Right to anonymity in jeopardy: An analysis of the history of debate surrounding governmental subpoenas of the press

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A RIGHT TO ANONYMITY IN JEOPARDY:
AN ANALYSIS OF THE HISTORY OF DEBATE
SURROUNDING GOVERNMENTAL SUBPOENAS OF THE PRESS

by

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Among those who work in the private press, newspaper reporters often are the only people who appear willing to go to jail to protect unpublished information, e.g., sources of documents and information. For more than one hundred years, many reporters have resisted subpoenas and court orders and have voiced a range of arguments in refusing to cooperate with fact-finding tribunals. Cases reaching the U.S. Supreme Court have failed to secure the necessary protection.

The purpose of the analysis is to explain this failure as a product of argumentative weaknesses in the historical debate. The weakness of the right-to-know argument, advanced on behalf of the testimonial privilege since 1886, is examined. The analysis also attempts to reconcile elements of the press' divergent arguments in favor of the privilege. A coherent theory is proposed based on a political right to anonymity held by authors and sources of information—potentially any member of the public.

The assembled record of debate contains documentary evidence and material from a variety of legal and general literature published through the end of 1977. It includes a brief history of the use of anonymous political commentary in early America. Also included is a distillation of the records of hearings in Congress between 1972 and 1975. There is a record of decisions of the Ad Hoc Coordinating Committee, led by the American Newspaper Publishers Association, as it attempted to present the press' argument in Congress.

The analysis suggests that, under existing conditions, it may be impossible for courts to recognize the overriding political value in the reporters' claims without being forced to make judgments inappropriate for the judicial branch. Hence a solution is recommended that would tend to increase pressure for a legislative resolution of the question. It would assign responsibility for unpublished information to the publishers who control it, not the reporters who collect it. The analysis concludes by questioning whether there are enough publishers with the will to force passage of a federal law prohibiting all governmental inquisition of the press through subpoena.
CONTENTS

Abstract....................... ii
PREFACE............................. iv

Chapters

I. INTRODUCTION.................. 1
II. THE ANONYMOUS VOICE........ 10
III. A BASIC CONSIDERATION OF POWER................ 37
IV. THE RIGHT TO KNOW............ 58
V. CALDWELL AND THE PANTHERS...... 91
VI. BRANZBURG: FROM COURT TO CONGRESS........... 109
VII. IN CONGRESS: THE BRANZBURG EXCEPTION........ 126
VIII. IN CONGRESS: THE LONDON COMPROMISE........ 165
IX. IN CONGRESS: IMPASSE........ 193
X. CONCLUSION................... 210

APPENDIX........................... 222
SELECTED BIBLIOGRAPHY........... 230

iii
This analysis grew out of a suggestion by Frank Adams, chief of the Great Falls (Mont.) Tribune Capitol Bureau in Helena. His use of confidential news sources was challenged by a subpoena from state prosecutors who were looking for evidence of an alleged assassination plot against the Montana attorney general. The attempt to co-opt Adams and the Tribune eventually was successful (a court ruled against them and they turned over the information), but it generated popular reaction sufficient to encourage the legislature to strengthen Montana's law protecting the press' unpublished information from governmental subpoena. For its part, resisting as long as it felt able, the Tribune in 1977 received the First Amendment Award of the society of professional journalists, Sigma Delta Chi, and so gained something in common with former U.S. Supreme Court Justice William O. Douglas and other modern defenders of press freedom.

One implication of the arguments here is that a reporter's right to hold unpublished information in confidence is merely an extension of his publisher's more basic institutional right to immunity from subpoenas. This seems but a small change in emphasis and interpretation in a problem that has been endlessly interpreted, but it could provoke
renewed political examination of press subpoenas and impor­tant spiritual renewal in the press itself. I am pleased to contribute it to the literature of journalism.

In a sense, this study is an interpretation of edito­rial rights as expressed in the philosophy of journalistic autonomy developed by John C. Merrill in his book *The Imper­ative of Freedom* (1974). But Merrill's conclusion on this subject, that truthful journalism must name sources always, I reject as specious.

This study was supported in part by the financial and academic resources of the University of Montana School of Journalism, and was supervised by its Dean, Warren J. Brier. Robert C. McGiffert, professor of journalism, and James J. Lopach, professor of political science, also supervised. Their suggestions for research and their critical review of the draft were invaluable.

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CHAPTER I

INTRODUCTION

Other momentous events were unfolding in the world in late April 1975 on the day an obscure Congressional subcommittee met to consider what freedom of the press in the United States might mean. South Vietnamese President Nguyen Van Thieu had resigned only days before. Ten army divisions under command of Thieu's Communist adversaries ringed Saigon. In response to the panic in Vietnam, U.S. officials proposed relaxing immigration rules to admit 130,000 refugees, the first of whom already had arrived. Still, the New York Times retained its usual perspective, finding space amidst war news to report on the birth of quintuplets in Cincinnati and the death of a 107-year-old veteran of the Spanish American War nursing corps. Even the trend in soybean futures was awarded some analysis. But no word appeared that day in the Times about a bill in subcommittee whose ultimate acceptance or rejection would affect a significant part of what we mean when we say the press shall be free. What for most of two centuries had been a much-disputed legal question was being stripped to its political heart in the nation's largest political forum: shall the government be allowed to annex the press as an investigative tool for use against the
citizenry? The possible answers were clear: "yes," "no," or "sometimes."

Members of Rep. Robert W. Kastenmeier's Subcommittee on Courts, Civil Liberties, and the Administration of Justice were not yet asking themselves or their fellow representatives to vote on the question. Even after years of testimony and the involvement of hundreds of members of Congress, they wanted to hear once again from the press itself on this delicate subject of "newmen's privilege," as Congress had come to call it. Kastenmeier explained that the bill at hand (H.R. 215)

... involves the balancing of vital but sometimes conflicting principles. The first is the well-known rule that Government has the right to secure the testimony of its citizens. The second is the equally urgent proposition that the public should have the greatest possible access to the news and other information and that members of the press shall not be cut off from their sources. It is persuasively argued that this will happen if newsmen can be forced [subpoenaed] to reveal information given to them in confidence.¹

The Congressman's words were familiar to the lawyers on the subcommittee. This was the standard framework that had bound the issue since any of them could remember: "The balancing of ... conflicting principles." There seemed to be no question about what was involved. After all, had not the

¹U.S. Congress, House, Committee on the Judiciary, Newsmen's Privilege, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice on H.R. 215, 94th Cong., 1st sess., 1975, p. 6 (hereafter cited as 1975 House Hearings). H.R. 215 (ibid., pp. 2-5) is reproduced in the Appendix as Exhibit B.
U.S. Supreme Court considered the same question in the same terms? Kastenmeier reminded the audience that the Court's controversial Branzburg v. Hayes decision in 1972 had ruled that the First Amendment does not give newsmen any special testimonial privileges. But Congress, said the Court, could create such a privilege "as narrow or broad a deemed necessary to deal with the evil discerned." Although it had a bill in hand to do this, the subcommittee was reopening hearings begun in 1972 mostly, said chairman Kastenmeier, to "observe where we are on this issue at this particular time in history."

Actually, Congress was approaching the end of an era that began in 1929 when the first "newsmen's privilege" bill was introduced. Over the years, scores followed but none was successful in passage. Congressional concern appeared to peak in 1973 when the record of testimony for and against protecting reporters filled more than 1,500 pages.

But Kastenmeier's intention to find out "where we are on this issue" referred to more than the members of Congress. Thinking in the press itself, in fact, whether to do anything at all about the subpoena question, had vacillated over the years, even during the early 1970s when relations between the

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3 Ibid., p. 706.

4 1975 House Hearings, p. 6.
press and government seemed at an all-time low. Official attacks on the institution of journalism seemed especially threatening at a time when, according to some, the institutional integrity of the press was helping support the Constitutional system against excesses of power by the President.

In the midst of that trauma, some organized journalism groups sent spokesmen to Congress to argue for protection from governmental subpoenas for unpublished information. Not on their own behalf, they said, but on behalf of the public. The public had a right to know what government officials really were doing and what dissidents in and out of government were saying. Only a ban on subpoenas could ensure a flow of information sufficient for informed decisions by the citizenry, they said. Publishers represented by the American Newspaper Publishers Association (ANPA) had held that view.

But the press, never monolithic despite those who like to see it that way, was fragmented in its opinion on the subpoena question. A few press spokesmen warned of the danger in any legislation affecting the First Amendment. Any legislative supplement would be dangerous, they said. One or two spokesmen warned that the press could abuse the power inherent in the power to protect sources of information. Many suggested a compromise: a statute that would effect a limit on the numbers of press subpoenas but concede the right of the government to use the press for enforcement of criminal and
civil law. For more than two years, Congressional subcommittees heard theoretical arguments concerning various approaches to the problem.

In 1975 Congress apparently hoped that some opinions in the press had changed. At last a committee of Congress had drafted a bill that it thought would pass if the press could unite behind it. After nearly a half-century of sporadic debate in Congress, basic questions would be answered for the record: What stake did the press have in its news film outtakes on cutting-room floors, the identities of its trusting informants, and the preservation of confidential documents it obtained from them? How much did the press believe in its constitutional independence from government? In short, was compliance with the free-press guarantee in the First Amendment a matter of degree, in this case, or of principle? Answers to these questions would be implied in press reaction to this particular bill, because it would generally limit, but not eliminate, the press' vulnerability to subpoenas from the three branches of government. It was protection "qualified" by major exceptions.

Anyone expecting more of the policy expressed previously by the ANPA on these matters would have been surprised when the publishers' group announced it was "pleased" to support the committee's bill. A spokesman summarized:

We are pleased to support H.R. 215 as being what we believe to be an effective adjustment to the views expressed by many people over the past several years and as representative of a good piece of legislation which we all know will be subject to review in the courts to
see whether or not something further need be done. . . . Of course we would prefer an "absolute" bill. We are trying to be realistic. We realize that that is almost impossible. And, after 2 years, we think that we had better get what we can get, if we can get that.5

In the face of Kastenmeier's announced belief that "an absolute privilege absolutely cannot make it" through Congress,6 ANPA's position certainly was realistic. And it was supported by leaders of the Columbia Broadcasting System, the National Broadcasting Co., and other lesser figures. Yet one important press group obstinately clung to idealism and withheld support from the bill. It would not be satisfied with getting what it could get. Among other reasons, the Reporters Committee for Freedom of the Press cited "the theoretical one that a qualified bill violates the first amendment to the extent that it does or could infringe on the information gathering potential of journalists."7 Its spokesman summarized the position of his constituency, "the working press":

. . . we believe that the Congress should pass an absolute and preemptive privilege statute, protecting journalists from being ordered to disclose unpublished information before any executive, legislative or judicial body of Federal, State or local government.

We strongly oppose any limitation on this privilege.8

Why should publishers and reporters have differed so strongly in their willingness to accede to the government's demands for unpublished information? The ANPA spokesman de-

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5Ibid., p. 106.
6Ibid., pp. 117-18.
7Ibid., p. 96.
8Ibid., p. 94.
nied that it had anything to do with differing "constitutional interests." "As a matter of fact," said the ANPA, "owners, publishers and editors have the same interest in preserving these first amendment rights as the reporters. They too can be sent to jail under the authority of the Branzburg case."9 But, the ANPA indicated, "we also live in a real world" where compromise of principles seems necessary sometimes.10 Its spokesman found himself forced into an embarrassing disagreement when one incredulous member of the subcommittee questioned the ANPA's moral position: "Who, if anyone, can waive the right of the public to have media that cannot be made into a part of the law enforcement agencies of the Nation?"11

Who indeed? The thesis here is that, by their support of qualified newsmen's privilege legislation in Congress, the ANPA and other press groups in 1975 complaisantly attempted to waive a fundamental right of the free press in the United States. But more than that, these organized journalism groups jeopardized a basic political liberty of every citizen: the right to comment on public affairs anonymously. Although there is support in Supreme Court decisions for that liberty, the Court has not recognized it in connection with press subpoenas. In fact, it is not a freedom commonly pointed out in

9Ibid., pp. 106-7.
10Ibid., p. 116
11Ibid., p. 117.
free-press debate, although the use of pseudonyms for public commentary in America had a distinguished following in Thomas Paine, Alexander Hamilton, John Jay, James Madison, John Adams, Samuel Adams, James Alexander, DeWitt Clinton and John Dickinson, among many others. However, it is a liberty threatened whenever the government can subpoena a publication to force disclosure of a source of information or to compel the testimony of a reporter. It is a liberty that can be protected best by publishers, although the history of debate surrounding governmental subpoenas of the press is nearly devoid of remarks concerning the responsibilities of publishers.

Whether the freedom to comment on public affairs anonymously under the First Amendment is protected from governmental subpoena power is a legal question not yet brought forward for resolution by the Supreme Court. Even as a general issue it never has been presented properly for legislative resolution, despite the years of debate surrounding the subject of press subpoenas.

The purpose of this analysis is to encourage reexamination of the subpoena question in terms of two specific political liberties: freedom from subpoena for publishers, and a right to anonymous commentary for all of us. The intent is to help counter the considerable momentum of our government toward their destruction.

Resolving the subpoena question in favor of the press would relieve publishers (to say nothing of reporters) of an
oppressive burden, but that happy side effect would be as a footnote in what should be a more general debate concerning political liberty. Let it begin here.

A review of the elements so far in the subpoena debate, a record of the judicial treatment of the relevant questions as they were presented, and a review of Congressional testimony on the need to protect journalists in the public interest, are the subjects of the remaining chapters. A concluding chapter proposes a theory and offers recommendations for action.
CHAPTER II

THE ANONYMOUS VOICE

Practically since Gutenberg, the history of publishing contains many examples of the use of legal force to pry unpublished information out of press hands. Early cases involved tracts printed without governmental approval and written by authors who wished to remain anonymous for fear of retaliation by those in power. If the published tract was in praise of what are now democratic traditions, and the legal force against its printer and author was exercised on behalf of autocratic rulers, the investigation and prosecution can be labeled witch-hunting without fear of contradiction. Today, of course, witch-hunting is highly disapproved of. The tools of its practice today commonly are thought to be confined to political forums, such as committees of Congress.

But there was a time, not long before the end of licensing and censorship in England, when printers were executed for shielding anonymous authors. One of the first was John Twyn, who was indicted and tried in 1663 for "compassing" (imagining) the King's death. The treasonable offense arose from his printing of A Treatise on the Execution of Justice, which held that rulers are "accountable to the people, and that the people may take up arms against a king and his fam-
ily . . . if he refuses accountability." At the time, this was a criminal notion. After he refused to say who wrote the treatise, Twyn was executed. Thirty years later, William Anderton was hanged for almost exactly the same crime after he refused to name the authors of treasonable books he had printed.2

In the eighteenth century, free at last from licensing, English journalism became a vital social and political force. The first half-century of this journalism was especially influential on the development of American colonial newspapers, which were in their infancy.3 Periodical essays began to appear, many written by great men of letters. At first, most of the discussion revolved around social, moral and literary topics, but gradually commentary became political. The master journalist of that century, Daniel Defoe, in his Mist's Journal developed "letters introductory": expositions on popular topics signed with various pen names. These essays and letters are considered to have been the prototypes of the modern editorial.4

As newspapers became the common medium of political dis-

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2 Ibid.
4 Ibid., p. 22.
cussion, many of the greatest political debates were carried on by men who wrote pseudonymously. One famous series of political letters was written by John Trenchard and Thomas Gordon weekly between 1720 and 1723 and published first in the London Journal and then in the British Journal. Signed "Cato," the letters had popular impact both in England and in America. An historian of journalism has observed:

The theories of liberty and of representative government set forth in Cato's Letters, as they were called when issued in four volumes in 1724, met with so hearty an approval in the colonies that some of the letters were reprinted and quoted in almost every colonial newspaper, beginning in 1721 with Franklin's New-England Courant. They helped crystallize the political ideas that finally found expression in the Declaration of Independence.⁵

Although it is usually cited for its victory against repressive seditious libel statutes, the case of John Peter Zenger, printer of the New York Weekly Journal, also involved anonymity. As in any libel prosecution, it was the printer who was on trial for publishing in 1734 attacks that labeled the colonial governor of New York a tyrant.⁶ Throughout his nine-month imprisonment and the trial, Zenger refused to name the individuals who wrote the critical articles for the Journal, though the governor had offered a substantial reward for their identity.⁷ The colonial government, focusing as it was on the alleged crime of seditious libel, did not need to exer-

⁵ Ibid., p. 23.

⁶ Nelson and Teeter, p. 23.

cise itself at trial to discover the author; jailing the printer would serve its purpose. Part of the defense counsel's successful argument to the jury was that "[men] who injure and oppress the people under their administration [and] provoke them to cry out and complain" should not be empowered to "make that very complaint the foundation for new oppressions and prosecutions." The words could have served as well to defend Zenger on the charge of contempt for failing to reveal who wrote the words he printed, but is was not to be.

About the time of the Zenger trial, young Benjamin Franklin was assisting his brother James, publisher of the New-England Courant. The Boston newspaper of religious and political satire was said to have libeled the government. When hauled before a committee of their colonial Assembly, the two refused to name the source of the offending articles. Benjamin Franklin later wrote:

One of the pieces in our newspaper on some political point, which I have now forgotten, gave offense to the Assembly. He [James] was taken up, censured, and imprisoned for a month by the speaker's warrant, I suppose, because he would not discover the author. I too was taken up and examined before the council; but, though I did not give them any satisfaction, they contented themselves with admonishing me, and dismissed me, considering me, perhaps, as an apprentice, who was bound to keep his master's secrets.

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There is nothing that appears in the record of colonial free-press debate to contradict the notion that the use, propriety and advantages of pseudonymous and anonymous writing were taken for granted during the entire eighteenth century.

James Alexander, who could have been the mysterious author in the Zenger case, was the first American to develop a philosophy of freedom of the press. He is one of the few early Americans to remark on anonymity as a right of free expression. In a 1734 essay ascribed to him, Alexander evinced great distaste for governmental "endeavors" to discover the authors:

I would be glad to know wherein this Liberty of Writing consists? If no Endeavours have been left untryed, either with Grand Juries, and even with one of the Branches of the Legislature to treat the Papers with the greatest Ignominy, and to discover the Authors--Even of Papers (as those of the Continuance of the Middletown Letter) which were purely argumentative upon political points, without the least Syllable of an indecent Reflection upon any Body, and the Reasons given for this Discovery was, that the Authors might meet with condign Punishment; with what Propriety of Speech can we be said to have the Liberty of freely communicating our Sentiments upon any points, when so great Endeavours are used to prevent its being done? Have not the Authors all the Reason in the World to fear a Repetition of the Exorbitant Fines and sanguinary Cruelties that stain'd the Reigns preceeding the Revolution?--Is it not a ridiculous Farce and an Affront to the common Sense of Mankind to talk of Liberty of the Press enjoyed with Impunity in this Case?10

Another author rejoiced in the anonymity of the typeface. William Livingston's essay in 1753, "Of the Use, Abuse and Liberty of the Press," commented on the necessity for anony-

mity and the power of the press to preserve it:

Secrecy, is another Advantage, which an Author had not before the Art of Printing was discovered. As long as Power may be perverted, from the original Design of its being lodged with the Magistrate, for protecting the Innocent and punishment of the Guilty, so long it will be necessary to conceal the Author who remarks it, from the Malice of the Officer guilty of so pernicious a Perversion; and by Means of this Art he may write undiscovered, as it is impossible to detect him by the Types of the Press.

The controversy over the Stamp Act in 1765 greatly advanced colonial opposition to British policies. In this and subsequent controversies, American leaders--statesmen, lawyers, scholars and clergymen--who supported or opposed British colonial policies used the newspapers to amplify their points of view. The usual means adopted were letters, published singly or in series and addressed to the printer or "author" of the newspaper. Like the authors of Cato's Letters, they signed with pen names:

Samuel Adams was the most prolific and the most effective of the Patriot writers for newspapers. In signing his letters and articles he used some twenty-five different pen names. . . . Probably no single Patriot did more to bring about the rupture between England and her colonies than did Adams.12

In turn, Loyalists used avowedly governmental newspapers to publish counterattacks. The attorney general of Massachusetts, Jonathan Sewall, wrote under the name of "Philanthrop" to engage in a protracted debate with Samuel Adams as "Vindex" over the outcome of the trial of British soldiers engaged in

11Ibid., p. 76.
12Bleyer, p. 82.

The debate continued, week by week, until cut short by the temporary suspension of the *Boston Gazette*, which ceased publication for two months immediately after the battle of Lexington. These letters attracted much attention, not only when they appeared . . . but when they were reprinted in pamphlet form both in the colonies and in England.14

During the critical years in American colonial affairs, 1769 to 1772, the *London Public Advertiser* published the famous letters by "Junius," who remains anonymous. These letters brought to the colonists and the citizens of England a clearer understanding of their . . . rights and a stronger determination to retain them. This method of carrying on political discussion in series of letters contributed to newspapers by political leaders, usually writing under the names of famous Romans, was very popular in both England and America.15

Another important pre-Revolutionary discussion was an outcome of Thomas Paine's pamphlet, "Common Sense," published in 1776. The Rev. William Smith, president of the University of Philadelphia, assumed the name "Cato" to answer Paine in a series of letters to the *Pennsylvania Gazette*. To these Paine re-

13 Ibid., p. 83.
14 Ibid., p. 84.
plied with a series of letters signed "Forester" and published in the Pennsylvania Packet. The "Cato-Forester" debate was one of the most significant public discussions of this crucial time in American affairs.16

Significantly, the end of the threat of British prosecution for sedition had no effect on the use of pseudonymously published opinion in newly independent America. Alexander Hamilton, James Madison, John Jay, DeWitt Clinton and John Dickinson were among the distinguished political leaders who continued the tradition of anonymity in advancing points of view for public consideration. In discussing the proposed Constitution, they relied as usual on published letters:

Unquestionably the greatest series of such letters was that known as The Federalist, written by Hamilton, Madison and Jay, under the name of "Publius," and addressed "To the People of the State of New York." They were first published in the semi-weekly New York Independent Journal: or General Advertiser, beginning on October 27, 1787, and continuing into April, 1788. These letters explained in detail the various articles of the Constitution and urged its adoption. Jefferson wrote from Paris that they constituted "the best commentary on the principles of government which was ever written." As fast as they appeared in the Independent Journal, they were reprinted in other newspapers that favored the ratification of the Constitution. . . . Hamilton, who had contributed essays and letters to newspapers from the beginning of the Revolutionary War, was the author of two thirds of these letters. As an exposition of the fundamental principles of constitutional government, The Federalist is the most important contribution to political science that has ever appeared in the American press.17

16 Ibid., p. 91.

17 Ibid., p. 102 (footnotes omitted).
After the Constitution had been accepted and the government organized, supporters of the Federalist and Republican theories of government continued their pitched battle for public support by founding their own newspapers. Hamilton, leader of the Federalists and secretary of the treasury, used the Gazette of the United States. In anonymously published articles he attacked Republicans in general and Jefferson in particular. Jefferson, leader of the Republicans and secretary of state, and his friend, James Madison, founded the National Gazette for similar purposes. When President Washington asked if it was true that Jefferson was responsible for the vitriolic anti-administration attitude of the National Gazette, Jefferson felt compelled to deny contributing anything anonymously to it. He told the President: "I never did by myself or any other, directly or indirectly, write, dictate or procure any one sentence or sentiment to be inserted ... to which my name was not affixed or that of my office." In the same letter, Jefferson advised Washington with the now-famous remark, "No government ought to be without censors: & where the press is free, no one ever will."19

Beginning in 1793, Noah Webster began editing the Federalist American Minerva. Its founding issue apparently was the first to declare a policy on anonymously published writings:

18Ibid., p. 107.
19Ibid., pp. 110-11.
The Editor will endeavor to preserve this Paper chaste and impartial. Confidence, when secrecy is necessary or proper, will never be violated. Personalities, if possible, will be avoided; and should it ever be deemed proper to insert any remarks of a personal nature, it will be held an indispensable condition, that the name of the writer be previously left with the Editor.  

Webster wrote for his paper letters under various names, including a series of twelve signed "Curtius." Part of another series written by Hamilton and Rufus King was published in the Minerva under the name "Camillus." All concerned Jay's treaty with England in 1795. Jefferson admired their effectiveness and thought they all were written by Hamilton.

In 1795, he wrote to Madison:

We have had only middling performances to oppose him. In truth, when he comes forward, there is nobody but yourself who can meet him. His adversaries having begun the attack, he has the advantage of answering them, & remains unanswered himself. . . . For god's sake take up your pen, and give a fundamental reply to Curtius & Camillus.

The virulent bitterness of the ideological struggle between the two sides plumbed deplorable depths during the last years of the century. Republican editorial abuse of the Federalists and their two figureheads, Washington and Adams, led directly to the country's first experiment with sedition laws. The leading Republican editors were English or Irish radicals who had fled England and were anxious to attack what they saw as pro-British attitudes

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20 Ibid., p. 113 (emphasis his).
21 Ibid., p. 114.
22 For a good summary, see Bleyer, pp. 115-29.
in foreign policies of the first two administrations. To curb the published abuse, the Federalist majority in Congress in 1798 passed the Alien and Sedition Acts. The Alien Act permitted the President to deport or imprison aliens who were, in his judgment, "dangerous to the peace and safety of the United States." The Sedition Act was aimed at aliens too, but also at native American editors and writers who were vilifying the government. For three years, it was a felony to "write, print, utter, publish . . . or procure to be written, printed, uttered or published, or . . . assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing . . . against the government" with intent to defame it or with intent to excite resistance to "any law . . . or any act of the President." Truth was an allowable defense under the Sedition Act.\(^\text{24}\)

Prosecutions under the Sedition Act included the arrest of about twenty-five persons, not all editors, and the conviction of ten persons. Apparently, none of the legal maneuvers involved efforts to pierce veils of anonymity. Prosecution apparently focused on those known to have written or assisted in the publishing of sedition as defined.\(^\text{25}\)

Argus, Greenleaf's New Daily Advertiser was one of three leading Republican newspapers attacked through the Se-

\(^{23}\text{Ibid.},\ p.\ 127.\)

\(^{24}\text{Ibid.},\ p.\ 120.\)

\(^{25}\text{Ibid.},\ pp.\ 121-23.\)
dition Act. Hamilton himself was responsible for the prosecution, which convicted David Frothingham, a printer employed by the publisher. The article complained of had appeared in several papers before being reprinted in the Argus. In a letter to the attorney general of New York, Hamilton requested "immediate measures towards the prosecution of the persons who conduct the enclosed paper." This and other bits of evidence from the period indicate that the Federalists were mainly interested in stopping "publications and republications" of seditious libels and were not particularly interested in the writers who remained anonymous.  

The turn of the century did not end the partisan bitterness of the late 1700s. An "era of good feelings" had to await the end of the War of 1812 and the decline of British and French influences on American politics. But the year 1800 does seem to represent a watershed in the use of anonymously published political commentary in the United States. According to the evidence, a major journalistic tradition disappeared virtually overnight. Perhaps this remarkable transition never will be explained fully.

Practically speaking, the change in favor of assuming credit for (or at least not denying association with) what was published must have been the result of a release from fear. No longer was there a threat of British prosecution for sedition. But there remains the curious continuation of the tradi-

26Ibid.
tion of anonymity during the formative years of the United States. It was as if Revolutionary and counter-Revolutionary excesses had to fight for dynamic balance before the use of protective anonymity in published opinion could be abandoned for the "safety" of the rule of law under a just (and amended) Constitution.

Regardless of their reasons, the fact is that the Founding Fathers of the United States fully demonstrated a belief in the appropriateness of anonymous commentary under our Constitution. Whether this fact helps justify constitutional protection for a right to comment on public affairs anonymously is a matter of opinion.

This study discovered no evidence that the Founding Fathers formally defined their right to comment on public affairs anonymously. There is no evidence—whether they wished to see it protected as an indispensable political liberty. Apparently, they took it as given, used it when they thought necessary, and abandoned it without a word of appreciation for its service.

To introduce a legal analysis of the right to anonymity, we have Tunis Wortman's Treatise Concerning Political Enquiry, and the Liberty of the Press. It was published in 1800 during the peak of governmental agitation to restore the "integrity" of a press widely considered to be totally licentious. Wortman tried to put matters in perspective:

It is of no consequence to enquire who writes a paper or a pamphlet, where principles and not individuals are the subjects of investigation. The only reasonable enquiry
is, are the principles contended for just? If they are let them have their due weight; if otherwise, they will meet with their merited contempt. In all cases, however, where specific or general charges are exhibited against an individual, or individuals, the person's name ought to be affixed to the publication. In this case, wilful calumny and abuse would never dare to make their appearance. He who had been once convicted of publishing a malicious falsehood, would forever after be deprived of the means of giving currency to his calumnies. Let no Government interfere. The laws of society... are fully sufficient to the purpose. 27

Indeed, it has become a legal axiom that "major values underlying free speech and press are society's need[s]." 28 Because free speech and press in the United States receive their protection from the First Amendment, 29 testimony about what it meant at the time of its adoption is relevant:

First of all (if the amendment is analyzed by focusing on the phrase, "freedom of the press"), it was merely an assurance that Congress was powerless to authorize restraints in advance of publication. . . . No other definition of freedom of the press by anyone anywhere in America before 1798 has been discovered. 30

The much broader First Amendment as we know it today is

27 Levy, p. 316.


29 "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." U.S. Constitution, amend. I (1791).

30 Levy, p. 1v. He adds: "It now appears that the prohibition on Congress was motivated far less by a desire to give immunity to political expression than by a solicitude for states' rights and the federal principle. The primary purpose of the First Amendment was to reserve to the states an exclusive authority as far as legislation was concerned, in the field of speech and press" (ibid., p. lix).
not nearly as old as the Constitution. "Having spent more than a century in largely hortatory limbo," said a 1971 Field Foundation study, "the first amendment has had a surprisingly brief career--just over fifty years--as a meaningful legal concept."\(^{31}\) According to that study, the earliest judicial decision awarding any meaningful protection to free speech was in 1917.\(^{32}\) Not until 1931 did the Supreme Court reverse a state-court judgment explicitly on First Amendment grounds.\(^{33}\) The first high-court decision striking down an act of Congress as repugnant to the First Amendment was in 1965.\(^{34}\)

The 1931 decision, *Near v. Minnesota*, established among other things that liberty of speech and press guaranteed by the federal Constitution are "safeguarded by the due-process clause of the Fourteenth Amendment from invasion by state action."\(^{35}\) Having thus established the federal power to enjoin unconstitutional action by states, the decision went on to forbid most legal restraints in advance of publication, especially in discussions of public affairs. Significantly, the decision explicitly left open the door for previous restraint when the words to be published involved a threat to the nation


\(^{32}\)Ibid., p. 233n. The decision was Judge Learned Hand's in *Masses Publishing Co. v. Patten*.

\(^{33}\)Ibid., *Near v. Minnesota*.

\(^{34}\)Ibid., *Lamont v. Postmaster General*.

\(^{35}\)Nelson and Teeter, p. 44 (quoting Chief Justice Charles Evans Hughes).
in time of war, or were obscene, or were incitements to vio-
ence or violent revolution.\textsuperscript{36} (It should be noted that cru-
cial legal battles involving subpoenas for unpublished infor-
mation occurred in the last century, long before the Supreme
Court breathed life into the First Amendment in \textit{Near v. Min-
nesota}. Practically speaking, defense under the federal
Constitution against subpoenas by state officers was unavail-
able to newsmen then.)

Consistently, courts have confused freedom of the press
with freedom of speech.\textsuperscript{37} The most important aspect of this
confusion with regard to press subpoenas is the settled no-
tion that a witness' freedom of speech does not include the
freedom to remain silent in court.\textsuperscript{38} The traditional privi-

\textsuperscript{36}Ibid., p. 45.

\textsuperscript{37}James A. Guest and Alan L. Stanzler, "The Constitu-
tional Argument for Newsmen Concealing Their Sources," North-

\textsuperscript{38}Ibid., p. 40. The justification for compulsory testi-
mony has its historical roots in England. Jeremy Bentham
stated the rule dramatically:

"Were the Prince of Wales, the Archbishop of Canterbury,
and the Lord High Chancellor to be passing by in the same
couch, while a chimney-sweeper and a barrow-woman were in
dispute about a halfpennyworth of apples and the chimney-
sweeper or the barrow-woman were to think proper to call
upon them for their evidence, could they refuse it? No,
most certainly" (4 Works of Jeremy Bentham 320 [Bowring ed.
1843], cited ibid., p. 24n).

The U.S. Supreme Court dictated a rule to conform to the
tradition long ago:

"It is clearly recognized that the giving of testimony and
the attendance upon court or grand jury in order to testify
are public duties which every person within the jurisdic-
tion of the Government is bound to perform upon being prop-
erly summoned, and for performance of which he is entitled
to no further compensation than that which the statutes
provide. The personal sacrifice involved is a part of the
leges accorded some witnesses in protected relationships—husband-wife, lawyer-client, priest-penitant, doctor-patient—have been based not on constitutional grounds of freedom of speech but rather on exceptions to the common-law presumption in favor of testimony by all. On this point, one analyst has remarked:

The fact that the compulsory testimony principle is consistent with freedom of speech, however, does not imply that it is consistent with other constitutional provisions. For each provision, courts must make an independent analysis. In the case of a criminal defendant, for example, regardless of freedom of speech, compulsory testimony violates the right of an accused to remain silent. Similarly, regardless of freedom of speech, compulsory testimony may violate freedom of the press.

Analysts also point to the strong legal presumption against testimonial privileges in explanation for legal resistance to such a right for journalists. In all newsmen's privilege cases where the issue was allowed to be framed as a common-law exception to a common-law rule, the courts followed the traditional legal presumption against any exceptions but those long since found to outweigh the "public interest in the search for truth." As we see in a later chapter, press

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39Ibid., p. 40.
40Ibid.
41Ibid. The quotation is from United States v. Bryan (1950).
spokesmen clung to common-law, rather than constitutional arguments, for about one hundred years.

