Branzburg v. Hayes

408 U.S. 665
Supreme Court of the United States
June 19, 1972

BRANZBURG v. HAYES ET AL., JUDGES. No. 70-85. Argued February 23, 1972. Decided June 29, 1972. Together with No. 70-94, In re Pappas, on certiorari to the Supreme Judicial Court of Massachusetts, also argued February 23, 1972, and No. 70-57, United States v. Caldwell, on certiorari to the United States Court of Appeals for the Ninth Circuit, argued February 22, 1972. CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY. Edgar A. Zingman argued the cause for petitioner in No. 70-85. With him on the briefs was *Robert C. Ewald. E. Barrett Prettyman, Jr.,* argued the cause for petitioner in No. 70-94. With him on the briefs was *William '. Carey. Solicitor General Griswold* argued the cause for the United States in No. 70-57. With him on the briefs were *Assistant Attorney General Wilson, Assistant Attorney General Petersen, William Bradford Reynolds, Beatrice Rosenberg,* and *Sidney M. Glazer. Edwin A. Schroering, Jr.,* argued the cause for respondents in No. 70-85. With him on the brief was *'. C. Fisher, Jr. Joseph J. Hurley,* First Assistant Attorney General, argued the cause for respondent, Commonwealth of Massachusetts, in No. 70-94. With him on the brief were *Robert '. Quinn,* Attorney General, *Walter '. Mayo III,* Assistant Attorney General, and *Lawrence T. Bench,* Deputy Assistant Attorney General. *Anthony G. Amsterdam* argued the cause for respondent in No. 70-57. With him on the brief were *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston,* and *William Bennett Turner. William Bradford Reynolds* argued the cause for the United States as *amicus curiae* urging affirmance in Nos. 70-85 and 70-94. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg.* Briefs of *amici curiae* urging affirmance in No. 70-57 and reversal in Nos. 70-85 and 70-94 were filed by *Alexander M. Bickel, Lawrence J. McKay, Floyd Abrams, Daniel Sheehan, Corydon B. Dunham, Clarence J. Fried, Alan J. Hruska, Robert S. Rifkind, Anthony A. Dean,* and *Edward C. Wallace* for New York Times Co., Inc., et al.; by *Don '. Reuben, Lawrence Gunnels, Steven L. Bashwiner,* and *Thomas F. Ging* for Chicago Tribune Co.; by *Arthur B. Hanson* for the American Newspaper Publishers Association; and by *Irving Leuchter* for the American Newspaper Guild, AFL-CIO, CLC. *John T. Corrigan* filed a brief for the National District Attorneys Association urging reversal in No. 70-57 and affirmance in No. 70-94. Briefs of *amici curiae* urging affirmance in No. 70-57 were filed by *Irwin Karp* for the Authors League of America, Inc.; by *'. Theodore Pierson* and *J. Laurent Scharff* for the Radio Television News Directors Association; and by *Earle K. Moore* and *Samuel Rabinove* for the Office of Communication of the United Church of Christ et al. Briefs of *amici curiae* in No. 70-57 were filed by *Leo P. Larkin, Jr., Stanley Godofsky,* and *John J. Sheehy* for Washington Post Co. et al.; by *Richard M. Schmidt, Jr.,* for the American Society of Newspaper Editors et al.; by *Roger A. Clark* for the National Press Photographers Association, Inc.; and by *Melvin L. Wulf, Paul N. Halvonik, A. L. Wirin, Fred Okrand,* and *Lawrence R. Sperber* for the American Civil Liberties Union et al.

Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE.

The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70-85, *Branzburg* v. *Hayes* and *Meigs,* brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to reveal the identity of the two hashish makers.[18] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana.[19] A state trial court judge[20] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky. Rev. Stat. § 421.100 (1962),[21] the First Amendment of the United States Constitution, or §§ 1, 2, and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibition and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. *Branzburg* v. *Pound,* 461 S.W. 2d 345 (1970), as modified on denial of rehearing, Jan. 22, 1971. It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky. Rev. Stat. § 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information, but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Kentucky. The article reported that in order to provide a comprehensive survey of the "drug scene" in Frankfort, petitioner had "spent two weeks interviewing several dozen drug users in the capital city" and had seen

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[18] The article contained the following paragraph: " 'I don't know why I'm letting you do this story,' [one informant] said quietly. "To make the narcs (narcotics detectives) mad, I guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed." App. 3-4.

[19] The Foreman of the grand jury reported that petitioner Branzburg had refused to answer the following two questions: "#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?" App. 6.

[20] Judge J. Miles Pound. The respondent in this case, Hon. John P. Hayes, is the successor of Judge Pound.

