5-1-1975

II. *Branzburg* and the Protection of Reporters' Sources

James C. Goodale

II. *BRANZBURG* AND THE PROTECTION OF REPORTERS' SOURCES

JAMES C. GOODALE*

There is a great deal of misunderstanding today concerning the subpoena of reporters' notes, sources, and out-takes,[1] much of which is due to the confusion surrounding the interpretation of the Supreme Court's decision in *Branzburg v. Hayes*.[2] I believe the popular conception of this decision is to the effect that reporters' sources must always be disclosed in any type of litigation, but, in fact, that was not the issue before the Court. Rather, the holding of the case concerned the power to subpoena materials in the possession of reporters, including out-takes.

There were actually four separate cases before the Court, but combined and styled under the name of *Branzburg v. Hayes*. First, there was *Caldwell v. United States*[3] which involved a reporter who had been subpoenaed to testify before a grand jury in California. The reporter initially argued that if he testified, he should have a qualified privilege. This privilege was ultimately recognized by the lower courts, but prior to appearing before the grand jury, the reporter decided that regardless of what he would actually have to reveal his mere appearance before the grand jury would compromise his relationship with his sources. Since they would have no way of knowing what the reporter actually revealed in the closed session, they might logically believe that he had given up all his "confidential" information. So the reporter chose not to appear at all. Thus, the only issue appealed in this case was whether the reporter could be compelled to *appear* and not what he could be compelled to *disclose*.

The second and third cases involved a young Harvard Law School graduate named Branzburg who was working as a reporter in Kentucky. In the first of these cases, Branzburg, who while working on a story had observed people processing hashish, argued to the state courts that a Kentucky statute protecting reporters from revealing *sources* allowed him to refuse to testify concerning these observations. The Kentucky Court of Appeals, however, held that observations are not sources and thus the statute afforded no protection to Branzburg.[4]

---

* Executive Vice President of the New York Times; Legal Counsel for the Times in both the *Caldwell* and *Pentagon Papers* cases.

1. These three items should be clearly differentiated. Reporters' notes are memoranda commonly made while gathering information for a story. Sources are the people from whom the information is gathered. Out-takes are those portions of a completed story which are removed prior to actual publication either as part of normal editing or for purposes such as maintaining confidentiality.

2. 408 U.S. 665 (1972).

3. 434 F.2d 1081 (9th Cir. 1970).

4. Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1970).

Although no explicit mention of it was made by the court, they implicitly recognized this issue as one of testifying about out-takes.

Although there was an attempt to get Branzburg to reveal sources in the other case involving the same reporter, the Kentucky statute protected him from compelled disclosure. But Branzburg further argued that, as in *Caldwell,* he should not even have to appear. It was only the appearance argument that was appealed to the Supreme Court.

The fourth case joined in the Supreme Court style of *Branzburg v. Hayes* was *In re Pappas.*[5] In that case, Pappas, a reporter, had witnessed certain events during a riot outside a Black Panther office in Massachusetts. He testified in front of a grand jury once, under subpoena, as to what he saw. He was subpoenaed a second time to testify as to what he saw when he later entered the office, but Pappas refused to answer the subpoena.

Thus, the Supreme Court in *Branzburg* had before it three cases presenting only appearance issues and one case presenting only an out-take issue; there were no cases involving revelation of sources. The high court held only that the reporters must *appear* and, in the first of the Branzburg cases, that a reporter witnessing a crime was required to testify concerning that crime.

I suggest that after the Supreme Court decided the case, Caldwell, Pappas, and Branzburg (in the second of his cases) could have returned to the lower courts and still argued that although they were now required to appear, they had a qualified privilege to refuse to offer testimony on much of what was given and told to them on a confidential basis. I further suggest that the Supreme Court recognized this qualified privilege in its *Branzburg* decision.

Under *Branzburg,* the privilege exists unless three conditions can be met. First, there must be a showing that the testimony sought is relevant and material to a particular case. Second, the information must not be obtainable by alternate sources. Third, there must be a compelling national interest in the testimony. This test was adopted by four of the Supreme Court justices, and parts one and three were adopted by Justice Powell.

This three-part test has been generally recognized in the cases following *Branzburg.*[6] I am aware of twenty-four cases since then dealing with compulsory testimony of reporters. In almost all, the three-part test was urged on the court; in a substantial number, the test was applied.

It has been suggested that an alternative to this judicially created qualified privilege would be some type of legislatively created shield law which would add clarity and uniformity to the protection offered

5. 358 Mass. 604, 266 N.E.2d 297 (1971).

6. *E.g.,* Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972); Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).

to reporters. But such legislation, in my opinion, would encounter great difficulty in passing through Congress. And even if it were enacted by the states, I am not sure precisely what it should contain, although I believe any attempt to draft such legislation should properly reflect the treatment which the courts are currently giving the issue of reporters' privilege.