The Supreme Court has been reluctant to recognize in newsmen's privilege a special constitutional right of the press not accorded to the public in general. One explanation given for this is the Court's "tendency in the past to view freedom of the press as a particularized form of freedom of speech." Many cases involving the press have been decided, in fact, on the grounds of a general "freedom of expression," citing neither the free-press nor the free-speech guarantee.

The nature of free-press rights, as distinguished from the rights of free speech or free expression, is unsettled in court opinions. Before the 1972 Branzburg decision, determinations of free-press rights were connected almost exclusively with balancing press rights in the publication and distribution aspects of publishing against society's interests--against libel, and restraint of trade, to name two. In Branzburg, the Supreme Court pointedly declined to suggest that "news gathering does not qualify for First Amendment protection; without some protection for seeking out the news,

43 Ibid.
freedom of the press could be eviscerated."^46

In decisions spanning thirty years, the Supreme Court recognized component parts of the free-press guarantee as follows: The freedom to publish without government approval (Near v. Minnesota, 1931); a right of circulation (Grosjean v. American Press Co., 1936); freedom to distribute literature (Marsh v. Alabama, 1946), and Martin v. City of Struthers, 1943); and the right to receive printed matter freely (Lamont v. Postmaster General, 1965).^47 Although it acknowledged in Branzburg a right to gather news, the Court promptly asserted that all relevant subpoenas for unpublished information are instances of permissible restrictions on the news-gathering right.^48 To support its conclusion, the Court majority relied on decisions supporting the view that the press may be constitutionally restrained by "enforcement of civil or criminal statutes of general applicability,"^49 that it is "not free to publish with impunity everything and anything it desires,"^50 and that there is no "unrestrained right to gather information"^51 that can be allowed to interfere with

^46 Supreme Court Reports, Book 408, p. 681.
^48 Supreme Court Reports, Book 408, p. 681.
^49 Ibid., p. 682.
^50 Ibid., p. 683.
^51 Ibid., p. 684.
the execution of justice and the police power.  

Detailed criticism of the Supreme Court's views in Branzburg will be pursued later, but for now it is appropriate to relay the general observation that in its haste to support law and order, the Court may have misweighed the news-gathering right it acknowledged. As one commentator observed:

There is good reason to view freedom of the press as co-extensive with freedom of speech in publication-distribution type cases and to measure the rights of the press to set forth its views by the rights of citizens in general to express their views on issues important to them. The free-speech guarantee's purpose of providing an opportunity "to discuss freely supposed grievances and proposed remedies"^51 would be frustrated equally as much by interference with printed expression as with spoken expression.

When the Court turns to the news-gathering function, this identification of protected interests logically suggests the rule based on a right of equal access which the Court apparently had in mind when it recognized the news-gathering right in Branzburg. However, the concurrence of free-press and free-speech interests in the publication or distribution contexts does not necessarily carry over to news gathering. Although the availability of information is admittedly essential to any exercise of free speech, the press differs from the ordinary citizen in that it is engaged in the active pursuit of news. . . . the press has been constitutionally accorded the role in society of seeking out news on behalf of the public and keeping it informed with facts and interpretive opinion.^53

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^52 Ibid., pp. 684-85.

^53 Hurst, p. 192.
When the Supreme Court noted that the government may enforce against the press "civil or criminal statutes of general applicability," it was restating a view much maligned but apparently gradually accepted by the press since the major cases were decided in the 1930s and '40s. In Associated Press v. NLRB (1937), the AP was required to comply with the National Labor Relations Act. A similar case in 1946 forced compliance with the Fair Labor Standards Act.\(^54\) Grosjean v. American Press Co. (1936), among other cases, affirmed that newspapers may be subjected to nondiscriminatory forms of general taxation.\(^55\) These "incidental burdening[s] of the press," as the Supreme Court has referred to them,\(^56\) have become accepted because their impact is not censorial. Clearly the business aspects of the press are the target, although their application indirectly affects the resources available for producing news. The remaining important case, Associated Press v. United States (1945), seemed to involve a much more direct interference with the publishing of news. It deserves close scrutiny here because it seems to be a source of confusion on the question of editorial control and what governmental actions constitute interference with it.

The case has been analyzed elsewhere.\(^57\) Briefly, by-
laws of the Associated Press were acting to restrain trade and commerce in the news among the states and to monopolize a part of that trade in violation of the Sherman antitrust law, the government said. The bylaws prevented AP members from selling news to non-members and from giving it away in advance of publication. They also made membership difficult for publishers who wanted to join the AP and compete in districts with established AP members. The Associated Press, the Chicago Tribune and many others argued that application of antitrust laws in this case would abridge freedom of the press. "A free press requires that newspapers shall be free to collect and distribute the news and that they shall be free to choose their associates in so doing," the defendants replied. The AP's underlying assumption was that because its members each "owned" the news stories they generated, the AP as a cooperative should be allowed exclusive control of their resale or trade. It is impossible to monopolize the trade in news, the AP said, because "the source of news lies in the event itself," which makes it potentially available to all who want to dig it out for publi-
In agreeing with lower-court rulings against the defendants, the Supreme Court held that trade in news is akin to the sale of "food, steel, aluminum, or anything else people need or want." This alone would permit nondiscriminatory regulation of its trade, said the Court, but there is more. Justice Hugo L. Black explained the reasoning of three of the five-Justice majority:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations . . . a refuge if they impose restraints on that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

As the Court's dissenting voices noted at the time, it was the first time the government's antitrust powers had been "used as a vehicle for affirmative intervention . . . in the realm of dissemination of information." Voicing what press law books describe as part of a "traditional libertarian

64 Nelson and Teeter, p. 602.
65 Ibid., pp. 602-3.
66 Ibid., pp. 603-4 (quoting Justices Owen J. Roberts and Frank Murphy).
Justice Frank Murphy issued a warning: "We cannot escape the fact that governmental action aimed at the methods or conditions of such collection or distribution [of news stories] is an interference with the press, however differing in degree it may be from governmental restraints on written or spoken articles themselves."68

There are two reasons why this so-called "traditional libertarian view" ought to be abandoned promptly. Both hinge on the observation that Justice Murphy's interpretation of the impact of Associated Press v. United States fails to distinguish any matter of principle that can be used in legal and political argument.

First, the Supreme Court has used the decision against the AP as part of its justification for governmental subpoenas of the press.69 The Court's idea seems to be that there is no distinguishable difference in principle between the "incidental burden" of the Sherman Act on the collective trade in news and the "incidental burden" of governmental subpoenas on individual publishers. If there is a difference in principle between the two kinds of interference, Justice Murphy's over-anxious dissent does not help press libertarians when they are confronted with the fait accompli of the Court's 1945 decision against the Associated Press.

67Ibid., p. 603.
68Ibid., p. 604.
69Supreme Court Reports, Book 408, p. 683.
Second is the fact that publishers "overwhelmingly" supported AP's position during the court tests leading to the Supreme Court's decision. Presumably they agreed with and may still agree with the dissenting proposition in support of AP: that governmental regulation of the collective trade in news is indistinguishable in principle from governmental restraints on individual publishers--on their freedom of press. However, that position is politically untenable because it does not enjoy even narrow popular sympathy or belief. Quite the contrary: most Americans would agree with Justice Black that upholding antitrust laws against the Associated Press was a great victory for free expression.

It is ironic that publishers can point to the case of Associated Press v. United States and correctly claim that it was a blow against press freedom--but not the blow they imagined it was. Justice Roberts' dissent said he feared that the case would be "but a first step in shackling of the press which will subvert the constitutional freedom to print or withhold as and how one's reason or one's interest dictates." Used by the Supreme Court as a precedent to justify subpoenas for the press' confidential information, the case clearly does assist in "shackling . . . the press" and subverting the freedom to "print or withhold"--disclose or retain--unpublished information. This institutional freedom

70Murphy, p. 42.
71Ibid., p. 45.
of publishers, of course, is the bulwark that can best safeguard the right to comment on public affairs anonymously.

The Court itself may have contributed to the mistaken idea that a publisher's freedom was endangered by the antitrust action. It referred to the defendant Associated Press\textsuperscript{72} as a "publisher" identical with "member publishers of AP."\textsuperscript{73} But Black's Law Dictionary defines "publisher" as

\begin{quote}
One who by himself or his agent makes a thing publicly known. One whose business is the manufacture, promulgation, and sale of books, pamphlets, magazines, newspapers, or other literary productions. One who publishes, especially one who issues or causes to be issued, from the press, and offers for sale or circulation matter printed, engraved, or the like.\textsuperscript{74}
\end{quote}

Hence to publish in its complete definition is to "print an edition" of a literary or journalistic product. Generally speaking, the AP is in no such business, having no presses of its own. It is mainly in the business of routing published news stories to and fro and partly engaged in supplementing member publishers' news staffs.

It is true that individual publishers have been legally restrained from discriminatory refusal of advertising,\textsuperscript{75} but commercial advertising is not "speech" under Supreme Court

\textsuperscript{72}According to Murphy, when the Supreme Court heard the case, the AP was the only remaining defendant. The 35 member publishers and newspapers defending the original suit had dropped out.

\textsuperscript{73}Nelson and Teeter, p. 602.

\textsuperscript{74}Black's Law Dictionary, 4th ed. (1951), s.v. "Publisher."

definition. 76 A leading case of governmental prosecution of a publisher, for antitrust violations in circulating news, rested on the jury's determination that the Kansas City Star and the Kansas City Times (although published by one company) were a "combination" of two newspapers, an abstraction, acting to restrain trade. 77 Mergers have been treated similarly. 78

It is unfortunate that the case of Associated Press v. United States left a legacy of liberal sentiment against the publishers who fought to preserve the AP's overdrawn prerogatives. The Nation, for example, objected that publishers "have come to believe that the First Amendment is practically their private property." 79 Because a publisher's freedom is so intimately involved in the preservation of the right to comment on public affairs anonymously, there is a danger that the sentiment will be inaccurately applied against the press when it seeks freedom from governmental subpoenas. In fact, this has happened over and over again in the course of the debate.

76 Ibid., p. 588.
77 Ibid., p. 613.
78 Ibid., pp. 614-635.
CHAPTER III

A BASIC CONSIDERATION OF POWER

Information is power. That the people, as the ultimate source of governmental power, should have sources of information invulnerable to suppression by the government is the basic consideration of power supporting the right to comment on public affairs anonymously. As we saw in the previous chapter, this liberty to comment from a position of safety, if it exists, is an inextricable part of the liberty of the press.

During arguments whether the Constitution should be explicit in protecting freedom of the press there was a question whether press freedom ought to be protected by public opinion or whether public opinion ought to be protected by a free press. Hamilton felt that freedom of the press would be best safeguarded by "public opinion, and on the general spirit of the People and of the Government." Jefferson, on the other hand, felt that the best way to preserve political liberty and the integrity of public opinion was to write into the Constitution an explicit prohibition on governmental suppression of the press and thus ensure freedom of the people and the press.¹ One of our debts to Jefferson, of course, is his rec-

¹Bleyer, p. 103.
ognition that public opinion cannot protect press freedom or any other political liberty unless the press is free.

According to Jefferson, the people must have an independent "tribunal of public opinion"\(^2\) if an orderly society free from the plague of revolution is to be maintained:

The people are the only censors of their governors . . . . The way to prevent these irregular interpositions of the people [revolutions] is to give them full information of their affairs thro' the channel of the public papers, & 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.\(^3\)

Less than a century later, Karl Marx elaborated on these concerns of Jefferson and brought into clearer focus the institutional framework automatically implied by the creation of an independent force in a governed society:

The administration and the administered both need a third element, which is political without being bureaucratic, an element that does not derive from bureaucratic presuppositions, that is, civic without being directly entangled in private interests and their needs. This complementary element, composed of a political head and a civic heart, is a free press. In the realm of the press the administration and the administered can criticize each other's principles and demands as equals, no longer in a subordinate relationship but with equal political worth, no longer as persons but as intellectual powers, with a basis of reason. The "free press," as it is the product of public opinion, also produces public opinion, and it alone has the power to make a special interest into a general interest; it alone has the power to make the [special] distress . . . an object of general attention and general sympathy . . . it alone has the

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\(^2\)Alan Barth, "Freedom of the Press," University of California Extension, Courses by Newspaper, American Issues Forum I, the (Missoula, Mont.) Missoulian, Nov. 9, 1975, p. 35.

power to alleviate the misery, if for no other reason than that it distributes the feeling of misery among all. . . .

... Finally, the free press carries the people's misery to the foot of the throne, not in a bureaucratically approved form, but in its own medium, before which the distinction between administration and administered disappears and which results in a more equally near-standing and more equally far-standing citizenry.4

According to Alan Barth, the constitutional framers' clear political purpose for a free press led to its protection in law under the First Amendment as, "in a significant sense, the most privileged of American institutions."5

There is much unsettled about the extent of protection the First Amendment affords this institutional role. At times, the Supreme Court has viewed the press as a collection of people without "constitutional rights superior to those enjoyed by ordinary citizens."6 Justice Lewis F. Powell has said:

The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation.7

Armed with the view that "no special privileges" accrue to individuals in the press, the Supreme Court has affirmed the


5 Barth, p. 35.


7 Ibid.
government's power to bar newsmen (along with the general public) from the courtroom,\textsuperscript{8} prohibit special access to information not available to the general public,\textsuperscript{9} and enforce contempt judgments against reporters who fail "to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."\textsuperscript{10}

However, Justice Powell also is the source of arguments for the defense of the press' institutional role. In 1974 he dissented from a majority ruling which held that newsmen have no constitutional right of access to "information not available to the public generally":

What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their destiny. . . . An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news, the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. . . .

This constitutionally established role of the news

\textsuperscript{8}United Press Association v. Valente (1954), cited in Guest and Stanzler, pp. 32-33.
\textsuperscript{9}Zemel v. Rusk (1965), cited in Supreme Court Reports, Book 408, p. 684.
\textsuperscript{10}Ibid., p. 682.
media is directly implicated here. . . . The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right.11

Justice Powell thus outlined the press' institutional status as "an agent of the public at large," and "the necessary representative . . . and the instrumentality which effects the public's right" to meaningful self-government. Sen. Sam J. Ervin Jr., a constitutional law scholar, put the same thought in plainer English:

Thus, the press, while comprised of ordinary citizens with no special office, has an extraordinary function tied to the heart of the democratic process. And this particular obligation to the public reinforces the reporter's determination to resist commands of the government which interfere with that obligation.12

Justice Powell's concern for the institutional role of the press was, as he said, one of maintaining a special status for the press as the "agent . . . enabling the public to assert meaningful control over the political process." In this form, his argument serves as an excellent justification for the freedom from subpoenas necessary to preserve the right to comment anonymously. But as we shall see in the next chapter, some of those anxious to defend press freedom in these matters tend to ignore the essentials of Justice Powell's approach. In fact they pointedly ignore his plea for special press status and pass by the important reference to political liberty. Their focus is exclusively on the

11 Supreme Court Reports, Book 417, pp. 862-64.
12 Ervin, pp. 234-35.
extremely nebulous concept of maintaining a "free flow of information and ideas." Walter Cronkite, for example, made both of these mistakes when he introduced a paperback book on the subject of press subpoenas:

The truth is so apparent to a working journalist that it beggars his understanding as to why others cannot see. Why can't the American people see that freedom of the press is not some privilege extended to a favored segment of the population but is purely and simply their own right to be told what their government and its servants are doing in their name.\(^2\)

The Supreme Court has found it easy to dismiss the essentials of the Cronkite argument. In *Branzburg v. Hayes* the Court majority said:

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own [Supreme Court] conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime 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.\(^2\)

Because the trustworthy status of the press as an institution is directly affected by governmental attempts to obtain unpublished information, it is helpful to detail some nuances of the trust between the press and its sources.

The case of Anthony Ripley, a *New York Times* correspondent, often is cited as an example of how a compromised press

\(^2\)Whalen, p. x.

\(^2\) *Supreme Court Reports*, Book 408, pp. 684-85.
can lose its effectiveness. Ripley reported on a national convention of Students for a Democratic Society. Reporters were admitted to the meeting only if they promised not to quote directly any of the proceedings on the convention floor. When one of the radical leaders, Bernardine Dohrn, described herself as a "revolutionary Communist," Ripley broke the pledge. Several months later, Ripley was subpoenaed by the House Committee on Un-American Activities. He did not contest the summons. Law professor Vince Blasi has recounted how Ripley, after he testified before HUAC, was labeled as a "fink" and denounced by a subsequent SDS convention in these words:

... "Mr. Ripley, by cooperating with this committee, and the New York Times, by authorizing his appearance there, have taken the side of the nation's most notorious witch-hunters. A reporter and a newspaper dedicated to the concept of 'objectivity' have plainly illustrated once again what 'objectivity' means in fact." The SDS membership [Blasi continued] then debated whether to demand from all establishment reporters seeking to cover the convention an affidavit promising not to "do a Ripley," and finally decided to bar all establishment reporters from the convention hall... The incident is illustrative... of a very important aspect of the press subpoena controversy in its contemporary form. The primary concern of reporters is not that they will lose their sources by being made to turn over highly sensitive and secret information--newsmen almost never are privy to such information. Rather, they worry is that their mere cooperation with fact-finding tribunals will alienate sources who demand to know of the reporters "whose side are you on?" To these sources it may make no difference that the newsman's "cooperation" with the tribunal is involuntary, perfunctory, and unhelpful. It is the principle that counts.15

Professor Blasi, who interviewed reporters and editors

15Blasi, pp. 262-64 (footnotes omitted).
across the nation in the early 1970s, possibly was the first
to examine reporters' methods in dealing with anxious sources:

Getting an interview is one thing; gaining an accurate
and comprehensive understanding of a person, a group, or a
news event is quite another matter. It is in this latter
pursuit that some reporters succeed and many fail. Per­
sonal recommendations, inside information, and mutual ac­
quaintances can be very important in getting a source to
relax and to speak expansively, or in persuading a group
to allow its operations to be observed in an unstructured
fashion. . . . In covering some of the polarized elements
in society--radicals, minority groups, police--it is vir­
tually impossible for the reporter to establish this feel­
ing of confidence unless the source is convinced that the
reporter is actually "on his side." This attitude, char­
acterized by the slogan "if you are not for me, you are
against me," is prevalent today among many news sources.
And other sources who do not put the matter in such either/or
terms demand at a minimum that the reporter maintain an
independence and an autonomy that may require him to avoid
any involvement whatsoever with "the other side."

. . . Regular confidential sources can also co-opt a
reporter, particularly when the reporter's career is inter­
related with the source's career. The danger of co-opta­tion is probably greatest in reporting on politicians, but
it is not unknown in covering radicals and minority
groups.

Reporters cope with this dilemma in different ways.
Every newsman whom I questioned on the point said that he
consciously strives to keep his role as a reporter clearly
defined. According to these journalists, it is important
for sources to realize that although a newsman's sympa­
thies may lie with his sources, his primary responsibility
is to his readers. This role definition sometimes takes
the form of a reluctance on the part of the reporter to
offer information or advice to sources, although it is not
uncommon for newsmen to counsel inexperienced sources on
public relations tactics such as the timing of press re­
leases and investigative reporters sometimes plot strat­
egy with bureaucrats who have decided to "blow the whis­
tle."16

Whistle-blowing does not quite convey the importance of
the anonymous voices shielded by the press' willingness to re­
sist their disclosure. Harvard government professor Richard

16 Ibid., pp. 240-42.
Neustadt has described that "class of confidential communications" commonly called a news leak:

A leak is, in essence, an appeal to public opinion. Leaks generally do not occur in dictatorships, where public opinion is not a force that those in power must take into account. In our country, leaks commonly occur when significant questions of public policy are being decided in secret. A leak opens the decision to public scrutiny and evaluation, and brings into play the forces that act in the public forum---congressional and other agencies of government, political party organizations, interest groups and other segments of society that have a stake in the decision. If the confidentiality of communications to newsmen could not be assured, I am convinced that the number of leaks would be greatly diminished, and that our political institutions would be less subject than they are to public monitoring and public control.17

Former Life magazine editor Thomas Griffith has discounted the importance of news leaks in "normal times,"18 acknowledging that most news leaks are mundane tattlings at best and self-serving ploys at worst. Yet there is at the heart of the question a basic consideration of power that becomes vitally important, as Neustadt noted, when the most significant questions of public policy are being decided. Griffith has said:

In Washington, D.C., where power is the leading industry, information is power. Information is valuable to own, valuable to withhold, valuable to discover. And so a continuing war exists between those who would hide and those who seek. Leaks first began to take on critical importance in the days of Vietnam, that undeclared and unpopular war fought in a secrecy directed not only against the enemy but against the American public.


Military men found themselves asked to fight fastidiously against an enemy who wasn't similarly restricted, or else forced to conceal the methods they and their allies were using, and fell into a self-righteous pattern of misleading, concealing and lying. Equally frustrated men who thought the Vietnamese war immoral and endless, pleaded a higher morality in confiding the secrets of the Pentagon Papers to journalists, and arrogated to themselves (as did editors) the decision that most of what was stamped secret was in any case of no current military value, whose exposure would only be inconvenient to the government. . . . Faced with constant dissembling and deceiving by the White House, the press could only increase its efforts to discover the reality behind the public relations performance that was not to be trusted. But what really brought everything into the open was a growing unease inside government itself at the enormity of the wrongdoing, and the degree to which ruthless men were entrenching themselves in power. . . . James Madison and Alexander Hamilton never foresaw that one of the crucial checks and balances against too powerful an executive branch would be news leaks.  

Griffith's mention of the Pentagon Papers case brings this chapter to the important question of balancing—whether a governmental power in an area of First Amendment concern can outweigh free-speech or free-press liberties as a matter of routine.

Prior restraint (pre-publication censorship) probably was the one thing the Founding Fathers did have in mind when they wrote the First Amendment. In the Pentagon Papers case the Supreme Court ruled that a governmental injunction against publication of the papers was improper because the government had failed to demonstrate a danger of "direct, immediate or irreparable damage to our Nation or its people."  

19 Ibid., pp. 173-74.

In the law on prior restraint, the definition of "damage" and the size of the community that might have standing as "our . . . people" are subject to interpretation. But the general principle stands: freedom of publication is not subject to the routine needs and conveniences of the government.21 "Prior restraint is hated for good reason," the press law books remind us. "If the government gains the power to silence its critics before they can speak, it has the power to hide its errors forever."22

Governmental subpoena power over unpublished information also effects a prior restraint on published views, but one less noticeable than the complete blackout resulting from a governmental order to stop the presses. It is a "grayout" in that it affects the content of potential publications--stories that could have, or might have been printed except for the lack of a willing author or source. The prior-restraint effect is even more pronounced when editors and publishers omit detail or restrict content to avoid prosecutorial interest in the information not published. For example:

A newspaperman might want to do a story on marijuana use among his town's youth; he knows that in order to do a proper job of research he must interview young marijuana users. But there is the . . . likelihood . . . he will be subpoenaed to testify in secret to a grand jury.

21 See discussion of prior restraint ibid., pp. 43-57.
22 Ibid., p. 43.
Does the reporter decide not to do the story?23

Today in the United States, according to the American Civil Liberties Union, "the decision not to do the story appears to be multiplying." It fears that "before long there will just not be very much interpretation of complex events and social movements. What will be left will be the relatively safe 'hard' news of speeches and statements, and that can be easily manipulated."24

As we shall see in the next chapter, these censorial effects of governmental subpoenas, while undoubtedly true, are so indirect and unprovable that they offer practically no support for arguments against the subpoena power. But in their connection to principles of political liberty, prior restraint and governmental subpoenas for unpublished information deserve to be considered as one. That is, the question must be asked whether the press' right to unpublished information is a matter of principle that cannot be violated in the ordinary course of events (as with prior restraint), or is it a matter of degree, subject to the routine needs and conveniences of the government? Fortunately, guidance is available. Quoting various Supreme Court justices, political philosopher Milton R. Konvitz has constructed a hypothetical argument appropriate to the judgment that must be made:


24Ibid., p. 41.
Here is a question of degree. "When you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line must fall."\(^8\) But the measure is not part of a strategy to undermine the principle; it is merely an instance of the truth that "constitutional rights like others are matters of degree," and "must be allowed a certain latitude in the minor adjustments of life."\(^9\) [Or shall we need to think, Konvitz continues:] Here it is not a question of degree; it is an attempt to undermine the principle. This measure is an instance of tyranny rather than liberty, though so small as to be almost palatable; but we must resist it; for "it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty."\(^10\) Reasonable minds will differ as to when either of these positions should be taken.\(^25\)

\(^8\)Holmes in Schlesinger et al. v. Wis., et al., 270 U.S. 230 (1925)


\(^10\)Rutledge in Thomas v. Collins, 323 U.S. 516 (1945)

There is thin but mildly promising support in law for the First Amendment right to anonymity.

One of the first Supreme Court test cases for the right to remain anonymous was considered under the Fourteenth Amendment's guarantee of privacy in group associations. In New York ex rel. Bryant v. Zimmerman (1928) the Court upheld a New York law requiring registration and disclosure of the names of all members of organizations that required an oath as a prerequisite for membership. The Ku Klux Klan had objected to the disclosure law, but the Court ruled that it

must submit. The Court held that, in view of the violent and unlawful record of Klan activities, the state legislature had acted properly.\footnote{26}

\textbf{NAACP v. Alabama (1958)} was the first decision in which the right to anonymity was upheld; again the case was argued under the Fourteenth Amendment.\footnote{27} The Court reversed contempt judgments against the NAACP for its refusal to produce the names of Alabama members of the civil rights group. \textbf{Bates v. Little Rock (1960)} was a similar case; it involved the NAACP's refusal to disclose the names of its members in the city of Little Rock. In both of these cases, the proponents of the right to anonymity argued that the exercise of free association was restrained because of specified threats of economic and even physical reprisals in the respective communities.\footnote{28}

The case of \textbf{Talley v. California (1960)} extended the protection of anonymity from the field of association generally to that of a specific utterance.\footnote{29} Significantly, the Court departed from the case-by-case approach of previous


\footnote{29}Harvey, p. 787.
anonymity cases which had balanced threats of retaliation against interests in disclosure as argued by the state. The Los Angeles city ordinance voided by the decision said in part: "No person shall distribute any hand-bill in any place under any circumstances which does not have printed on the cover . . . the name and address of . . . the person who printed, wrote, compiled or manufactured the same." The Court found that the prerequisite of disclosure of authorship was equivalent to a general prohibition on publication (prior restraint), a prohibition not justified by any asserted interest of the city of Los Angeles:

Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited . . . . Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils . . . . We have recently had occasion to hold . . . . that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. . . . The reason was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance [for the same reason] . . . is void on its face.

The Court struck down the ordinance and supported the First Amendment right to anonymity because of its importance to the conditions under which informants of all shades of opinion may make information available through the press to the public. It noted:

30 Ibid.
31 Supreme Court Reports, Book 362, pp. 60-61.
32 Ibid., pp. 64-65.
Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Liburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

6Penry was executed and Udal died as a result of his confinement. 1 Hallam, the Constitutional History of England (1855), 205-206, 232.

7In one of the letters written May 28, 1770, the author asked the following question about the tea tax imposed on this country, a question which he could hardly have asked but for his anonymity: "What is it then, but an odious, unprofitable exertion of a speculative right, and fixing a badge of slavery upon the Americans, without service to their masters?" 2 Letters of Junius (1821) 39.

Justices Tom Clark, Felix Frankfurter, and Charles Whittaker disagreed; their law-and-order approach disallowing the recognition of anonymity was expressed by Justice

33Ibid. (emphasis mine).
Clark's dissent:

I stand second to none in supporting Talley's right of free speech—but not his freedom of anonymity. The Constitution says nothing about freedom of anonymous speech. . . .

All that Los Angeles requires is that one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks from the platform. The ordinance makes for the responsibility in writing that is present in public utterance.

Although some legal commentators say that the NAACP and Talley cases "point to the emergence of anonymity as essential to the exercise of rights under the first and fourteenth amendments," others are more cautious because of the implied inconsistency of the ruling with earlier decisions upholding disclosure requirements:

The strongest objections to the "void on its face" approach are based on its seeming inconsistency with earlier related decisions upholding disclosure statutes in limited areas, such as registration of publications using the mails, and registration of lobbying activities. There is also a problem in the existence of various statutes requiring disclosure of authorship or sponsorship of election campaign literature. In all of these cases the right to speak anonymously in a certain manner, or on a certain subject, or to a certain audience has been denied. It is possible to distinguish these cases as involving statutes drafted in a sufficiently narrow and certain manner so as to limit their operation to the area of the peculiar state interest involved. Yet this distinction is in a sense artificial in that the threat of retaliation does not disappear during election campaigns, or when using the mails, or when presenting a viewpoint to Congress. Although there is a strong state interest in disclosure as conducive to responsibility in each case, there is also a forceful argument that in the area of national politics, more than anywhere else, free speech in all of its manifestations should receive its maximum constitutional protections.

36 Harvey, pp. 788-89.

United States v. Harriss, 347 U.S. 612 (1954), upholding Sec. 308 of the Federal Regulation of Lobbying Act, 60 Stat. 841 (1946), 2 U.S.C. Sec. 267 (1958), which requires persons engaged in lobbying to divulge their identities. In this case even the dissent of Justices Black and Douglas stated that Congress had sufficient interest in the subject matter to constitutionally require disclosure.

Thirty-six states have statutes prohibiting the anonymous distribution of materials relating to elections. E.g., Cal. Elec. Code Sec. 5005, which states: "Every person is guilty of a misdemeanor who writes, or causes to be written, printed, posted, or distributed, any circular, pamphlet, letter, or poster which is designed to injure or defeat any candidate for nomination or election to any public office by reflecting upon his personal character or political action, unless there appears upon the circular, pamphlet, letter, or poster, in a conspicuous place, the name and address of the printer, and either: (a) The name and address of the chairman or secretary or the names and addresses of two officers at least of the political or other organization issuing it. (b) The name and residence, with street and number thereof, if any, of some voter in this State, who is responsible therefor." See also Cal. Elec. Code Sec. 5005.7, which imposes similar requirements on circulars, pamphlets and posters promoting passage or defeat of a measure appearing on the ballot.

These statutes have always been assumed valid. See the dissent by Justices Black, Douglas, and Warren in United States v. Auto. Workers, 352 U.S. 567, 598 n.2 (1956), wherein these three members of the Talley majority state "in expressing their views on the issues and candidates, [at elections] labor unions can be required to acknowledge their authorship and support of these expressions."

The Court majority in Talley denounced governmental efforts to pierce veils of anonymity, as revealed in history, even when established authority needed to "get evidence to
convict" someone of a crime. On the other hand, the Court majority in Branzburg v. Hayes approved of the same power when it took the form of a subpoena for unpublished information. In Branzburg, the government's authority and interest in prosecuting crime was pitted against a generalized societal interest in the "free flow of information." It was not a close fight. When Congress heard the press' case for freedom from subpoenas, the press lost again, for much the same reason. (More on this in subsequent chapters.) Ironically, a central point in the press' argument in Court and in Congress has been that forced disclosure of unpublished information hurts society's interest in prosecuting crime. It could be said that either the government does not believe that the fear of reprisal will hinder discussion of public affairs, or it believes that no societal interest in the free discussion of public affairs is worth the chance that

37Abe Mellinkoff, city editor of the San Francisco Chronicle, informed Congress in 1973:

"Who does ask for anonymity when talking to newspapers? A prominent businessman gave me the first lead that led to the imprisonment of a city assessor. The businessman was afraid to have his name used for fear his own taxes would go up if the assessor beat the rap. Exposure of illegal expenditure of Golden Gate Bridge funds was uncovered with the help of a timid bookkeeper. A Federal Home Loan Bank office was sloppy in checking on practices of a lending institution. An employee at the bank led us to the story and eventually we believe to better procedures by the bank. Even our science reporter talked with still unnamed violators of drug laws to learn better of abuses in drug treatment centers" (cited in U.S. Congress, Senate, Committee on the Judiciary, Newsmen's Privilege, Hearings Before the Subcommittee on Constitutional Rights on S. 36 et al., 93rd Cong., 1st sess., 1973, p. 369, hereafter cited as 1973 Senate Hearings).
a criminal action—however difficult that may be to define—will go unpursued. The Court already has dismissed the former option. In Lamont v. Postmaster General, the justices were solicitous of the impact of even slight governmental interference with a right to anonymity: the right to receive information anonymously. Writing for the majority, Justice William O. Douglas said the fear that government officials could find out the subject matter of their mail would intimidate many people,

especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like school teachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from that, any addressee is likely to feel some inhibition in sending for literature which the federal officials have condemned as "communist political propaganda." The regime of this Act [at issue here] is at war with the "uninhibited, robust and wide-open debate and dissent that are contemplated by the First Amendment." New York Times v. Sullivan, 376 U.S. 254, 270.38

Subsequent chapters will show what arguments were advanced against the government's single-minded interest in law and order. It is sufficient to say here that at no time did the press argue that freedom from forced disclosure of unpublished information is essential to freedom of the press, or that the basis of the freedom from disclosure must be the right to anonymity. It seems appropriate therefore to present, as a kind of foreword to the chapter on the "right to know," the thoughts of Karl Marx on the connection between anonymity and freedom of the press:

38 Supreme Court Reports, Book 381, p. 307.
... I follow the conviction that anonymity belongs to the essence of the press, which transforms a newspaper from a collection point of many individual opinions into an organ of a single mind. A name separates an article from other articles as firmly as the body of a person separates him from other individuals, thus thoroughly doing away with the article's intention to be only a supplementary member. Finally, anonymity makes not only the speaker himself but also the public more unbiased and more free, in that it does not look at the man who speaks but at the subject he discusses, shifting its yardstick of undisturbed judgment from the empirical person to the intellectual personality.\(^{39}\)

\(^{39}\)Karl Marx on Freedom, p. 70.
CHAPTER IV

THE RIGHT TO KNOW

In a 1973 study of press coverage of government for the National Press Club, American University researchers introduced the chapter on "journalists' protection of news sources" with this view of its history:

Courts' seeking information from journalists is not a new phenomenon; in fact, 1974 will mark the centennial of the first such recorded case in America. Through the 99 years since, prosecutors, politicians and others have found that news people's probings and confidences that they glean are a tempting source of legal material. In many cases reporters, seeing themselves as good citizens, have supplied such information. But at other times journalists have claimed a right--indeed, a responsibility--not to reveal the source of sensitive social and political stories, basing their stand on the First Amendment guarantee of the press's independence.¹

The statement that journalists in the nineteenth and twentieth centuries based refusal to comply with demands for unpublished information on the "First Amendment guarantee of the press' independence" is quite misleading. When the Amer-

¹"The Press Covers Government: The Nixon Years from 1969 to Watergate," study by the Department of Communication, American University, Washington, D.C., for the National Press Club, June 13, 1973, Congressional Record 119: 19,467. The 1874 case alluded to probably was People ex rel Phelps v. Fancher, cited as 2 Hun. 226, 230 (N.Y. App. Div. 1874) in Ervin, p. 235n. An editor refused to name the author of a story, claiming the disclosure would violate the newspaper's own regulations. The court rejected that reason, suggesting that the newspaper regulations were too ephemeral to notice.
ican University study was published in the Congressional Record in 1973, the press' constitutional argument for protecting unpublished information was a mere fifteen years old, having first appeared in 1958 in the famous Garland v. Torre case. As a history of the debate for the one hundred years previous to that case shows, the press exhausted every other possible argument before resorting to the Constitution.