[21] Ky. Rev. Stat. § 421.100 provides:

"No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," petitioner Branzburg moved to quash the summons;[22] the motion was denied, although an order was issued protecting Branzburg from revealing "confidential associations, sources or information" but requiring that he "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky. Rev. Stat. § 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished *Caldwell* v. *United States,* 434 F. 2d 1081 (CA9 1970), and it also announced its "misgivings" about that decision, asserting that it represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." It characterized petitioner's fear that his ability to obtain news would be destroyed as "so tenuous that it does not, in the opinion of this court, present an issue of abridgment of the freedom of the press within the meaning of that term as used in the Constitution of the United States."

Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ.[23] 402 U.S. 942 (1971).

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[22] Petitioner's Motion to Quash argued:

"If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture.

"The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences." App. 43-44.

[23] After the Kentucky Court of Appeals' decision in *Branzburg* v. *Meigs* was announced, petitioner filed a rehearing motion in *Branzburg* v. *Pound* suggesting that the court had not passed upon his First Amendment argument and calling to the court's attention the recent Ninth Circuit decision in *Caldwell* v. *United States,* 434 F. 2d 1081 (1970). On Jan. 22, 1971, the court denied

In re Pappas, No. 70-94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3 p. m.˜ He then asked for and received permission to re-enter the area. Returning at about 9 o' clock, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid, which Pappas, "on his own," was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had occurred in the store while he was there. Two months later, petitioner was summoned before the Bristol County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment

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petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S. '. 2d 345, 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky. Rev Stat. § 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition, and it dealt primarily with the State's construction of the phrase "source of any information" in Ky. Rev. Stat. § 421.100. The passage that the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature."

Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the question of whether a common-law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase "source of any information" were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Kentucky Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in *Branzburg* v. *Pound* was properly preserved for review.

afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the grand jury and "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the Commonwealth before . . . the Grand Jury." His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts.˜ The record there did not include a transcript of the hearing on the motion to quash, nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury's securing the information it sought from petitioner by other means.˜ The Supreme Judicial Court, however, took "judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts." 358 Mass. 604, 607, 266 N. E. 2d 297, 299 (1971). The court then reaffirmed prior Massachusetts holdings that testimonial privileges were "exceptional" and "limited," stating that "[t]he principle that the public 'has a right to every man's evidence' " had usually been preferred, in the Commonwealth, to countervailing interests. *Ibid.* The court rejected the holding of the Ninth Circuit in *Caldwell* v. *United States, supra,* and "adhere[d] to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury."˜ 358 Mass., at 612, 266 N. E. 2d, at 302-303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only "indirect, theoretical, and uncertain." *Id.,* at 612, 266 N. E. 2d, at 302. The court concluded that "[t]he obligation of newsmen . . . is that of every citizen. . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries." *Id.,* at 612, 266 N. E. 2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presiding judge, who had the duty "to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation," *ibid.,* to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress.[24] The burden was deemed to be on the witness to establish the

[24] The court noted that "a presiding judge may consider in his discretion" the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work product, *id.,* at 614 n. 13, 266 N. E. 2d, at 304 n. 13, and cautioned that: "We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge." *Id.,* at 614 n. 14, 266 N. E. 2d, at 304 n. 14.

impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U.S. 942 (1971).

United States v. *Caldwell,* No. 70-57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena *duces tecum* was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization.[25] Respondent objected to the scope of this subpoena, and an agreement between his counsel and the Government attorneys resulted in a continuance. A second subpoena, served on March 16, omitted the documentary requirement and simply ordered Caldwell "to appear . . . to testify before the Grand Jury." Respondent and his employer, the New York Times,~ moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants." App. 7. Respondent argued that "so drastic an incursion upon First Amendment freedoms" should not be permitted "in the absence of a compelling governmental interest – not shown here – in requiring Mr. Caldwell's appearance before the grand jury." *Ibid.* The motion was supported by *amicus curiae* memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U.S. C. § 871 (threats against the President), 18 U.S. C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S. C. § 231 (civil disorders), 18 U.S. C. § 2101 (interstate travel to incite a riot), and 18 U.S. C. § 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that "[w]e will kill Richard Nixon" and that this threat had been repeated in three subsequent issues of the Party newspaper. App. 66, 77. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that "[i]n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns," and quoting the Chief

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[25] The subpoena ordered production of "[n]otes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel, and members, including specifically but not limited to interviews given by David Hilliard and Raymond 'Masai' Hewitt." App. 20.

of Staff of the Party as declaring: "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*]." App. 62. The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U.S. C. § 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

On April 6, the District Court denied the motion to quash, *Application of Caldwell,* 311 F. Supp. 358 (ND Cal. 1970), on the ground that "*every person* within the jurisdiction of the government" is bound to testify upon being properly summoned. *Id.,* at 360 (emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent had to divulge whatever information had been given to him for publication, he "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until there had been "a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." *Id.,* at 362.

