The Confidential Informant: Will His Views Still Make News?

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Does the first amendment freedom of speech and press guarantee to newsmen a testimonial privilege to refuse to appear or to testify before state or federal grand juries as to information gained through a relationship with confidential sources? This was the question posed to the United States Supreme Court by a trilogy of cases arising from the United States Court of Appeals for the Ninth Circuit, the Court of Appeals of Kentucky, and the Supreme Judicial Court of Massachusetts.

The Ninth Circuit had reversed in part a decision of the United States District Court for the Northern District of California, and held that a New York Times reporter covering the Black Panthers had such a privilege. The court went beyond the lower court's decision which merely restricted the questions asked of the reporter while requiring appearance. It determined that, absent the government showing of compelling reasons to the contrary, a reporter need not jeopardize the confidence of his sources by appearing before a closed-door grand jury session. In contrast, the highest state courts of Kentucky and Massachusetts, considering respective motions by a newspaper reporter and a TV newsmen to quash state grand jury subpoenas, found that any "confidential informant" privilege was so limited that it was outweighed by the right of the public to "every man's evidence." On writ of certiorari, the United States Supreme Court, in a five-four decision, held: Requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the first amendment, regardless of whether the flow of news from confidential sources is discouraged by such a requirement. Branzburg v. Hayes, 92 S. Ct. 2646 (1972).

6. The three cases were decided in one opinion, with a separate dissent in the Caldwell case. Petitioner Branzburg, a staff reporter for a daily newspaper in Louisville, Kentucky, had refused to testify with respect to the identities of two men who had confided in him concerning their illegal activities producing and selling hashish. Branzburg had actually published a picture of the activity, and despite section 421.100 of the Kentucky Revised Statutes (1969), granting him a newsmen's testimonial privilege against revealing sources, he was ordered to testify as to any criminal acts he had actually observed. Petitioner Pappas, a newsmen-photographer for a New Bedford, Massachusetts, television station, had been subpoenaed to testify as to his knowledge of Black Panther activities. Each of the newsmen had asserted first amendment testimonial privileges against divulging his sources, Caldwell also asserting a claimed privilege not even to appear before the grand jury, since the Panthers would never know how much or how little he had said if he did appear.
As the majority reasoned, the "heart" of the newsmen's claim was that the infringement on the right of the press to gather news was so great that it outweighed the interest of the public in obtaining the testimony of newsmen subpoenaed before a grand jury. This assertion, in essence, asked the Court to recognize an exception to the common law rule that the public has a right to every man's evidence, including that of journalists. The newsmen nevertheless maintained that the privilege they sought was implicit within the "freedom of press" clause of the first amendment to the Constitution.

The argument that the first amendment exempted information obtained in confidence by the news media from public disclosure was first advanced in 1958 in the case of Garland v. Torre. There it was held that any first amendment testimonial privilege was not absolute and should yield to the "fair administration of justice" when the information sought went to the "heart of the claim" stated. In cases decided since Garland, several courts, accepting the idea of a limited or "qualified" testimonial privilege, have suggested other tests for balancing the public's right to evidence against the first amendment protection of the free flow of news. Among these tests is the "compelling state interest" test.

In addition to the majority opinion by Mr. Justice White, there was a concurring opinion by Mr. Justice Powell, a dissenting opinion by Mr. Justice Stewart, in which Justices Brennan and Marshall joined, and a separate dissent by Mr. Justice Douglas.

The Court summarized the reporters' argument that a burden is placed on news gathering thusly:

[T]o gather news it is often necessary to agree either [1] not to identify the source of information published or [2] to publish only part of the facts revealed, or [3] both; . . . if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.

Id. at 2655 (numbering added).


