpoenas as violation of the Illinois newsman's privilege law.

17. Thomas Hennessy, publisher-reporter of a weekly newspaper, Pittsburgh Forum, was asked by defense attorneys in a federal court hearing to identify the confidential source who supplied information for an article about defendant Anthony Gross, reputed head of the numbers racket in Pittsburgh area. Hennessy refused to reveal his sources.

18. Republican attorneys in the civil suits arising from the Watergate bugging case issued subpoenas seeking testimony and notes from 11 reporters and officials of the Washington Post, the Washington Star-News, New York Times and Time magazine, on February 26, 1973. The subpoenas were opposed by the reporters and later dropped as the complete story of Watergate unfolded.

APPENDIX C

NEWSMEN'S PRIVILEGE BILLS

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NEWSMEN'S PRIVILEGE BILLS*

S. 158

March 8, 1973

(Referred to the Committee on the Judiciary and ordered to be printed. This bill was introduced by Sen. Alan Cranston with additional amendments proposed by himself and Sen. Edward Kennedy. The bill, S. 158 is to insure free flow of information to the public).

That this Act may be cited as the "Free Flow of Information Act" was enacted in an amendment clause to S. 158.

FINDINGS AND DECLARATION OF PURPOSE

Sec. 2. The Congress finds and declares that--

(1) the purpose of this Act is to preserve the free flow of news to the public through the news media;

(2) a public fully informed about events, situations, or ideas of public concern or public interest or which affect the public welfare is essential to the principles as well as the effective operation of a democracy;

(3) the public is dependent for such news on the news media;

(4) those in the news media who regularly gather, write, or edit news for the public or disseminate news to the public must be encouraged to gather, write, edit, or disseminate news vigorously so that the public can be fully informed;

*The Cranston and Ervin bills introduced in the 93rd Congress, which have received most support from journalists and legislators will be cited here. While the Cranston bill is absolute in nature, the Ervin bill is considered most restrictive of all proposed qualified newsmen's privilege bills.

(5) such persons can perform these vital functions only in a free and unfettered atmosphere.

(6) such persons must not be inhibited, directly or indirectly, in the performance of such functions by governmental restraint or sanction imposed by governmental process;

(7) compelling such persons to present testimony or produce material or information which would reveal or impair a source or reveal the content of any published or unpublished information in their possession dries up confidential and other news sources and serves to erode the public concept of the press and other news media as independent of governmental investigative, prosecutorial, or adjudicative processes and functions and thereby inhibits the free flow of news to the public necessary to keep the public fully informed.

(8) there is an urgent need to provide effective measures to halt and prevent this inhibition in order to preserve a fully informed public;

(9) the practice of the news media is to monitor and report across state boundaries those events, situations, or ideas, originally reported locally in one state which may be of concern or interest to or affect the welfare of residents of another state;

(10) the free flow of news to the public through the news media, whether or not such news was originally published in more than one state, affects interstate commerce;

(11) this Act is necessary to implement the first and fourteenth amendments to the Constitution of the United States and article I, section 8 thereof by preserving the free flow of news to the public, the historic function of the freedom of the press.

EXEMPTION

Sec. 3. No person shall be compelled pursuant to subpoena or other legal process issued under the authority of the United States or of any State to give any testimony or to produce any document, paper, recording, film, object, or thing that would--

(1) reveal or impair any sources or source relations, associations, or information received, developed, or maintained by a newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium; or

(2) reveal the content of any published or unpublished information received, developed, or maintained by a newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium.

PRESUBPOENA STANDARDS AND PROCEDURES

Sec. 4. (a) No subpoena or other legal process to compel the testimony of a newsman or the production of any document, paper, recording, film, object, or thing by a newsman shall be issued under the authority of the United States or of any State, except upon a finding that--

(1) there are reasonable grounds to believe that the newsman has information which is (A) not within the exemption set forth in section 3 of this Act, and (B) material to a particular investigation or controversy within the jurisdiction of the issuing person or body;

(2) there is a factual basis for the investigation or for the claim of the party to the controversy to which the newsman's information relates; and

(3) the same or equivalent information is not available to the issuing person or body from any source other than a newsman.