Subsequently,~ the term of the grand jury expired, a new grand jury was convened, and a new subpoena *ad testificandum* was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and, by stipulation of the parties, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

Respondent Caldwell appealed the contempt order,~ and the Court of Appeals reversed. *Caldwell* v. *United States,* 434 F. 2d 1081 (CA9 1970). Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that, absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of

the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition for certiorari.~

II

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government,~ decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount,"~ and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.~ The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.~

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not

constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.[26] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB,* 301 U.S. 103, 132-133 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 192-193 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178 (1946). *Associated Press* v. *United States,* 326 U.S. 1 (1945), similarly overruled assertions that the First Amendment precluded application of the Sherman Act to a news-gathering and disseminating organization. Cf. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.,* 293 U.S. 268, 276 (1934); *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 139 (1969); *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 155-156 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. *Grosjean* v. *American Press Co.,* 297 U.S. 233, 250 (1936); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 112 (1943).

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-280 (1964); *Garrison* v.

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[26] "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege.

". . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." 8 J. Wigmore, Evidence § 2286 (McNaughton rev. 1961). This was not always the rule at common law, however. In 17th century England, the obligations of honor among gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confidence. See *Bulstrod* v. *Letchmere,* 2 Freem. 6, 22 Eng. Rep. 1019 (1676); *Lord Grey's Trial,* 9 How. St. Tr. 127 (1682).

Louisiana, 379 U.S. 64, 74 (1964); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 147 (1967) (opinion of Harlan, J.,); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 277 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. *Craig* v. *Harney,* 331 U.S. 367, 377-378 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk,* 381 U.S. 1, 16-17 (1965); *New York Times Co.* v. *United States,* 403 U.S. 713, 728-730 (1971), (STEWART, J., concurring); *Tribune Review Publishing Co.* v. *Thomas,* 254 F. 2d 883, 885 (CA3 1958); *In the Matter of United Press Assns.* v. *Valente,* 308 N. '. 71, 77, 123 N. E. 2d 777, 778 (1954). In *Zemel* v. *Rusk, supra,* for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "render[ed] less than wholly free the flow of information concerning that country." *Id.,* at 16. The ban on travel was held constitutional, for "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.,* at 17.[27]

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own 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 before an impartial tribunal. In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.,* at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.,* at 361. See also *Estes* v. *Texas,* 381 U.S. 532, 539-540 (1965); *Rideau* v. *Louisiana,* 373 U.S. 723, 726 (1963).~

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.[28] Grand jury

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[27] "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 381 U. S., at 16-17.

[28] "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon

proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Hannah* v. *Larche,* 363 U.S. 420, 489-490 (1960) (Frankfurter, J., concurring in result). The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."~ The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States,* 350 U.S. 359, 362 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States.~ Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States,* 250 U.S. 273, 282 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, *id.,* at 279-281, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan,* 339 U.S., at 331; *Blackmer* v. *United States,* 284 U.S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.[29]

A number of States have provided newsmen a statutory privilege of varying breadth,[30] but the majority have not done so, and none has been provided by

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reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia,* 370 U. S. 375, 390 (1962) (footnote omitted).

[29] Jeremy Bentham vividly illustrated this maxim:

"Are men of the first rank and consideration – are men high in office – men whose time is not less valuable to the public than to themselves – are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320-321 (J. Bowring ed. 1843).

In *United States* v. *Burr,* 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

[30] Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources:

federal statute.˜ Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[31] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. 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. Nothing before us indicates that a large number or percentage of *all* confidential news

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Ala. code, Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (Supp. 1971); Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1971-1972); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code § 1070 (Supp. 1972); Ind. Ann. Stat. § 2-1733 (1968); Ky. Rev. Stat. § 421.100 (1962); La. Rev. Stat. Ann. §§ 45:1451-45:1454 (Supp. 1972); Md. Ann. Code, Art. 35, § 2 (1971); Mich. Comp. Laws § 767.5a (Supp. 1956), Mich. Stat. Ann. § 28.945 (1) (1954); Mont. Rev. Codes Ann. § 93-601-2 (1964); Nev. Rev. Stat. § 49.275 (1971); N. J. Rev. Stat. §§ 2A:84A-21, 2A:84A-29 (Supp. 1972-1973); N.M. Stat. Ann. § 20-1-12.1 (1970); N.Y. Civ. Rights Law § 79-h (Supp. 1971-1972); Ohio Rev. Code Ann. § 2739.12 (1954); Pa. Stat. Ann., Tit. 28, § 330 (Supp. 1972-1973).