We can start in 1857, for example, when New York Times reporter James Simonton revealed that some Congressmen were taking $1,000 bribes in exchange for votes. The Times then editorialized that "a corrupt organization of Members of Congress and certain lobby agents . . . holds the balance of power . . . sufficient, in most cases, to kill or carry any measure pending in the House." A select investigating committee summoned Simonton, and asked him to reveal his sources of information, but he declined with these words: "I do not see how I can answer . . . without a dishonorable breach of confidence." Although a member of Congress decried Simonton's "perverse principle of honor," he and his colleagues were unable to break him. He spent nineteen days in custody for contempt of Congress. Meanwhile, the House determined that the Times charge was true and forced the resignation of three of


Ibid., pp. 17-18.

Ibid., p. 19.
its members.  

The Simonton case caused Congress to show its colors and enact the first legislation supplementing the existing implied power of Congress to compel witnesses to appear and answer. With the new law the Congress permitted itself the power to turn over contemptuous witnesses to the judicial branch for further punishment at the end of a Congressional session.  

In claiming the right to unpublished information as an expression of personal duty (and causing considerable disturbance in Congress), Simonton set an early precedent that seemed to color many such conflicts in the nineteenth century. In 1870, for example, a New York Evening Post reporter asserted that it would be a "violation of good faith to make public the source [of] . . . documents" when questioned by the House of Representatives.  

A year later, the Senate queried New-York Tribune reporters on a similar matter. The reporters tried to excuse themselves "on account of . . . professional honor," but they too were jailed.  

A breach of grand jury secrecy revealed to John T. Morris, Baltimore Sun police reporter in the 1880s, probably

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5 Ibid., pp. 19-21.  
7 Whalen, p. 21.  
8 Ibid., p. 22.
set the greatest number of precedents among all nineteenth century cases in which unpublished information was an issue. After the appearance of Morris' story revealing pending grand jury action against a sheriff, the panel's successful attempt to have Morris cited for contempt achieved considerable notoriety in Maryland and was followed closely by the New York Times. The passage in Maryland ten years later of the nation's first statute protecting the source of published information is attributed partly to the Morris case, which stimulated similar legislative action in other states too.

On the day Morris appeared in court to explain himself, the Times reported that "Morris is very popular in Baltimore, and there is a disposition to settle the matter so as not to send him to jail." According to the Sun, Morris told Judge Edward Duffy that "he had promised his informant not to reveal his name and that he considered himself bound by that promise." The Times quoted more directly, from a letter of ex-

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10 According to Gordon: "Maryland's 1896 newsman's shield law was at least in part a result of Morris's jailing [in 1886]. But that statute was not the only attempt in 1896 to secure evidentiary privilege for newsmen, nor was it even the first attempt on record. Almost simultaneously, the first legislature of the new state of Utah was considering and finally rejecting a proposal to grant journalists an evidentiary privilege. Six years earlier, a privilege bill was proposed in the Iowa State Senate" (Ibid., p. 1).

11 Ibid., p. 13.

12 Ibid., p. 12.
planation Morris wrote. A reporter, he said, "must as a member of an honorable profession refuse to violate the confidence reposed in him by making known the source of his information." Morris also pleaded that a kind of right to know and an even larger societal good justified his intrinsigence:

The public assuredly has a deep concern in all occurrences affecting the integrity of public officers, and recent trials in the city of New York have shown that publicity given to details in a far more specific form than in the article complained of is an important aid to the administration of justice.14

In all that, Judge Duffy (like most judges to follow him) saw nothing more than the possibility of bad precedent and a threat to the orderly administration of justice in his courtroom. Before sending Morris to jail, the judge gave a speech worth quoting for its revelation of the extent the reporter's "personal defense" had clouded the issue as early as 1886:

We see here a tribunal, part of this court, the highest tribunal in the state, to which we are all amenable, complaining that there has been made public, not only the fact that a presentment had been made, but it is also set forth what part certain members took on one side or the other of that case. If the proceedings of the grand jury should be kept secret, can you conceive of anything more calculated to break down the grand jury than such a publication? It tends to break down the independence of the members of the grand jury. It is a complaint proper to make. We cannot but suppose that the information came from some member of the grand jury. They undertook to find out who it is that has thus violated every idea of propriety, and, far above that, the oath that he has taken in this court. In undertaking that, they send for the

13 Ibid., p. 13.
gentleman who furnished the information to the newspaper for publication. Are they not doing right? The grand jury in thus undertaking to find this thing out is stopped by the witness, who says he cannot give the author of the information because he has given his word not to do so. . . . This is a case of the greatest moment to the public good. . . . If this position were sustained it would go to the destruction of courts of justice. If the witness will not throw the responsibility on the court, but prefers to act on his own responsibility, he must be punished. . . . If he is right, every other witness can do the same thing.15

Editorially, the Sun decried the judge's decision, and it justified Morris' silence as proper "simply and solely because he would violate his honor" if he talked.16 "There is no honorable man, in or out of journalism, who will not commend Mr. Morris' course," said the Sun, presumably not including Judge Duffy.17

The perpetuation in public debate of what might be called the "personal defense" against reporters being forced to reveal unpublished information was only one of several harmful precedents set in the Morris case.18 For one thing, the focus seemed stuck on protecting the "source" of information. Thereby a crucial question was left unsettled: What right does a newspaper have to its unpublished documents, tapes, photographs and files? Secondly, newsmen reached not

15Ibid., p. 18 (emphasis mine).
16Ibid., p. 21.
17Ibid., pp. 20-21.
18A half-century later, reporter Edward Milne refused to disclose the source of information to a Congressional subcommittee. His reason: it would be a "dishonorable act" that would bring down "the contempt" of his fellow correspondents (Whalen, pp. 27-28).
to the First Amendment but to statutory and common law for justification of their stands. Apparently without much thought, these precedents were carried nationwide by the International League of Press Clubs at the request of the Baltimore Journalists' Club, which met in the winter of 1895 to consider and pass a special resolution. It was drafted by Edgar Goodman, a prospective lawyer and a telegraph editor for the Baltimore American. He began:

Whereas, the judiciary throughout the country is not yet educated to an understanding of the necessity of confidential relations between newspaper men and those for whom they rely on for information;

And whereas, it is at least as much in the public interest as their own that they be protected in preserving these confidences as Counsel, pastors, clerks and others are protected against being compelled to disclose confidential information....

The resolution went on to call for passage in Maryland of "such legislation as will amply protect newspaper men in the preservation of all confidences as are reposed in them as such," and recommended "the adoption of similar legislation by the legislatures of all the states of the Union and by the Congress of the United States."19

By declaring that "it is at least as much in the public's interest as their own" to be shielded from governmental inquisition, members of the Baltimore Journalists' Club were, of course, seeking popular support. But their appeal left unspoken much that could have been marshaled in defense. There was no claim that the press should be inde-

19 Gordon, pp. 24-25.
pendent from government; there was no serious regard for the rights of sources. Even the reason for appeal to the masses for support was left largely to the imagination and a common sense. The people had an interest in treating newspaper reporters with the same deference paid to "Counsel, pastors, clerks and others." Gradually, the argument moved even farther from specifics and in a basic sense became self-destructive. Walter Cronkite's explanation almost one hundred years later embodied these trends. He said freedom from forced disclosure by reporters "is not some privilege extended to a favored segment of the population but is purely and simply their own right to be told." The appeal to what came to be called the public's "right to know" had serious legal weaknesses too, the primary one being the face-off of two generalized public interests: the "right to know" and the prosecution of justice. Besides being an invitation to judicial compromise, the comparison of generalized public interests had other harmful legal impacts, to which we shall turn presently.

The greatest weakness of the right-to-know argument is not a legal one. It is its obvious logical fallacy: if the public has a "right to know," why doesn't it have a right to know sources and other unpublished information? However

much press spokesmen may explain that it is an overall "right to know" or a "free flow of information" that is jeopardized by governmental power over unpublished information, the logical fallacy remains unresolved. Even with its potential for self-destructiveness in political forums, the "right to know" argument still is the most popular among those who seek protection for reporters. What is its strong appeal? Journalism professor John C. Merrill offers a reasonable explanation:

Although many press people in America still believe in the older concept of their rights as representatives of "the press," they realize that by the simple semantic trick of bringing "the people" and their supposed rights into the picture, they tend to dissipate some criticism from intellectuals that the press has only selfish motivations in its continual quest for freedom.²¹

Of course, as we have seen in the discussion of the right to anonymity, the press in resisting disclosure of sources is protecting a right of the people. The question is, what right? If it is said to be their right to know, the argumentative road leads to a compelling contradiction: In the twentieth-century political debates over this issue, journalist Fred W. Friendly argued that the government's subpoena power "can... be a liberating force" in breaking down "irresponsible" decisions of editors and publishers.²²

²¹Ibid., p. 102.

Friendly called for a "precisely drawn" statutory shield for journalists:

It should provide protection from the prosecutors and others bent on fishing expeditions but at the same time be limited enough not to produce all-purpose immunity for journalists. The shield law and the guidelines by which journalists work must be structured in such a way as to provide protection for the public's need to know, but not a sanctuary for those who because of fear, special interests, or just plain irresponsibility are seeking a privileged place to hide.

"There may be instances," Friendly concludes, "when a subpoena combines the common interests of good law and good journalism." He defined the latter as forced access to the unpublished information of publishers who other publishers think have acted "irresponsibly" by holding their information in confidence. Can the press be free under conditions of such wars between publishers? This is the contradiction.

In his book The Imperative of Freedom (1974) Merrill was adamant that the press' only legal responsibility is to remain free. "Journalists," he said, "should dedicate themselves to keeping the system as 'pure' as possible by keeping control of their own journalistic decisions and by thwarting as vigorously as possible any outside power or control."²³ Press freedom, Merrill insisted,

[Insert reference: Merrill, pp. 11-12.]
velop their own journalistic ethics and make editorial decisions. All this "freedom" or decision-making is by press people independent of other "people" who are outside the the press.24

The "right to know," Merrill said, "if it existed, would impose an obligation on the press to let the people know; this would thereby conflict with the freedom of the press to determine its own editorial actions."25

The Baltimore Journalists' Club compared the claim of Morris to the confidential relationships authorized in statute and common law on behalf of "Counsel, pastors, clerks and others . . . protected against being compelled to disclose confidential information." In so doing, Baltimore led all journalists into a legal swamp that has complicated press claims for autonomy in handling unpublished information.

As we have seen in the Simonton and Morris cases, news­men have concealed sources to avoid violating personal or professional ethical codes.26 The English courts by 1776

24 Ibid., pp. 64-65.
26 Section 5 of the Code of Ethics adopted by the 1934 convention of the American Newspaper Guild (now the Newspaper Guild) is reprinted widely in legal literature and is often thought to be the original condification of the "newsman's code" of confidentiality. It reads: "Newspaper men shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies; and . . . the newspaper man's duty to keep confidences shall include those he shared with one employer even after he has changed his employment."

The codifications of the principle go further back. As early as 1922, journalism students of Ohio State University suggested a code with this command:

"Journalists should keep sacred all information given them in confidence. Such information should not be pub-
denied validity of the defense of honor in resisting compulsory testimony, and American courts never have accepted it. 27 The common law emphasizes that "every citizen owes an affirmative duty to testify to facts of his personal knowledge which are relevant and competent in connection with a legitimate judicial, legislative, or administrative inquiry." 28 It scarcely matters that sources of power to

27 Guest and Stanzler, p. 29.

compel testimony vary among the legislative, executive and judicial branches; when a situation arises of legitimate power being exercised, in an official forum, testimony may be compelled unless excused--privileged--by common law or by statute. Law scholarship is extremely hostile to most such privileges:

The only professional privilege recognized by the common law, apart from statute, is that covering confidential communications between attorney and client for a lawful purpose. All manner of other confidential communications have had their advocates for privilege: e.g., partners, businessmen and others and their clerks, secretaries and assistants; trustees and their fiduciaries; bankers and borrowers or depositors; brokers and investors, sureties and their principals; accountants and their clients; social workers and relief recipients; and possibly sorority house mothers, among others. But since the late seventeenth century, the common law has recognized none of them. No oath of secrecy or pledge of privacy can avail in a court of justice against the demand for truth except when the public policy demanding secrecy has been found to be extremely important. To mention the most important instances, the attorney-client relation is privileged because the client supposedly cannot be represented unless the attorney knows the truth and the client will not talk if the attorney's lips are not sealed. The nonprofessional privilege for confidential marital communications is sacrosanct because of the notion that secrecy will promote marital harmony. Government officials are bound to silence as to treaty negotiations and military secrets for obvious reasons. Generally speaking, only when legislatures are persuaded to act by organized lobbyists or special interests do other relations secure "special treatment," thus further hampering the search for truth.29

A massive American Bar Association committee--virtually a convention with eighty-five lawyers and judges and fifteen law professors--made much objection in 1938 to "certain novel privileges of secrecy" being authorized by state legislatures

29Ibid., pp. 245-46.
Despite the law profession's hostility, the federal government is not hesitant to provide or propose special privileges, though not often for broad groups. Congress has made many particular exceptions to compulsory testimony to provide for secrecy in government census information, reports of nuclear accidents, railroad mishaps, and airplane crashes. The administrative arm of the federal judiciary, the Judicial Conference of the United States, could provide testimonial immunity for journalists facing grand jury inquiry, but it has refused. What is done, though, is continue the government's privilege to withhold the identities of its informants and propose in 1973 a new testimonial privilege for government officials, "to refuse to give evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information."

The unsatisfactory legal results of the analogy between reporters and other testimonially privileged persons arise from the limitations long accepted as part of traditional privileges. Most traditional privileges belong to a known informant, who alone can waive it. "Generally speaking,"

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30 Ibid., p. 247.
33 Beaver, p. 254.
noted one law scholar, "only in the case of the police-informant privilege is the identity of the communicator the very thing rendered immune from testimonial compul-
sion."34 All the other privileges, even the police-
informant one, depend on a judge's supervision of their use in case, based on a determination of the issues, ap-
plication of rules of evidence, and other factors.35

Furthermore, the comparison between reporters and others with testimonial privileges invites consideration of li-
censing for journalists, because many professionally privi-
ileged witnesses--lawyers, doctors, experts--are licensed by the state or closely supervised by its agencies.

Lacking common-law standing or protection of a statute, most reporters following Simonton's or Morris' course found themselves stigmatized as was reporter Thomas Hamilton of the Augusta (Ga.) Herald. In 1911, Hamilton refused to tell a board of police commissioners who among the police had given him information about a murder.36 He argued that "should he breach the journalistic code by an-
swering, he would lose his job and be prevented from prac-
ticing his profession in the future."37 The Georgia Supreme Court ruled that:

34 Ibid., pp. 254-55.
35 Ibid., p. 255.
36 Kuhn, p. 68.
37 Ibid., pp. 68-69.
The citizen or inhabitant owes to the State the duty of testifying, when lawfully called up to do so, in order that the truth may be ascertained and impartial and complete justice done. . . . A promise not to testify when so required is substantially a promise not to obey the law. 38

Between 1929 and 1935, five cases arose in which news­men who based their silence on professional ethics were jailed or otherwise punished for contempt. 39 According to one legal historian, "these cases, which caused wide national interest, gave great impetus to the cause of confidence legislation" to protect reporters. 40 Thus by 1937, seven more states had joined Maryland and passed laws to protect reporters. 41 A brief review of the cases that caused the up-

38 Ibid., p. 69.
39 Ibid., p. 71.
40 Ibid.
41 Ibid., p. 61. They were New Jersey, 1933; California and Alabama, 1935; Arkansas and Kentucky, 1936; Pennsylvania and Arizona, 1937. By 1972, only nine more states had joined the list, most of those probably the result of the notorious Marie Torre case in 1958. But by 1975, the total had jumped to twenty-six, reflecting political interest in governmental subpoena policies in general and celebrated cases in particular, especially that of New York Times reporter Earl Caldwell.

Of the twenty-six, only twelve grant an absolute immunity impervious to challenge once the newsperson meets certain criteria of eligibility. Fourteen state laws provide protection only against revealing the source of confidential information. Ten extend the privilege to unpublished information itself. Much has been written about the defects of state newsmen's privilege statutes, but the chief difficulty seems to be the sometimes ludicrously strict interpretation courts read into them. Most have been interpreted for what they are--departures from the common-law rule of testimony, narrow and unique in the absence of a recognized Constitutional connection. State courts have held, for example, that the privilege is available only for information received in
roar illustrates the tone of the debate as it neared its eightieth year in America.

In 1929, three Washington Times reporters refused to tell a District of Columbia grand jury any more than they had published about speakeasies in Washington. "If we gave the names and addresses of the men who sold us the liquor we would be placed in the position of prohibition agents, stool pigeons and snoopers," they said.42 Their jailings for contempt prompted the first of many unsuccessful proposals in Congress to create a reporter's privilege in federal proceedings.43

In 1931, a judge in Hopewell, Virginia, was angered at criticism of the court published in an anonymous letter to the Hopewell News, so he had its editor J. W. Mapoles jailed for refusing to say who wrote the letter. The Virginia press was outraged. "The liberty of the press and the right of privileged communication is [sic] directly involved," said confidence, regardless of what the statute might say. Hence radio stations have been forced to turn over tapes and letters received from identified dissident groups. Other courts have denied the privilege to reporters concerning events they witnessed because no pledge of confidentiality was demanded or tendered. Cases in many states have stripped the privilege by applying standard rules of evidence against it—holding that revealing part of the confidential information nullified the privilege concerning the unpublished remainder (Ben Singetary, "Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen," Tulsa Law Journal 11 [1975]: 258-78). See also Peter J. Shurn and Jacqueline Y. Parker, "Reporter's Privilege," New England Law Review 11 (1976): 405-62.

42 Whalen, p. 63.

43 Kuhn, p. 71.
the Richmond Times-Dispatch. The Richmond News-Leader went further: "If the sources of information are not privileged, then freedom of the press is a fiction and political liberty soon will be."45

In 1934, the Kentucky legislature also was angered by a letter to the editor. It was a satirical attack on legislative corruption, published by the Louisville Courier-Journal and signed by "a member of the House of Representatives."46 When technicalities prevented the punishment warranted by a legislative committee (jail), it ordered the editor to pay a fine. And by resolution, the Kentucky House voted to ask the President to recall Robert W. Bingham, owner of the Courier-Journal and then U.S. Ambassador to England.47

Only four months later, the Kentucky legislature again was angered. One of its members had been hanged in effigy for his vote in favor of a state sales tax.48 Two reporters summoned to name the culprits said, "we refuse to answer on the grounds of newspaper confidence." The presiding magistrate decided to judge and jail them for each repeated refusal and commented, "if this is an endurance contest I can

44Whalen, p. 65.
45Ibid.
47Kuhn, p. 72.
48Whalen, p. 65.
stand it."\(^{49}\) The *Lexington Leader* observed, "it is a mistake for anyone to ask that newspapermen violate their own universally accepted rule of action, which is in the interest of society as a whole."\(^{50}\) Editor & Publisher graciously cheered the reporters as "red-blooded young Americans" and "brave young spirits" who faced "judicial torture."\(^{51}\)

Reporting for the *New York Journal-American* in 1935, Martin Mooney investigated the numbers game and found it flourishing in spite of a grand jury clean-up. The embarrassed panel wanted to know more from Mooney, but he refused to answer. Facing a contempt charge, Mooney told the judge:

> I cannot answer the questions put to me because I violate a confidence [if I do], and if the day should come when it is imperative for me in order to earn my bread and butter to double cross people who give me information, off the record, then that day, your Honor, I will deem it advisable to tear up this press card.\(^{52}\)

Later, a court of appeals affirmed the charge, jail sentence and fine against Mooney. The court commented that if a privilege were to be given reporters, "it should be done by the Legislature which has thus far refused to enact such legislation."\(^{53}\)

Up to this point, the momentum against reporters' testimonial privilege was based on the presumption against

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\(^{49}\) Ibid., p. 66.  
\(^{50}\) Ibid.  
\(^{51}\) Kuhn, p. 73n.  
\(^{52}\) Whalen, pp. 66-67.  
\(^{53}\) Ibid., pp. 67-68.
a common-law exception to a common-law rule.\textsuperscript{54} The sporadic passage of protective statutes among the states was, if anything, an affirmation of this presumption--in effect filling a gap in the common law. Gradually, what the Baltimore Journalists' Club called the "public's interest" in reporters' testimonial immunity emerged as a possible constitutional basis for argument. Later some would call it the public's "right to know;" others would describe the public's interest as protection of the "free flow of news." Whatever it was called, two things were to prejudice that constitutional argument and effect its defeat by the courts. The first, simply stated, was an accident of history. Having dealt with the repeated assertion of what they saw as a nonexistent common-law right, the courts started with the common-law presumption against any reporters' privilege and viewed the constitutional argument as another exception that would have to justify itself.\textsuperscript{55} Also working against recognition of a constitutional basis was the emphasis approved by the press itself on the public's interest in the free flow of news. We will return to this point in a moment.

The courts' general presumption against the constitutional argument in the context of history may have been merely human, but it was unfair, according to some constitutional-law scholars:

\textsuperscript{54}Guest and Stanzler, p. 40.
\textsuperscript{55}Ibid, p. 28.
The notion that common law criteria should not apply to the consideration of a constitutional interest is exemplified by the right of a witness not to testify on the grounds of self-incrimination. This privilege or right is not an exception, justified on some independent weighing of merits, to a general principle in favor of compulsory testimony. To be sure, the fifth amendment obstructs the efficient operation of the judicial system even more than do traditional privileges, but it simply takes precedence over the principle of compulsory testimony. A similar approach should be taken in consideration of freedom of the press.

51 "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ." U.S. Const. Amend. V.


We already have examined the chief political weaknesses of the "right to know": its logical fallacy and its self-destructiveness as a free-press principle. The press' stubborn insistence on it as a basis for a privilege for re-

56 Ibid. The Constitution's Sixth Amendment guarantee, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor," has been used as part of the argument against granting testimonial immunity to reporters. While the argument that immunities interfere with the judicial process is inescapable, the conclusion that reporters' immunities would uniquely let the guilty go free, or worse, allow the innocent to suffer punishment, is misleading. The Sixth Amendment right to compulsory process was established merely to give the defendant the same rights the prosecution had by common law (see discussion in Nicholas G. Tinling, "Newsmen's Privilege: A Survey of the Law in California," Pacific Law Journal 4 [1973]: 899). Consequently, according to long-standing rules and precedents, the right to compel testimony does not override testimonial privileges recognized by common law or statute, in part because they stand equally against prosecution.
porters had no more strength in the judicial sphere. The reasons are many. First, judges and lawyers came to believe that "the sole asserted interest is free flow of news to the public."57 Focused as the issue was on reporters, the problem came to be viewed as one of deciding the extent their "news-gathering" activities should be allowed to interfere with the administration of justice. The next problem encountered was that news gathering as a reporter's right has been much more severely abridged by courts than news dissemination, a publisher's right. Aside from the doubts of many judges (and some journalists) whether freedom of the press even includes a "news-gathering" right, restrictions on that right have been held constitutional upon a "balancing' of interests.

Now, in general, the closer a restriction comes to interfering with the publishing of news and views, the greater the likelihood that the courts will presume it unconstitutional unless strongly justified.58 The tendency toward balancing news gathering against other interests appears to be governed by the same function: news-gathering activities once or more removed from the fact of publishing are given less and less

and defense. If the source of exculpatory information is privileged, there can and probably would be a directed acquittal, or prosecution can be dropped. If the source of indicting or convicting information is privileged, justice may be frustrated, but no more so (and no more regularly) than it is when evidence is excluded for violating the Fourth Amendment, or if testimony is silenced by the Fifth Amendment, or by accepted common-law privileges.

57 Guest and Stanzler, p. 28.
58 Ibid., p. 27.
constitutional weight. These tendencies, combined with the traditional reluctance of courts to find exceptions in the general duty to testify, fully account for the reception given to the "right to know" advanced as the press' constitutional argument.

Further, there appear to be both factual and psychological reasons for the defeat of the privilege in court. The psychological one is extremely potent and is made apparent by the answer to this question: is "newsmen's privilege" a personal right, belonging to reporters and other press employees, or is it an institutional right, asserted by publishers as representatives of the press as an institution? The answer stands weak or strong against the government, which is, of course, asserting an institutional interest:

From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole--from justice as an institution, and from law and order as indispensable elements of civilized life.\(^{59}\)

The factual basis of the "right to know" as a vehicle for carrying the public's interest in protecting reporters also is very weak. As some see it, the attack against the constitutional privilege mainly has focused on the lack of any perceptible impact on the free flow of news in those

\(^{59}\)Wigmore, Evidence 8 (McNaughton rev. 1961), Sec. 2192, cited ibid., p. 37 (emphasis mine).
states where there is no statutory privilege for reporters. 60

The difficulty in counterattacking that assertion long has been recognized:

In determining whether the lack of a privilege has impaired the flow of news it is meaningless to compare privilege-jurisdiction newspapers to non-privilege jurisdiction newspapers in terms of output—e.g., to say that despite the absence of a privilege the New York Times is a good newspaper so therefore there must be no impediment—because looking at output does not tell what might have been [published]. 61

What impact does governmental subpoena power have on a life process as diversified as the "flow of news"? Most news arises from on-the-record sources anyway. Beyond that, there is great variability in newsmen's use of informants. A Field Foundation study by one lawyer documented

several factors such as type of media, experience of reporters, and type of assignment. . . . The average newsmen relies on confidential sources for between 27 and 34 percent of his stories. Approximately 12 percent of a newsmen's stories come from first-time sources, which are often the most important, and approximately 22 percent are the result of information supplied by regular informants (a source who has supplied information more than twice). It is also noteworthy that of the various media, newsmagazines rely the heaviest on confidential sources—by a factor of greater than 2 to 1 over local radio and television stations, the media which use confidential sources the least. 62

Newsmen use and rely on confidential sources. But no one can agree on factual evidence for proof that occasionally requiring newsmen to testify and reveal sources and inform-

60 Ibid., p. 42.
61 Ibid., p. 43.
62 Tinling, p. 883.
tion will curtail the flow of news significantly. The Supreme Court easily dismissed that argument when it considered newsmen's privilege in Branzburg v. Hayes:

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

Press-supported studies back up much of the Court's reasoning. The Field Foundation study concluded that "the most significant effects that subpoenas have on newsgathering are of a highly personal, and relatively unmeasurable, nature." When a group of journalists was surveyed, fewer than 10 percent thought that their news coverage had been affected adversely by the possibility of being subpoenaed and forced to reveal unpublished information.

Arguing the relative impact of subpoenas on the flow of news inevitably invites compromise. Law professor Vince Blasi concluded his study on the subpoena question by proposing a neat solution. "From the available evidence," he said, "it seems that the press can operate [without diminished news product] as long as the use of subpoenas remains within accept-

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63 Ibid., pp. 883-84.
64 Supreme Court Reports, Book 408, pp. 698-99.
65 Blasi, p. 265.
66 Tinling, p. 885.
able limits." Here is how he says it could work:

If the reporter's testimonial obligation were limited to those few instances in which he really does have important information that is not available through non-press sources, and if some provision were made to protect confidences in stories about victimless crimes, the contingency of press involvement with official fact-finding would be so remote as to have only a negligible impact on the flow of news.

The professor calls this reducing the subpoena threat, but it doubles nicely as a potent political weapon for those opposed to absolute privilege for the press' unpublished information.

Other problems plague the "free flow of news" as the sole constitutional support for protecting reporters. One of the most outrageous has been the serious conclusion of some legal scholars that "the most logical constitutional

\[\text{Ibid. (emphasis his).}\]

\[\text{Blasi, p. 280.}\]

\[\text{Ibid.; p. 284. A few years later in Congress Professor Blasi was still talking about reducing the subpoena threat:}\]

"What will protect the flow of information most of all is not an absolute privilege or carefully drawn qualified privilege; what will protect the flow of information most of all is if people quit paying so damn much attention to the subpoena issue. The press has been committing hara-kari. If I were worried about protecting the information flow, I would try to bury the issue. The more people are aware of the threat, the more it is in the minds of sources.

"I think what you should be trying to achieve by a privilege is to greatly reduce the number of subpoenas and the indiscriminateness with which they are thrown around, the extent to which they are used in situations in which there is very little evidentiary gain to be had" (U.S. Congress, House, Committee on the Judiciary, Newsmen's Privilege, Hearings Before Subcommittee No. 3 on H.R. 717 and Related Measures, 93rd Cong., 1st sess., 1973, p. 129 [hereafter cited as 1973 House Hearings]).
basis for a federal shield law would be the commerce clause," referring to Congress' power under Article I to "regulate commerce . . . among the several States." This is not the place to criticize their views, except to say that acceptance of that conclusion would expand the government's misuse of the Associated Press v. United States decision.

Another result of the "free flow of news" argument is that it leads to issues essentially extraneous to the claims of publishers and reporters (on behalf of news sources). Hence "newsmen's privilege" has been lumped with issues of freedom of association, secrecy in personnel records, the right of lawyers to evaluate themselves anonymously, the general integrity of library and banking records, and other "representative problems of confidentiality." With the narrow focus of "the flow of news," publishers' institutionally based claim can be bypassed:

In terms of practical effect on the flow of news it probably makes little difference whether the privilege is mandatory or discretionary. . . . Perhaps . . . more informants would reveal more matters to more newsmen if the informants knew that the newsmen were forbidden to reveal their identity. Such a law also should satisfy the critics who seem to have a latent distrust of newsmen and do not want to give them any discretion and the critics who object to the privilege because they think that newsmen are simply seeking prestige.

The manifold weaknesses of the "right to know" as a con-

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71 Ibid., p. 532.
72 Guest and Stanzler, p. 45.
stitutional support for the press' right to unpublished information became apparent the first time it reached a court. By another accident of history, the test case, Garland v. Torre, grew out of New York Herald Tribune column written by Marie Torre. Singer Judy Garland and the CBS television network could not agree on a contract for a television spectacular. In 1957, Torre used her contact in CBS and published his version of the reason for the Garland-CBS trouble: "I don't know, but I wouldn't be surprised if it's because she thinks she's terribly fat." The source remained unnamed.

Out of the trivial remark sprang a $1.4 million "libel" suit, not against the Herald Tribune but against CBS, which Garland also sued for breach of contract. In the face of denials by likely CBS officials, Garland needed proof and Torre could provide it. The columnist was cited and convicted for contempt when she refused to betray her source. Judge—now Mr. Justice—Potter Stewart in the appeals court affirmed the conviction, holding that Torre's evidence "went to the heart of the plaintiff's claim." Because her evidence was relevant, Stewart said, any abridgement of press freedom that might be involved "must give place under the Constitution to a paramount public interest in the fair adminis-

73Whalen, p. 50.
74Marie Torre, "Did I Go to Jail for Nothing?" Look, May 26, 1959, p. 62.
75Ervin, p. 238.
istration of justice."  

Torre and her publisher, Ogden R. Reid, appealed to the Supreme Court. They argued that the press needs to assure sources of anonymity to maintain the flow of news. "The extent that any rule of law renders such assurance unavailable or precarious," they said, "to that extent the flow of news to the public is pinched off at the source and ... the public's right to know is diminished." The petition was denied without comment.

Marie Torre spent ten days in jail and received worldwide attention, by her own account. "The letters and newspaper, radio and television editorials were about 90 percent in my favor, and that's a conservative estimate," she said. The Wall Street Journal was among the 10 percent opposed. "The hue and cry of some of our colleagues about press freedom is misplaced," it said:

Miss Torre was asked to name the person who had made the remarks, and she refused to say, pleading that a compulsory disclosure of a confidential source would affect freedom of the press. That, plainly, is nonsense. Freedom of the press guarantees only a right to print matter; it is no guarantee that one may not have to answer for what is printed.

The controversy spurred the introduction of "Marie Torre

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76Ibid., p. 237.
77 Beaver, p. 250.
78 Supreme Court Reports, Book 358, p. 910.
79 Torre, p. 62.
80 Ibid., p. 69.
Bills" in nine statehouses and one in Congress; her name had become temporarily synonymous with the usual flurry of shield legislation that accompanied jailing of reporters anywhere.