In addition to the argued exception which relied on the first amendment to the Constitution, petitioner Branzburg argued a privilege based on sections 1, 2, and 8 of the Kentucky Constitution and on Ky. REv. STAT. § 421.100 (1969). The Court of Appeals of Kentucky ignored the state constitutional argument entirely and construed the statute narrowly to exempt the newsman from divulging the names of informants, but not the names of individuals whom he personally had observed in the commission of a crime. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970). Therefore, since neither the Massachusetts legislature nor the United States Congress had acted, and since the highest court of Kentucky construed its statute so narrowly, all three newsmen's hopes stood solely on first amendment grounds.

The logic behind the first amendment privilege argument has been reduced to three points: (a) Freedom of the press implies the right to gather news; (b) the right to gather news implies the right to protect news sources; and (c) the right to protect news sources must be broad and subject only to clear exceptions [for "confidential sources" to retain "confidence"]. Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 YALE L.J. 317, 325-38 (1970).

Id. at 319-25 discusses several proposed tests.
accepted by the Court of Appeals for the Ninth Circuit in *Caldwell v. United States*, reversed by the Supreme Court in the decision herein noted.\(^1\)

The *Caldwell* test, to which three members of the Court would have subscribed, claimed a first amendment privilege against grand jury interrogation, qualified in that the privilege would be lost when a grand jury proved sufficient grounds for believing

[1] that the reporter possesses information relevant to a crime the grand jury is investigating, [2] that the information the reporter has is unavailable from other sources, and [3] that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.\(^0\)

The *Caldwell* test is consistent with a long line of cases which require that any official action with an adverse impact on first amendment rights be justified by a public interest that is "compelling" or "paramount."\(^7\) However, the majority of the Supreme Court refused to acknowledge that any "right" had been abridged.\(^8\) While recognizing that news gathering did qualify for first amendment protection, the majority circumscribed in negative terms the scope of the protection offered. Distinguishing the cases before the Court from any in which first amendment abuse had previously been recognized, the majority listed seven elements which were not, in its view, factors in the instant cases, but which presumably would have raised a "first amendment question":

[1] This case involves [1] no intrusions upon speech or assembly, [2] no prior restraint or restriction on what the press may publish, and [3] no express or implied command that the press publish what it prefers to withhold. [4] No exaction or tax for the privilege of publishing, and [5] no penalty, civil or criminal, related to the content of published material is at issue here. [6] *The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law.* [7] No attempt is made

\(^{14}\) 434 F.2d 1081 (9th Cir. 1970).
\(^{15}\) According to the Court's summary of their claims, all three newsmen subscribed to the same test. 92 S. Ct. at 2655.
\(^{16}\) *Id.* (numbering added).

[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. *Accord*, *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).
to require the press to publish its sources of information or indiscriminately to disclose them on request.\(^9\)

In delineating the possible fact patterns under which it might have found a first amendment privilege, the Court in effect held that newsmen have no privilege at all to withhold information merely because its disclosure might jeopardize their relationships with confidential sources. Although the Court went to great lengths to point out that the three cases before it would have been decided no differently even had it accepted the "compelling interest" doctrine,\(^2\) the majority clearly desired to do more than merely decide the instant cases on their respective facts. The purpose seemed negative, however, rather than positive—the Court expressed great reluctance toward any "far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere."\(^2^1\) In short, the Court declined to place on the government the burden of proving that the testimony would be relevant, critical, and otherwise unobtainable in every instance in which a grand jury sought to obtain a newman's testimony.

In seeking to avoid the addition of such a procedural burden to the administration of grand jury investigations, the Court had one option which, with the exception of Mr. Justice Douglas, it declined to consider—the idea that newsmen might have an absolute privilege not to appear before grand juries. This, the majority hinted, would have been the only certain solution to the problem of the deterrence of confidential informers, since even a "qualified privilege" would leave a degree of uncertainty as to whether the informer's name or other information might have to be disclosed by a newsmen.\(^2^2\)

Rejecting the possibility that journalists might have an absolute privilege under the first amendment, the majority went on to cite numerous collateral reasons for its decision against allowing even a qualified privilege. In addition to the possibility of an increased procedural burden, the Court noted that, historically, the press has been limited to the constitutional rights of other citizens. The press has not been free from obligations to obey the law, nor privileged to publish without regard to the rights of others, nor guaranteed the right to information not available to the general public.\(^2^3\)