[31] The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice." 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961). His criticism that "*all privileges of exemption from this duty are exceptional,* and are therefore to be discountenanced," *id.,* at § 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, Foreword, Model Code of Evidence 22-30 (1942); 2 Z. Chafee, Government and Mass Communications 496-497 (1947); Report of ABA Committee on Improvements in the Law of Evidence, 63 A. B. A. Reports 595 (1938); C. McCormick, Evidence 159 (2d ed. 1972); Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 Yale L. J. 607 (1943); Ladd, Privileges, 1969 Law & the Social Order 555, 556; 58 Am. Jur., Witnesses § 546 (1948); 97 C. J. S., Witnesses § 259 (1957); *McMann* v. *Securities and Exchange Commission,* 87 F. 2d 377, 378 (CA2 1937) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. 1971) has included a newsman's privilege.

sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

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, while understandable, is hardly deserving of constitutional protection.˜ [W]e 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.

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas,˜ but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.[32] It would be difficult to canvass the views of the

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[32] Cf., *e. g.,* the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, *supra,* n. 20. A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly, *e. g.,* "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Herald-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely," Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.). This

informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.[33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and 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 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.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.~

Of course, the press has the right to abide by its agreement not to publish all the information it has, but 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. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests. As Mr. Justice Black declared in another context, "[f]reedom of the press from governmental

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study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

[33] In his Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 6-12, Prof. Vince Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. *Id.,* at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. *Id.,* at 53.

interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States,* 326 U.S., at 20.

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect 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. The public through its elected and appointed law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But

> "[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States,* 353 U.S. 53, 59 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case.^ Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

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.[34]

It is said that currently press subpoenas have multiplied,~ that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials.

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[34] Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, *e. g.,* Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36-37; G. Bird & F. Merwin, The Press and Society 592 (1971). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md. Ann. Code, Art. 35, § 2 (1971).

These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.~

Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task.~ We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.[35] For them, it would appear that only an absolute privilege would suffice.

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[35] "Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation ' will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege." Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317, 341 (1970).

In re Grand Jury Witnesses, 322 F. Supp. 573 (ND Cal. 1970), illustrates the impact of this *ad hoc* approach. Here, the grand jury was, as in *Caldwell,* investigating the Black Panther Party, and was "inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U.S.C. § 1751), to free him from threats (18 U.S.C. § 871), to protect our armed forces from unlawful interference (18 U.S.C. § 2387), conspiracy to commit the foregoing offenses (18 U.S.C. § 371), and related statutes prohibiting acts directed against the

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. *In re Grand Jury Witnesses,* 322 F. Supp. 573, 574 (ND Cal. 1970). 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 historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 450, 452 (1938). See also *Mills* v. *Alabama,* 384 U.S. 214, 219 (1966); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information,

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security of the government." *Id.,* at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalist's privilege. The District Court entered a protective order, allowing them to refuse to divulge confidential information until the Government demonstrated "a compelling and overriding national interest in requiring the testimony of [the witnesses] which cannot be served by any alternative means." *Id.,* at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts that the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify:

"The whole point of the investigation is to identify persons known to the [witnesses] who may have engaged in activities violative of the above indicated statutes, and also to ascertain the details of their alleged unlawful activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluation thereof by the Court without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court.' " *Id.,* at 577.

Another illustration is provided by *State* v. *Knops,* 49 Wis. 2d 647, 183 N. '. 2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an "underground" newspaper, the Madison Kaleidoscope, printed a front-page story entitled "The Bombers Tell Why and What Next – Exclusive to Kaleidoscope." An editor of the Kaleidoscope, was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: "[Appellant] faces five very narrow and specific questions, all of which are founded on information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks." 49 Wis. 2d, at 658, 183 N. '. 2d., at 98-99.

and that these sources will be silenced if he is forced to make disclosures before a grand jury.[36]

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, 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 criminal 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.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true – that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries – prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney

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[36] Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such "sham" newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. *New York Times Co.* v. *Sullivan,* 376 U. S., at 269-270; *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 689 (1959); *Winters* v. *New York,* 333 U. S. 507, 510 (1948); *Thomas* v. *Collins,* 323 U. S., at 537. By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials.[37] These rules are a major step in the direction the reporters herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.~ Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

III

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in *United States* v. *Caldwell,* No. 70-57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is *a fortiori* true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some "compelling need" for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

The decisions in No. 70-85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs,* must be affirmed. Here, petitioner refused to answer questions that directly related to criminal conduct that he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute,

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[37] The Guidelines for Subpoenas to the News Media were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo. No. 692 (Sept. 2, 1970), which was sent to all United States Attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that: "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice" and that: "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information form non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press and require the express authorization of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is "sufficient reason to believe that the information sought [from the journalist] is essential to a successful investigation," and whether the Government has unsuccessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in "emergencies and other unusual situations," subpoenas may be issued which do not exactly conform to the Guidelines.