The American Civil Liberties Union was so moved by Torre's incarceration that it spent fifteen months reviewing "the conflict between the public's right to know and the due process of law." The ACLU saw the threat this way: "to compel a reporter to disclose the identity of sources to whom he promised anonymity would weaken one of the principal tools which he employs . . . to keep the public informed." But granting reporters absolute control over unpublished information, said the ACLU, "is tantamount to saying that the public interest, under the First Amendment in the free flow of information, shall be paramount to the public interest in due process in all cases where the two come in conflict." It also feared that consideration of the question in a political forum could be dangerous to press freedom.

The same week in 1959, a group of editors decided that bills in the Connecticut legislature to protect reporters should be killed. A spokesman for the Connecticut Council for

81 Ray Erwin, "Marie Torre Recalls Historic Jail Term," Editor & Publisher, Sept. 18, 1965, p. 50.
82 "Civil Liberties Union Vetoes Reporter Bills," Editor & Publisher, March 21, 1959, p. 16.
83 Ibid.
84 Ibid.
Freedom of Information said it "did not want special privileges and feared the bills might lead to regulation, even licensing of the press." 85

In Marie Torre's hometown, three major state associations of publishers and editors convened en masse to discuss the Torre case and to decide whether to support shield legislation in New York. Editor & Publisher devoted more than a full page to the event.

One of the speakers, Oxie Reichler, editor of the Yonkers Herald-Statesman, seemed to be responding to some snootiness among the publishers and editors present:

Whether Marie Torre is a reporter or a columnist is not the issue. . . . Whether what she wrote about Judy Garland was or wasn't trivial is of no consequence in this discussion. Whether she was or wasn't a martyr is a matter of personal opinion.

What is important is that her freedom was abridged and that she was punished (without suit against her or her paper) for refusing to betray her professionally given word, as a newswriter. . . . Our editors, publishers and staffs have been conducting a continuing fight for the people's right to know. If we retreat on this one--if we surrender on the matter of reporter's confidence or oppose such legal protection--then our freedom of information fight falls on its face and becomes meaningless. 86

Dr. Wesley G. Clark, dean of the Syracuse University journalism school, tried to clarify the issues by offering some "serious questions" about shield laws. "Can we find the mechanism to screen reporters and eliminate bad ones from under the umbrella?" he asked. "Has the world so

85 Ibid.
changed that we have to have them [shield laws]?"  
But it was William Fitzpatrick, Wall Street Journal associate editor, who challenged the audience to reject a tempting freedom. We must ask, he said,

how the nation's press, the acknowledged champion of the right of the public to know all where the public interest is involved, can at the same time champion for itself a privilege to remain silent on matters that may well involve the public interest quite as deeply as its right to know. . . . We had best be careful about attempts to broaden freedom of the press lest we be accused of seeking not just liberty to print, but license to print. We may believe that complete immunity will serve a responsible press, but others may well believe that it will lead to irresponsibility flowing from arrogant power to hold ourselves unaccountable for what we print. . . .

. . . Is it possible that we are so blind as to believe we can have it both ways--that we can demand full disclosure where all others are concerned but deny it where we are concerned? Or is it possible that, if we follow such a course, the public will someday wonder whose interests, ours or the public's is our real concern.  

"After prolonged debate," reported Editor & Publisher, "the editors group contented itself with a statement formally expressing its concern over the Torre case, [and] reaffirming its belief that reporters are traditionally immune from punishment for not revealing confidences." The editors also decided to "study" the many proposed immunity laws. "The other two groups [publishers] took no action," said E & P.  

After a week's reflection on these events, Editor & Pub-

87 Ibid.  
88 Ibid., pp. 9-10.  
89 Ibid., p. 9.
lisher decided to set the record straight. In an unsigned editorial, it said that in seeking protection for reporters, no one was advocating that reporters, least of all columnists, be given a "license" to print anything. "The privilege to protect a confidence does not carry a corresponding privilege to commit libel at will," said E & P. "The libel laws serve as an effective restraint." Newspapers are, and should, be responsible under the libel laws for everything printed, it said. Then it turned to the central issue:

It is contended by some that freedom of the press is involved in this issue. Perhaps it is. People, including newspapermen, can still write what they please within certain legally defined limitations. There is no prior restraint on publication. But it seems to us there is a conflict when people (reporters) are punished for not revealing who told them something even though the information as reported is correct. . . . There are many times that the public interest requires publication of information even though the source cannot be identified. It is for that reason only that they should be protected by confidence laws.91

90 Editor & Publisher, Feb. 14, 1959, p. 6.
91 Ibid.
CHAPTER V

CALDWELL AND THE PANTHERS

A decade after Garland v. Torre, marijuana, bombs, riots, war and protest were becoming hallmarks of a disor­
dered U.S. society, but not much had changed in the rule of law against reporters. The constitutional argument for re­porter's privilege was unchanged, and still had no support in court decisions.¹

A disgruntled ex-employee of the Honolulu Civil Ser­vice Commission sued it when reporter Alan Goodfader found out about her dismissal before she did. In 1961 the Hawaii Supreme Court found no serious constitutional problems with an order that Goodfader testify in the civil trial, although the court conceded that there would be some "impairment of freedom of the press."²

In 1968, the Oregon Supreme Court affirmed an order that Annette Buchanan, University of Oregon student reporter, release to a grand jury the real names of seven marijuana users she had interviewed for publication.³

The Wisconsin Supreme Court in 1970 conceded that a

¹Kaplan, p. 738.
²Whalen, p. 70.
³Ibid., pp. 71-72.
reporter has a constitutional right to refuse to disclose confidential information except when it conflicts with the "public's overriding need to know." In the case before it, Wisconsin v. Knops, Milwaukee Kaleidoscope editor Mark Knops was therefore ordered to reveal the names of persons he interviewed for a story on a murderous anti-war protest bombing at the University of Wisconsin. (He refused, and spent six months in jail.) The Wisconsin court said:

In a disorderly society such as we are currently experiencing, it may well be appropriate to curtail in a very minor way the free flow of information, if such curtailment will serve the purpose of restoring an atmosphere in which all our fundamental freedoms can flourish.

It took fourteen years, but the U.S. Supreme Court in 1972 finally addressed the substance of the press' constitutional arguments first advanced in Garland v. Torre. Its opinion, entitled Branzburg v. Hayes, was ostensibly about the refusal of Louisville Courier-Journal reporter Paul Branzburg to reveal the identities of young hashish makers he observed at work and interviewed for a story on the Louisville drug scene. Some legal reviews later were to conclude that the five-justice majority focused almost entirely on Paul Branzburg and the fact that he had witnessed a felony:

They personalized the quest for a reporter's privilege

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4 Ibid., p. 72.
5 Ibid.
6 Supreme Court Reports, Book 408, pp. 665-752.
and found that the individual journalist's claim for a first amendment shield did not outweigh the interest of the government in pursuing law enforcement goals through the grand jury system. To the meager extent that the Court focused on the relationships between the denial of privilege and the free flow of news, it consistently underestimated the element of causation, demanded impossible proof of first amendment injury, and consciously elevated short-term law enforcement goals over long-term first amendment interests. The impact of forced disclosure on whistle blowing and investigative journalism was totally ignored by the majority, who, piqued at the facts of the title case, treated the quest for reporter's privilege as a simple matter of crime control.  

There is good evidence to conclude that the Court in Branzburg, like the Wisconsin Supreme Court in Knops, was saying more. Court fears of social disorder and a willingness to sacrifice "in a very minor way" to help government prosecutors set things right permeated the Branzburg decision. For Branzburg was an opinion on three cases, and two of them dealt with something far more fearsome than hashish: the political opposition of the Black Panther Party.

Earl Caldwell began reporting on riots in black communities during forays across the country for the New York Times (and sixty other papers which subscribed to its news service) in the summer of 1967. He traveled with Rap Brown, moving from Roxbury in Boston, to Chicago's South Side, and to Watts in Los Angeles. Later, he was to recall: "I went across the country with him, and I watched thousands of black folks who were fed up, who were so filled with rage that they, too, were about to explode. Out of all that came  

7 Kaplan, p. 770 (footnotes omitted).
the Black Panther party." Among the way, Earl Caldwell found many blacks fed up with the system and angry and bitter about a press which they felt had a history of treating them unfairly. But despite those feelings and although they were reluctant, they were still willing to talk with reporters and to give them a chance to have an up-close look at things as they were. I was able to file many, many stories on the people and the life on the black side of those towns.

After the assassination of Dr. Martin Luther King Jr., Caldwell made several trips to the San Francisco area to report on the Panthers. They began to trust him. During a September visit, something scary happened:

Late one night in San Francisco they yanked an old couch away from a wall in a cramped apartment, exposing stacks of guns of every sort. I could tell my readers then to take these people seriously, and I did.

The story about the weapons provoked the government's interest too; the FBI called, then visited, the city room of the Times in New York. They wanted more on the Panther arms cache than Caldwell had written. He refused. He had published all he knew, he told the government agents. But they did not believe him. They wanted names and places.

By the spring of 1969, according to Caldwell, the Black Panthers organization had grown so large and influential among young blacks that the Times transferred Caldwell to its San Francisco bureau. Caldwell later said the as-

8Whalen, p. 85.
91973 Senate Hearings, p. 87.
10Whalen, p. 85.
111973 Senate Hearings, p. 87.
signment was necessary because "suspicions and fears among many segments of the black community were such that white reporters were unable to gain access to . . . black militant organizations." Soon, Caldwell was an insider--according to him the only person close enough to the Panthers to tell the real story:

I wrote of the breakfast program they were operating for black children and the politics that were involved, long before most other reporters even knew it existed. I wrote with some detail of weapons they owned and later how they were beginning to attract wide support in various sections of both the black and white communities. I wrote too of their ideas of what the society should be--not just shallow pieces taken from brief interviews, but in-depth stories that were drawn from hours and hours of sitting and watching and listening. Listening not from a distance, but from inside their private offices, offices where weapons stood in corners and where sandbags lined the walls and huge metal plates covered the windows.13

On November 15, 1969, David Hilliard, leader of the Panthers, made a publicly televised speech in which he declared, "We will kill Richard Nixon." The threat was repeated in three issues of the party's newspaper. In December, coincidentally a time of numerous violent confrontations between the Panthers and police, Hilliard was indicted by a federal grand jury for uttering threats against the President. The charges eventually were dropped when the government refused to reveal

12 Ibid., p. 86.
13 Ibid., p. 87.
14 Supreme Court Reports, Book 408, p. 679.
wiretapping information in the case. Also in December came Caldwell's major story on the aspirations of the Panther Party. "In their role as the vanguard in a revolutionary struggle," Caldwell wrote, "the Panthers have picked up guns." He quoted Hilliard: "We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle [sic]."

After the story appeared, the FBI began calling on Caldwell. The reporter began to worry that the Panthers would suspect him of collaborating. He had his calls screened; the FBI used women callers to pierce the screen to find Caldwell's whereabouts. The agents followed him to another city and tried to interview him there. Between December 23, 1969, and January 12, 1970, FBI agents tried six times to interview Caldwell, but he refused. At the end of the month, "an agent told an employee at The Times San Francisco bureau to inform me that they were not going to fool around any longer, that if I did not cooperate with them, that I would be in court." Meanwhile, the government had

16 Supreme Court Reports, Book 408, p. 677.
17 1973 Senate Hearings, p. 88.
18 Whalen, p. 87.
19 1973 Senate Hearings, p. 88.
convened a grand jury to conduct a broad investigation of the Panthers, but in particular to investigate crimes by the Black Panther Party. Among the government's allegations: threats against the President, conspiracy to assassinate the President, and interstate travel to incite riot.

The FBI carried out its threat against Caldwell only days after delivering it. On February 2, 1970, he was subpoenaed to testify in secret before the grand jury. He was to bring all his notes and tape recordings "reflecting statements made for publication" by the Panthers since January 1, 1969--essentially files from a year's work. It was the beginning of a famous court case, but for Caldwell, the end of a career as an interpreter of black militancy. A few years later he recalled:

My reporting on the Black Panther Party ended the day the first subpoena was issued. It was not ended by the New York Times but rather, it was ended by the Justice Department and solely, I believe, because I refused to meet secretly with agents of the FBI and discuss in private with them information that had come to me through my hard-earned sources. Today as a reporter I keep no files. I no longer use a tape recorder but still I have found source after source suspicious that anything told to me, a journalist, will end up in the hands of some investigative agency. And I am not alone. Reporters across the country had told me that they are having similar experiences.

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21 Supreme Court Reports, Book 408, pp. 676-77, discussed in Kaplan, pp. 740-41. The government apparently chose not to prosecute the Panthers under the Smith Act (see Nelson and Teeter, p. 42).

22 Supreme Court Reports, Book 408, p. 675n.

23 1973 Senate Hearings, p. 88.
The subpoena against Caldwell was eight months old when a grand jury in Bristol County, Massachusetts, decided to subpoena television newsman Paul Pappas for his knowledge of the Panthers. Two months earlier Pappas had covered civil disorder in New Bedford and had been allowed into Panther headquarters there after promising to write nothing unless an expected police raid occurred. It did not, and Pappas went home empty-handed after about three hours. He wrote nothing and told no one what he had seen, but the grand jury found out he had been there. The state Supreme Judicial Court eventually ruled against Pappas' claim for a First Amendment privilege. It noted that Massachusetts had no statutory privilege. In arguments later before the U.S. Supreme Court, Pappas said he would concede the government's power to compel his testimony if the grand jury demonstrated a "compelling need" and an "overriding public necessity" for his information, but he insisted that the case involved not even a hint that a crime had been committed during Pappas' visit to the Black Panther headquarters. It was a classic case of a grand jury "fishing expedition," Pappas argued.24

Pappas' case soon was consolidated with Caldwell's, and Branzburg's as it arose from the Kentucky courts. Before reviewing the Supreme Court's decision against the three reporters, it will be helpful to investigate press reaction to the Caldwell case, which achieved considerable notoriety.

24 Whalen, pp. 73-76.
The government may have been encouraged to hound Caldwell into court by timid press compliance with other governmental subpoenas. In January 1970, for example, CBS broadcast an hour-long interview with Black Panther minister Eldridge Cleaver. Within forty-eight hours, CBS News faced federal subpoenas demanding all correspondence, files and unused portions (outtakes) of film from the interview. The files dated to 1968. CBS protested, but it obeyed.

Several months before co-opting CBS, the government's grand juries investigating Students for a Democratic Society subpoenaed (and apparently obtained) unedited files and unused pictures belonging to Time, Life and Newsweek magazines, and the Panther files of four Chicago newspapers. "For several months," reported one researcher, "federal prosecutors obtained film clips and news files from newspapers, magazines, television stations and networks, sometimes through subpoenas and other times simply by placing an unofficial request for the information." Editorialists were slow to protest, and even when it became apparent that the Caldwell case was but a snowflake in a flurry of subpoenas arising from coverage of political dissidents,

27 Kaplan, p. 739.
28 Ibid.
influential voices urged caution. Broadcasting reported that television network executives intended to cooperate with the government unless it appeared that a "really solid" First Amendment issue was involved.

The subpoenas continued. By mid-1971, NBC and CBS and their affiliates had been served with a total of 121 subpoenas, the majority involving network coverage of militants. Field Enterprises was served with thirty. The New York Times, which had a history of only five subpoenas (for unpublished information) between 1964 and 1968, faced three in 1968, six in 1969, and twelve in 1970.

Reaction of reporters was predictable. Two days after the Caldwell subpoena, the New York Times reported that Wall Street Journal reporters had petitioned their editors to resist press subpoenas. Seventy black writers advertised in the Times to protest the government's attempts to co-opt Caldwell.

Then-Federal Communications Commission member Nicholas Johnson warned Nieman Fellows in Washington that freedom and

29 Ibid.
31 Ervin, p. 245.
32 Ibid.
integrity of the press were in serious danger and that the owners and operators of the media were contributing to their own peril by not refusing absolutely to comply with the subpoenas.35

The Times itself wrote with restraint about the government's demands and volunteered that "this newspaper and all the mass media have the same duties as other organizations or individuals to cooperate in the processes of justice."36

It was not the use, but the "misuse" of the government's subpoena power that was causing problems, said the Times. Government demands for "blanket access to press files" will create the impression that the press is an arm of government investigatory powers, it said. "That danger is not eliminated even when subpoenas--such as the one served on a reporter for The Times [Caldwell]--are limited to demands for notes or tapes 'reflecting statements made for publication.'"37 While the Times failed to make clear what would be acceptable, it indicated that subpoenas for "notes, files, film and other material" jeopardized the "line of separation" between government and the press, a line it said must be kept "unmistakable."38

37 Ibid.
38 Ibid.
The *Times' ambivalence about government subpoena power was reflected in its on-again, off-again support for Caldwell during his case's lengthy journey to the U.S. Supreme Court. The first battle seemed suspiciously easy. When Caldwell protested the breadth of the subpoena, it was withdrawn. It was announced that another subpoena would be issued, merely requiring Caldwell to appear. At that point, the lawyers the *Times had provided Caldwell felt compelled to contact the government's counsel to see if the information sought was "at all relevant;" apparently the *Times' views had then advanced from objec- 
ting to opening files, to demanding that any testimony have relevance to legitimate law en-
forcement efforts. The government replied that the grand jury's intentions were none of Caldwell's business.39

In early April, Federal District Judge Alfonso J. Zirpoli denied a motion by Caldwell and the *Times to quash the new subpoena. They had polished up the unsuccessful argu-
ments used in the Torre, Goodfader and Buchanan cases40 but it had not worked. They had argued that enforcing such a broad subpoena would drive "a wedge of distrust" between Caldwell and the Panthers. The court should not permit "so drastic an incursion upon First Amendment freedoms," they said, "in the absence of a compelling governmental interest--

39 Whalen, p. 87.
40 Kaplan, p. 741.
But Judge Zirpoli refused to change the general rule: "Every person . . . is bound to testify," he recited. Nevertheless, the District Court seized the Times' cue and for the first time recognized a First Amendment connection. Caldwell would have to divulge whatever information he had been given for publication, Zirpoli ordered, but he had a First Amendment privilege to withhold confidential information unless the government could show "a compelling and overriding national interest . . . which cannot be served by any alternative means." Because the grand jury's term had expired, most of the legal motions were repeated on both sides. Zirpoli again ordered Caldwell to testify before a grand jury, and he again allowed the reporter some protection. The Times announced that it was fully satisfied with the decision. Apparently the prosecutors were satisfied too; they did not appeal the protective order. They would be satisfied with Caldwell's appearance in the grand jury chamber.

However, Earl Caldwell was not satisfied. Given Zirpoli's protective conditions, there was no need to appear, he reasoned, especially because even a silent appearance in secret before the inquisitors would destroy his credibility as a reporter. When he therefore refused to appear, he was con-

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41 Supreme Court Reports, Book 408, p. 676.
42 Ibid., p. 678.
victed of contempt. Caldwell then petitioned the Ninth Circuit Court of Appeals. The New York Times paid Caldwell's legal fees for the appeal but did not join in it. Managing editor A. M. Rosenthal explained, "We are not joining the appeal because we feel that when a reporter refuses to authenticate his story, the Times must, in a formal sense, step aside. Otherwise, some doubt may be cast on the integrity of Times news stories." Later, Times lawyers said they "didn't want to risk" loss of the concessions granted by Judge Zirpoli, which had "carried the privilege . . . many steps further" than any previous decision.

In mid-November, the Court of Appeals decision in Caldwell's favor was thoroughly unprecedented, the first to acknowledge constitutional validity to the press' claim of privilege. The court agreed with Caldwell's reasons for refusing to appear under the circumstances. It explained that "it is not the scope of the interrogation to which he must submit that is here at issue; it is whether he need attend at all."

In analyzing how the appeals court reached its decision in Caldwell's favor, it is important to note that the court

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44 Ibid.
46 Ervin, p. 253.
47 Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970), reprinted in 1973 Senate Hearings, pp. 498-505.
was affirming the existence of a limited news-gathering right, in Caldwell's case one so fragile as to merit special protection not generally available to reporters.\(^{48}\) Second, the court approached the issue of subpoenas for unpublished information as being an example of "otherwise permissible governmental action not directed at the regulation of speech and press." No consideration was given to the possibility that governmental subpoenas for information have more than incidental impact on First Amendment rights. Here we have an obvious conflict between competing "public interests," said the court, and so it bound itself by a long-standing Supreme Court rule:

Where, as here, the alleged abridgement of First Amendment interests occurs as a by-product of otherwise permissible governmental action not directed at the regulation of speech or press, "resolution of the issue always involves a balancing by the court of the competing private and public interests at stake in the particular circumstances shown." Barenblatt v. United States, 360 U.S. 109, 126 (1959).\(^{49}\)

The appeals court then proceeded to balancing the interests and first weighed those supporting Caldwell:

The Government's statement is that First Amendment interests in this area are adequately safeguarded as long as potential news makers do not cease using the media as vehicles for their communication with the public. But the First Amendment means more than that. It exists to preserve an "untrammeled press as a vital source of public information." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). Its objective is the maximization of the "spectrum of available knowledge," Griswold v. Connecticut.\(^{49}\)

\(^{48}\) The court said: "It is not every news source that is as sensitive as the Black Panther Party . . . It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source" (ibid., p. 504).

\(^{49}\) Ibid., p. 498n.
cut, 381 U.S. 479, 482 (1965). Thus, it is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view.

The need for an untrammeled press takes on special urgency in times of widespread protest and dissent.

On the other hand, the court said, "the Grand Jury does not know what it wants from this witness." Although the grand jury has extensive powers of investigation, it said, the Supreme Court long has ruled that investigatory bodies may be restrained when they imperil First Amendment freedoms. "The [Supreme] Court," the appeals court noted, "has required the sacrifice of First Amendment freedoms only where a compelling need for the particular testimony in question is demonstrated."

Two First Amendment freedoms would be in jeopardy if Caldwell were not supported, the court said. One is that compelling testimony from reporters would induce self-censorship, all the more heinous if done unnecessarily. But by previous Supreme Court decisions the First Amendment guards against governmental action that induces self-censorship. Second, the court issued a ringing defense of "a measure" of press autonomy:

If the Grand Jury may require appellant [Caldwell]

50 Ibid., pp. 499-500.
51 Ibid., p. 500.
52 Ibid.
to make available to it information obtained by him in his capacity as a news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes. To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function on them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function. To accomplish this where it has not been shown to be essential to the Grand Jury inquiry simply cannot be justified in the public interest.5

5 It is a paradox of the Government's position that, if groups like the Black Panthers cease taking reporters like appellant into their confidence, these journalists will, in the future, be unable to serve a public function either as news gatherers or as prosecution witnesses.

The appeals court was not sure what would constitute a "compelling need" to justify forced testimony, but it noted that Caldwell's lawyers had suggested at least three conditions the Government should have to meet: 1) reasonable grounds to believe the reporter has information; 2) proof that the information is relevant to an identified crime; and 3) presenting evidence exhausting alternative sources less destructive of First Amendment interests.54

The appeals court thus was willing to accept the idea (offered by the press) of a qualified privilege, one approving of the government's subpoenaing a reporter and forcing his

53 Ibid., p. 501.
54 Ibid., pp. 503-4.
testimony after demonstrating "compelling need." The announce­ment was received with equanimity, if not enthusiasm. Press spokesmen, surveyed for their opinions on pending leg­islation in Congress to protect reporters, adopted a "wait and see" attitude because the government was appealing the Caldwell decision—even if it was to a Nixon Supreme Court.  

Earlier, at a news conference in the spring of 1971, President Nixon had announced possessing "a very jaundiced view" of subpoenaing reporters' notes unless "there was a major crime that had been committed and where the sub­poenaing of the notes had to do with information dealing directly with that crime."  

A Field Foundation survey during 1971 found that reporters' anxieties "have greatly subsided as a result of the strong stand taken by the journalism profession and the ten­tative victories in court." The surveyor found that many newsmen "would be happy to accede to more qualifications and exceptions if the probability were thereby increased that the Supreme Court would recognize the basic principle of a newsman's privilege."  

\[\text{55Ervin, p. 253. ANPA President Stanford Smith told a Senate subcommittee: "We suggest that the extent to which . . . legislation will be needed can only be determined after the U.S. Supreme Court renders its decisions" ("ANPA Statement to Ervin Subcommittee on Freedom of the Press," ANPA General Bulletin, no. 49 [Oct. 12, 1971], p. 249).}\]  

\[\text{56Ervin, p. 254.}\]  

\[\text{57Blasi, p. 283.}\]  

\[\text{58Ibid.}\]
CHAPTER VI

BRANZBURG: FROM COURT TO CONGRESS

Following the Supreme Court's decision to review the cases of Caldwell, Pappas and Branzburg, spokesmen for organized journalism groups were divided on their advice to the Court. Some began to see that even the court of appeals decision left room for governmental co-opting of the press for law enforcement; they argued therefore for an absolute testimonial privilege for newsmen and their information. The absolutists included the American Newspaper Publishers Association, the Washington Post, Newsweek, the American Society of Newspaper Editors (ASNE), Dow Jones and Co., Inc., and the journalism society, Sigma Delta Chi.

The ANPA's arguments to the Court were straightforward:

Nothing short of an absolute privilege, under the First Amendment, vested in professional newsmen to refuse to testify before any tribunal about any information or source of information derived as a result of their reportorial functions will create the certainty needed to generate confidence in their promises, whether express or implied, to preserve either a source's anonymity or privacy, and thus guarantee the right of the public to be fully informed. Moreover, without such a privilege, the history of independence and disassociation

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1Supreme Court Reports, Book 402, p. 942.
2Ervin, p. 254n.
from government enjoyed by the Press, the necessity for which is obvious, will be sacrificed.  

Although a reporter's right to gather news may be limited, the ANPA said, the right to insulate informers and sources must be absolute:

This privilege to honor confidentiality must be absolute if it is to possess any value at all to society... Unlike the abstract right to gather news which may be subject to narrow limitations and qualifications, the right to protect a reporter's sources can have no limitation or qualification. Although the privilege of confidentiality protects the right of the people to be fully and completely informed, the right to invoke this privilege must necessarily be vested in the newsmen for only he is in a position to weigh the need for confidentiality.

Subpoenas "pierce the wall traditionally separating the press and government," the ANPA said, and reluctant informers will not be reassured by half-way protections:

The privilege must be absolute for without that certainty an informer would be reluctant to confide in a reporter who could not honestly guarantee, without the risk of suffering a contempt penalty, the confidence of the relationship...

In no way can a government more effectively stifle a free press than by intimidation of news sources which desire to remain anonymous. Attempts at prior restraint are necessarily open, visible and, therefore, can be prevented while compulsory process for appearance at a secret grand jury proceeding is more subtle. We can conceive of no easier road for a government bent on tyranny to travel than the intimidation of newsmen and their sources of information.

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3 Brief for Amicus Curiae, American Newspaper Publishers Association, United States v. Caldwell, Branzburg v. Hayes, and In re Pappas, U.S. Supreme Court, October Term, 1971, Nos. 70-57; 70-85; 70-94, p. 4.

4 Ibid., p. 8.

5 Ibid., p. 10.
ANPA's passionate defense notwithstanding, the New York Times headed a great list of those friends of the court "happy to accede" in a qualified reporters' privilege: they basically supported what the appeals court had ruled in the Caldwell case. The Times was joined by the television networks, ABC, NBC and CBS; and the Chicago Sun-Times, the Chicago Daily News, the Associated Press Managing Editors Association, the Associated Press Broadcasters Association, and the Association of American Publishers.6

We already have explored elements of the Supreme Court's decision against Caldwell, Pappas and Branzburg. Announced on June 29, 1972, the five-to-four decision was absolutely against protecting reporters from subpoenas, and it denied that reporters' news-gathering rights were affected unconstitutionally.

The opinion of the Court was delivered by Justice Byron R. White, joined by Chief Justice Warren E. Burger and Justices Harry A. Blackmun and William H. Rehnquist. Justice Lewis F. Powell, Jr., filed a brief concurring opinion suggesting that the majority view was not an authority to harass the press. Justice Potter Stewart dissented, in an opinion in which Justices William J. Brennan, Jr., and Thurgood Marshall joined. They advocated use of the press only for legitimate, pressing needs of law enforcement. Justice William O. Douglas filed the lone dissent advocating absolute

6Ervin, p. 254n.
First Amendment privilege for journalists.

The Court majority was firm: forcing reporters to testify in secret before grand juries presented no question of censorship, prior restraint, or inhibition of freedom of the press.\(^7\) Sen. Samuel J. Ervin summarized the decision of the majority:

The Court ruled that the first amendment did not entitle a reporter to refuse to reveal the identity of his confidential sources to a grand jury. There was no testimonial privilege recognized or even hinted at, not even a qualified one. In the absence of statutory protection, newsmen were left to the mercy of prosecuting and defense attorneys. The balance had shifted, and the issue dropped into the lap of Congress.\(^8\)

Let us pass over the skimpy news coverage of the Supreme Court's landmark denial of privilege for reporters\(^9\) and check the editorial reaction, best characterized as lamentation. Arthur O. Sulzberger, publisher of the Times, said the decision "now makes it imperative that Congress and those state legislatures that have not yet acted pass laws that would give the necessary protection . . . vital to a free press and the public."\(^10\) The Los Angeles Times said the Court had dealt "a heavy blow at the independence of the

\(^{7}\) Kaplan, p. 749.

\(^{8}\) Ervin, p. 255.

\(^{9}\) A point covered in Norman E. Isaacs, "Beyond the Caldwell Decision: There May Be Worse to Come from This Court," Columbia Journalism Review, September-October 1972, reprinted in 1973 Senate Hearings, pp. 618-622.

press.\textsuperscript{11} The \textit{Washington Star} said that \textit{Branzburg} would "automatically inhibit the whole process of newsgathering."\textsuperscript{12} The Chicago \textit{Sun-Times} said "the people's right to a free press has been impaired."\textsuperscript{13} To the American Society of Newspaper Editors, \textit{Branzburg} was "a direct blow at the right of the people to be fully informed without hindrance by the government." Sigma Delta Chi expressed disappointment and apprehension.\textsuperscript{14}

To NBC News president Richard C. Wald, the \textit{Branzburg} decision was a bombshell. "I and many other newsmen assumed that the first amendment protected the press from compulsory testimony," Wald said later in Congress. "We were told that a developing trend of court decisions tended to uphold this protection. Then came the \textit{Caldwell} decision."\textsuperscript{15}

To say nothing of Wald's understanding of the relevant

\begin{itemize}
\item \textsuperscript{11} Los Angeles Times, July 2, 1972, p. E-2, cited in Ervin, p. 255n.
\item \textsuperscript{12} Washington Star, July 3, 1972, p. A-10, cited ibid.
\item \textsuperscript{13} Chicago Sun-Times, July 2, 1972, p. 11, cited ibid.
\item \textsuperscript{14} "Branzburg, Caldwell & Pappas Cases," University of Missouri Freedom of Information Center Report, no. 321 (May 1974), p. 3.
\item \textsuperscript{15} 1973 Senate Hearings, p. 294.
\end{itemize}
history, should he have been surprised? What did Branzburg v. Hayes decide?

It will be helpful to examine the disarming ease with which the Court majority disposed of what it called "the claimed invasion of First Amendment interests occasioned by the [forced] disclosure" of unpublished information. 17

First, according to the Court, the subpoena is another instance of "incidental burdening" of the press when government enforces laws in the public interest. 18 Second, the hampering of news gathering is standard procedure in government; the press is "regularly excluded" from grand jury rooms, court chambers, executive sessions, private meetings, scenes of disaster and controversial trials. 19 Third, the public interest in effective law enforcement easily outweighs the "consequential, but uncertain" impact on news gathering effected by press subpoenas, said the Court, especially because "the vast bulk of confidential relations between reporters and their sources" are unaffected: 20

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16 Sigma Delta Chi president William C. Payette said in public in 1973: "What we are talking about is getting back to what we had. We talk about absolute shield versus qualified shield. For 200 years we have had an absolute shield. We have had absolute unabridged freedom of the press for 200 years. In the past few months [since Branzburg] this has been changed" (1973 Senate Hearings, p. 304).

17 Supreme Court Reports, Book 408, p. 680.

18 Ibid., p. 682.

19 Ibid., pp. 684-85.

20 Ibid., p. 691.
Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. . . .

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference is hardly deserving of constitutional protection.21

Fourth, even when the source is "not engaged in criminal conduct but has information suggesting illegal conduct by others," said the Court, there is no demonstrable evidence that the free flow of news would be deterred by giving the government the power to unmask informers.22 Any group like the Black Panthers relies on the press "to propagate its views, publicize its aims and magnify its exposure to the public;" therefore the threat of subpoena is unlikely to be a hindrance, the Court said.23 Good citizens put their trust in the proper authorities anyway, said Justice White:

Law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal

21Ibid.

22Ibid., p. 693. In his dissent, Justice Douglas remarked how inconsistent Justice White was here: "The majority need look no further than its holdings 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. McCray v. Illinois, 386 U.S. 300; Scher v. United States, 305 U.S. 251; cf. Roviaro v. United States, 353 U.S. 53" (ibid., p. 723n).

23Ibid., pp. 694-95.
safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his. 24

As for the remaining informers, those deterred "for whatever reason," the Court was willing not to hear from them. 25

Thus the Court found it easy to conclude that press subpoenas impinge on no legitimate First Amendment right, certainly not one that calls on the government to demonstrate "compelling need" for the newsman's testimony before issuing the subpoena, as Caldwell would have accepted. 26

But was the minority view, which sided with NBC's Richard Wald and the Sun-Times, New York Times and other of the press' most influential voices, qualitatively different? Speaking for the dissenters, Justice Potter Stewart, who wrote the Garland v. Torre opinion, accused the majority of undermining the "historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government." 27 The free flow of information, an important public interest, implies

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24 Ibid., p. 695.
25 Ibid.
26 Ibid., p. 708.
27 Ibid., p. 725.
a right "of some dimensions" to gather news, Stewart said. As in 

Talley v. California, he noted, "the First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available." Sources made vulnerable through press subpoenas "can never be sure" they will not be unmasked, and reporters will be hesitant to deal with controversial news. While the deterrent effect is not provable "with scientific precision," Stewart said, "we have never before demanded that First Amendment rights rest on elaborate empirical studies." Some deterrence is inevitable, he added. As the appeals court noted, First Amendment safeguards applied against other governmental investigations are appropriate to the grand jury's work too, Stewart said. The "unrestrained use of the grand jury's subpoena power" is not acceptable, he concluded.