19. 92 S. Ct. at 2556 (numbering and emphasis added).
20. Id. at 2666.
21. Id. at 2665.
22. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.
In contrast to its refusal to allow the press any special legal status, the Court emphasized the status and role of the grand jury in both state and federal prosecutions. The provision of the fifth amendment to the Constitution requiring a grand jury presentment or indictment in the case of all "capital, or otherwise infamous crime[s]," as well as the need for the grand jury to have broad investigative powers to perform this required role, were considered paramount. The grand jury is "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation ...."

Consistent with the viewpoint of a more conservative court, the majority declined to add to the common law a testimonial privilege other than that already rooted in the fifth amendment—the privilege against self-incrimination. Conceding that to do so lay within the prerogative of Congress and the state legislatures, it took judicial notice of the fact that neither the majority of states nor the Congress had chosen to create such an exception.

As further justification for its holding, the Court cited the uncertainty of the deterrent effect on the flow of news, the fact that the press has always flourished without the privilege, and the power of the press to protect itself (presumably by influencing public opinion and thereby the legislative branch of government). Additionally, it was asserted that the deterrence of future crimes by effective prosecution of persons presently suspected of offenses outweighs the speculative loss of future news about crimes from undisclosed sources. As the Court stated, "[a]greements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."

24. In addition to the federal requirement imposed by the Constitution, there are thirty-two states which require that certain kinds of criminal prosecutions be initiated by indictment, and eighteen states which use the grand jury as an investigative tool when they proceed by information. Spain, The Grand Jury, Past and Present: A Survey, 2 Am. Crim. L.Q. 119, 126-42 (1964).
26. Seventeen states, including Kentucky [Ky Rev. Stat. § 421.100 (1969)] have done so. Kentucky's statute has been narrowly construed. See note 10 supra. For an analysis of proposed Congressional legislation, see Staff of Senate Comm. on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).
27. But see McCray v. Illinois, 386 U.S. 300 (1967), and Scher v. United States, 305 U.S. 251 (1938), which, in the words of Mr. Justice Douglas, hold that prosecutors need not disclose informers' names because disclosure would (a) terminate the usefulness of an exposed informant inasmuch as others would no longer confide in him, and (b) it would generally inhibit persons from becoming confidential informers.
28. 92 S. Ct. at 2663.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [guilty of misprison].
18 U.S.C. § 4 (1970). Case law, however, has held that some affirmative act of concealment or participation is also required. Bratton v. United States, 73 F.2d 795 (10th Cir. 1934).

Mr. Justice Douglas' dissent indicated that he felt it was unfortunate that this case ever arose. This writer feels that it is a sad commentary on Americans and American
The Court also speculated that the bulk of confidential relationships should not be threatened by the fact that a few might be opened to grand jury scrutiny. First, it was noted that most news sources are not themselves engaged in criminal activity. Second, a reporter may never be called to testify. Third, the symbiotic relationship of many minority and dissident group "informants" with the press will necessitate that the former continue to utilize their press link to air their views. Finally, the Court rationalized that persons who would fear for their job security would have no more fear of a secretive grand jury knowing their testimony than of the press having similar knowledge. Since much of the Court's reasoning was based on speculation, there was considerable disagreement with, and rebuttal of, the majority opinion in the dissenting opinion of Mr. Justice Stewart, in which Justices Brennan and Marshall joined.

