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Branzburg v. Hayes

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Mr. Zingman (for Branzburg)

Contends that "mere appearance" by reporter violates his rights

Contend that 4th ¶ of protecting order (p 46, 47) takes away all protection granted in first 3 paragraphs. (The Qs as to possession of marijuana – p 6 – would have to be answered)

This is Π's position

Π's proposition: Gov't must prove a "compelling & overriding need" –

Wants Ct. to hold that 1st amend protects newsman from testifying until Govt has carried foregoing burden of proof in a public hearing.

Zingman (cont - p 2)

What is meant by "compelling & overriding" need? Π's answer - as minimum

Get transcript on this

1. Probable cause as to need
2. No other means available
3. Necessary to prevent immediate commission of a major crime

Open hearing is "essential" to Zingman position.

Same privilege should exist in a criminal trial as with respect to a grand jury proceedings.

Byron asked this question

Schroering (for Ky)

Proposed "tests" of Π would handicap G/Jury. An open hearing would destroy secrecy of grand jury

In response to my question, he expressed disagreement with Judge Meigs order as to a qualified privilege (A 46).

Note to myself: a rational position might be based on J. Meigs order - according qualified privilege - but not accepting Zingman's submission (which is similar to Bickel)

See AG's guidelines.

The actual Q in these cases is whether Π must appear - not what he may be required to answer.

Reynolds (SG - amicus)

See Brief amicus

Difficult point to deal with

Newsmen have no exclusive interest in gathering or commenting on news. Thus the privilege - if granted - must apply to anyone who writes (any where) or lectures, 1st Amend. protects right to "associate" as well as speech & press. Thus, anyone might claim privilege - if it is recognized. (But this stretches argument too far).

Query - Is the privilege of lawyer anything more than a rule of evidence?

Interesting Point

See S.G. Brief - p 7 - as to misprision of a felony. (also get Eng. case - Denning)

"

S.G. suggests that the press' position here is not in interest of freedom of press - 7,8

lfp/ss 4cc 2/23/72

UNITED STATES v. CALDWELL 70-57
IN RE PAUL PAPPAS 70-94
BRANZBURG v. HAYES & MEIGS 70-85
Argued 2/23/72

Tentative Impressions*

Although the facts in these cases differ, counsel for the media - in the principal briefs and in the briefs amicus - are asserting a First Amendment right - a right of constitutional proportions - to a privilege against disclosing - in judicial or other proceedings - sources of information or confidential information.

Statements of this position vary. That in the brief on behalf of Branzburg (at p. 9) is typical:

> "The First Amendment provides newsmen a privilege against compulsory appearances in closed proceedings and against compulsory disclosure of confidential information. In order to overcome this privilege, the state has the heavy burden of proving, by clear and convincing evidence, that the testimony of the reporter is absolutely necessary to prevent direct, immediate andirreparable prospective damage to the national security, human life or liberty. Any lesser burden does not adequately protect the press from state action which endangers the freedom of the press guaranteed by the First Amendment."

*These impressions are dictated on the afternoon following argument to record my initial and tentative impressions. I will have read, in preparation for the arguments, the principal briefs, some of the cases and the bench memo. I hope to do further study before the Conference. My views are subject to change and to the discussion at the Conference.

Prof. Bickel, representing the New York Times and various other media, states their position as follows:

> "The First Amendment demands . . . that the reporter be protected. The standard of protection can be defined by objective criteria, and made self limiting in practice.
>
> "A reporter cannot, consistently with the Constitution, be made to divulge confidences to a governmental investigative body unless three minimal tests have all been met. 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information."

The decisions of the three courts differed materially. In Caldwell, the Ninth Circuit agreed substantially with the press - although its decision was narrowly drawn in light of the specific facts (the government had not introduced any evidence to show a need for the testimony).

In Branzburg, the court reached a different result from Caldwell. It decided that the reporter would have to testify before the grand jury, and it expressed grave doubt as to whether there was any constitutional privilege. The reporter had not shown, as was true in Caldwell, that he had no information - other than stories already published - to disclose.

In Pappas, the Massachusetts court held flatly that there was no First Amendment privilege, qualified or absolute, available to newsmen.

My Tentative Views:

Caldwell: I would reverse Caldwell, as it went too far in establishing a constitutional right not even to testify at all.