"This is not to say," Stewart cautioned, "that a grand jury could not issue a subpoena." Subpoenas may issue against reporters for their information, he explained. Once

28 Ibid., p. 728.
29 Ibid., p. 730.
30 Ibid., p. 731.
31 Ibid., p. 733.
32 Ibid., p. 741.
33 Ibid., p. 743.
in the grand jury room, reporters should be privileged to retain "confidences" unless the government can show a clear need of them for solving any "specific, probable violation of law."\textsuperscript{34}

In sum, Justice Stewart was not rejecting the majority's decision to "annex the journalistic profession as an investigative arm;" he was rejecting its "simplistic and stultifying absolutism . . . in denying any force to the First Amendment."\textsuperscript{35} Both the majority and the minority, and the influential press voices not supporting an absolute ban on subpoenas of the press, supported the notion that the press is a legitimate tool of government for investigative law enforcement. This always has been the government's position through history, even before Constitutional safeguards for our liberty were adopted.

No statement in \textit{Branzburg} more clearly points to the necessity for a political solution to the problem of this abuse of liberty than the Court's expression of reluctance to embroil itself in a test, suggested by Justice Stewart (and the \textit{New York Times}), concerning the conditions necessary to overcome First Amendment values and issue the subpoena:

\begin{quote}
\ldots by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different crim-
\end{quote}

\textsuperscript{34}Ibid.

\textsuperscript{35}Ibid., p. 746.
inal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.36

Even under these conditions, the Court could have justified excusing all reporters from forced testimony, but it shied completely away from value judgments and approved such forced testimony in all grand-jury investigations, "compelling need" shown or not.

The approach of the entire Court (save Douglas) on the basic question of using the press for law enforcement is easy to characterize. Examine its reaction to the question asked by the United States when it petitioned the Supreme Court for reversal of Caldwell's appeals court "victory." According to the Court:

The petition presented a single question: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in published articles."37

The Branzburg majority, of course, answered "no." The Court minority (save Douglas) said "yes," but only until the government demonstrates some degree of necessity. The best that could be hoped for in any Supreme Court decision on the matter

36Ibid., p. 706.
37Ibid., p. 679n.
would be an assurance that the government would not be permitted to use the press as an investigatory tool except when it needed to, as the appeals court had ruled when it shielded Caldwell.

Branzburg, Pappas and Caldwell did not claim an absolute privilege; only briefs filed by friends of the court did so. The assertions of the eight Justices who sided in principle with the New York Times and other influential press voices merely confirmed the view continuously held by the government since the beginning of the debate. Justice William O. Douglas knew this when he alone, among the case's principals, pleaded for preservation of the press' "preferred position in our constitutional scheme." If he could understand the Court majority's viewpoint, he could not understand what the press' influential voices had done:

The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against the needs and conveniences of the government. My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advanced in this case.

As Justice White said in the majority opinion, "only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas."

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38 Ibid., p. 721.
39 Ibid., p. 713.
A substantial part of the majority opinion was devoted to exploring the implications of reporters' knowledge of crimes. Justice White began the discussion by implying strongly that the subpoena, in issuing to a reporter with knowledge of a crime, is a restraint against "wrong-doing" by the reporter, presumably failure to report the crime to the police:

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

"It is obvious," he went on, "that agreements to conceal information relevant to the commission of a crime have very little to recommend them from the standpoint of public policy." According to common law, Justice White said, citizens have a duty to raise a "hue and cry" and report felonies to the authorities: "Misprision of a felony—that is, the concealment of a felony 'which a man knows, but never assented to . . . [so as to become] either principal or accessory,'" W. Blackstone, Commentaries *121, was often said to be a com-

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40 Ibid., p. 692.
41 Ibid.
42 Ibid., p. 696.
43 Ibid.
mon-law crime." In fact misprision of felony was declared a federal crime in the first Congress, and so he cited the statute to emphasize the point:

"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 misprision]." 18 U.S.C. Sec. 4. Such conduct [he continued] deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.44

Those reading the Branzburg opinion would do well to move carefully in this section so as not to miss a very important point about misprision of felony. In a footnote regarding that section of the law, Justice White said: "This statute has been construed, however, to require both knowledge of a crime and some affirmative act of concealment or participation."45

Clearly, then, a case could be constructed that a reporter witnessing a felony and writing about it commits no crime unless he actively participates in it. Even then, the Fifth Amendment may protect him.

Justice Douglas recognized the latter point when he dissented from the opinions of the other eight Justices:

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity

44 Ibid., pp. 696-97 (footnote omitted).
in my view is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before the grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. 46

The notion that the press should be granted its right to withhold information that the government could use against the citizenry reminded Justice White of the right to "print or withhold" claimed by the press in the Associated Press v. United States: "The right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function." As in the case against the AP, he said, "private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests." 47 Granting the claimed privilege would be a Court sanction for a conspiracy "beyond legislative or judicial control," an attempt to erect

a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. 48

Justice Douglas based his general conclusions in favor of absolute reporters' immunity on a variation of the personal-rights claim advanced by so many reporters, unsuc-

46 Ibid., p. 712.
47 Ibid., p. 697.
48 Ibid.
cessfully, since the mid-nineteenth century. If government is to remain subordinate to the people, he said, people must have absolute freedom and privacy in their individual opinions and beliefs. An individual, therefore, "must also have privacy over whatever information he may generate in the course of testing his opinions and beliefs." In upholding this right to privacy, Justice Douglas said the fact that Caldwell was a reporter "is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual viewpoint."

Combined with the notion that the people must have an "uncensored flow of opinion and reporting" for effective self-government, the two principles lend a constitutionally protected status to Caldwell and all other reporters, Justice Douglas said.

Subpoenas to testify infringe not only on security of belief and ideology, he added, but also on the right of privacy of association. Court precedents doubtless prohibit bringing a person before a grand jury for "the sole purpose of exposing his political beliefs," said Justice Douglas, yet upholding the Caldwell subpoena "effectively permits that result under the guise of allowing an attempt to elicit from

49 Ibid., p. 714.
50 Ibid., pp. 714-15.
51 Ibid., p. 715.
him 'factual information.'"  

Furthermore, rights of the whole society are endangered when the inquisition is against a reporter, who

is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.  

Justice Douglas was grim about the ultimate result of this "clog upon news gathering":

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that 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.  

\[52\] Ibid., p. 719  
\[53\] Ibid., p. 722.  
\[54\] Ibid., pp. 724-25.
The day after the Branzburg decision Sen. Alan Cranston (formerly a wire-service correspondent) introduced a bill to provide absolute testimonial privilege for reporters in all federal and state legal proceedings. It was the first of many reporters' privilege bills introduced in 1972 during the last quarter of the Ninety-second Congress.¹ Cranston's bill, and an identical one in the House sponsored by Rep. Jerome Waldie, was drafted to protect from subpoena "the source of any information procured for publication or broadcast."² Soon, a group known in Washington as the Joint Media Committee, apparently after a long period of inaction,³ revived itself to draft some legislation. Columbia Broadcasting System vice-president William J. Small then was chairman of the committee, which in one report was said to include representatives of the American Society of Newspaper Editors (ASNE), the Associated Press Managing Editors Association.

¹Ervin, pp. 255-56.
³Ervin, p. 256.
tion, Sigma Delta Chi, and the National Press Photographers Association. The group agreed to draft and support bills introduced by Sen. Walter Mondale on August 17 and Rep. Charles Whalen on September 5. (This study failed to discover a record of the Joint Media Committee's deliberations.) The Mondale-Whalen bills were "qualified;" they established exclusive conditions under which reporters would be compelled by the government to reveal sources and information.

By August 18 in Washington, the American Newspaper Publishers Association (ANPA) had decided that the ostensible press support of a qualified privilege bill was intolerable. ANPA General Counsel Arthur B. Hanson arranged a conference of lawyers who had been involved or interested in the Caldwell, Bранzburg and Pappas cases to find a consensus among what the ANPA politely called "divergent views" in the press. This new press group, the Ad Hoc Coordinating Committee, originally included the ASNE, Sigma Delta Chi, the National Association of Broadcasters, National Broadcasting Co. (NBC), Columbia Broadcasting System (CBS), the Radio-Television News Directors Association, the Newspaper Guild labor union, the Association of American Publishers (book publishers), the Reporters Committee for Freedom of the Press, the American Civil Liberties Union,

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4 Ibid.


6 Describing itself as "the only legal research and defense fund organization in the nation exclusively devoted to protecting the First Amendment and the freedom of information interests of the working press in all media," the Reporters
and the organizations involved in the three cases consolidated in Branzburg.\textsuperscript{7} The group met at least a dozen times during the fall and surfaced after Christmas with a bill (which the ANPA specifically endorsed) to have introduced in both Houses of the Ninety-third Congress.\textsuperscript{8}

Meanwhile, the lame-duck House, in a Judiciary subcommittee headed by Rep. Robert W. Kastenmeier, held hearings in late September and early October on the twenty or so post-Branzburg bills still in contention, most of which would establish qualifications under which reporters would be compelled to reveal sources.\textsuperscript{9} Whalen's bill, still supported by the Joint Media Committee, received most of the attention. It would have provided broad immunity from disclosure but with two significant exceptions: disclosure of sources in a libel suit when the source of the libel was in question; and disclosure of sources in any case where a hearing showed that the source probably had information about a specific crime,

\textsuperscript{7}1973 House Hearings, p. 253.

\textsuperscript{8}Ibid.

\textsuperscript{9}Ervin, p. 256n.
that the information was unavailable elsewhere, and that there was a "compelling national interest in the information."\textsuperscript{10}

Richard W. Jencks, vice-president of CBS at its Washington Bureau, testified for the Joint Media Committee in favor of the Whalen bill. "We recognize that, in some extreme situations, a party should, by making a proper showing to a court, be able to compel the production of information or the source thereof" from the press, Jencks said.\textsuperscript{11}

Several witnesses opposed the Whalen bill. Sen Cranston said qualified protection could "open the door to loopholes . . . governmental abuse and repressive restrictions."\textsuperscript{12} An ACLU spokesman said anything less than an unqualified privilege would insufficiently protect the public's right to know.\textsuperscript{13} Charles Perlik, Jr., president of the Newspaper Guild, said the right of reporters to protect unpublished information is absolute and should be recognized as such by Congress.\textsuperscript{14} Assistant Attorney General Roger Cramton opposed all privilege laws. He said only nine subpoenas had been issued to newsmen by federal prosecutors since the Justice Department

\textsuperscript{10} Schardt, p. 3.

\textsuperscript{11} "Demand for Absolute Privilege Marks Final Hearings on News Protection," Criminal Law Reporter 12 (Nov. 8, 1972): 2126.

\textsuperscript{12} Ibid., p. 2127.

\textsuperscript{13} Ibid.

\textsuperscript{14} Ibid., p. 2128.
had drafted guidelines in 1970 to limit subpoenas of reporters. Said Cramton, as an internal policy of the Attorney General's office, the guidelines furnished adequate protec-

15 Attorney General John N. Mitchell announced the guidelines on Feb. 5, 1970, a few days after the Caldwell subpoena. Henceforth, he said at the time, "no subpoenas will be issued without a good faith attempt by the department [of Justice] to reach a compromise acceptable to both parties prior to the issuance of the subpoena" (New York Times, Feb. 6, 1970, p. 1). The Times rather implausibly surmised that Mitchell "recognized he might not fare so well" in the courts if the rash of subpoenas were tested against the claimed privilege of reporters. "But the issue has not been significantly tested in the courts because many news organizations have been equally unwilling to risk defeat," the Times admitted. Government lawyers were quoted as saying that basic policy had always been the same; that reporters were always subpoenaed as a last resort: "If denied, they say, they have often retreated. If shown some cooperation, they have at times served subpoenas to demonstrate that the reporter was testifying under duress."

The two-decade-old practice of reporters asking to be subpoenaed to disguise their collaboration with prosecutors against the citizenry is worthy of research much more extensive than that presented here. But it began, the Times revealed, as the press' idea:

"... in recent years ... notably in civil rights cases in the South and the case against Chicago policemen arising out of the riots at the 1968 Democratic National Convention, reporters are said to have agreed in informal discussion with Federal attorneys to supply unpublished film and notes under narrowly drawn subpoenas that protected the names of their sources and other confidential material."

The Times said Mitchell "contends that the recent round of subpoenas served on The New York Times, C.B.S., Time and Newsweek, were meant to be in that pattern;" the mistake as Mitchell saw it being the failure to "negotiate" for information that the press traditionally would have been willing to part with. The Times writer seemed to be relieved at the apparent change of heart: before Mitchell's "retreat," the Times reported, "some newsmen and executives suspected" the government of intentionally breaking tradition because it wished to isolate the Panthers from society by cutting off some of their publicity:

"Some Government officials, in turn, privately charged that some newsmen were departing from their own custom, having offered cooperation when it suited them in civil rights cases and resisting it now out of partial sympathy for the Panthers in their contest with the police."
"There is now evident on both sides, however, a desire to avoid confrontation in the courts, to reaffirm the tradition of special ad hoc handling of reporters and to leave unresolved some of the difficult questions of law" (Max Frankel, "Mitchell and Press Problems," New York Times, Feb. 6, 1970, p. 40).

The new guidelines were merely policy, directing U.S. Attorneys to negotiate subpoenas only when necessary and have them approved expressly by the Attorney General's office. On Oct. 26, 1973, Attorney General Elliot Richardson added the requirement of personal approval by the Attorney General before any reporter could be questioned, subpoenaed, arrested or indicted by the federal government except under "exigent circumstances" ("Justice Department Announces New Press Subpoena Guidelines," Press Censorship Newsletter, no. III [November-December 1973], p. 21). It has never been clear whether all reporters, including freelancers and staff of underground newspapers, are entitled to the privilege; the guidelines don't talk about it. In any case, in "emergencies and unusual situations," a prosecutor can bypass them.

During the 1972-75 period that Congress considered reporters' testimonial immunity in earnest, the efficacy of the guidelines was a point constantly in dispute, as was their propriety in theory. The guidelines could be adhered to or not, as the prosecutors saw fit, and in any case did not affect the actions of officers of the judiciary or state officials. In 1973, the Administration told Congress that its lawyers had

"requested issuance of subpoenas to newsmen in thirteen situations since the Guidelines went into effect in August, 1970. In eleven of the thirteen situations the newsmen agreed to testify or to produce documents but preferred the formal issuance of a subpoena" (1973 House Hearings, p. 579).

In 1975, the frequency had risen to fifty-four subpoenas approved under the guidelines since 1973, involving 109 journalists. In forty-two of the fifty-four situations, newsman had agreed to provide the requested information but had requested that a subpoena be issued first, apparently because it somehow looked better. The government spokesman said such requests were "becoming a common professional practice for newsmen who are willing to testify." Twenty-two subpoenas were issued without the Attorney General's approval, he added, by U.S. Attorneys who did not "appreciate" the long-standing requirements ("Justice Dept Issues 76 Subpoenas to Press in Past Two Years: 29 Percent of Subpoenas Violate Guidelines," Press Censorship Newsletter, no. VIII [October-November 1975], p. 35).

Between May 1975 and November 1976, forty-two more federal subpoenas were served, thirty-six requested in advance by the news organizations. Three were not approved in advance as required (Testimony of the Reporters Committee before the Subcommittee on Immigration, Citizenship and International Law of the Committee on the Judiciary, House of Representatives, delivered
tion against misuse of governmental subpoena power.\footnote{16} ANPA president Stanford Smith emphasized that his organization "refrained from endorsing any of the numerous pending legislative proposals" because "we now see that the complexities of the matter are very great and must be examined with extreme care." He did not specify opposition to the Whalen bill.\footnote{17}

The ACLU, which was observing the proceedings, was disturbed about the record being assembled:

Ironically, however--and this may either be a reflection of the degree to which the media have been intimidated, or a reflection of the actual willingness of the media to invest in vigorous (and expensive) investigative reporting--most of the media who have been heard from so far have opted for laws that would actually give them less latitude than they had before. Upcoming hearings, however, are expected to hear more from working reporters, rather than the management types who characterized much of the first session.\footnote{18}

One of the working reporters who had been scheduled to testify that fall was New Jersey newsman Peter Bridge, who became the first post-Branzburg reporter-celebrity by having to surrender himself to jail for contempt on the day he was to

\footnotetext{16}{Schardt, p. 3.}\footnotetext{17}{"ANPA Statement on Newsman's Privilege," ANPA General Bulletin, no. 50 (Sept. 28, 1972), p. 221.}\footnotetext{18}{Schardt, p. 3.}
testify in Congress. Earlier in 1972, Bridge was reporting for the soon-to-fold Newark News. Filling in for another reporter, Bridge rather off-handedly interviewed Pearl Beatty, the mayor's appointee to the Newark Housing Authority. There was to be a crucial vote, and the mayor already had alleged that "organized criminal elements" were trying to influence the housing authority. Reporter Bridge quoted Mrs. Beatty: "A man walked into my office and offered me $10,000 if I would vote for 'their' choice for executive director." She had notified the U.S. Attorney of the bribe attempt, Bridge reported. A special grand jury quizzed Mrs. Beatty about it, but she claimed that the news had been distorted. She also rebutted two other versions attributed to her. The prosecutor subpoenaed Bridge; he complied, but then refused to answer questions about unpublished information (besides, he had taken no notes). When cited for contempt, Bridge invoked the Constitution and the New Jersey shield law, which at that time gave newspaper workers "a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published . . . was procured," except when "any part of the privileged matter" had been disclosed. A judge dismissed both arguments, saying Bridge had automati-

19 "Demand for Absolute Privilege Marks Final Hearings," p. 2126.
21 Whalen, p. 99.
cally waived his statutory immunity by naming Mrs. Beatty in the story.\textsuperscript{22} The case—and Bridge’s twenty days in jail—received wide press coverage and prompted the New Jersey legislature to amend the shield law to protect information as well as sources, and reporters even after they leave journalism.\textsuperscript{23}

A month after the Kastenmeier hearings, another reporter, William T. Farr, also went to jail after a state court applied an existing shield law and found a loophole. While working for the Los Angeles Herald-Examiner in 1970, Farr obtained and printed the bizarre contents of a witness’ statement to police in connection with the Charles Manson murder trial then in progress. It was evident to all that a court officer—possibly one of the lawyers—had leaked the information to Farr contrary to the judge’s orders, but Farr would not say and could not be forced to because of California’s shield law. But the shield applied only to working reporters at the time, and after Farr left the paper the judge demanded to know who had leaked. Following his lawyer’s advice, Farr conceded that it had been two of the six lawyers. But each of them when questioned by the judge denied it. The infuriated judge vowed to find the perjurer and sentenced Farr to an indefinite jail term for civil contempt. After forty-six days in jail, he was released pending appeal, but not before the judge made it clear that if Farr lost the appeal he would be

\textsuperscript{22}Ibid.

\textsuperscript{23}Kaplan, p. 762.
"going back for years, not days."\(^{24}\)

Despite grumblings that Bridge and Farr had behaved irresponsibly and were not good cases to show Congress,\(^{25}\) these and other cases\(^{26}\) convinced many in the press to rally behind an absolute, unqualified federal statute. Resolutions calling for enactment of an absolute privilege were passed by the ASNE\(^{27}\) and Sigma Delta Chi (both members of the Joint Media Committee) in November, and by the Radio-Television News

\(^{24}\) 1973 House Hearings, p. 340. Other details of the Farr case are taken from 1973 Senate Hearings, pp. 650-52. In upholding the contempt citation against Farr, the California Supreme Court not only rejected his arguments, but stated its opinion that to allow a statutory privilege in any such situation would constitute unconstitutional usurpation of the judicial function by the legislative branch (22 Ca. App. 3d, at 69; 99 Cal. Rptr. at 343 [1972], cited in Ervin, p. 260n). The California legislature considerably strengthened the statutory immunity for reporters in the wake of the Farr case, but it couldn't do much about what the state Supreme Court had said. In mid-1977, however, the state Assembly passed and sent to the Senate a proposed amendment to the California constitution (ACA No. 4), to be referred to a popular vote if it could clear the houses. The amendment essentially would incorporate the California shield law into the constitution to prevent the judiciary from overturning it in a Farr case or one like that of the "Fresno Four," staff members of the Fresno Bee who revealed in a 1975 story information in a grand jury transcript. California newspaper publishers refused to support the amendment, arguing that it was not necessary for most newspaper work, would nevertheless be vulnerable to challenge under the U.S. Constitution's Fourteenth Amendment, and could fail and thereby weaken the existing statute (Telephone interview with Michael B. Doraise, legislative representative, California Newspaper Publishers Association, July 19, 1977).

\(^{25}\) 1973 Senate Hearings, pp. 650-52.

\(^{26}\) See Ervin, p. 258n.

\(^{27}\) President Nixon on Nov. 4 sent a highly publicized letter to the ASNE announcing his opposition to a federal shield law "at this time" (ibid., p. 259).
Directors Association and the ANPA in December. Editor & Publisher was alarmed. "The record of contempt cases against reporters for refusing to divulge their confidential sources is becoming frightening," it said. "Grand juries, judges, and legislative committees are using the contempt power recklessly." A few weeks later, it was reported that a dozen journalists were facing pressure to cooperate in investigations around the country. Meanwhile, the Joint Media Committee found that the Mondale-Whalen qualified-privilege bill it had drafted no longer could command a majority vote of its members. On December 11, 1972, it declared:

Events have added new emphasis to the need for legislative relief. Peter Bridge of New Jersey and William Farr of California have been jailed for refusing to submit to questioning. Other cases have surfaced in recent months. Various journalism organizations have reacted strongly to the continuing abuse of the First Amendment.

Only a week earlier, a Gallup poll showed that 57 percent of 1,462 persons interviewed thought reporters should not be forced to reveal confidential sources of news stories. Many explained their reasons in terms of the right to know; forced disclosure would impair the ability to gather information.

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28 Ibid., p. 258n.
29 Editor & Publisher, Dec. 9, 1972, p. 6, cited in Kaplan, p. 754.
tion necessary for important news.\textsuperscript{32} In a poll of 3,737 persons following a December 7 public television debate on "The Advocates," the vote was even stronger: 77 percent in favor of a press privilege.\textsuperscript{33}

Even before the Ninety-third Congress convened, bills were pouring in to create a testimonial privilege for reporters. Thirty-two Senators and more than a hundred Congressmen formally committed themselves by sponsoring sixty-five measures in the two houses. Some observers called the commitment illusory, or at least "by no means overwhelming in light of the strong public interest which had been generated over the previous six months." Strategically, the plethora of bills itself was a bad sign, indicating disagreement on the basic approach.\textsuperscript{34}

The hearings, held in February and March, revealed disagreement not only on basic approaches but on a host of important details too. The collected testimony and statements for the record filled two thick books.\textsuperscript{35} Represented were the views of politicians, professors and private practitioners of law, public prosecutors, civil libertarians, publishers, reporters, editors, columnists and journalism groups. Most of the


\textsuperscript{33} Ervin, p. 259n.

\textsuperscript{34} Ibid., p. 261.

\textsuperscript{35} Previously cited as 1973 Senate Hearings and 1973 House Hearings.
press groups favored an absolute testimonial privilege, but some hedged their bets or ridiculed those who would not. Among those who wanted or would stand for a qualified bill, some advocated a privilege which would apply only to investigatory proceedings--grand juries and legislative committees--but not to courts. Others thought the privilege might apply in all proceedings but be vulnerable to showings of "overriding national interest" or the "interests of justice." Still others questioned the right of Congress to legislate for the states and favored controlling subpoenas of the press only at the federal level. 37

Another disagreement was whether a journalist should be able to claim the privilege in a libel suit. Those who said yes cited the likelihood of suits filed solely to discover the identity of news sources. Those who said no said it seemed unfair to allow a libel defendant to plead privilege when the veracity or reliability of the source was an issue. 38

Another issue concerned who should be entitled to claim the testimonial privilege. Some bills would have protected only a "legitimate member of the professional news media" or a "professional newsman." These limitations seemed at odds with


37 Ervin, p. 262.

38 Ibid.
the common understanding that the First Amendment protects everyone. 39

An idea advanced during the hearings—that a new procedure be created to control the issuance of subpoenas against the press—also became an issue and caused considerable confusion. The suggestion represented an untested legal innovation essentially separate from the question of privilege itself, but it later was incorporated in some of the bills, including one originally supported by the ANPA. 40

In the Senate, the crucial issue seemed to be whether a reporter witnessing a crime should be vulnerable to subpoena for testimony. There was wide agreement that most reporters would volunteer, especially in cases of violent crime, but the question was one of law—should reporters be vulnerable? To Sen. Sam Ervin, whose subcommittee was reviewing the privilege proposals for the Judiciary Committee, it was a question of propriety. Early in the hearings, he told newsman Fred P. Graham:

I am not sold on the wisdom of an absolute privilege. I do have trouble with the proposition. I don't have trouble with the proposition that if the newsman receives information in confidence, that he ought not to be required to divulge the sources or the content of it. I have the same feeling about unpublished information. I do have trouble with where a newsman, even if he accumulates this information in the course of his job, accumulated personal knowledge of the commission of a crime. I have difficulty in saying that he should not be required to bear the same burden of any other citizen and

39 Ibid., pp. 262-63.
40 Ibid., p. 263n.
testify as to his personal knowledge.\footnote{1973 Senate Hearings, p. 73.}

Time after time, Sen. Ervin considered and rejected what he saw as an attempt to change an immutable law of evidence: all persons must testify about events they personally witness. To appreciate the Senator's stubborn consistency on this important point, let us follow some of his remarks:

To columnist James J. Kilpatrick on the \textit{Branzburg} decision: "I thought they [the Supreme Court Justices] were confused by the \textit{Branzburg} case where the newspaper reporter had personal knowledge of violation of law."\footnote{Ibid., p. 85.}

To Sen. Charles H. Percy, on the proposed Senate legislation: "I object to some of the proposals that have been made because they really would exempt newsmen from testifying, even to facts that he acquired, not by communication from others, but by the exercise of his own senses."\footnote{Ibid., p. 225.}

To William Cahn, of the National District Attorneys Association:

In the first place, we have the rule of evidence, normally speaking, that a person is not required to testify at all, at least before a court, unless he has personal knowledge which tends to prove or disprove some matter in issue in the case. Most newspapermen do not see crimes committed. Most of the information they have in respect to crimes, for example, or any other event is obtained by them on the basis of information supplied by other people. Except for a few exceptions in the hearsay rule, they would not be competent witnesses if brought to court.

Now, is there any reason whatever for exempting a newsmen, even if he is engaged in practicing his profession,
from testifying as to a crime which he sees committed?\textsuperscript{44}

To Jack L. Bradley, president of the National Press Photographers Association: "people who have possession of personal knowledge upon which . . . news is based should be required to testify just like any other citizen."\textsuperscript{45}

In announcing a third and final draft of his own bill for protecting reporters, Sen. Ervin pressed his audience to understand the "small qualification" he was insisting on:

The bill provides [un]qualified protection for a newsman's sources and for his unpublished materials . . . .

It is important to note that, despite these provisions, the newsman is not excused from testifying to the identity of any persons who commits a crime in his presence. This provides a clear standard which puts both newsmen and sources on notice that where the newsman has viewed a criminal act, whether or not as a result of his pledge of confidentiality, he may later be compelled to identify the perpetrator of that act. This provision provides a small qualification to the general privilege conferred by the bill. But it is a necessary and reasonable exception. No newsman would lightly conceal a crime from public authorities, and no newsman should have a right to keep this information from the police. Yet to conform to the exception will require little imposition on the part of the newsman. He need only tell his source: "The law will protect against my having to disclose your name. But I cannot hide your identity if your are committing a crime." These terms are reasonable to any man, and will not interfere with the normal and necessary reporting and information function of the journalist.\textsuperscript{46}

Sen. Ervin explained his proposal further to Martin F. Richman, chairman of a New York Bar Association committee:

I put in the fact that this should not excuse a newsmen from testifying to the identity of people who commit-

\textsuperscript{44} Ibid., p. 233.
\textsuperscript{45} Ibid., p. 249.
\textsuperscript{46} Ibid., p. 315.
ted crimes in his presence. I think that is essential to get a bill through Congress. I don't think a majority of Congress will ever vote to say the newsman should not be compelled to testify just like everybody else to a crime he sees committed even though he comes in, as in the Branzburg case, and gets the opportunity to see the crime committed only because of confidential relationships between him and his sources. I would put it like this: If anybody invites a newsman in to see him commit a crime, I don't think he ought to be exempted from prosecution. However, a jury might acquit him on the grounds that anybody who would do that is insane.  

Many witnesses told Sen. Ervin that the qualification he was insisting on was, like many others, unworkable in practice. Early in the hearings, lawyer-reporter Graham, speaking for the Reporters Committee, had this exchange with him:

Sen. ERVIN: Just one more observation. To me, I think the newsman is entitled to be exempt from disclosing information he receives from other people but not the things he knows exactly himself.

Mr. GRAHAM: I sympathize with that, Senator . . .

. . . The thing that concerns me is making a reporter repeat what he was told in confidence. I am afraid that under the bill you have proposed here, Earl Caldwell would clearly have been required to testify because he allegedly was told that a man named David Hilliard had threatened the President's life.

Sen. ERVIN: Did David Hilliard tell him that?

Mr. GRAHAM: Yes, sir; that is what my understanding is.  

Paul Branzburg himself was questioned on what came to known as Sen. Ervin's Branzburg Exception. Subcommittee lawyer Lawrence M. Baskir had an illuminating debate about it with Branzburg that is worth quoting at length:

47 Ibid., p. 388.
48 Ibid., p. 64.
49 Paul Branzburg then was employed by the Detroit Free Press.
[Mr. BASKIR:] Now it appears to me that it is a small exception and a reasonable exception. In effect, all that the exception will do will be to require reporters like yourself to change the way you gather news in those small areas, but won't affect the actual newsgathering itself. . . .

Mr. BRANZBURG: . . . I think it is dangerously deceptive for a number of reasons. The reporters will have no access to people who are engaged in something which is considered illegal. If I want to talk to some people who are contemplating violent revolution, I won't be able to talk to them. If I can't talk to them, the public will not know what they are up to.

I think the public benefits by my talking to people like that.

There are any number of criminal sorts who might talk to a reporter. There is no public benefit with that kind of exception. If they don't talk to reporters, they will be unable to have a voice in the press and the prosecutors will know less about them. If there is an absolute privilege statute, at least the prosecutors and the public benefit.

Mr. BASKIR: I would point out that this exception doesn't exclude from protection the identity of somebody who has committed a crime and tells you about it later. What it does is to cover what Senator Tunney was talking about: eyewitness personal observation of the commission of a crime.

Mr. BRANZBURG: If someone tells me they are involved in a large-scale drug dealings, I will try to verify what he is telling me and see the drugs and watch him deal. I think that is responsible journalism. To accept it on his say-so, without attempting to check his assertions, is, I think, irresponsible. I think that kind of exception encourages irresponsible journalism.

Mr. BASKIR: I think when you come to that, Senator Ervin's language does not excuse newsmen from identifying any persons who commit a crime in their presence. Quite clearly, in your case, you could not have seen the hash factory; you could only have interviewed the people outside the building.

Mr. BRANZBURG: I don't believe people unless I can check up on what they say. I try to check as much as I can and I certainly wouldn't have taken their word unless I witnessed it.

Mr. BASKIR: This is the exception in news reporting.

Mr. BRANZBURG: I am not really all that interested in the subject of drugs per se, but one of the reasons it fascinates me is because people who are involved in drugs are often able to give information about public officials who are taking graft, allowing drug traffic to go on. One of the ways reporters can find out about that is by talking to the dealers themselves, and there is no way to hang
around with them without watching what they are doing. Otherwise, you are never going to get the opportunity to write a story exposing public officials. It just so happens there is heroin traffic partly because the police departments have a large number of police who are taking graft from dope dealers, and the only way to get the information is to deal with junkies and heroin dealers.

Mr. BASKIR: Suppose you are accompanying a drug dealer around the city and you observe him negotiating with a police officer. You write a story. Even though you have that relationship with the dealer, you write that story. Under Senator Ervin's bill, you would have to identify the policeman in order to identify the goods.

Mr. BRANZBURG: I would have to identify him anyway. The way it works, policemen don't come to pick up the graft at a fixed time. They don't say, meet me at so and so corner. They say, I will be around. And then they show up at a certain location, usually at a place where drugs are being used or sold and just walk in unexpected at 3 o'clock in the morning. How is a reporter supposed to be sitting around there posing as a heroin addict without witnessing a crime? It is impossible.

Mr. BASKIR: You say you would identify those police officers?

Mr. BRANZBURG: Right. And I also said I would never reveal anything that I saw going on in a dope dealer's house in return for that opportunity to get that crooked police captain or sergeant. I would say that such an arrangement is an ethical one. In fact, police do it all the time. They make arrangements to look away from an informant's crimes so they can get other criminals.

[Asst. Counsel BRITT SNIDER:] The State legislature has obviously made a judgment that the criminal activity they are prohibiting is not in the interest of society. What would give the reporter the right to supersede that judgment and determine that it is more important that society be informed that a law is being broken than to reveal what he knows?

Mr. BRANZBURG: It seems to me that the first amendment was written because the Founding Fathers recognized that you could not have a democracy unless the people were informed. In this country, theoretically, the people are supposed to be the governors and the ones they elect are supposed to be the representatives and the people cannot govern unless they are informed. That is why the publication and gathering of news has to be given protection.