Despite the considerable effort devoted to posing a wide variety of arguments which varied in scope from legal philosophy to group psychology, it appears to this writer that the decision of the Court truly hinged on certain practical considerations. These considerations become apparent from the Court's logic, which may be summarized thusly: (1) Reporters claim a privilege which is conditional, not absolute. (2) The suggested condition precedent to subjecting them to a grand jury subpoena would require a grand jury to prove, a fortiori, probable cause that a particular crime has been committed by a particular person, that it is of a serious or "compelling" nature, and that the reporter possesses relevant information not otherwise available to the grand jury. (3) This suggestion, heretofore denominated as the "compelling interest test," is unacceptable for three reasons: First, one of the functions of the grand jury is to determine whether or not probable cause for an indictment exists. Paradoxically, the suggested test would require the grand jury to prove the existence of probable cause prior to calling for the testimony of the reporter. Society that freedom of expression is so stifled either "officially" or "unofficially" (by the legal system or simply by "moral suasion") that a man need fear to expose his views and admit that they are his own, or to volunteer his observations of fact when they might lead to the correction of a public wrong. Of course, neither the press nor the legal authorities would like to do without their "stool pigeons"; both use them in the name of the public good. Yet, while the majority noted the tainted nature of information so derived and questioned its credibility, the dissent pointed to the unfortunate consequence that without it much corruption might never be unearthed.


30. United States v. Caldwell, 92 S. Ct. 2646, 2671-86 (dissenting opinion). Both the majority and the dissent actually distinguished between two types of informant: the "spy," who has done nothing criminally wrong himself, but who has knowledge relevant to criminal activity as defined by current laws, and the "criminal," who is such because his personal views, and perhaps actions, run contrary to such laws. These two "types" clearly have different motives for fearing exposure. Consequently, arguments were made concerning the possible effect of the Court's decision on both species of informant.
of a reporter expected to aid them in determining whether probable cause existed. Second, such a requirement, were it reasonable, would necessitate that, for every reporter subpoenaed, a judge not only decide whether the proper predicate of probable cause and relevancy had been laid, but also make a value judgment as to the relative weight of the public interest in prosecuting a particular statutory crime. Such a decision, said the Court, properly belongs in the hands of the legislative branch and should not be added to the burden of the judiciary. Finally, even if the compelling interest test were not otherwise impracticable, its institution would probably fail to achieve the desired first amendment result of promoting the free flow of news, in that once certain crimes had been judicially designated as serious enough to create the "compelling" public interest, a generalized deterrent would be created toward any informant whose information related to such crimes.31

(4) The Court also suggested that if, as alleged by the news media,32 the "leads" given by news stories made possible by confidential informants would be more valuable to law enforcement than the grand jury subpoena power over the newsmen would be, the law enforcers would recognize this and cease to subpoena them. It was noted that the Attorney General of the United States had already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials.33

While the Court refused to find any abuse of judicial discretion in the cases before it,34 it explicitly stated that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."35 As an

31. See note 22 supra.

32. Amicus curiae briefs and affidavits were filed by such news agencies as The New York Times and by such newsmen as Walter Cronkite (Cronkite's affidavit was filed in Caldwell at the district court level).

33. Guidelines for Subpoenas to the News Media, Dept. Justice Memo. No. 692 (Sept. 2, 1970). The guidelines provide for criteria similar to the "compelling interest test" to be met, and, with limited exceptions, provide that the Attorney General himself must expressly authorize such subpoenas.

34. [It is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.


The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain. . . . The syllogism was not complete. There was nothing to connect the questioning of petitioner with this fundamental interest of the State.

35. 92 S. Ct. at 2669.
example, the Court cited Younger v. Harris, where the Court distinguished between incidental and direct infringements upon constitutional rights in determining when a petitioner might be entitled to injunctive relief against state action.

The Harris Court limited the prior decision of Dombrowski v. Pfister, in which "overbreadth" of a state statute affecting first amendment rights was held to be cause for federal injunctive relief. In Harris, it was opined that there may nevertheless be "extraordinary circumstances in which [an] . . . irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment" such that injunctive relief might be granted. Even there, however, the Court declined to specify further what circumstances would fit its definition. The Branzburg decision, while likewise failing to speculate, kept the door open and stated that any burdening of the press without a law enforcement purpose would subject subpoenas of newsmen to a motion to quash. As interpreted by Mr. Justice Powell in his concurring opinion, the result of the Court's holding should be a judgment of each claim of privilege "on its facts," balancing first amendment rights and societal interests in law enforcement "on a case-by-case basis."