(b) A finding pursuant to subsection (a) of this section shall be made--

(1) in the case of a court, grand jury, or any officer empowered to institute or bind over upon criminal charges, by a judge of the court;

(2) in the case of a legislative body, committee, or subcommittee, by the cognizant body, committee, or subcommittee;

(3) in the case of an executive department or agency, by the chief officer of the department or agency; and

(4) in the case of an independent commission, board, or agency, by the commission, board, or agency.

(c) A finding pursuant to subsection (a) of this section shall be made on the record after hearing. Adequate notice of the hearing and opportunity to be heard shall be given to the newsman.

(d) A finding pursuant to subsection (a) of this section made by a body, agency, or other entity described in clause (2), (3), or (4), or subsection (b) of this section shall be subject to judicial review, and the issuance of the subpoena or other legal process shall be stayed by the issuing subpoena or other legal process shall be stayed by the issuing body, agency, or other entity for a reasonable time to permit judicial review.

SPECIAL LIMITATIONS

Sec. 5 (a) A finding under section 4 of this Act shall not in any way affect the right of a newsman to a de novo determination of rights under section 3 of this Act.

(b) If any provision of this Act or the applications thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the invalidated provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

DEFINITIONS

Sec. 6 For the purpose of this Act:

(1) The term "information" includes fact and opinion and any written, oral, or pictorial means for communication of fact or opinion.

(2) The term "news" means any communication of information relating to events, situations, or ideas of public concern or public interest or which affect the public welfare.

(3) The term "newsman" means any person (except an employee of the Federal Government or of any State or other governmental unit while engaged in disseminating information concerning official governmental policies or activities) who is or was at the time of his exposure to the information or thing sought by subpoena or legal process an operator or publisher of a news medium, or who is or was at such time engaged on behalf of an operator or publisher of a news medium in a course of activity the primary purpose of which was the gathering, compiling, or composing, reviewing, editing, publishing, or disseminating of news through any news medium; and includes a freelance writer who has disseminated news on a regular or periodic basis to the public.

(4) The term "news medium" means any newspaper, periodical, book, other published matter, radio or television broadcast, cable television transmission, or other medium of communication, by which information is disseminated on a regular or periodic basis to the public or to another news medium.

(5) The terms "operator or publisher" mean any person engaged in the operation or publication of any news medium.

(6) The term "State" means any of the several states, territories, or possessions of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

Amend the title so as to read: "A bill to preserve the free flow of news to the public through the news media."

S. 1128

March 8, 1973

(Referred to the Committee on the Judiciary, introduced by Sen. Sam Ervin, Jr.)

A BILL

To protect the freedom of speech and of the press and to secure the flow of information in interstate and foreign commerce by protecting the newsman against the compulsory disclosure of confidential sources of information and the compulsory production of unpublished information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. This Act may be cited as the "Newsman's Privilege Act of 1973."

Sec. 2. The Congress hereby finds and declares that compelling newsmen to disclose their confidential sources of information impairs the willingness of persons having information the people need to know, to communicate the same to newsmen, and deters many of them from so doing; that jailing or otherwise punishing newsmen who refuse to disclose their confidential sources of information or to produce unpublished information tends to intimidate them in the exercise of their occupation and deters many of them from collecting and disseminating to the public, information the people need to know; that for these reasons the right of the people to know what is occurring in our land or elsewhere is seriously impaired; and that this Act is necessary to protect the freedom of speech and of the press and to secure the full flow of information in interstate and foreign commerce.

Sec. 3. As used in this Act--

(a) "Newsman" means an individual who is regularly engaged in the occupation of collecting information or making pictures for dissemination to the public by any means of communication.

(b) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(c) "State" means any State of the United States or the Commonwealth of Puerto Rico, or the District of Columbia, or any territory or possession of the United States.