Branzburg: I would affirm the holding, although I would not accept all of the reasoning of the court.

Pappas: It seems to me that the Massachusetts court may have been right in holding that there is no privilege as a matter of constitutional right, either absolute or qualified. But the Court did not give due weight to the importance of balancing First Amendment interests against the other interests involved. I would be inclined to reverse Pappas for reconsideration in light of the principles and guidelines established in this Court's opinion.

* * * * *

As to the controlling principles, I am tentatively inclined to share the view expressed by Justice Stewart in Garland v. Torre, 259 F. 2d 545, namely, that there is no constitutional privilege

specifically available to newsmen. Mr. Justice Stewart also declined to recognize - as I read his opinion - even an "evidentiary privilege" (such as that available to a lawyer). He did emphasize the important First Amendment interest involved, and concluded that these needed to be balanced against the interest being served by the administration of justice (in the Garland case the need to have the testimony of a critical witness).

I have been interested in the protective order entered by Judge Meigs in the Branzburg case (Appendix 46) which purported to protect confidential sources and information, but required the witnesses to appear before the grand jury and to answer questions "which concern or pertain to any criminal act, the commission of which was actually observed by Branzburg."

Some elaboration and refinement of Judge Meigs approach might make sense. His qualification, for example, with respect to crimes "actually observed" is not broad enough. Crimes which might be planned or discussed in his presence should not be privileged.

Some of the "safeguards" proposed by counsel for the media - such as imposing a heavy burden on the state to show a "compelling and overriding interest", and to guarantee a public hearing prior to the newsman being required to answer any question, go much too far.

L. F. P., Jr.

Conf. 2/25/72

Court ....
Argued February 23, 19 72
Submitted ...., 19...

Voted on................, 19...
Assigned ...., 19...
Announced ...., 19...

No. 70-85

BRANZBURG

vs.

HAYES

Affirm
5 to 4

I don't agree with much of Key opinion but if there is no 1st Amend. Privilege, this is merely a state case.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Douglas, J.													
Burger, Ch. J.													

DOUGLAS, J. Reverse
There is a Const. privilege.

MARSHALL, J. Reverse
agrees with Brennan

BRENNAN, J. Vacate & Remand in accord with his views of a 1st amend. Privilege (Reverse)

BLACKMUN, J. Affirm

STEWART, J. Reverse
Two cases - two stories - the Frankfort story should be protected (Ky statute) (Chief agrees with this)

POWELL, J. Affirm
as I do not think there is a const. privilege

WHITE, J. Affirm

REHNQUIST, J. Affirm

MEMO: Chief - as Branzburg witnessed a criminal act, he would Affirm

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

No. 70-85 Branzburg v. Hayes
No. 70-94 In the Matter of Paul Papas
No. 70-57 U. S. v. Caldwell

From: Powell, J.

Circulated: JUN 23 1972

Recirculated: ______

MR. JUSTICE POWELL, concurring, in the opinion of the Court.

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 the 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 - basically free and untrammelled 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 protection 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 Court merely holds that a newsman ~~(however he may be defined~~) has no testimonial privilege as a matter of

right under the Constitution. We do not hold that the protection of the Courts is unavailable to newsmen under circumstances where legitimate First Amendment interests require protection.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

Circulated: JUN 2 4 1972

Recirculated: ________

SUPREME COURT OF THE UNITED STATES

Nos. 70-85, 70-94, AND 70-57

Paul M. Branzburg, Petitioner, 70-85 v. John P. Hayes, Judge, etc., et al.	On Writ of Certiorari to the Court of Appeals of Kentucky.
In the Matter of Paul Papas, Petitioner. 70-94	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
United States, Petitioner, 70-57 v. Earl Caldwell.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1972]

MR. JUSTICE POWELL, concurring, in the opinion of the Court.

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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.*

*It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the government has made a showing that meets the three pre-conditions specified in the dissenting opinion of MR. JUSTICE STEWART. To be sure, this would require a "balancing" of interests by the Court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the Court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional pre-conditions that Caldwell and the dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by the dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

In short, the Court merely holds that a newsman has no testimonial privilege as a matter of right under the Constitution. We do not hold that the protection of the courts is unavailable to newsmen under circumstances where legitimate First Amendment interests require protection.