Ky. Rev. Stat. § 218.010 (14) (1962), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky. Rev. Stat. § 218.210 (1962). It held that petitioner "saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish," in *Branzburg* v. *Pound,* 461 S. '. 2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story that forms the basis of the subpoena in *Branzburg* v. *Meigs.* In both cases, if what petitioner wrote was true, he had direct information to provide the grand jury concerning the commission of serious crimes.

The only question presented at the present time in *In re Pappas,* No. 70-94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as "meager," and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony." 358 Mass., at 614, 266 N. E. 2d, at 303-304.

So ordered.

MR. JUSTICE POWELL, concurring.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in MR. JUSTICE STEWART'S dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media – properly free and untrammeled in the fullest sense of these terms – were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.˜

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

MR. JUSTICE DOUGLAS, dissenting in No. 70-57, *United States* v. *Caldwell.*

˜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 in my view is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury, it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions. The basic issue is the extent to which the First Amendment (which is applicable to investigating committees, *Watkins* v. *United States,* 354 U.S. 178; *NAACP* v. *Alabama,* 357 U.S. 449, 463; *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539; *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 6-7; *In re Stolar,* 401 U.S. 23) must yield to the Government's asserted need to know a reporter's unprinted information.

The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of 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 advance in the case.

My view is close to that of the late Alexander Meiklejohn:˜

> "For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed.' The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process' is irrelevant."

He also believed that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express,"˜ and that "[p]ublic discussions of public issues, together with the spreading of information

and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power."~

Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. In this regard, Caldwell's status as a reporter is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual view-point. The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination. In this respect, Caldwell's status as a news gatherer and an integral part of that process becomes critical.~

Today's decision will impede the wide-open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.

I see no way of making mandatory the disclosure of a reporter's confidential source of the information on which he bases his news story.

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

As Mr. Justice Black said in *New York Times Co*. v. *United States,* 403 U.S. 713, 717 (concurring opinion), "The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."

Government has an interest in law and order; and history shows that the trend of rulers – the bureaucracy and the police – is to suppress the radical and his ideas and to arrest him rather than the hostile audience. See *Feiner* v. *New York,* 340 U.S. 315. Yet, as held in *Terminiello* v. *Chicago,* 337 U.S. 1, 4, one "function of free speech under our system of government is to invite dispute." We went on to say, "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though

they live in the city where the forces that would undermine society operate. The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. Its performance means that the press is often engaged in projects that bring anxiety or even fear to the bureaucracies, departments, or officials of government. The whole weight of government is therefore often brought to bear against a paper or a reporter.

A reporter 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.~ When we deny newsmen that protection, we deprive the people of the information needed to run the affairs of the Nation in an intelligent way.

Madison said:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." (To '. T. Barry, Aug. 4, 1822.) 9 Writings of James Madison 103 (G. Hunt ed. 1910).

Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they should exercise caution in how they use whatever information they can obtain.~

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.

I would also reverse the judgments in No. 70-85, *Branzburg* v. *Hayes,* and No. 70-94, *In re Pappas,* for the reasons stated in the above dissent in No. 70-57, *United States* v. *Caldwell.*

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL'S enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision

impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice.~

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press,~ because the guarantee is "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc.* v. *Hill,* 385 U.S. 374, 389.~

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised,~ and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ." *Estes* v. *Texas,* 381 U.S. 532, 539; *Mills* v. *Alabama,* 384 U.S. 214, 219; *Grosjean, supra,* at 250. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.~

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. *Grosjean, supra,* at 250; *New York Times, supra,* at 270.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, *Near* v. *Minnesota,* 283 U.S. 697; *New York Times Co.* v. *United States,* 403 U.S. 713, a right to distribute information, see, *e. g., Lovell* v. *Griffin,* 303 U.S. 444, 452; *Marsh* v. *Alabama,* 326 U.S. 501; *Martin* v. *City of Struthers,* 319 U.S. 141; *Grosjean, supra,* and a right to receive printed matter, *Lamont* v. *Postmaster General,* 381 U.S. 301.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.~