There is no way to get certain kinds of stories unless reporters have that kind of protection. It really frightens me an exception like that in Sam Ervin's bill would cut off reporters from certain kinds of sources. I think if Thomas Jefferson and George Washington were out there today cooking up a revolution, I couldn't talk with them under this bill.
Mr. BASKIR: You could talk with them but not witness their activity.

Mr. BRANZBURG: I recently wrote a story about the mayor of a town near Detroit. He had entered into a silent partnership with a group of businessmen. They bought a piece of land and the mayor of this town never revealed to his constituents he was in the silent partnership. He voted to rezone that property and without telling anyone he was involved in it. As a result of that rezoning, he and the other businessmen made a killing. Somebody had to give me a copy of that silent partnership. Silent partnerships aren't things you go to the county buildings and public files to get.

When he gave me that piece of paper, he committed a felony or a misdemeanor right on the spot. I can't identify the source. I witnessed a crime because his handing me a piece of paper was a crime. But . . . [t]he public learned of this mayor's activities and he admitted that he had been involved in a conflict of interest.

It also seems to me that it is bad to write legislation worrying about these little fine exceptions. There are always possibilities for abuse in any kind of statute. For example, if any of you gentlemen right now libeled somebody, say, libeled one of the editors of the Detroit Free Press, he could not sue any of you for libel because anything you say before this committee is immune from a libel suit. I think this is generally good that you have this privilege, but it can be abused, as Senator McCarthy did all the time. He libeled people and hid behind his immunity.

There might be times when a reporter will abuse an absolute privilege statute, but it nevertheless is a bill we need.

"You have convinced me," said the lighthearted junior Democrat on the subcommittee, Sen. John V. Tunney, after Branzburg had spoken. Indeed, Paul Branzburg's impromptu remarks on the fifth day of the hearings had been probably the clearest expression ever, anywhere, of the issues involved. It is too bad Sen. Ervin was away from the hearings chamber during his counsel's debate with Branzburg.

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50 Ibid., pp. 364-67.

51 Ibid., p. 363.
he read the transcript.

Other witnesses also advised the Senators to see the larger interest and not worry about "these little fine exceptions." Rep. Jerome R. Waldie, a proponent of absolute privilege, testified that "anything slightly less than absolute being left to the tender mercy of the judicial system would be totally less than absolute when they finally concluded their deliberations."\textsuperscript{52}

Reminded that Sen. Ervin and his counterpart in the House, Rep. Kastenmeier, doubted the possibility of passing such a bill, Waldie said:

\begin{quote}
I think it is impossible ... if you start out with the premise of both of those gentlemen. If you start out with the premise it is absolutely certain we will get an absolute privilege bill through Congress, the chances are good, and I would much prefer starting out with that premise and if I found that my judgment was in error in that instance ... I would then simply drop the matter. To start out with the assumption that Congress is timid may be warranted, but it seems to me to the extent that it is not warranted you reinforce that possibility.\textsuperscript{53}
\end{quote}

Charles S. Perlik Jr., representing the Newspaper Guild and its 40,000 news workers, urged passage of an absolute privilege. He announced that the guild had "negotiated guaranteed wage payments to employees jailed under these circumstances and employer-paid but employee-chosen legal counsel and will continue to do so, law or no law."\textsuperscript{54}

\textsuperscript{52} Ibid., p. 245.

\textsuperscript{53} Ibid., p. 255.

\textsuperscript{54} Ibid., p. 306.
continued:

If Congress cannot do it, then the trade union which represents people in this dilemma feels it must provide the protections a man's family is certainly going to need if he is going to face the pain of jail and long and indeterminate jail sentences while the legalisms, while the protections, are being resolved either before the judiciary or here in the legislative halls of Congress.

. . . We can document occasions when employers without knowledge, let alone consent, of their employees have turned over files, published and unpublished photos, verified and unverified information, names and sources, et cetera, to Government agencies. . . . We believe such end runs must be stopped . . . to prevent anyone other than the originating news gatherer from disclosing information, material, or sources which the originator could not be required to disclose unless this auxiliary party has the unrevoked consent of the originator to do so.

We don't expect a welcome to this proposal with open arms at bargaining tables across the land, but it is our members and their peers who are going to jail. I admit my admiration for publishers who have said recently the publisher should go to jail, too, though, to my knowledge only two have said that. However attractive the prospect might be to some to have bosses behind bars, instead of their employees, it hardly presents a solution to the problem.55

Rep. Ogden R. Reid, Marie Torre's former publisher, admitted he once favored a qualified-privilege statute for reporters but had changed his mind after courts "found ways to emasculate these laws and to strip away the protection."56 Reid urged protection not only for unpublished information but for testimonial privilege concerning published information as well. "Compelling journalists to testify as to what they have witnessed and written about inevitably leads to demands for notes, out-takes, and the like in order to test the

55Ibid., pp. 306-7.
56Ibid., p. 322.
accuracy of what was reported.\textsuperscript{57}

Other witnesses urged caution, at least, and some suggested outright dismissal of the press' claims. Robert G. Dixon, an assistant attorney general, said the Justice Department's subpoena guidelines were sufficient to protect "the legitimate interests of the press." Any press privilege could become a shibboleth, Dixon warned, frustrating the rights of defendants and obstructing proof of recklessness in libel suits.\textsuperscript{58}

James J. Kilpatrick, \textit{Washington Star} columnist, opposed a statutory privilege for its potential conflicts with defendants' rights but also for its unreliability:

\begin{quote}
We will find ourselves mousetrapped one of these days. We ought not to rely upon a statute, which may prove as ephemeral as the winds. We ought instead to rely upon the Constitution itself, which is a rock. . . . Since Caldwell, we fettered watchdogs have raised a fearful howl, and judges are not deaf. I believe that as time passes, the courts will acquire a much better understanding of the problem as we newsmen see it. You have been regaled, I know, or you will be, with accounts of judges who refuse to understand. The most spectacular of these accounts has to do with the case of William Farr. I venture this observation, that when my colleagues stand upon this case, they stand upon quicksand. From what I know of this case, Mr. Farr was not engaged in serious investigative journalism; he was engaged in sensationalism. If I may borrow from another field of first amendment law, his story was utterly without redeeming social importance. Mr. Farr is now in the untenable position of a man who first conspired in contempt and now condones perjury. His conduct, in the midst of the Manson trial, impresses me as a flagrant violation of ethical journalism. To defend that conduct in the name of "the people's right to know" is to make a mockery of that concept.
\end{quote}

\textsuperscript{57} Ibid., p. 325.

\textsuperscript{58} Ibid., pp. 330-31.
If we leave these decisions in the hands of the judiciary, we of the press will win some and lose some. We will lose some we ought to win, and we will win some we probably ought not to win, but we will be in a far healthier position than we should occupy if we put our first reliance in a statute, and not in the Constitution itself. 59

Sen. Alan Cranston, whose absolute-privilege bill 60 was introduced on behalf of the ANPA, doubted "that the best way to get the Government and the courts to back down is for more reporters to choose jail rather than violate a confidence":

Most newsmen would agree . . . that the sight of a newsmen being carted off to jail is more likely to shake up a news source than reassure him. And it's less than a sure bet that Government prosecutors are going to be deterred even by a succession of sacrificial lions behind bars. . . .

Most people won't read the law, of course. But they will read of reporters and their information caught in its web. When silence is so much safer, few potential informants will be willing to take their chances of emerging unscathed from the vague and uncertain legal maze created by a qualified protection. 61

Sen. Cranston also had answers for lawyer Dixon and for columnist Kilpatrick regarding their concerns for defendants' rights and the effective pursuit of redress for libel. On defendants' rights, he said:

I believe that the constitutional provisions for due process and a fair trial provide adequate protections in

59 Ibid., p. 81.

60 The bill Sen. Cranston introduced on behalf of the ANPA is not the S. 158 in the Senate hearings record. That is a rewritten version. For a view of the bill as introduced, see H.R. 2200 (reproduced in the Appendix as Exhibit A) in 1973 House Hearings, pp. 614-17. It is identical to the original Cranston bill.

61 1973 Senate Hearings, p. 47.
criminal cases. If it is found that a defendant in a case will be denied those constitutional rights under circumstances where to [uphold a confidence a reporter would] avoid revealing a source, a court would, I believe, decide in that case that the law to provide unqualified protection was unconstitutional, as applied to the set of facts in that particular case. In that event, if there was a new trial, the newsman would have to testify or go to jail.

On proving recklessness to recover damages for libeling a public figure, Cranston said:

I personally feel that one who enters public life should not have the protections of a libel law. I feel that those who wish to criticize you, whether in campaigns, your opponents or in the media, should have that freedom and they should be free to make whatever charges they choose to make and if they can't make them stick in the public arena of political debate, I think it will become apparent they were ill-founded.62

Appearing in support of the Cranston proposal was Stanford Smith, ANPA president. He explained that the ANPA had seized "the leadership role" in trying to create a united front for the press on the issue of newsmen's privilege:

The language of the Supreme Court decision played an important part in our deliberations. This enabled us to get past the argument that we should not seek legislation but instead rely on the courts or on the protection of public opinion. It is far too late for that. The language of the court also helped lead us to the conclusion that an unqualified privilege law is appropriate.63

Although the Ad Hoc Coordinating Committee convened at ANPA's request failed to discover "consensus among media executives on just what qualifications would be appropriate in a qualified bill," Smith said, as a group its members had drafted the absolute-privilege bill introduced by Sen. Cranston. "The

62Ibid., pp. 55-56.
63Ibid., p. 129.
ANPA specifically endorses and urges approval of that bill," Smith said. "When we ask for an absolute privilege," he added in a statement, "what we are truly seeking is a reaffirmation of the already established right of the American people to be informed, that right being embodied in the First Amendment."

In their testimony, spokesmen for other members of the Ad Hoc Coordinating Committee were not uniformly sure that the absolute-privilege approach was a necessary condition for the "reaffirmation" sought by ANPA. It will be instructive to examine their testimony one by one:

American Society of Newspaper Editors. Robert G. Fichenberg, chairman of the freedom of information committee, announced that the editors had reconsidered their position of the previous fall. "We now feel that anything less than an absolute immunity bill would be meaningless and ineffective," Fichenberg wrote in a statement submitted for the record. He said the ASNE also had resolved to "urge editors and publishers to support their reporters and take the brunt of the attack on themselves in every way possible as this fight for the public's constitutional rights is continued."

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64 Ibid., p. 134. Smith also said the ANPA had approved the endorsement at a board of directors' meeting Dec. 1, 1972, when it voted "to support Federal legislation which would afford unqualified privilege from subpoena of reporters and unpublished news media materials in both Federal and state proceedings" (ibid., p. 133).

65 Ibid., p. 135.

66 Ibid., p. 251.
Sigma Delta Chi. William C. Payette, president, told the Senate that his journalism organization had set its goal as "the enactment of absolute privilege laws in all 50 states and at the federal level." Meanwhile, the organization was working "for the strongest possible shield legislation in the 93d Congress." When pressed, Payette would not rule out support of a qualified-privilege law. "I couldn't give you a valid answer to that," he told Sen. Tunney, "without seeing how much is lost. Conceivably there could be a qualification which would not put a newsman at that much hazard."^8

National Association of Broadcasters. A statement submitted for the record noted that NAB represented 3,600 AM and FM radio stations, 530 television stations and all national radio and television networks. It announced support of the Cranston bill and said its earlier support of qualified-privilege legislation was wrong. "At first blush," said counsel John Summers, "it appeared to many in broadcasting that some kind of qualified statutory privilege would provide adequate protection to insure the free flow of information to the public." But any qualification, Summers continued, "would bear the seeds of . . . governmental interference or intimidation" as it was subjected to "varying interpretations" by authorities. Summers agreed with ANPA counsel Arthur Hanson that the proper legislative order should be absolute privilege.

67Ibid., p. 301.

68Ibid., p. 305.
first, qualifications if necessary to correct abuses, later:

The newsmen serving this nation's communications media must, at the very least, be accorded an initial absolute privilege if the public [interest in preserving the free flow of information] is to be so served. Should experience under such an absolute privilege result in serious abuses of that right, then Congress would be free to consider remedial legislation.69

National Broadcasting Company. Richard C. Wald, president of NBC News, told the subcommittee that "completely aside from any rights of an informant, the fundamental public right to the information should not have to rest on newsmen's individual choices to hold to principle and be punished as a result." Wald said NBC had concluded that "preference should be given" to absolute legislation for reporters' protection. Later he said it would be "preferable not to have any" qualifications; still later, he said absolute privilege is "almost mandatory." He continued in this exchange with Sen. Tunney:

[Mr. WALD:] I think that there may be in some way that I have not yet seen a qualification that would be acceptable to us. I haven't seen one yet. It is just you have to assume that maybe somebody has one.

Sen. TUNNEY: Are there any circumstances where your network would agree to the release of unpublished tapes where they had a direct bearing upon the solution of a serious crime or upon a serious threat to national security?

Mr. WALD: Yes; I think there are such circumstances where, if we were the only holders of such information and such information was required and there was a showing that it wasn't meant to harass or invade our files, or something like that, I think we would cooperate with an investigative agency.70

69Ibid., pp. 587-88.
70Ibid., pp. 295-98.
Columbia Broadcasting System. Frank Stanton, vice-chairman, said the network "believes that the free flow of information to the public will be best assured by an absolute privilege--such as is provided for in S. 158. . . . We know, that reasonable arguments can be made for a qualified privilege."71

Radio-Television News Directors Association. In testimony submitted for the record, Charles F. Harrison, president of the one thousand news directors, said they once thought "that a moderate approach would be sufficient. But thereafter the jailings of several newsmen made it clear that anything less than absolute legislation would not fully correct the situation." He continued:

While we wish to emphasize our support for an absolute testimonial privilege for these persons--such as that embodied in S. 158--we urge you to consider nothing less than a highly protective qualified privilege bill, one which places the burden of the proceedings and a heavy burden of proof on the person seeking to divest the privilege. At the very least, the testimonial privilege should apply in all circumstances except when there is a

71Ibid., pp. 169-72. American Broadcasting Company's role in the Congressional debate was muted. It supported the Joint Media Committee (favoring qualified privilege) in 1972 "in the belief that . . . would suffice." ABC News president Elmer W. Lower told the Senate, "we in the news profession do not fancy ourselves as a privileged class entitled to immunity as a matter of personal right" (ibid., p. 575). ABC's practice under Lower was "to evaluate each subpoena request on its merits. In certain circumstances, such as film of the attempted assassination of Governor Wallace, we turned over unpublished information with no hesitation. In that instance, the request was for specific probative evidence of a major crime unobtainable from non-press sources, and we were convinced we were not being used as a convenient substitute for the government's own investigation" (1973 House Hearings, p. 298).
"compelling and overriding national interest in the information" (to use the standard of the Joint Media Committee . . . ), or where there is "an imminent danger of foreign aggression, of espionage, or of threat to human life, which cannot be prevented without disclosure of information or the source of information."72

The Newspaper Guild. Charles S. Perlik, Jr., president, agreed "with Justice Douglas that there has to be either an absolute privilege or none at all."73

The Association of American Publishers. Edward M. Korry, president, said the group represented those "responsible for approximately 75 percent of the publication of books in this country." Korry continued:

It would be patently absurd to say you can have a law which affords protection to people and then leave naked those same people when they were using the same sources of information, dealing with the same kinds of information, but put their work into a book . . . .

In short . . . publishers believe that the First Amendment, in its absolute language, applies to the entire press--books very much included--under all circumstances and at all governmental levels--and that the liberties it guarantees cannot and must not be negotiated or divided.74

Reporters Committee for Freedom of the Press. Speaking for the "working press," Fred Graham of CBS said the basis of the committee's position in favor of an absolute privilege was "that all unpublished information, all information gathered by newspapers, if it was published, anyone in the world is free to see it and if it is unpublished it belongs to the press."

The committee's statement urged Congress to "tell all govern-

72 1973 Senate Hearings, p. 354.
73 Ibid., p. 309.
74 Ibid., pp. 161-67.
ments forcefully and clearly that the press is not a cooperative fourth branch of government." It continued:

What would happen if all newsmen had the privilege to refuse to disclose confidential sources and unpublished information? In those few states which have broad shield laws, there has been no reported adverse reaction either by law enforcement agencies or the courts. In fact, the federal government operated quite effectively until recently without forcing news reporters to disclose information.

In addition, the Bureau of Labor Statistics reports that there are currently about 350,000 attorneys in the nation, about 320,000 physicians and about 280,000 clergymen who, of course, have the privilege. Thus, about 900,000 citizens already have the privilege of confidentiality in almost every state and in federal proceedings. The Bureau estimates a total of 112,000 working news editors and reporters in the country—and one could hardly argue that the Republic is going to crumble if these 900,000 persons are raised to a million.

Furthermore, we note that nowhere in the Constitution is there a specific protection accorded to attorneys, physicians and clergymen. By contrast, the First Amendment specifically mentions the press.75

American Civil Liberties Union. Joel M. Gora spoke for the ACLU: "Everyone starts out with the understanding that the first amendment is there not for the benefit of journalists, not to protect them, but so that the public will be fully informed." If a qualified bill were drafted, "I think certainly there must be an exception for the criminal defendant in a felony case, when the reporter has highly exculpatory information." He continued:

I think that exception is necessary, because in that situation you have a clash between two sets of constitutional values, those protected by the first amendment and the defendant asserting his specific textual right in the sixth amendment for compulsory process to obtain witnesses.76

75 Ibid., pp. 71-78.
76 Ibid., pp. 111-13.
Later Gora cautioned: "I am not sure the evidence shows that [that] situation comes up often enough [that we should have] to allow written exception into the statute." According to Gora a qualified privilege could be acceptable to the ACLU:

If a bill provides that no subpoena may be issued except after a court order and hearings, given that procedure, protection would result even if you had relatively mild substantive provisions. I think a bill like that would be worthwhile. However, if the bill provides only moderate procedural protections and moderate substantive definitions, then I would rather take my chances with the courts. I think it depends on what kind of bill, what procedures, what substance.78

Caldwell's Lawyer. Anthony G. Amsterdam, Stanford Law School professor, said he was going to skirt "'free press' generalities" because legislation should deal with real problems. "The most important harm, surely, is the effect of compelling disclosure of newsmen's confidential sources." Governmental subpoenas also impair the independence of the press, cause divisive disagreements between reporters and editors, drain time and monetary resources away from newspapering and encourage self-censorship, he said. What, he asked, does a subpoena mean to an editor?:

What it means at the very least is loss of time, legal fees, possibly an internal fight within his own newspaper as to what position to take, and then perhaps a knock-down, drag-out court fight, which is not going to do him any good with some of his advertisers who believe the news media should not obstruct the Government. I think that kind of pressure, extraneous to the newsworthiness of items, operating 24 hours a day on the

77 Ibid., p. 121.
78 Ibid.
thousands of news desks around this country, has the potential to destroy the freedom of the press upon which we all depend.79

As for qualifications, Amsterdam said, the important distinction is whether the information comes from sources who would be affected by a compelled disclosure:

It seems to me that one might distinguish between what a reporter sees when he is out in a place where everybody can see, and what he sees where he has been admitted to some private place in a relationship of confidence. If a qualification is put on the bill which exempts from the scope of its protection eyeball testimony of a reporter, that will constitute, I think, a grave incursion in some instances where protection is needed. Under such a qualification, for example, Paul Branzburg would not have been protected because he saw opium being produced.80

Testifying on February 22, Amsterdam submitted a long paper for the record developing "the theory that a privilege alone will be pathetically inadequate protection for the news media." It was, as Sen. Ervin would say later, "a new, complicated, and untested legal innovation, which reduced its political acceptability in Congress."81 Without some way to screen "improvident subpoenas in the first place," Amsterdam said, harried judges would often make mistakes ruling against the claimed privilege and reporters still would end up in jail, at least until the appeals courts could act.

Because the Supreme Court in Branzburg had denied the First Amendment claim of privilege, Amsterdam said, Congress

79 Ibid., p. 177.
80 Ibid., p. 178.
81 Ervin, p. 263.
should simply forget about book publishers; they were not involved in "the free flow of information" anyway:

What you ought to focus on--this is the most important reason for giving the protection--is to protect the flow of information to the public and to the media. Is this person a participant in the regular flow of news? The limitation I would impose is whether the person is someone who disseminates news to the public on a periodic, regular basis.82

Amsterdam's legal paper also said:

... any degree of protection which is given newsman's sources will result in some net gain of information flowing to newsmen and thence to the public. Even a qualified protection will decrease the number of press subpoenas that are issued, and probably also the visibility of the press-subpoena threat to sources. This is the real lesson to be drawn from the history of the days before Branzburg.83

As for his new theory on the need for procedural safeguards, Amsterdam said, "I would go so far as to say that the establishment of such procedures is far more important than the question of the precise shape of a newsman's testimonial privilege."84

That was ANPA's Ad Hoc Coordinating Committee. Those Joint Media Committee members who had not joined with the ANPA since the 1972 hearings further confused the Senate subcommittee by showing up separately and demonstrating a concerted willingness to compromise. A prime example was John R. Finnegan, executive editor of the St. Paul Dispatch and spokesman for the Associated Press Managing Editors Associa-

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82[1973 Senate Hearings, pp. 181-84.]
83Ibid., p. 200.
84Ibid., p. 203.
tion. He urged the Senate to adopt "the strongest possible legislation which will guarantee the free flow of information to the public, unhampered by unbridled subpoena power."

As if built-in equivocations were not enough, Finnegan volunteered another:

"I do not believe as some newsmen do that only an absolute bill will suffice. It is ridiculous to hold that no law is better than a good qualified shield law. A tight, qualified law can eliminate most of the harassing, intimidation-type subpoenas that plague the press today."

Finnegan also revealed that the AP managing editors had drafted for Minnesota Sen. Walter Mondale what Mondale was calling "the Finnegan Bill." Mondale said of Finnegan, "the proposals that have come from him are slowly emerging as the consensus position here [in the Senate]," a consensus favoring "a very tightly drawn but qualified protection bill."

Another member of the Joint Media Committee to testify was Jack L. Bradley, president of the National Press Photographers Association. It was not very clear from his state-

85 Ibid., pp. 373-75.

86 Sen. Mondale's bill, S. 637, had been introduced at the end of January. Cosponsors included Sens. Burdick, Haskell, Humphrey, McGovern, Mansfield, Pell, Proxmire, and Williams. It would have provided protection in state and federal proceedings for unpublished sources and information developed by a broad range of media including book publishers. A separate state or federal court order would be required before a subpoena could be issued. The court could order the disclosure if a hearing clearly demonstrated that the reporter or publisher had information relevant to "a specific probable violation of law" over which the court had jurisdiction; that the information was unavailable elsewhere, and that the information would be necessary to prevent "imminent danger of foreign aggression, of espionage, or of threat to human life" (ibid., pp. 435-40).
ment that his association once supported qualified privilege:

Last September 21, at a House Subcommittee on the Judiciary hearing on proposed legislation to create a newsman's shield bill, Assistant Attorney General Roger C. Cramton said there was no need for "shield" legislation for professional journalists. Since that appearance, more than a dozen cases can be cited to show why we do need legislation to make it clear that the first amendment is an "absolute" and not a "qualified" guarantee that newsmen can protect the sources of the information they gather.

The National Press Photographers Association joins the members of the Joint Media Committee on Free Flow of Information in support of this absolute right as outlined in the first amendment. 87

According to Sen. Ervin, when the hearings adjourned on March 14, the only thing established was that "a persuasive case had been made that, indeed, newsmen did have a problem." The senator saw the legislative inaction that followed as a failure of the press to coalesce behind one approach. "It did seem clear," Sen. Ervin offered, "that unless the press groups themselves could achieve some unanimity on the issue, it was likely to fail without any effort from its opponents." 88

Of course, this was sophistry. The most formidable Senate opponent of absolute privilege for reporters was Sen. Ervin himself, and his stubborn refusal to yield on the Branzburg Exception. And he saw to it that the final draft of his own bill, S. 1128, 89 had support of important Senate leaders and liberals, among them Senate Democratic Leader

87 Ibid., p. 248.
88 Ervin, p. 270.
Mike Mansfield and Sens. Lee Metcalf, William Proxmire, and William Fulbright. The Ervin bill they supported generally would have protected all unpublished information a reporter might receive in confidence except the "identity of any person who commits a crime in his presence." Sen. Ervin and the majority he could command in the subcommittee believed that S. 1128 "met all of the important press interests and stood the best chance of surviving debate in the full committee and on the floor."\(^{90}\) On another occasion, Sen. Ervin said his bill "gives to the media precisely that protection to which they are entitled."\(^{91}\) The bill apparently was opposed even by the Joint Media Committee and never came to a subcommittee vote.\(^{92}\)

Believing as he did that the Branzburg Exception was not an "important press interest," Sen. Ervin looked elsewhere to place the blame for Senate inaction. He did not have to look far. The lack of unity among press groups was important, of course, but their sudden strategic disarray in mid-hearing probably was even more important. Sen. Ervin pointedly noted the most important cause of the disarray: Caldwell lawyer Anthony Amsterdam's insistence on a pre-subpoena screening process (a legally irrelevant issue), which

\(^{90}\)Ervin, p. 271.

\(^{91}\)Howard Fields, "Shield Bills Languish One Year After Court Ruling," Richmond (Va.) Times-Dispatch, July 15, 1973, p. 4.

\(^{92}\)Ervin, p. 271.
took important Senate privilege proponents on a wild ride. 

Sen. Cranston, for example, redrafted in mid-March the legislation he had introduced in January for the ANPA. In doing so, he instantly made politically irrelevant the February testimony of the ANPA and simultaneously left it supporting a bill without a Senate sponsor. 93

In his review of Congress' treatment of the issue, Sen. Ervin also cited the appearance of a few court rulings favorable to the press 94 and apparent restraint by prosecutors (no new jailings of reporters) as major factors easing pressure for Senate action. In addition, faced with Sen. Ervin's stern warnings that an absolute privilege never would get out of his subcommittee, newsmen began, he said coyly, "to reconsider the legislative alternative"—especially, we might add, as those alternatives were constrained by men like Sen. Ervin.

In the face of the embarrassing disaster of the Senate hearings, Sen. Cranston (among others) was willing to seize

93 Ibid., p. 263n.

94 Ibid., p. 272. Cited were Baker v. F & F Investment Co. (1972) and Cervantes v. Time, Inc. (1972). Ervin could have cited Bursey v. United States (1972), in which the Ninth Circuit Court of Appeals upheld two staff members of the Black Panther Party newspaper when they refused to answer some, but not all, of the questions of a grand jury. Earlier, they had lost an appeal (In re Grand Jury Witnesses, 322 F. Supp. 573 N.D. Calif. [1970], discussed in Supreme Court Reports, Book 408, pp. 703n-4n) of an order that they at least appear and face the questions (see discussion in Kaplan, pp. 756-58). Bursey seemed to place the burden of justifying the propriety of the questions on the government.
any excuse and, as luck would have it, a very appealing one appeared: Watergate. Writing for the New York Times on July 1, Martin Arnold quoted the California Democrat: "Watergate, I think, improved the general attitude toward the press, but, on the other hand, it was all done without a shield law, so why do we need one?" Sen. Cranston also said: "There are still Senators who don't want to pass laws protecting 'those guys.' Everybody in public office is always claiming he's misquoted, you know."95

Hearings in the House of Representatives progressed like those in the Senate, covering many of the same issues, witnesses and positions, but with historically much more significant results. What emerged in the House never has been given a proper name to match its historical importance; here it will be called the London Compromise. To understand its origins, let us return to February and March, 1973.

Unlike the Senate hearings, those in the House were graced by a spokesman representing the New York Times management: A. M. Rosenthal, managing editor. Rosenthal was reluctant to appear, calling himself a "professional non-advocate" and a believer that "people who gather or edit news should not take part in political action or become the champions of causes, publicly or privately."

However, Rosenthal said he was driven by fear that the First Amendment was being eroded; specifically, confidential sources, "absolutely vital to a free press," were being threatened. He continued:

There has been a lot of talk about confidentiality and a certain amount of doubletalk and playacting. For one thing, as we all know, all levels of government quite happily and regularly employ the technique of confidentiality to their own ends. Every day in the year
in Washington and every other major city in the country, appointed officials and elected political figures hold briefings at which they give out information or opinions but refuse to allow themselves to be identified. Sometimes the motivations are important; a government believes a piece of information should be known, but feels an official imprimatur would give it too much weight or distort its significance.

But much more often the press and officials do allow this sort of confidentiality to be used as a convenient way of masking the source, manipulating news or sending up trial balloons. On the New York Times we do not have a blanket rule against accepting this kind of information, but more and more we try to move away from it and ask for as close an identification as possible. The movement is away from pseudo-confidentiality, but it is still just a movement.1

But there exist vital confidential sources, Rosenthal added, "men and women, or even institutions, that have information they feel should be made public but are afraid to allow their names to be attached to it." Without them, he said, a free press would not be the same:

The most dramatic examples, of course, come from the area of investigative reporting, and I say flatly that without the guarantee of confidentiality, investigative reporting will disappear. The erosion of confidentiality will mean the end of the exposure of corruption insofar as the press is concerned.2

The political connection formed a big part of Rosenthal's argument, and he pursued it eloquently:

Very often confidential sources are among dissidents. Dissidents need not be demonstrators with placards. A lieutenant general can be a dissident or an executive vice-president of a steel company, or an official of a trade union. They think something they know should be known to the public, but they don't feel strong enough to put their name tag on it. The question is: Should this information be denied to the public? Need the price of disclosure be martyrdom? . . .

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2Ibid., pp. 239-40.
Sometimes the need for confidentiality is the result of different backgrounds and social attitudes. I dare say there is nobody in this room who is really afraid of dealing with authority, Government authority or police authority or business authority. We regard them as part of our own lives, in a sense arms of ourselves, our own servants.

But there are millions of people in this country who do not have that sense of confidence, who regard authority as menacing, who do not trust it. They will sometimes talk of even the most innocuous matters only if they are not-named. The question here is: Are they to be denied access to the public through the press, is access to the press to be permitted only to the confident and powerful?

The conditions for a free press are what are important, Rosenthal said, not the words we praise in the Constitution. "The very process of subpoenaing reporters, trying to get them to testify, attempting to use them as branches of government investigation," is endangering essential conditions, he said. There was but one best solution:

I am urging passage of legislation prohibiting the use of subpoena power in all matters relating to the free press provisions of the first amendment. I realize that absolutism is any kind goes against the grain of many people; as a matter of fact, generally speaking it goes against my own grain and my own position on this has evolved over the past couple of years, and the last year as a result of what I see as an increasing danger. But I think that to introduce qualifications would be to introduce the concept of varying degrees of information freedom depending on the kind of information, and I do not really think that was the intent of the first amendment.

After Rosenthal's speech, subcommittee chairman Robert W. Kastenmeier decided to get right to the point riding in the subcommittee's collective mind: could the Times' Mr. Rosenthal, "in the event that something emerges short of ab-

3Ibid., p. 240.
solute privilege," support it? His answer:

I have thought a lot about that one, too. I do believe that absolute legislation is terribly important. I am afraid of qualifications, however well intended, however well designed. One man's qualification is another man's restriction. I do fear the precedent of writing qualifications into the first amendment. I think that would be my answer.5

Other subcommittee questions revealed that subtle pressures were acting in the House committee. The pre-subpoena screening process brought up only a week or so earlier in the Senate is alluded to in this exchange between Rosenthal and Rep. Edward Mezvinsky:

[Mr. MEZVINSKY:] I think when you use the word "absolute" the position I would hope we would come to would be that we would simply reaffirm the first amendment. That may be a clarification. I am interested in your comments concerning being called into court and the subpoena issuances that are taking place.

Aren't you equally concerned that with any legislation you pass that you still may have to come into court and still may have to fight the battle?

Mr. ROSENTHAL: Well, sir, I believe that we may have to come to court, but I believe with a reaffirmation of the first amendment, as you put it, we would be on much stronger ground. I think that is why it is necessary.

I also think that if Congress spoke in "reaffirmation" of the first amendment--and I prefer that word, too--that it would deter a great many people who now feel they have a license to go after reporters and editors. . . .

[Mr. MEZVINSKY:] Would your position be that if we come out with qualifications that we are better off with no law at all, or would you then try to accept the position that comes out of the subcommittee?

Mr. ROSENTHAL: I would hope that the Congress would come out with a piece of legislation that would totally reaffirm the first amendment. If it did not, I think that I, as an individual--and speaking for the Times--would continue to urge total reaffirmation. . . .

. . . I think that if Congress comes out with no law at all, or a qualified law . . . this will be taken by prosecutors and other enforcement agents on all levels of

5Ibid.
government . . . as an indication that they have a right to go ahead and continue as they are. I think you will see more and more of this kind of action; more and more restrictions built into reporting of all kinds.6

Stanford Smith, ANPA president, was next. "We are here to support unqualified legislation," he told the subcommittee. "I might say that nothing in this world is absolutely 'absolute.'" He explained further that the ANPA supported H.R. 22007 introduced at its request by Rep. Charles Wilson. It differed only slightly from four other bills, the five together signed only by their sponsors. In contrast, the leading qualified bills (eight of them), introduced by Rep. Charles W. Whalen, Jr., together had a total of seventy-one Congressional cosponsors. The two most popular Whalen bills, cosigned by a total of forty-eight representatives, were nearly identical.8 They would apply only to proceedings in "Congress or any Federal court, grand jury, or administrative entity" and protect sources and unpublished information with exceptions. The exceptions were, "the source of any allegedly defamatory information" in libel cases where "the defendant . . . asserts a defense based on the source;" and information a court determined was necessary to investigate a "specific, probable violation of law" in which there was "a compelling and overriding national interest."