In a footnote to his opinion, Mr. Justice Powell stated that the majority view frees the judiciary to balance fairly the freedom of the press and the obligation of all citizens to give relevant testimony. On the other hand, he revealed his feeling that

[the new constitutional rule endorsed by the dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.]

This would be the result, it was impliedly argued, since a reporter would be allowed to "litigate at the threshold the State's very authority to subpoena him."

As previously stated, the majority ultimately decided that the burden of proof in a controversy over whether a reporter must testify before a grand jury remains on the reporter to support his motion to quash a subpoena. The Court refused to shift to the government the burden of proof by requiring that it meet requirements such as those asserted in the proposed test. The majority indicated that the prosecution should not have to prove, nor should a judge have to determine, that the enforcement of a given law has any more "compelling interest" than the enforce-

37. Id. at 53.
38. 380 U.S. 479 (1965).
40. 92 S. Ct. at 2671.
41. Id. at 2671 (concurring opinion).
42. Id.
ment of any other, in order to justify requiring a newsman to testify before a grand jury.\textsuperscript{43}

The majority placed its hope in the proposition that law enforcement agencies, in their own interest, will police themselves, or in the alternative, that such a "hue and cry" will be raised that Congress and the state legislatures will take remedial action. In this regard, the majority's point is well taken that of all "interest groups," the news media are among the least defenseless. If anything will result in the awakening of the power of the press against blind sponsorship of "law and order" at the expense of constitutional rights, perhaps this decision will. And perhaps the fear alone of such an awakening will deter the government from any outlandish abuses of discretion. Meanwhile, if reporters seek their protection in the courtroom, they must be prepared to offer positive proof that the government's grand jury is on a mere "fishing expedition," or that in some other way one of the seven enumerated offenses\textsuperscript{44} violating the freedom of press is occurring.

The question unresolved by \textit{Branzburg}, which leaves the criteria for freedom of the press somewhat uncertain, is whether trial and appellate courts will truly take such applications for judicial protection on a case-by-case basis, or whether, in avoiding a solid shield of protection for all confidential relationships, the Supreme Court has left the news media in the exposed and unprotected position feared by the dissent.\textsuperscript{45}

\textbf{DOUGLAS K. SILVIS}

\section*{DISCRIMINATORY JURY SELECTION: REVERSIBLE ERROR REGARDLESS OF DEFENDANT'S OWN RACE}

Petitioner, a white male, was indicted and convicted for burglary.\textsuperscript{1} No member of either the grand jury which indicted him or the petit jury which convicted him was black. In a petition for federal habeas corpus relief, he raised the claim that discriminatory jury selection practices were used and that blacks were thereby systematically excluded from these bodies.\textsuperscript{2} On the basis of this exclusion, the petitioner claimed that

\textsuperscript{43} \textit{Branzburg} v. \textit{Hayes}, 92 S. Ct. 2646 (1972).

\textsuperscript{44} See note 19, supra, and accompanying text.

\textsuperscript{45} The dissent, per Mr. Justice Stewart, expressed the fear that "[t]he court . . . 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." 92 S. Ct. at 2671.

\textsuperscript{1} This action has a long and involved history. Petitioner was tried twice for this offense. The first trial resulted in a conviction that was reversed on appeal on fourth amendment grounds. Peters v. State, 114 Ga. App. 595, 115 S.E.2d 647 (1966). On retrial, petitioner was again found guilty. This conviction was affirmed on appeal. Peters v. State, 115 Ga. App. 743, 156 S.E.2d 195 (1967).

\textsuperscript{2} A previous petition was denied for failure to exhaust then-available state remedies. Peters v. Rutledge, 397 F.2d 731 (5th Cir. 1968).