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality – the promise or understanding that names or certain aspects of communications will be kept off the record – is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power – the absence of a

constitutional right protecting, in *any* way, a confidential relationship from compulsory process – will either deter sources from divulging information or deter reporters from gathering and publishing information.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers."~

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. 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 through the press to the public.~

In *Caldwell,* the District Court found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news."~ Commentators and individual reporters have repeatedly noted the importance of confidentiality.~ And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news gathering.~

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship."~ The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers.~

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.~

The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt

that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.~

The deterrence may not occur in every confidential relationship between a reporter and his source.~ But it will certainly occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal – and therefore unattainable – imprimatur from empirical studies.~ We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships.~

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.~

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their "delicate and vulnerable" nature, *NAACP* v. *Button,* 371 U.S., at 433, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.~

[W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;~ (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.~

The crux of the Court's rejection of any newsman's privilege is its observation that 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." See *ante,* at 691 (emphasis supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those "confidential informants involved in actual criminal conduct" and those having "information suggesting illegal conduct by others." See *ante,* at 691, 693. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information that is clearly relevant to a specific probable violation of criminal law.~

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the

administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space." *NAACP* v. *Button,* 371 U.S., at 433.˜

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70-57, *United States* v. *Caldwell.*˜ In the other two cases before us, No. 70-85, *Branzburg* v. *Hayes* and *Meigs,* and No. 70-94, *In re Pappas,* I would vacate the judgments and remand the cases for further proceedings not inconsistent with the views I have expressed in this opinion.

Zurcher v. Stanford Daily

436 U.S. 547
Supreme Court of the United States
May 31, 1978

ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. v. STANFORD DAILY ET AL. No. 76-1484. Argued January 17, 1978. Decided May 31, 1978. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Together with No. 76-1600, Bergna, District Attorney of Santa Clara County, et al. v. Stanford Daily et al., also on certiorari to the same court. Robert K. Booth, Jr., argued the cause for petitioners in No. 76-1484. With him on the briefs were Marilyn Norek Taketa, Melville A. Toff, and Stephen L. Newton. Eric Collins, Deputy Attorney General of California, argued the cause for petitioners in No. 76-1600. With him on the briefs were Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Edward P. O'Brien, Assistant Attorney General, Patrick G. Golden and Eugene Kaster, Deputy Attorneys General, Selby Brown, Jr., and Richard K. Abdalah. Jerome B. Falk, Jr., argued the cause for respondents in both cases. With him on the briefs was Anthony G. Amsterdam. MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases.

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the Fourteenth Amendment, are familiar:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As heretofore understood, the Amendment has not been a barrier to warrants to search property on which there is probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated. We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be located there should not issue except in the most unusual circumstances, and that except in such circumstances, a subpoena *duces tecum* must be relied upon to recover the objects or evidence sought.~

Late in the day on Friday, April 9, 1971, officers of the Palo Alto Police Department and of the Santa Clara County Sheriff's Department responded to a call from the director of the Stanford University Hospital requesting the removal of a large group of demonstrators who had seized the hospital's administrative offices and occupied them since the previous afternoon. After several futile efforts to persuade the demonstrators to leave peacefully, more drastic measures were employed. The demonstrators had barricaded the doors at both ends of a hall adjacent to the administrative offices. The police chose to force their way in at the west end of the corridor. As they did so, a group of demonstrators emerged through the doors at the east end and, armed with sticks and clubs, attacked the group of nine police officers stationed there. One officer was knocked to the floor and struck repeatedly on the head; another suffered a broken shoulder. All nine were injured.~ There were no police photographers at the east doors, and most bystanders and reporters were on the west side. The officers themselves were able to identify only two of their assailants, but one of them did see at least one person photographing the assault at the east doors.

On Sunday, April 11, a special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police. The photographs carried the byline of a Daily staff member and indicated that he had been at the east end of the hospital hallway where he could have photographed the assault on the nine officers. The next day, the Santa Clara County District Attorney's Office secured a warrant from the Municipal Court for an immediate search of the Daily's offices for negatives, film, and pictures showing the events and occurrences at the hospital on the evening of April 9. The warrant issued on a finding of "just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with Deadly Weapon, will be located [on the premises of the Daily]." App. 31-32. The warrant affidavit contained no allegation or indication that members of the Daily staff were in any way involved in unlawful acts at the hospital.

The search pursuant to the warrant was conducted later that day by four police officers and took place in the presence of some members of the Daily staff. The Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. Locked drawers and rooms were not opened. The officers apparently had opportunity to read notes and correspondence during the search;

but, contrary to claims of the staff, the officers denied that they had exceeded the limits of the warrant.˜ They had not been advised by the staff that the areas they were searching contained confidential materials. The search revealed only the photographs that had already been published on April 11, and no materials were removed from the Daily's office.