The ANPA's testimony was much the same as it was in the

6Ibid., pp. 249-51.
7Reproduced in the Appendix as Exhibit A.
Senate, except that, as lawyer Arthur Hanson explained, the absolute privilege desired by ANPA should be supplemented by "procedural safeguards." "This language," he said, "would then serve as a bar to the free issuance of subpoenas which I know Mr. Mezvinsky, for instance, fears if you merely use the generalized reaffirmation of the first amendment."9

To the Wilson bill (reproduced in the Appendix as Exhibit A), ANPA would have added this provision:

No subpoena or other legal process to compel the testimony of a newsman or a 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 in accord with the requirements of the issuance of subpoenas under the Federal Rules of Civil Procedure and after determination by the issuing authority that section 2 herein [the prohibition against forced disclosure] is not abrogated by the issuance of said subpoena.10

The purpose of the new language, said Hanson, would be to "put a requirement of a showing" to burden prosecutors sufficiently so that subpoenas in conflict with the privilege law would not be issued maliciously or mistakenly.

It had become usual for the subcommittee to test each press representative for equivocation; this time there was an unusual chewing out to which Smith and Hanson respectfully nodded:

Mr. MEZVINSKY: If you were sitting up here having to face a qualified bill in the form of the Whalen bill . . . and the choice would be the Whalen bill or no bill at all, is it my understanding that your position would be that it is better to wait and hope a later Congress maybe will re-

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9Ibid., p. 322.

10Ibid.
spond? . . .

[Mr. SMITH:] We feel so strongly that legislation substantially in the form of H.R. 2200 and the others is the proper legislation that I am extremely reluctant to choose between the Whalen bill or any other bill and no legislation at all.

I realize that is not a clear-cut response to your question, but it is about as far as I am able to go as a policy matter set by our board of directors. . . .

[Mr. HANSON:] We again want to emphasize that the language of that [H.R. 2200] embodies the ideas and concerns, but it could develop, after the hearings that you gentlemen have had and the testimony you have before you, it can probably be improved.

The subpoena problems that I mentioned a few minutes ago is one method . . .

Mr. MEZVINSKY: I personally appreciate that addition. I might say, and I think it follows, that I think a case has been given very strongly that we need to reaffirm the first amendment. I think we realize in testimony given by Mr. Rosenthal as well as the qualified argument you have given that the real loser with either position [no bill or a qualified bill] will be the public.

So I think you have a job as well as members of the committee to make certain that this view is brought out in the open in a much more striking fashion than it has been today, because I am concerned that a qualified bill could come out of the subcommittee.

Mr. SMITH: We have failed utterly to get that message over up until now.

Mr. MEZVINSKY: I keep hearing about the power of the press or the voice of the press, so maybe we can hear it between now and the time we go into the markup session.

Mr. SMITH: This has not been underscored and it is the first order of business in my opinion for all of us.11

Congressman Mezvinsky's appeal for a stronger press voice in support of an unqualified-privilege bill cannot have had the impact he wanted. The pressure for compromise seemed more intense in the lower house, ostensibly on the matter of making a rule of law that would apply to the states. The Republican minority had adopted the Nixon Administration position—that preemptive (federal-state) legislation was perhaps

11Ibid., pp. 324-25.
unconstitutional—though Constitutional-law wizards like Sen. Ervin had by that time abandoned that view.\(^\text{12}\) (Sen. Ervin's bill was federal-state.) While the minority view was untenable legal scholarship, it was politically effective. Ranking subcommittee Republican Thomas F. Railsback announced that he opposed any bill that would apply to the states, but would not try to defeat such a measure if he agreed with its other provisions.\(^\text{13}\) Behind him stood the likelihood of a Presidential veto of any bill that would preempt state law and a more nearly certain veto of any that would create sweeping immunity without exception.\(^\text{14}\)

The first day of the subcommittee deliberations set the stage for the birth of the London Compromise when Rep. Kastenmeier was greeted with virtual silence when he asked who agreed with the bills supported by ANPA.\(^\text{15}\) The Republican minority already had drafted and was seeking support for a compromise measure, the so-called Cohen bill. Designated H.R. 5928, the bill was introduced by Rep. William S. Cohen of Maine.\(^\text{16}\) It designed a two-tier framework of privilege, one absolute and one highly qualified. The general purpose was to


\(^{13}\)Ibid.

\(^{14}\)Ibid.

\(^{15}\)Ibid.

cut down on press vulnerability to investigative subpoenas—those tools of fishing expeditions conducted by grand juries, executive and legislative agencies. Retained were the government's power to use, when necessary, the press' unpublished information to convict at trials and the court's power to order production of press information for the defense at trial. To defeat the privilege in a civil or criminal trial, the court would have to agree 1) that the information was "indispensable to the establishment" of the offense charged or action pleaded, or the defense pleaded (as in a libel suit) and 2) that the information was unobtainable elsewhere and 3) that there was "compelling and overriding public interest" in the information. 

In short, the Cohen bill would cut down the use of the press for law enforcement by prohibiting the use of unpublished information for indictments. At the same time, the bill would affirm the propriety of using the press to obtain convictions and to help one side or another in civil disputes. Because the Cohen system would guard against grand jury "fishing expeditions" at the press' expense and protect informants up to the trial stage, it had received the important endorsement of Common Cause chairman John W. Gardner on April 16. 

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The complete story of how the Cohen bill came to be supported by a majority of influential press organizations may never be known. The extensive behind-the-scenes negotiations and deliberations of the giants in the press world were not followed in the press, although conditions governing the "people's right to know" were being defined by a small, self-appointed group of men and women. In particular, crucial meetings were ignored or obscured, and the most important of these took place outside the United States.

The countdown to the London Compromise can begin June 13, 1973, in Rep. Kastenmeier's subcommittee, which was tired of talking and decided to put competing privilege measures to a vote. The absolute bills were defeated on a four-to-four vote that specifically considered H.R. 2187, virtually identical to H.R. 2200 supported by the ANPA. The subcommittee then approved for full Judiciary Committee consideration the Cohen bill, by a vote of five to three; chairman Kastenmeier voted with the four Republicans. Later he was to say, "I start off accepting the situation that a purely absolute bill is not realizable at this time, so that a committee-designated bill is [meant] to move the issue off [dead] center and is not meant to be final." Rather than send it to the full Judiciary Committee, though, Rep. Kastenmeier decided to first solicit comments from the press.

20 Arnold, p. 22.
The ANPA announced almost immediately its strong opposition to the Cohen bill and wrote to the House that it preferred no legislation rather than the enactment being considered. Specifically, according to a legal analysis it prepared, the ANPA objected to the bill's definition of "newsman," which appeared to exclude publishers and other executives from protection. "This is among the [bill's] most serious defects," it said.

The House's entire approach to the problem was defective, the ANPA said:

This version of H.R. 5928 still suffers from the same fatal defect as earlier versions in that separate standards for different types of proceedings will negate the effectiveness of any bill designed to protect the free flow of information. While Section 3 provides an absolute privilege for any federal or state proceedings, including a grand jury (except civil or criminal actions in a federal or state court), the benefits of this section would be greatly emasculated by Section 4. Section 4 sets forth a qualified privilege where there would be a number of circumstances under which a newsman could be required to reveal the identity of a confidential source or confidential information received from that source. As long as this qualification to the privilege exists, a source of information can never be totally confident that his identity will not be disclosed. A prospective source of information could not predict the likelihood of a newsman being able to successfully assert a privilege against disclosing the source's name. How can a source predict whether information which he provides to a newsman could be the subject of a Congressional hearing, criminal trial or civil trial? The Watergate case would be an example of this situation. How can a source predict whether the information which he provides or the disclosure of his identity could be obtained by alternative means or would be indispensable to one of the parties in litigation?


Even more so, how can one expect a source to determine whether a judge will determine disclosure of his identity to be required on the grounds of a "compelling and overriding public interest"? As long as a potential source of information knows that there are circumstances under which his identity may be disclosed, then the absolute privilege in Section 3 has no meaningful effect because the source will be deterred from providing information. There are just too many variables...23

The Cohen bill's exception for libel cases, denying the privilege "with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source," also appeared dangerous to the ANPA. It commented:

Aside from the fact that...[it] imposes an additional qualification to the privilege which would deter a potential source of information from communicating...[it] appears to open all newsmen to potential subpoena in libel cases in which they or their publications were not the defendants.24

Here the ANPA was concerned about any case like Marie Torre's, whose newspaper was made vulnerable to subpoena for unpublished information though it was not a party to the libel suit. The ANPA also was concerned with libel suits in general. During the Congressional hearings, news media lawyers had made a good case that "an exception to the privilege could not be a meaningful enough aid to plaintiffs in libel cases so as to justify its likely detrimental effects on the

23Ibid., pp. 1-2.
24Ibid., p. 2.
flow of news." The core of their argument was in two parts. In most cases, the defendant publisher has the burden of proving truth in the offending statement. If the confidential source is needed to prove the truthfulness of the defamation, the defendant publisher can either bring forth the source or remain silent and risk loss of the case by failure to establish a proper defense. Thus, the common man's redress for libel remained sound. In cases of alleged libel of a public figure, to collect damages the defamed must show that the publisher in fact had serious doubts about the truth of the statements published, aside from his knowledge of the source's reliability. Thus, the media arguments ran, neither the identity of the source nor his testimony could serve to prove that the publisher's mind had been afflicted with doubt. The conclusion of the argument had been phrased as follows:

In view of the high improbability that an exception to the privilege would be of legitimate usefulness to libel plaintiffs, the opportunities which such an exception would provide for displeased public figures to harass the news media, and to smoke out their confidential sources for non-judicial purposes, should be foreclosed. Moreover, the mere existence of such an exception would often create grave doubt in the minds of potential sources of information about whether their identities could be kept secret.


26Ibid., p. 576. In Gertz v. Welch, Inc. (1974) and later revised, the Supreme Court said "a plaintiff who is not a public officer or a public figure may recover damages in an action for libel by proof of negligence in the publish-
So complete was the ANPA's objection to the Cohen bill that it urged Rep. Kastenmeier and the subcommittee to "re­scind its approval . . . and retain jurisdiction of the issue . . . for further study." Stanford Smith also rather child­ishly reminded the subcommittee that ANPA represented "the owners of more than 1,000 daily newspapers having more than . . . even though the libel occurred in the reporting of an event of public or general concern" ("Mass Supreme Court Adopts Gertz Negligence Rule but Bans Punitive Damage Claim for Published Libel," Press Censorship Newsletter, no. VIII [October-November 1975], p. 106). It has been pointed out that, in setting standards that must be met by the plaintiff in libel cases, ostensibly to allow for publi­cation of defamatory falsehoods through honest error, the courts have opened up new territory:

". . . the level of care exercised by a newspaper, mag­azine, or television station in preparing, writing, and presenting a story is the critical factor in determining whether it can be held liable for defamatory statements it publishes. Once that is recognized, the conflict is ob­vious: On the one side, reporters and editors want to pro­tect confidential sources, to withhold notes and methods of operation, and to maintain the privacy of the editorial pro­cess; on the other, judges perceive a need to examine the editorial process to determine the level of care used in working on a particular story. How else can judges deter­mine whether the Times-Sullivan standard of constitutional malice or the Gertz standard of negligence has been satis­fied? For these standards, the judges point out, have nothing to do with the intent of editors, reporters, or publishers; they have everything to do with the state of the journalists' knowledge about the truth or falsity of the statement written about a particular plaintiff. Thus, the argument continues, judges must examine in depth the editorial processes of newspapers in order to assess their potential liability" (Simons and Califano, p. 18). The situation seems to invite conflict, but only when the pub­lication cannot defend on the basis of truth without revealing the source. Courts could adopt rules so that source protec­tion presents no unfair advantage to either side.
90% of total ... circulation,"27 so its opinion should count.

Rep. Kastenmeier was not discouraged; he asked the ANPA to reconvene the Ad Hoc Coordinating Committee to reveal the "contemporary consensus."28 Apparently, he knew something Stanford Smith did not, and it became obvious on July 6 when the media committee met in private at Washington's International Club. Ad Hoc Committee chairman Arthur B. Hanson posed the question immediately: "whether the organization would prefer no bill rather than the Cohen bill and also whether the organization had any suggestions" for improving the Cohen bill.29

Surprisingly, Hanson found himself almost outvoted. Of the original Ad Hoc Committee members, Sigma Delta Chi, NBC and the ACLU were not represented in the informal tally. Voting for the Cohen bill were representatives of the National Association of Broadcasters, CBS, the Radio-Television News Directors Association and the Association of American Publishers. No votes also numbered four: ANPA, ASNE, the Newspaper Guild, and the Reporters Committee. Given their equivocal stands during the congressional hearings, it would


be likely that NBC and the ACLU would side with the yes votes.

Jack Landau, of the Reporters Committee, questioned "whether as a matter of tactics it would be damaging to start making concessions at this point . . . in the legislative process."

The CBS network had joined the Ad Hoc Coordinating Committee, but apparently William Small had been busy behind the scenes for the Joint Media Committee, which, for the second time in six months, had reversed course and decided to favor a qualified bill. According to Hanson, the Joint Media Committee representative (presumably Small) "has indicated to Congressman Kastenmeier that they could give only minimal support to the Cohen bill in its present form but that they could enthusiastically support the bill" with certain changes.

The committee wanted photographs and film specifically mentioned as being in the class of protected information; it suggested the bill's title be changed to "Free Flow of Information Act" (from "Newsmen's Privilege Act"); it wanted assurance that the qualifications in the bill would not apply to pre-trial proceedings; it suggested deletion of the exception for libel cases, and it insisted that reporters be exempt from testimony even if the source revealed his own identity. Hanson wrote of the meeting: "It was determined that each of the organizations would make their views on the Cohen bill known to Congressman Kastenmeier as soon as possible."

Rep. Kastenmeier was delighted. As Congress returned
from its summer recess, he was reported as "buoyed by support from the news media" and happy with "indications the media have shifted from general opposition to the bill to a willingness to support it."30

A few weeks later, Rep. Kastenmeier wrote Arthur Hanson that the subcommittee had agreed to five changes in the bill to meet press objections: a change in title; including publishers in the definition of "newsman;" guaranteeing reporters' immunity at pre-trial proceedings; requiring testimony in defamation cases only when the newsman himself is named as defendant; and deleting any explicit waiver-by-source provision. Only the libel provision was anything more than cosmetic change, and even it was only half of the ANPA concern with libel.

Rep. Kastenmeier added in his letter that some members of the subcommittee opposed any bill and others still favored only absolute legislation. "It is important," he told Hanson, "that there be substantial support from the media itself if this legislation is to move successfully through both Houses of Congress and be signed by the President."31 He asked the ANPA to reconsider its opposition in view of the changes.

That was September 19. Less than a week earlier, the New York Times had reported that "there is a growing feeling

30 "News Shield Bill Given Momentum," Atlanta (Ga.) Journal, Sept. 6, 1973, p. 17-B.

in the news-gathering industry that a Federal 'shield law' is all but dead in Congress":

If this is so, it was not the Nixon Administration's opposition that has killed the possibility of a newsmen's privilege law, but rather the press itself. The industry is schizophrenic on the issue, and to get an acceptable bill it has to be totally united, the people involved in the Congressional fight for the bill agree.

The Times story also reported that the Joint Media Committee membership then included Sigma Delta Chi, the Radio-Television News Directors, the AP Managing Editors, the National Press Association [sic], and the ASNE. Media committee chairman William Small reportedly was urging widespread industry support for the Cohen bill as "an extremely strong bill and, realistically, as far as we can expect the House of Representatives to go." He added: "It has become fashionable for some in our profession to say that no bill is needed, that failing an absolute bill we ought simply to fall back on the First Amendment." Small said those who make such a claim are "fooling themselves," and noted that the Supreme Court already had ruled that the First Amendment does not give reporters any testimonial privileges. 32

Between September 19 and October 3, a complete reversal of position occurred in the ANPA, reportedly because of what the ANPA later described as the "substantial modifications"

Rep. Kastenmeier had proposed for the Cohen bill. Reports are sketchy, but the decision-making began with the ANPA Committee on Government Relations (voting two to one) and its support of "a modified version of the bill if specific amendments" were made as promised by Rep. Kastenmeier and if "a consensus could be reached of media organizations with which the ANPA had coordinated." Then came the London Compromise:

At a duly constituted Board meeting held in London, England, the first week of October [October 3], the ANPA Board had gone on record unanimously among those members present as favoring the position of the ANPA Government Relations Committee.

Found only in Editor & Publisher on October 6, 1973, here is the entire United States news coverage of that meeting:

The board of directors of the American Newspaper Publishers Association began a four-day meeting in London, England, on Oct. 1 to discuss issues affecting the organization's member daily newspapers in the United States and Canada.


34 Ibid., pp. 247-48.

35 Letter from Arthur B. Hanson to members and interested persons connected with the Ad Hoc Coordinating Committee, Oct. 19, 1973 (copy furnished by ANPA).

36 Editor & Publisher, Oct. 6, 1973, p. 9. All information supplied by ANPA on the London meeting follows:

"The Board of Directors of the American Newspaper Publishers Association met at the Savoy Hotel, London, England at 9:30 a.m. Monday and Tuesday October 1 and 2, and at 9:00 a.m. Wednesday, October 3. There were present Chairman David Taylor, Vice-Chairman Harold W. Andersen, Treasurer Len H. Small and Directors Richard H. Blackledge, Lyell B. Clay, John M. Jones, Allen H. Neuharth, Dolph C. Simons, Jr., Joe D. Smith, Jr., and Richard C. Steele."
The day after the London Compromise, October 4, 1973, was a big day for big-name newspaper people and publishers in the United States. Vice President Spiro T. Agnew was under investigation for corruption and his lawyers wanted to prove a new kind of pre-trial prejudicial publicity in his case--publicity so intense that the grand jury deliberations then under way to secure an indictment against him were being prejudiced unconstitutionally. Federal Judge Walter E. Hoffman in Baltimore was sufficiently impressed by the argument to grant unprecedented authority for Agnew's lawyers to conduct their own investigation into alleged leaks by the Justice Department. The judge authorized subpoenas to news­men, who were to be questioned in secret under oath about the sources of published information. The journalists were to bring with them "all writings and other forms of record (including drafts) reflecting or related to direct or indirect communications" with employees of the government whose

Also present by invitation were former Directors J. Howard Wood and Charles H. Peters." According to Who's Who in America, 37th ed., Neuharth was a national regional director of Sigma Delta Chi and president of Gannett Co., Inc.; Simons was publisher of the Lawrence (Ks.) Journal-World; Steele was publisher of the Worcester (Mass.) Telegram-Gazette; Andersen was publisher of the Omaha World-Herald; Taylor was publisher of the Boston Globe; Blacklidge was publisher of the Kokomo (Ind.) Tribune; Wood formerly was board chairman and publisher of the Chicago Tribune and Peters was president of the Gazette Printing Co., Ltd., Montreal.

work related to the Agnew investigation; in other words, their notes.

The subpoenas were served on reporters of the New York Times, the New York Daily News, the Washington Post, Newsweek, Time, the Washington Star-News, and CBS. Agnew's resignation October 11 ended the legal force of the subpoenas, but the New York Times indulged itself in a fantasy of what might have been had the controversy continued:

Arthur Ochs Sulzberger, publisher of The Times and Katharine Graham, publisher of The Post, had been prepared to go to jail. So had been A. M. Rosenthal, managing editor of The Times; Benjamin C. Bradlee, executive editor of The Post; and Osborn Elliott, editor of Newsweek, which is owned by the Washington Post Company.

The Times story continued:

The publishers and the reporters involved had decided that they would stand on the journalistic principle of refusing to disclose their sources, and Mr. Sulzberger and Mrs. Graham were prepared to go to jail with the reporters involved rather than disclose the sources and give up the reporters' notes and records. . . .

The case involving Mr. Agnew and the reporters was different [from the Caldwell case], and part of the news organizations' strategy was to force the issue once again to the Supreme Court in the hope of at least further narrowing the Caldwell ruling.

One difference was that the Agnew case was a pure case of newsmen's sources. There was no contention that the journalists involved might have witnessed the commission of a crime. . . .

The strategy of Mr. Sulzberger and Mrs. Graham was that, as chief executives of their corporations, they would say that the corporations, not the individual reporters, owned the information, and that they were, there-

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40 Ibid.
fore, ordering the reporters not to turn it over to Mr. Agnew's lawyers or to the courts. They would, in essence, intervene between the court and their employees.

Among other things, it was hoped that the sheer drama of the publishers of two of the most influential news-gathering organizations possibly going to jail would have some subtle effect on the Supreme Court's deliberations, and at the same time perhaps force Congress and the public to consider more seriously any attacks on the First Amendment. 41

Between the London Compromise and October 19 (the exact date is not clear), the ANPA’s Arthur Hanson reconvened the Ad Hoc Coordinating Committee as the ANPA board of directors had expected. The purpose was to see whether "any sort of consensus could be developed amongst the media to support the 'Cohen Bill' as amended." 42 Hanson was careful to note in his memorandum on the meeting that the decision was not all that important, for "irrespective of what bill might or might not be passed by the House of Representatives, there still had to be a bill passed by the Senate and a conference held on the results of the work of the two legislative bodies."

Hanson informed the media representatives of the ANPA decision in London, then took a poll of the group, which included lawyers from the New York Times, Newsweek, NBC, CBS, ASNE, Association of American Publishers, National Newspaper Association, The Newspaper Guild, the Reporters Committee, the Joint Media Committee, and the Scripps-Howard chain. According to Hanson, the poll found

strong support for the position now being espoused by the

41 Ibid.
42 Letter from Arthur Hanson to Ad Hoc Committee.
ANPA on the House bill amongst all the electronic media represented as well as by the Joint Media Committee, Scripps-Howard and the National Association of Broadcasters. The Reporters Committee took the position that it would not oppose the "Cohen Bill" as to be amended.

The ASNE Board is meeting to consider these developments on October 26. The American Association of Publishers (book publishers) is having ... meetings ... to consider these matters but they are favorably impressed by developments. The National Newspaper Association still favors an absolute bill or not at all but will not actively oppose the "Cohen Bill" as amended. The New York Times maintains a similar position although not disfavoring a qualified bill. Newsweek was not prepared to state a position ... The Newspaper Guild would prefer an absolute bill but will undertake a re-examination of that position.43

According to Hanson, the group agreed to ask the Kastenmeier subcommittee to draft a bill in final form for consideration by the Ad Hoc Coordinating Committee.

The ANPA board met again in December to ratify the course of events it had set in motion in London and to review in detail the latest versions of the amendments proposed for the Cohen bill. It drafted a few additional changes, but nothing substantial. The ANPA board, announcing agreement to support Rep. Cohen's two-tiered, qualified privilege, said that

any qualification will inevitably result in deterring potential sources of information from communicating with newsmen. Nevertheless, we believe that this hindrance to the free flow of information will be outweighed by the overall benefits of H.R. 5928.44

As for agreeing with court powers to subpoena the source in

43 Ibid.

a libel case, the ANPA offered a similar explanation:

Our view [is] that any qualification will deter potential sources of information from communicating with the news media. Nevertheless, we believe that the overall advantages of the bill will outweigh the adverse effect of the defamation qualification.\(^\text{45}\)

With the new year, the New York Times announced results of the behind-the-scenes maneuvering since its mid-September report that a shield law was "all but dead."

Months of discussions, "conducted informally through meetings, letters and telephone calls" had borne fruit. "A majority of news media organizations and a House Judiciary subcommittee have reached general agreement on a bill to protect newsmen against forced disclosure of confidential information," it said. The January 4 report went on to describe the Cohen bill as amended, noting that the new version "provides slightly more protection than the one approved . . . last summer . . . but still falls short of the absolute protection against disclosure originally sought."\(^\text{46}\) If the deal was only "slightly" better, why the sudden switch? The Times had an answer:

A key factor in the media's decision to support the new version was a Federal court ruling last September that permitted lawyers for former Vice President Spiro T. Agnew to subpoena newsmen . . . the incident sharpened the media's realization that some protection might be better than none. The Ag-

\(^{45}\text{Ibid.}\)

\(^{46}\text{"News Shield Bill Spurred in House," New York Times, Jan. 4, 1974, p. 41. A story on the same page reiterated the results of a November 1973 Gallup poll reporting that a total of 62 percent of 1,585 persons interviewed said newspaper reporters should not be required to reveal confidential sources in court about information published, up from 57 percent the year before.}\)
new subpoenas could not have been issued under the proposed bill.\textsuperscript{47}

It sounds reasonable, but the \textit{Times} had the month wrong. The Agnew subpoenas were in October, too late for them to have influenced the crucial decision. The London Compromise beat the wave of subpoenas by at least one day, probably more.\textsuperscript{48} For the other members of the Ad Hoc Coordinating Committee, obviously, the Agnew incident could have been influential. But it seems unlikely that the subpoenas, which were issued, celebrated and killed in exactly one week, had more to do with the media majority's decision than the London Compromise. And the \textit{Times} failed to penetrate the important mystery: what really changed the publishers' minds?

Perhaps they were afraid of any more close calls. The closest in history had occurred about the time the original Cohen bill was drafted, in March 1973. Federal District Judge Charles R. Richey, presiding over civil suits between the Democrats and the Republicans concerning the Watergate break-in,\textsuperscript{49} quashed ten subpoenas for notes and testimony\textsuperscript{50}

\begin{footnotes}
\item[47] Ibid.
\item[50] According to the court, the ten subpoenas "summoned members of the press to appear for depositions and bring with them all documents, papers, letters, photographs, audio and video tapes relating in any way to the
pending against newsmen and news organizations, among them Carl Bernstein, Robert Woodward and others working for or managing the Washington Post, the New York Times, Washington Star-News and Time magazine. The subpoenas were authorized at the request of the Committee for the Re-election of the President (CRP) and others in the President's camp who were being sued by the Democrats. According to United Press International, the subpoenas were "widely considered to be an effort to learn the sources of leaks about the White House cover-up [of the break-in] so they could be stopped."

Judge Richey's opinion on the order to quash the subpoenas was a significant but unique ruling granting a qualified privilege under the First Amendment based on a weighing of merits between the public harm that might be done by the disclosures and the benefit to the private civil defendants. The opinion was an illustration in microcosm of the status of newsmen's privilege in 1973:

The Court is well aware that other courts in "civil" and "criminal" cases, and the Supreme Court of the Unit-
ed States in a landmark case involving a newsman's testimony before a grand jury, have been reluctant in the absence of a statute to recognize even a qualified newsman's privilege from disclosure of confidential news sources. In view of the decisions and circumstances present in the above-cited cases, it is instructive to note what is not present in the instant cases. These cases are not "criminal" cases, and even though they are primarily actions for money damages, their importance transcends anything yet encountered in the annals of American judicial history. Moreover, Movants [the subpoenaed newsmen] are not parties to the actions, but have merely been called to testify and produce documents at deposition. The parties on whose behalf the subpoenas were issued [CRP] have not demonstrated that the testimony and materials sought go to the "heart of [their] claim," as was found to be true in the case of Garland v. Torre. What is ultimately involved in these cases between the major political parties is the very integrity of the judicial and executive branches of our government and our political processes, for without information concerning the workings of the government, the public's confidence in that integrity will inevitably suffer. This is especially true where, as here, strong allegations have been made of corruption within the highest circles of government, and in a campaign for the Presidency itself. This Court cannot blind itself to the possible "chilling effect" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public. This Court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government, no amount of legal theorizing could allay the public suspicions engendered by its actions and by the matters alleged in these lawsuits. . . .

. . . The Court in no way wishes to imply that today's ruling constitutes the implicit recognition of an absolute privilege for newsmen. Such would clearly be improper under the Branzburg decision. It may be that at some future date, the parties will be able to demonstrate to the Court that they are unable to obtain the same information from sources other than Movants, and that they have a compelling and overriding interest in the information thus sought. Until that time, however, the Court will not require Movants to testify . . . or to make any of the requested materials available.52

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9See, e.g., Garland v. Torre, 259 F. 2d 545 (C.A. 2), cert denied, 358 U.S. 910 (1958); Murphy v. Colorado, (Colo. Sup. Ct., unreported opinion), cert, denied, 365

521973 Senate Hearings, pp. 539-40.
Of equal importance is the necessity of a well-informed public which is fully able to participate in the political process. This has long been recognized by the Supreme Court to be a basic concern underlying the First Amendment's protection of freedom of the press. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Grosjean v. American Press Co., 297 U.S. 233 (1936).

Judge Richey's decision to strike a balance in the press' favor was, nevertheless, a close call for the biggest of the big-name publishing concerns. His expressed willingness to reconsider the balance in different circumstances must have sent a chill into the press' collective heart. The decision of the publishers to embrace a statute less than "reaffirmative" of the First Amendment, one guaranteeing confidentiality at least in pre-trial proceedings, is understandable under the circumstances, perhaps even patriotic in the atmosphere of the Watergate crisis. The next question, why publishers were less than forthright about their reasons for compromising, seems less important than the reasons themselves, and will be abandoned here.
CHAPTER IX

IN CONGRESS: IMPASSE

Apparently, the ASNE board and the American Association of Publishers decided against lending their support to the Cohen bill then pending in the House Judiciary Committee of the Ninety-third Congress.

Just before the New York Times announced in early 1974 that "a majority of news media organizations" supported the bill for qualified newsmen's privilege, another report listed the supporters as CBS, NBC, the National Association of Broadcasters, the Associated Press Managing Editors, Sigma Delta Chi, the ANPA, Scripps-Howard chain, the Radio-Television News Directors Association and the National Press Photographers Association—essentially the original Joint Media Committee with ASNE swapping positions with ANPA.

The first round of debate on March 26, 1974, revealed strong opposition to the Cohen bill in the Judiciary Committee. Liberal representatives opposed it for what it failed to protect, and conservatives opposed it for what it would

protect. Rep. Kastenmeier became pessimistic. Soon, the hearings on the articles of impeachment against Richard Nixon would bury the issue for the remainder of the Ninety-third Congress.

The Ninety-fourth Congress in 1975 saw the immediate introduction of three new privilege bills in the House; two others came later. The Senate had given up. The leading House measure was H.R. 215, very similar to the old Cohen bill and sponsored by Democrat Kastenmeier and Republicans Railback and Cohen. It is reproduced in the Appendix as Exhibit B.

On short notice, Rep. Kastenmeier decided to hold hearings on his bill and, as we learned in Chapter 1, to "observe where we are on this issue at this particular time in history."

The leadoff witness on April 23, 1973, for the new Ford Administration was Antonin Scalia, an assistant Attorney General, who opposed the Kastenmeier bill because it would hinder

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5 1975 House Hearings, p. 6.
law enforcement and, he said, stimulate disrespect for the law. The latter point was a new one in the Congressional debate. Here is how Scalia explained it:

If . . . the present bill is passed, it would be entirely possible for you to watch on your television screens in the near future a face-to-face interview with Patricia Hearst and other alleged members of the SLA now fugitives from justice and under indictment in connection with several crimes. Law enforcement officers would in no way be able to learn from the newsman the location at which the interview was taped, nor would they be able to obtain a copy of the tape itself for the purpose of identifying the location from intrinsic evidence, or even for the purpose of circulating the most recent photograph of the fugitives.

In my view, even the possibility of such a situation . . . would make a mockery of the criminal justice process. It would be bad not merely because it would prevent the apprehension of the fugitives in question, but more importantly, because it would demonstrate in stark fashion our lack of earnestness in the matter of law enforcement. The public would in effect be told: Establishing the conditions which make such a program possible is more important than the relatively inconsequential interest of capturing individuals who may have violated our laws and who may injure our citizens again in the future.

The Government cannot display an attitude of this sort towards the enforcement of its laws without soon causing all of its citizens to take those laws and their enforcement less seriously. The freedom of the press is important, but it must be protected in a way that does not bring the law enforcement process into contempt.6

Interestingly, Scalia opposed the new Kastenmeier bill for two of the same reasons the ANPA originally opposed the Cohen bill—for its creation of a two-tiered system of privilege and for its casting of a substantial doubt on the certainty of the immunity and making the public benefit of it practically worthless.7

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7Ibid., pp. 7-8.
Because the Kastenmeier bill would extend the privilege to anyone engaged in public communications, it was at once dangerously discriminating and impractically inclusive, Scalia told the subcommittee. He said "freedom of the press" in the Constitution does not use the term "press" in the institutional sense. It does not mean freedom for newspapers and publishing houses, but rather freedom to publish. . . . But in thus extending the sweep of this legislation to all of those whom the first amendment is designed to protect, the impracticality of what is sought to be achieved becomes all the more strikingly apparent.  

He also revived some old objections, namely that criminal types would set up newspapers to hide behind the immunity; that the privilege would frustrate Sixth Amendment compulsory process and lead to mandatory dismissal of prosecutions; that it would hinder redress for libel; and that, while not unconstitutional, the federal-state application of the bill was inconsistent with "the spirit of federalism." The best protection for the free press consistent with the government's righteous claims, Scalia said, is "constant advertence to the particular sensitivity of this area by law enforcement agencies themselves. At the Federal level, this has been assured by Justice Department guidelines."

The next witnesses were Jack Nelson and Fred Graham of the Reporters Committee, which by then had abandoned its 1973

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8Ibid., p. 8.
9Ibid., pp. 6-12.
10Ibid., p. 12.
pledge to the ANPA to stand aside if the publishers wanted to compromise in Congress. Urging passage of an absolute and preemptive privilege statute, the reporters stood by their previous arguments:

Courts have tended to stretch qualifications that have been written into State shield laws, and we fear that a qualified Federal law would weaken the rights of journalists to protect their sources, and could encourage prosecutors and others to subpoena reporters.

We believe that the First Amendment protects journalists from being compelled to testify under circumstances that impair their capacity to collect and publish news. Despite the Supreme Court's adverse decision in Branzburg v. Hayes, lower courts have quashed subpoenas against journalists in a number of cases since Branzburg. Also, journalists have generally demonstrated a determination to resist compelled testimony that seems to have discouraged some efforts to subpoena reporters.

In short, the Branzburg case has not proved to be the disaster that some feared it would be, and we fear that reporters might be inviting a worse result if they supported a qualified shield bill simply to get a law on the books.\textsuperscript{11}

Subpoenas nevertheless are a problem, they added, "unpleasant, distracting and expensive." Small publications, underground and student newspapers especially are burdened even by the threat, they said. A good solution would be "an unqualified, airtight shield law that would preclude subpoenaing in the first place."