(d) "Legislative body" means the Congress or the legislature of a State or any committee or subcommittee acting under the authority of the Congress or the legislature of a State.

(e) "Unpublished information" means any memorandum, note, manuscript, transcript, picture, negative, recording, tape, or other record whatsoever which was made or obtained by a newsman while engaged in his occupation and which has not been disseminated to the public by any means of communication.

Sec. 4. A newsman shall not be compelled to disclose to a court, a grand jury, a legislative body, or other investigative or adjudicative agency of government, which acts under the authority of the United States or any State, the identity of any person who supplies information to him while he is engaged in his occupation if he expressly or impliedly gives the person supplying the information a contemporaneous assurance that the source of the information will not be disclosed by him. Nothing contained in the preceding sentence or any subsequent provision of this Act shall be construed to excuse a newsman from testifying to the identity of any person who commits a crime in his presence.

Sec. 5. A newsman may invoke the provisions of section 4 of this Act in either or both of the following ways:

(a) When a newsman appears before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government as a witness in obedience of a subpoena, as a party to a civil or criminal action, or otherwise, he may invoke the provisions of section 4 of this Act by an oral or written objection, and the court, the grand jury, the legislative body, or the investigatory or adjudicative agency shall thereupon enter such order or take such action as may be necessary or appropriate to insure that the newsman shall not be compelled to disclose the source of information received by him contrary to the provisions of section 4 of this Act. If the grand jury overrules his objection, the newsman must be accorded a review of its ruling by the judge presiding in the court in which the grand jury sits before he testifies further before the grand jury.

(b) When a newsman is served with a subpoena or other order to testify as a witness before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government prior to the time designated for his appearance, he may invoke the provisions of section 4 of this Act by moving that the court in which he is ordered to appear or in which the grand jury sits, or the legislative body, or the investigatory or adjudicative agency quash the subpoena or order or limit the testimony he is required to give under it, and the court, legislative body, or investigatory or adjudicative agency shall thereupon hear and determine the motion in camera and enter such order to take such action as may be necessary or appropriate to insure that he shall not be compelled to disclose the source of information received by him contrary to section 4 of this Act.

Sec. 6. Neither a newsman nor any other person having custody or control of the same shall be compelled to produce before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government, which acts under the authority of the United States or any State, anything which constitutes unpublished information within the purview of the definition set forth in section 2 (e) of this Act.

Sec. 7. The provisions of section 6 of this Act may be invoked in either or both of the following ways:

(a) When a newsman or any other person having custody or control of unpublished information is ordered to produce the same before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government, he may invoke the provisions of section 6 of this Act by an oral or written objection, and the court, grand jury, legislative body, or other investigatory or adjudicative agency shall thereupon enter such order to take such action as may be necessary or appropriate to insure that the newsman or other person is not compelled to produce the unpublished information contrary to the provisions of section 6 of this Act. If the grand jury overrules his objections, the newsman or other person must be accorded a review of its ruling by the judge presiding in the court in which the grand jury sits before any production on his part can be required by the grand jury.

(b) When a newsman or any other person having custody or control of unpublished information is served with a subpoena duces tecum or other order commanding him to produce such information before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government prior to the time designated for its production, he may invoke the provisions of section 6 of this Act by moving that the court before which the information is ordered to be produced or in which the grand jury sits, or the legislative body, or the investigatory or adjudicative agency quash the subpoena duces tecum or order, and the court, legislative body, or investigatory or adjudicative agency shall thereupon hear and determine the motion in camera and enter such order or take such action as may be necessary or appropriate to insure that the newsman or other person having custody or control of the same shall not be compelled to produce unpublished information contrary to the provisions of section 6 of this Act.

Sec. 8. Any person invoking the provisions of section 4 or section 6 of this Act shall have the right to the assistance of counsel of his own choosing.

Section 9. Nothing in this Act shall be construed to impair or preempt the enactment or application of any State Law which secures the minimum privilege established by this Act.

Section 10. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the

remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Sec. 11. This Act shall take effect upon its enactment.

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