A month later the Daily and various members of its staff, respondents here, brought a civil action in the United States District Court for the Northern District of California seeking declaratory and injunctive relief under 42 U.S. C. § 1983 against the police officers who conducted the search, the chief of police, the district attorney and one of his deputies, and the judge who had issued the warrant. The complaint alleged that the search of the Daily's office had deprived respondents under color of state law of rights secured to them by the First, Fourth, and Fourteenth Amendments of the United States Constitution.

The District Court denied the request for an injunction but, on respondents' motion for summary judgment, granted declaratory relief. 353 F. Supp. 124 (1972). The court did not question the existence of probable cause to believe that a crime had been committed and to believe that relevant evidence would be found on the Daily's premises. It held, however, that the Fourth and Fourteenth Amendments forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause to believe, based on facts presented in a sworn affidavit, that a subpoena *duces tecum* would be impracticable. Moreover, the failure to honor a subpoena would not alone justify a warrant; it must also appear that the possessor of the objects sought would disregard a court order not to remove or destroy them. The District Court further held that where the innocent object of the search is a newspaper, First Amendment interests are also involved and that such a search is constitutionally permissible "only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." *Id.,* at 135. Since these preconditions to a valid warrant had not been satisfied here, the search of the Daily's offices was declared to have been illegal. The Court of Appeals affirmed *per curiam,* adopting the opinion of the District Court. 550 F. 2d 464 (CA9 1977).˜ We issued the writs of certiorari requested by petitioners. 434 U.S. 816 (1977).˜ We reverse.˜

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.˜ [I]t is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest.

Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of crime, involves hazards to criminal investigation much more serious than the District Court believed; and the record is barren of anything but the District Court's assumptions to support its conclusions.˜ At the very least, the burden of justifying a major revision of the Fourth Amendment has not been carried.˜

The District Court held, and respondents assert here, that whatever may be true of third-party searches generally, where the third party is a newspaper, there

are additional factors derived from the First Amendment that justify a nearly *per se* rule forbidding the search warrant and permitting only the subpoena *duces tecum*. The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to gather, analyze, and disseminate news. This is said to be true for several reasons: First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of information will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure. Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

It is true that the struggle from which the Fourth Amendment emerged "is largely a history of conflict between the Crown and the press," *Stanford* v. *Texas,* 379 U.S. 476, 482 (1965), and that in issuing warrants and determining the reasonableness of a search, state and federal magistrates should be aware that "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant,* 367 U.S. 717, 729 (1961). Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford* v. *Texas, supra,* at 485. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden* v. *Kentucky,* 413 U.S. 496, 501 (1973). Hence, in *Stanford* v. *Texas,* the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgments about books and papers and was the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment. Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to "focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant, supra,* at 732; *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 210 (1964); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636, 637 (1968); *Roaden* v. *Kentucky, supra,* at 502; *Heller* v. *New York,* 413 U.S. 483, 489 (1973).

Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness

and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant – probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness – should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort. Nor are we convinced, any more than we were in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

The fact is that respondents and *amici* have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated – nor should it be.

Respondents also insist that the press should be afforded opportunity to litigate the State's entitlement to the material it seeks before it is turned over or seized and that whereas the search warrant procedure is defective in this respect, resort to the subpoena would solve the problem. The Court has held that a restraining order imposing a prior restraint upon free expression is invalid for want of notice and opportunity for a hearing, *Carroll* v. *Princess Anne,* 393 U.S. 175 (1968), and that seizures not merely for use as evidence but entirely removing arguably protected materials from circulation may be effected only after an adversary hearing and a judicial finding of obscenity. *A Quantity of Books* v. *Kansas, supra*. But presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint. *Heller* v. *New York, supra.* And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint

whatsoever on the publication of the Daily or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits.

We note finally that if the evidence sought by warrant is sufficiently connected with the crime to satisfy the probable-cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash. Further, Fifth Amendment and state shield-law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment. Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.~

We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment. Nor has anything else presented here persuaded us that the Amendments forbade this search. It follows that the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of MR. JUSTICE STEWART'S dissenting opinion. As I understand that opinion, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute,~ I agree with the Court that there is no constitutional basis for such a reading.

If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. As the opinion of the Court points out, the struggle from which the Fourth Amendment emerged was that between Crown and press. *Ante,* at 564. The Framers were painfully aware of that history, and their response to it was the Fourth Amendment. *Ante,* at 565. Hence, there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other person.