Under questioning, the reporters said they would support the Kastenmeier bill without its qualifications and even would support limiting the privilege to information "received or obtained . . . in express or implied confidence," as the bill required. Fred Graham remarked, "I do

\textsuperscript{11}\textsuperscript{11}Ibid., pp. 94-95.
not believe that most journalists would say that they think a privilege should extend beyond information that is obtained, either expressed or implied, under a situation of confidentiality.¹²

Wouldn't any bill be as likely (or unlikely) to be amended by future Congresses, they were asked. Jack Nelson answered:

I think you make a good point, and that is one reason a number of reporters have hesitated to support any bill, and quite a few reporters and news organizations feel there should be no bill. But I think, after careful study of the situation, that the Reporters Committee has unanimously reached the decision that an unqualified bill, with the sense of Congress being that it should not be qualified, would not be likely to be amended.

April 24, 1975, was the second and final day of the hearing on H.R. 215. Len H. Small, ANPA board member and chairman of the Government Relations Committee, was there, as was ANPA lawyer Arthur Hanson. The grilling they received from at least one member of the subcommittee concentrated on the London Compromise, or more accurately, the reasoning behind it. Knowing it was coming, Len Small made a complex (if not confusing) argument that "absolute" and "qualified" had become meaningless:

In truth and in fact, there is no constitutional concept of an "absolute privilege." Nor is there any concept of a "qualified privilege" under the law in the pure philosophical sense.

What is meant by these terms under the law is that certain factual circumstances evolve which meet qualifications dictating that source or subject matter should be privileged as a matter of right . . .

Under certain circumstances conditions dictate that

¹²Ibid., p. 101.
the source of the subject matter should be revealed... and this has come to be known as a "qualified privilege." Notwithstanding this terminology, such a privilege, from a court standpoint, is absolute within the qualification.

It appears to us that... H.R. 215... is the establishment of those qualifying factual situations where-in a newsman does not have to disclose his confidential sources...

It appears to us that it is nonproductive to take the position that it would be better to have no bill than a "qualified bill." Our reasons... are pragmatic.

The Supreme Court decision in Branzburg was actually established by a 8 to 1 vote... in terms of the position of "all or nothing" under the first amendment...

Justice Stewart and his two supporters in Branzburg accepted the qualifications advanced by Professor Amsterdam, the attorney for Caldwell... We believe that H.R. 215 does better than the dissent and comes closer to the libertarian position than did Justice Stewart...

We would remind the committee that, whether we like it or not, the preferred constitutional viewpoint as accepted by most constitutional authorities and by the majority of the Supreme Court as now constituted, and as constituted in the past throughout history, is that every amendment to the Constitution is subject to the interplay of the social and political forces which exist at the time that a given fact situation arises for the Court's determination.

In some instances, first amendment considerations will prevail. In other instances, sixth amendment considerations will prevail. And, still in others, fifth amendment considerations will prevail.

The Constitution of the United States is not a document of fixed absolutes. It is a document of compromise as the mores of the people dictate in the times, and in accordance with the views of the nine Justices interpreting the Constitution in light of those mores at that time. This is one of the reasons that the Constitution is referred to as a "living document."

We are pleased to support H.R. 215 as being... an effective adjustment.¹³

Hanson and Small discounted the precedent that passage of a qualified shield law would set:

...it is true that what Congress gives Congress can take away. But, if we have nothing and we get something and it is taken away, we are no worse off than we

¹³Ibid., pp. 105-6.
are today. There is always the question of testing anything the Congress does in the courts [anyway].

Congressman Robert Drinan was very upset with the ANPA's accommodation to the Kastenmeier bill's chief qualification (disclosure of unpublished information at trial) which, he said, had never been justified by evidence. No facts had been offered that, in civil or criminal cases, it was essential to "pierce the shield of journalists." He demanded to know why the ANPA had given up the fight for an unqualified privilege. Arthur Hanson was squirming. He indicated what the 1973 hearings showed, namely that resistance to unqualified privilege had been at least as great within the press as it had been among the lawmakers:

Mr. HANSON: We have gone through this bill very thoroughly, as you know, and the ANPA has gone through it thoroughly, and we spent not just "a" meeting, but as Mr. Small knows, and you gentlemen know, we had many meetings of a conglomerate of the media groups and the media representatives, and it was not very easy to get the conclusion that came out when we presented a bill to both this committee and the Senate side, which was an absolute bill.

What I would suggest to you is that no matter how absolute you make a bill, the courts are going to test it in light of the Supreme Court's views of the first amendment. And I would be just as satisfied if this compromise was enacted to let the courts take a look at it, as we said in our testimony, to let the courts take a look at it and then come back in 5 to 10 years from now, if it needed some further work on it.

... I submit there is no constitutional absolute.

Mr. DRINAN: ... The right of a journalist not to be subpoenaed is obviously not a personal right. It is the right of the public to know, of which the newsman is a trustee. The essential question, therefore, comes to this:

Who, if anyone, can waive the right of the public to have media that cannot be made into a part of the law enforcement agencies of the Nation?

It is my conviction that no Federal or State statute

14 Ibid., p. 113.
should try to set forth those circumstances which would permit the Government to set aside the right of the public to know.

Mr. HANSON: I only submit that the Constitution itself is a statute adopted by the people, adopted by the necessary majority of the State houses of the original States.

So, basically, the first amendment itself is subject to amendment if someone wants to start down that road. It is not an absolute Constitution, really, so I would disagree with your statement on that, sir.

Mr. DRINAN: One last question. How recently, and how intensely, have all of the media caucused among themselves on this? The testimony you are giving now, you gave in effect 3 years ago, after the media got together and said, well, this is the best thing we can get. But have you come together, prior to these hearings, and said, "what shall we say in the year 1975, that is new?"

Mr. SMALL: No, we have not. 15

The final witnesses that day were Richard Jencks and William Small, executives of CBS. They said they were glad for the "opportunity to renew CBS' commitment to the prompt enactment of legislation which will protect journalists against the compulsory disclosure of their unpublished sources and information." The Kastenmeier bill would, they said, "advance the ability of journalists to carry out their responsibilities . . . . We enthusiastically support its passage." Jencks continued:

Under this bill, no longer will a reporter face jail if he refuses to testify before a grand jury about his undisclosed sources or his unpublished notes. Nor will a broadcast news organization have to risk being held in contempt for refusing to turn over its unpublished film or outtakes in connection with a congressional inquiry. . . . While the bill is not absolute at the trial stage, it realistically requires that an adequate showing be made for disclosure—with the right of the journalist to promptly appeal an adverse ruling.

15 Ibid., pp. 116-17.
Finally, the bill is applicable to the States, which should make it possible for journalists to know their basic rights wherever they may gather news, publish or broadcast.16

Congressman Drinan also pressed an attack on the CBS position. Small was satisfied that the Kastenmeier bill would "solve fully all but the rarest of cases involving newsmen." Jencks was satisfied that all "frivolous" governmental inquiries would be stopped by the requirements laid out in the bill, which would occasion only inquiries he rated as matters "of consequence."

In a statement for the record, NBC's Richard Wald essentially agreed with CBS. "We believe," he said, "that all of us seeking to reach this objective--legislators, press, and others--should now stop exploring alternative means and get behind this bill." Without a statute, Wald said, political tensions that erupt from time to time would "put at risk the ability of the press to perform its traditional function as a conduit to the general public of information and views without fear or favor of any individual group or institution." He concluded:

I would be less than candid if I, as a newsmen, advocated H.R. 215 as my ideal. It falls short of providing the protection that an expansive view of the Constitution would afford. Some no doubt believe the press needs and is entitled to that larger measure under the Constitution. That goal, however right in theory, has proved to be unattainable in practice. H.R. 5928, the predecessor of H.R. 215, had after much debate and compromise been accepted by a consensus of those active in this field. The basis of that conclusion, in which we concur, is that the bill will afford a substantial mea-

16Ibid., p. 120.
sure of protection, it is workable, and it can be passed. We believe this conclusion applies equally to H.R. 215 and for this reason . . . NBC News supports its enactment into law.  

When the hearing adjourned at 11:45 a.m. that April 24, it marked the end of an era in the debate. None of the newsmen's privilege bills in the House came to a vote, and the fading interest in the subject in the Ninety-fourth Congress was a bright light compared with the action in the Ninety-fifth Congress. As late as mid-July 1977, there was no Congressional action on the subject. One Congressman knowledgeable on the subject commented, "It appears that no further action will be taken until the news media reach a consensus with respect to which form [absolute or qualified] of legislation they prefer." A spokesman for the ANPA indicated that, were the same hearing held in 1977, the publishers' position would be the same:  

ANPA would still prefer to have an absolute, unqualified bill. But, absent congressional support for that type of legislation, ANPA supports a qualified bill which at least offers some very substantial protection for reporters. The qualified newsmen's shield bill in the 94th Congress, HR 215, never moved out of the House subcommittee because there was then and remains now a difference of views on this subject among many in the news business. Some support a qualified shield bill; some are willing to accept a qualified shield with the understanding that an absolute shield bill cannot be passed by Congress;

17 Ibid., pp. 129-30.  
others want only an absolute shield bill or no legislation whatsoever; and still others want no legislation at all, preferring to rely on the First Amendment despite the Supreme Court's decision in Branzburg.\textsuperscript{20}

The government's position in 1977 also resembled that of the Ford Administration in 1975 and the Nixon Administration in 1973. A spokesman for Attorney General Griffin Bell in May 1977 revealed that Bell had no plans to modify the Justice Department's 1973 administrative rules with respect to subpoenas and arrests of newsmen. The spokesman declined to comment on the Attorney General's views on reporters' privilege, preferring to wait until Congress presents another bill for comment.\textsuperscript{21}

In August 1977 a spokesman for President Jimmy Carter said the President was cautious, but negative, on the desirability of protective legislation for journalists:

I can advise you that the Administration is studying the issue of statutory protection of newsmen's information and will continue the review. As of now, the President's inclination is not in favor of statutory protection. He has indicated concern about unresolved questions such as national security considerations and the sanctity of grand jury proceedings.\textsuperscript{22}

One case that could have generated renewed Congressional action was that of CBS correspondent Daniel Schorr, who was subpoenaed by the House Ethics Committee and ordered to testi-


\textsuperscript{21}Letter to author from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, May 16, 1977.

\textsuperscript{22}Letter to author from Jim Purks, Special Assistant, Media Liaison, The White House, Aug. 24, 1977.
fy in September 1976. The committee wanted to know who had leaked a House report on CIA intelligence activities to Schorr in January, 1976. Nearly four hundred persons were questioned before the Ethics Committee turned to Schorr. The correspondent appeared before the committee, but protested the subpoena itself as a blow against the free press. He also objected to the terms of the subpoena, which demanded his notes relating "in any way" to the investigation.

In a statement, parts of which were reported in news broadcasts nationwide, Schorr said:

I take the same position that Dr. Frank Stanton, the President of CBS Inc. took in 1971. He refused to comply with the House Commerce Committee subpoena demanding the scripts and the so-called "out-takes" of interviews filmed in preparation for the CBS television documentary, "The Selling of the Pentagon." His position then and mine today is that the internal process of preparing news for publication or for broadcast cannot be subjected to the compulsory process of subpoena without subverting the purposes of the First Amendment. . . . My role in the publication of the report and my right to withhold the source are protected by the Constitution. . . .

For some of us--doctors, lawyers, clergymen, and journalists--it is an article of faith that we must keep confidential those matters entrusted to us only because of the assurance that they would remain confidential.

For a journalist, the most crucial kind of confidence is the identity of a source of information. To betray a confidential source would mean to dry up many future sources for many future reporters. . . .

But, beyond all that, to betray a source would be to betray myself, my career, my life. I cannot do it. To

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say I refuse to do it is not saying it right. I cannot do it.25

The committee apparently was persuaded not to cite Schorr for contempt of Congress. _New York Times_ columnist Anthony Lewis commented that, had the Schorr case made it to the courts, Congress' broad investigatory powers could have been tested against those of the grand jury upheld in _Branzburg_. He said Congress' decision to let the Schorr case rest may have illustrated what to do with the debate surrounding press subpoenas in general:

Curiously, that result might be regarded by Justice White and the Supreme Court majority as support for their view that the issue should be left largely to the give and take of society. Instead of writing a journalist's privilege rigidly into the Constitution, they might say, we should let the outcome be influenced by such factors as the strength of the reporter's convictions, because that instructs our democracy.26

Indeed, Schorr's focus on the integrity of the editorial process may have been instructive--sharpening understanding of the subpoena debate within the press more, perhaps, than any other case in the 1970s. Two months after Schorr's testimony, the _New York Times_ published one of its periodic reviews of the outstanding subpoena cases. This review was the first, it seems, to recognize that there is more to the subpoena debate than the "right to know." Times news analyst Deirdre Carmody wrote:

Reporters' notes are jealously guarded—even when

25_Ibid._

they do not contain confidential information—because they contain raw material that may be unverified or even irrelevant. They are a vital part of a newspaper's decision-making or its editorial process because they are the first step in producing the finished story that appears in the paper.

Most newspapers would agree that under the First Amendment, the editorial process is not to be interfered with by anyone, particularly government. But, they argue, if a reporter turns over his notes in court, he opens himself to questions such as, "If this appeared in your notes why didn't it appear in the story you wrote?"

Newspapers contend that the decision of what to include in a story is an inherent part of the editorial process and should not be subjected to any outside scrutiny.

It is at this point in the argument that many skeptics simply throw up their hands and ask why all this should be so fiercely guarded by newspapers. Why should newspapers not be subjected to the same kind of scrutiny they impose on others?

The First Amendment specialists answer this by saying that the First Amendment, which prohibits abridgement of freedom of the press, is based on the assumption that a high potential for evil-doing exists in government. They point out that a special mandate was given to the press by those who drew up the Constitution to monitor the processes of government and to report to the people, through the newspapers, any governmental abuses.

It is why the press, in order to carry out its mandate effectively, must maintain absolute separation from government. It also explains why so much importance is attached to protecting confidential sources—such as people who work in government—because it is often the information from these sources that is the first step in exposing governmental wrongdoing.\(^{27}\)

Attempts beginning in 1976 to reform the federal grand-jury system have involved some of the same press groups that fought for newsmen's privilege legislation, with the same or similar goal: ending governmental use of the press for law enforcement.

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The Reporters Committee, testifying for procedural reforms that would ease grand-jury pressure on newsmen, asked Congress to counter the trend in the courts and recognize some validity in the First Amendment protection of confidential sources. "Federal courts may feel themselves free to completely ignore a First Amendment claim if Congress is silent," it said.\(^\text{28}\) It explained:

We continue to believe that news reporters have an absolute privilege under the First Amendment to withhold from government the identity of their news sources and the content of unpublished information. We think that the press is independent and that the public must have the confidence to feel that when it talks to a news reporter, it is not talking to the FBI or to a grand jury, based on the whim of a government prosecutor. When one considers the resources of the federal government--18,000 FBI agents, 94 U.S. district courts with the power to convene grand juries and 94 U.S. Attorneys offices plus thousands of marshals and other law enforcement agents in the Department of Treasury and the Secret Service, etc.--we think there is virtually no instance where the government, with its wiretapping, subpoena and search and seizure powers, cannot find the same information from non-press persons it wishes to discover from a news reporter if it wants to.\(^\text{29}\)

The Newspaper Guild also testified for grand-jury reform, supporting a suggested limit on jail sentences for contempt of the grand jury and restrictions on judges' powers:

We think the six-month limit on contempt confinements . . . is a badly needed reform; as matters stand, news gatherers and others can be put behind bars for the length of the grand-jury term--as long as 18 months. But, in the case of news gatherers, at least, we think the provision should go farther. Whatever justification there can be for jailing reporters in order to compel their testimony, there can be none for jailing them as punishment. A news gatherer who refused

\(^{28}\) Testimony of Landau, p. 41.

\(^{29}\) Ibid., p. 35.
to answer questions before a grand jury is doing so in accordance with the highest standards of his profession; to punish him or her for doing so is unconscionable. The very least we feel should be enacted is a provision exempting from criminal contempt any person who refuses to give information obtained in the course of gathering, receiving, or processing information for any communications medium.30

Governmental powers to grant compulsory immunity to reporters who might plead the Fifth Amendment to questions from a grand jury also should be revoked, said the Newspaper Guild:

Reporters, quite candidly, are more reluctant than most to plead the Fifth Amendment; they are much happier --if less successful--pleading the First. In the case of a news gatherer, pleading the Fifth is not only regarded, however wrongly, as implying guilt but seems to suggest an involvement not in accord with the news gatherer's role as a detached observer. But reporters have occasionally made such pleas when asked to reveal confidential information or sources. . . .

Forcing reporters to disclose such information or sources may be requiring them to testify to their own disadvantage [despite the grant of immunity], seriously damaging their ability to perform their job. If, in the words of a federal judge many years ago, compulsory immunity enables the government to "probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants," in the case of news gatherers, it makes the government a potential party to every confidence given a reporter by a source of news. As long as absolute privilege for news gatherers does not exist, they should not be denied this avenue of protection.31


CHAPTER X

CONCLUSION

The history of debate surrounding governmental subpoenas of the press suggests a coherent and potentially effective theory that could be used to reopen political consideration of a ban on subpoenas for unpublished information.

The theory assumes that anonymous speech is among the forms of free speech protected by the First Amendment, and that it can assume many forms, all of them having a connection to publishing. The purest form is the publishing of a work which has been assigned a pseudonym. Another includes the passive or active provision of documents or information to supplement the written work of an identified author. Other forms might include the admittance or presence of an author observing the activities of persons, with or without their knowledge, where the objective is to communicate news and views (in this case "actions" are symbolic speech).

The theory argues that anonymous speech, in view of its significant political history, deserves the protection afforded in law to the act of publishing itself and therefore cannot be restrained or intimidated (as through subpoenas for sources and information) except to prevent "direct, immediate or irreparable damage to our Nation" (New York Times Co. v. 210
Because anonymous speech must have a highly protected status to guarantee it as a political liberty, its use and protection must be regarded as an institutional prerogative of publishing. As such, the control of anonymous speech is the responsibility of publishers, not those employed or contracted by them. (This point greatly enhances the political value of the theory because it reduces the number of persons who would claim immunity from subpoena.)

In summary, the theory of anonymous speech holds that governmental subpoena power over unpublished information should be abolished because it threatens two fundamental political liberties: a freedom from subpoena that guarantees the effectiveness of publishing anonymous speech (and which is available to anyone who owns a press),¹ and the right to speak anonymously without the fear of governmental intimidation represented in subpoenas for unpublished information. Obviously, these two rights merge in the limiting case of a single individual who, for example, wishes to publish his own work anonymously using his own press.

The Supreme Court agrees that freedom of the press is a "fundamental personal right," but it has not recognized in it

¹"Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion.' Lovell v. Griffen, 303 U.S. 444, 450, 452 (1938)" (quoted in Supreme Court Reports, Book 408, pp. 703-4).
the freedom from subpoenas necessary for the press to preserve the constructive purposes of anonymous speech that it applauded in Talley v. California (1960).

Even if the Court were to receive an appropriate case to test the right to anonymity as affected by the subpoena power, the Court likely would rule against it if it involved the government's power to investigate or prosecute crime. This can be inferred from the majority opinion in Talley, where the Justices indicated that laws "aimed at providing a way to identify those responsible" for crime could defeat the right to anonymity, providing that there was no alternative. In Branzburg v. Hayes (1972), an eight-man majority supported the notion that the press is a legitimate tool for law enforcement (through access to unpublished information), although they disagreed whether prosecutors should be required to show "compelling need." In that case, the Court majority clearly indicated that the judiciary is not in the position to judge the political value of failure to uphold criminal laws by every means within its disposal. However, it said Congress' power includes the right to make the judgment by creating a testimonial privilege "as narrow or broad as deemed necessary." But Congress has not been persuaded by press arguments so far.

Congress needs convincing evidence that the press is serious and united—at least as united as it was in support of newspapers defending the Pentagon Papers case. A basic strategy for increasing pressure on Congress has been con-
conceived by those two influential publishers, Katharine Graham and Arthur O. Sulzberger. We recall that as chief executives of their corporations they would say that the corporations, not the individual reporters, owned the information, and that they were, therefore, ordering the reporters not to turn it over . . . to the courts. They would, in essence, intervene between the court and their employees.

Mr. Sulzberger and Mrs. Graham recognized the potential impact of the strategy on political and judicial thought. They hoped it would have "some subtle effect" on the Supreme Court and, "perhaps force Congress and the public to consider more seriously" the First Amendment claim involved. This study will not dispute their assumption.²

The timidity, vacillation and faithless complaisancy of publishers have been serious handicaps in efforts to end the government's power over unpublished information. Well into the 1930s, we recall, publishers seemed content to decry the oppression of reporters with expressions of sympathy for those "brave young spirits" who faced "judicial torture" on their behalf. In 1959, after all the arguments were over in the Marie Torre case, Editor & Publisher had to reach deeply

²The Reporters Committee reacted to the Times story on the Sulzberger-Graham strategy with irony:
"It was noted by several eminent legal authorities that jailing publishers and editors is an unknown tactic so that it is difficult to assess its impact. Some experts argue that one jailed publisher is worth a dozen jailed reporters--while other experts argue just the opposite" ("Publishers, Editors Seek Jail to Protect Sources," Press Censorship Newsletter, no. III [November-December 1973], p. 39).
for an answer to the question whether the dispute over the Judy Garland subpoena (or any subpoena) was a free-press issue. "Perhaps it is," said the voice of publishing.

When the press offered arguments to the Supreme Court on behalf of Caldwell, Pappas and Branzburg, the publishers' views had advanced considerably, but by then they were outnumbered (and politically out-shouted) by influential press representatives who disagreed with them fundamentally. The contradiction, we recall, occurred on the most basic question of all—the need for unqualified immunity. The most politically influential voices represented in friend-of-the-court arguments disagreed with the ANPA when it said, "this privilege to honor confidentiality must be absolute if it is to possess any value at all to society." After such a good start, the publishers' record of vacillation in Congress between 1972 and 1975 is disappointing, to say the least.

Compliance with subpoena demands for unpublished information is now commonplace. According to the government, in fact, there is a trend toward news media requests for subpoenas so that an appearance of duress may be maintained while news media lawyers collaborate with prosecutors. The apparent willingness of publishers and broadcasters to be satisfied with a political impasse, rather than to reconcile their disagreement with the Reporters Committee and others insisting on absolute privilege, is cause for even greater alarm. Whatever the reasons for publishers' acquiescence in the legal and political situation, they cannot es-
cape accusations of impropriety. Fred Graham and Jack Landau have pointed out how reprehensible the publishers' behavior seems in view of their industry's vigorous and successful campaign to secure the special privileges against antitrust action contained in the Newspaper Preservation Act. The reporters observed:

The conclusion is quite simple: what the media owners want from Congress, the media owners get from Congress. . . . The only question that remains is whether the First Amendment is of as much concern to the media owners as was the exemption from the anti-trust laws.\(^3\)

Mr. Sulzberger and Mrs. Graham apparently overlooked several difficulties inherent in their plans to re-educate the public, Congress and the Supreme Court on the seriousness of their opposition to the subpoena power.

The first problem is that reporters have been fighting the publishers' battles for so long that many of them seem to think it is their fight alone. Consider the view of the Reporters Committee, which cooked up this objection to the Sulzberger-Graham strategy after it was announced:

Ever since the subpoena controversy first arose in the summer of 1969, it has been clear that eventually the working press and management would be in conflict over the question of who has control over a reporter's notes and tape recordings.

The issue arises in a duces tecum subpoena because the subpoena generally applies to those who have possession and ownership of materials.

Most news media management takes the position that notes and tape recordings are its property and that management has the sole authority to decide whether to turn notes over to a court—even if the action will disclose a reporter's confidential source.

They argue a strict "property" theory: that the

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notebooks and the tape recordings are management property because the information contained therein was obtained during the course of employment for the publishers. This is traditional doctrine developed in copyright law.

A few news media owners—and the Reporters Committee—believe that the reporter has either an exclusive or joint property right in his notes. This is because the decision on whether to take notes—in what form and how detailed—is a decision left up to the individual reporter. Furthermore, there is at least one decision which compares a reporter's notes to the personal working papers of an attorney.

The Reporters Committee suggests that—at a minimum—disclosure of confidential sources should be a joint privilege like the husband-wife privilege.4

The Newspaper Guild, representing 40,000 newspaper workers, was so exercised by the thought of publishers betraying reporters' confidences that it seriously asked Congress to create a new felony: the disclosure of unpublished information without the written "and unrevoked" consent of the journalist who originally acquired it. The Guild proposal also would have authorized injunctions against publishers and any other "news custodian" who would violate a journalist's wishes in these matters.5

The idea that publishers are mere "news custodians" in a great war of reporters protecting the First Amendment against the intrusions of government may have a kind of juvenile appeal to some, but it should be rejected. In the scheme suggested here, really the opposite is true: when a reporter's unpublished information is subpoenaed by govern-

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5 1973 House Hearings, pp. 574-75.
ment, the rights threatened belong not to the reporter but to his publisher and the public. In practice, of course, reporters are entrusted with the task of collecting and storing confidential information, but they cannot reasonably expect to turn their borrowed prerogatives against the wishes of publishers. A publisher, therefore, always remains free to dispose of unpublished information as he sees fit. On the other hand, the reporter also remains free to dispose of unpublished information, because the publisher's rights in the matter relate to freedom from the pressure of subpoena, a governmental action. Publishers cannot interfere with the decisions of authors, sources, reporters or editors who wish to reveal unpublished information. In other words, the right to protect unpublished information as presented here is not a property right at all. It is a carefully defined political freedom attached to publishers on behalf of a special political right belonging to every person. The chief principle of the rights and duties of publishing with regard to press subpoenas, therefore, it that preservation of the prerogatives of publishing needed to maintain the security of the right to comment on public affairs anonymously is not the responsibility of reporters, but of publishers.

A second hitch in the Sulzberger-Graham strategy is slightly more profound than the precociousness of reporters. Reporters might be willing to shift the burden of a subpoena to trusted publishers, but the government may not be willing to oblige. Once the government knows who has the information
it wants, it need not subpoena any other person to obtain it. It would be easy enough, as Carl Bernstein did when the CRP subpoenas threatened, to pass files, notes and other documents to the publisher for her protection. But a reporter caught in the Branzburg Exception possesses knowledge that cannot be passed away. When that reporter was faced with conflicting orders—a publisher's directive not to testify and a court's demand backed up by the power to punish contempt—the Sulzberger-Graham strategy would break down. Caldwell, Pappas and Branzburg certainly would have been vulnerable. In fact, today it appears that in most cases the government can safely ignore publishers when it seeks unpublished information. This situation must be changed.

The problem seems insurmountable unless publishers resolve to shield the identity of their reporters, say be removing by-lines or assigning pseudonyms when necessary and wherever possible. (Members of the Newspaper Guild have the contractual right to insist on anonymity in their writing.) The point of this exercise, obviously, would be to compel the government to approach the publisher first. He in turn would have a choice: actively betray the reporter and his sources or actively shield them. What is important is even a mild trend toward anonymity would increase the probability that, when a subpoena was issued, it would have to go first to the publisher to pry out of him the identity of the reporter.

Meanwhile, much the same effect could be achieved by reporters who cannot remain anonymous (television reporters,
for example) if their public reasons for refusal to cooperate with the subpoena were altered slightly. The explanation to the court might be something like, "I cannot answer (or provide the document or film or tape demanded) because I would be cooperating in an attempt to violate the publisher's constitutional rights under the First Amendment to protect the anonymity of the source from governmental subpoena. By the way, he (or she) has the information you are seeking, because I have shared it with the publisher."

The last point is crucial. A reporter who refuses to share unpublished information with the publisher obviously does not trust him. But a reporter has no right to ask his sources to place any more trust in him than he has placed in the publisher. After all, an institutional protection for the right to anonymity dictates that it is the publisher's duty to resist the subpoena and the publisher's right to release unpublished information voluntarily if he wishes. To reiterate: it is the subpoena for unpublished information that violates the First Amendment, not the release of the information. There must be occasions when the request represents a legitimate societal interest in knowing unpublished facts. In such a case, the government has the option to present its case in the court of public opinion, where the publisher would have to justify his actions, not only to the outside community, but to his fellow publishers and to the reporters, editors, authors and sources whose lives might be affected. Any societal interest offering proof of imminent
harm to the nation could, of course, defeat the claim of publisher's immunity.

Publishers' decisions for or against voluntary disclosure of unpublished information would tend to isolate for searching community scrutiny those publishers who would unreasonably cooperate with governmental investigations against the citizenry. Similarly isolated would be those publishers who would not support promises of confidentiality made by their reporters under their express authority. Reporters who worked long for publishers of the weak-willed persuasion would lose their confidential sources. Strong publishers would benefit with highly competitive news stories (in the case of daily newspapers) and the chance to hire reporters willing to trust their publishers in the important duty of protecting anonymous speech.

The question, from a reporter's point of view, is whether there exist enough courageous publishers willing to embrace their responsibilities, force the issue whenever necessary and possible, and be jailed. (It should be pointed out that any appeal of a publisher's contempt conviction before the legislature can be persuaded to act favorably would risk prejudicing the legislative outcome.) Upon that number rests whatever chance remains for a proper political solution to this most political problem of press subpoenas. If the political battle were won, publishers collectively would hold a protected right to unpublished information and be forever publicly accountable for its preservation. Publishers also
would be publicly accountable for the occasional voluntary disclosure of unpublished information necessary to defend themselves in libel actions and to aid law enforcement and governmental investigations in general to the extent their moral philosophies dictate.
A BILL
To insue a free flow of information.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,
That this Act may be titled "The Free Flow of Information
Act".

SECTION 1. Congress declares that—
(1) the purpose of this Act is to insure the free flow
of news and other information to the public; those who
gather, write, or edit information for the public or dis-
seminate information to the public can perform these
vital functions only in a free and unfettered atmosphere;
(2) such persons must not be inhibited, directly or
indirectly, by governmental restraint or sanction imposed
by governmental process; rather they must be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public can be fully informed;

(3) compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public;

(4) there is an urgent need to provide effective measures to halt and prevent this inhibition;

(5) the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce;

(6) this Act is necessary to insure the free flow of information and to implement the first and fourteenth amendments and article I, section 8 of the Constitution.

Sec. 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.
SEC. 3. For the purpose of this Act, the term—

(1) "Federal or State proceeding" includes any proceeding or investigation before or by any Federal or State judicial, legislative, executive, or administrative body;

(2) "medium of communication" includes, but is not limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television;

(3) "information" includes any written, oral, or pictorial news or other material;

(4) "published information" means any information disseminated to the public by the person from whom disclosure is sought;

(5) "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated;
(6) "processing" includes compiling, storing, and editing of information;

(7) "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.
H. R. 215

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. KASTENMEIER (for himself, Mr. BAUMGART and Mr. CONES) introduced the following bill: which was referred to the Committee on the Judiciary

A BILL

To protect news sources and information from compulsory disclosure by newsmen.

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

2 That this Act may be cited as the "News Source and Information Protection Act of 1975".

3 SEC. 2. As used in this Act—

4 (1) the term "newsman" means any man or woman who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual (including partnership, corporation, association, or other legal entity existing under or authorized by the laws of the United States or any State) engaged
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1 in obtaining, writing, reviewing, editing, or otherwise
2 preparing information in any form for any medium of
3 communication to the public;
4 (2) the term "State" means any of the several
5 States, territories, or possessions of the United States,
6 the District of Columbia, or the Commonwealth of
7 Puerto Rico.
8
9 Sec. 3. Except as qualified by sections 4 and 7 of this
10 Act, in any Federal or State proceeding (including a grand
11 jury or pretrial proceeding, no individual called to testify
12 or provide other information (by subpoena or otherwise)
13 shall be required to disclose information or the identity of
14 a source of information received or obtained by him in his
15 capacity as a newsman.

16 Sec. 4. At the trial of any civil or criminal action in
17 any court of the United States (as defined in section 6001
18 (4) of title 18, United States Code) or of any State, a
19 newsman may be required to disclose the identity of a source
20 of information or any other information if—
21 (1) the identity or information was not received
22 or obtained by him in express or implied confidence in
23 his capacity as a newsman, or
24 (2) the court finds that the party seeking the
25 identity or information has established by clear and
26 convincing evidence—
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(A) that disclosure of such identity or information is indispensable to the establishment of the offense charged, the cause of the action pleaded, or the defense interposed in such action;

(B) that such identity or information cannot be obtained by alternative means; and

(C) that there is a compelling and overriding public interest in requiring disclosure of the identity or the information.

Sec. 5 (a) Any order of a court of the United States or of any State granting, modifying, or refusing a claim of privilege on the part of a newsman shall be subject to judicial review and shall be stayed by the issuing court for a reasonable time to permit judicial review.

(b) Section 1292 (a) of title 28 of the United States Code (relating to appeal of interlocutory decisions) is amended by striking out the period at the end of paragraph (4) and inserting in lieu thereof a semicolon and by adding at the end thereof the following new paragraph:

"(5) Orders of such district courts or the judges thereof granting, modifying, or refusing a claim of a newsman's privilege of nondisclosure. Such appeals shall be given preference and expedited and shall be heard at the earliest practicable date."

Sec. 6. Nothing in this Act shall be construed to impair
or preempt the enactment or application of any State law which secures the minimum privileges established by this Act.

Sec. 7. Sections 3 and 4 of this Act shall not be available to a defendant in a defamation suit with respect to the source of any allegedly defamatory information when such defendant asserts a defense based on such source. Such defendant need testify only if plaintiff demonstrates that identification of the source will lead to persuasive evidence on the issue of malice.

Sec. 8. This Act shall apply only to individuals required, after the date of the enactment of this Act, to testify or provide other evidence.

Sec. 9. 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.
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