This is not to say that a warrant which would be sufficient to support the search of an apartment or an automobile necessarily would be reasonable in supporting the search of a newspaper office. As the Court's opinion makes clear, *ante,* at 564-565, the magistrate must judge the reasonableness of every warrant

in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant. While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment – such as those highlighted by MR. JUSTICE STEWART – when he weighs such factors. If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.˜ *Ibid.*

In any event, considerations such as these are the province of the Fourth Amendment. There is no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach.˜

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

Believing that the search by the police of the offices of the Stanford Daily infringed the First and Fourteenth Amendments' guarantee of a free press, I respectfully dissent.˜

I

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time˜ will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public,˜ because important information can often be obtained only by an assurance that the source will not be revealed. *Branzburg* v. *Hayes,* 408 U.S. 665, 725-736 (dissenting opinion).˜ And the Court has recognized that "'without some protection for seeking out the news, freedom of the press could be eviscerated.'" *Pell* v. *Procunier,* 417 U.S. 817, 833.

Today the Court does not question the existence of this constitutional protection, but says only that it is not "convinced. . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches." *Ante,* at 566. This facile conclusion seems to me to ignore common experience. It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed. And it cannot be

denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks, and wastebaskets of a newsroom.~ Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's access to information, and thus the public's, will thereby be impaired.~

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant,~ while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.

One need not rely on mere intuition to reach this conclusion. The record in this case includes affidavits not only from members of the staff of the Stanford Daily but also from many professional journalists and editors, attesting to precisely such personal experience.~ Despite the Court's rejection of this uncontroverted evidence, I believe it clearly establishes that unannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press to gather news and report it to the public.

II

In *Branzburg* v. *Hayes, supra,* the more limited disclosure of a journalist's sources caused by compelling him to testify was held to be justified by the necessity of "pursuing and prosecuting those crimes reported to the press by informants and . . . thus deterring the commission of such crimes in the future." 408 U.S., at 695. The Court found that these important societal interests would be frustrated if a reporter were able to claim an absolute privilege for his confidential sources. In the present case, however, the respondents do not claim that any of the evidence sought was privileged from disclosure; they claim only that a subpoena would have served equally well to produce that evidence. Thus, we are not concerned with the principle, central to *Branzburg,* that "'the public . . . has a right to every man's evidence,'" *id.,* at 688, but only with whether any significant societal interest would be impaired if the police were generally required to obtain evidence from the press by means of a subpoena rather than a search.

It is well to recall the actual circumstances of this litigation. The application for a warrant showed only that there was reason to believe that photographic evidence of assaults on the police would be found in the offices of the Stanford Daily. There was no emergency need to protect life or property by an immediate search. The evidence sought was not contraband, but material obtained by the Daily in the normal exercise of its journalistic function. Neither the Daily nor any member of its staff was suspected of criminal activity. And there was no showing that the Daily would not respond to a subpoena commanding production of the

photographs, or that for any other reason a subpoena could not be obtained. Surely, then, a subpoena *duces tecum* would have been just as effective as a police raid in obtaining the production of the material sought by the Santa Clara County District Attorney.

The District Court and the Court of Appeals clearly recognized that *if* the affidavits submitted with a search warrant application should demonstrate probable cause to believe that a subpoena would be impractical, the magistrate must have the authority to issue a warrant. In such a case, by definition, a subpoena would not be adequate to protect the relevant societal interest. But they held, and I agree, that a warrant should issue only after the magistrate has performed the careful "balanc[ing] of these vital constitutional and societal interests." *Branzburg* v. *Hayes, supra,* at 710 (POWELL, J., concurring).˜

The decisions of this Court establish that a prior adversary judicial hearing is generally required to assess in advance any threatened invasion of First Amendment liberty.˜ A search by police officers affords no timely opportunity for such a hearing, since a search warrant is ordinarily issued *ex parte* upon the affidavit of a policeman or prosecutor. There is no opportunity to challenge the necessity for the search until after it has occurred and the constitutional protection of the newspaper has been irretrievably invaded.

On the other hand, a subpoena would allow a newspaper, through a motion to quash, an opportunity for an adversary hearing with respect to the production of any material which a prosecutor might think is in its possession. This very principle was emphasized in the *Branzburg* case:

> "[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." 408 U.S., at 710 (POWELL, J., concurring).

See also *id.,* at 707-708 (opinion of Court). If, in the present litigation, the Stanford Daily had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true – that the evidence sought did not exist. The legitimate needs of government thus would have been served without infringing the freedom of the press.

III

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press.

For these reasons I would affirm the judgment of the Court of Appeals.