A HOUSE DIVIDED: EARL CALDWELL, *THE NEW YORK TIMES*, AND THE QUEST FOR A TESTIMONIAL PRIVILEGE

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I. INTRODUCTION

With a Democrat in the White House and strong Democratic majorities in both the House and Senate, proponents of a federal "shield law" for reporters are hopeful that the 111th Congress will finally do what earlier Congresses have failed to accomplish: enact a statutory testimonial privilege to enable journalists to protect their confidential sources.[1] Until it does, however, federal prosecutors will be permitted to subpoena members of the working press to appear before grand juries and other tribunals and force them to identify all manner of whistleblowers, ax-grinders, traitors, patriots, and garden-variety leakers. Once again, journalists will argue they have a First Amendment right to protect their sources as essential to gathering the news. And once again, the argument will probably fail.

In the 1972 case of *Branzburg v. Hayes*,[2] the Supreme Court held the First Amendment does not protect journalists who refuse to reveal their confidential sources or newsgathering product in response to a federal grand jury subpoena.[3] That decision has remained vital for thirty-five years and has reverberated through a number of recent high-profile cases.[4] Despite some form of protection in nearly

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[1] The U.S. House of Representatives passed the Free Flow of Information Act of 2009, H.R. 985, by voice vote on March 31, 2009. *See* Samantha Fredrickson, *House Passes Federal Shield Bill*, News Media Update (Reporters Committee for Freedom of the Press), March 31, 2009, http://www.rcfp.org/newsitems/index.php?i=10682. The U.S. Senate Judiciary Committee reported its own shield law, S. 448, on Dec. 10, 2009. *See* Cristina Abello, *Federal Shield Bill Passes Senate Judiciary Committee*, News Media Update (Reporters Committee for Freedom of the Press), Dec. 10, 2009, http://www.rcfp.org/newsitems/index.php?i=11167. An identical "shield law" passed the House in the 110th Congress by a vote of 398–21; a similar bill was approved by the Senate Judiciary Committee but died at the end of the 110th Congress. *Id.*

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

[3] *Id.* at 667.

[4] *See, e.g.*, *In re* Grand Jury Subpoena Wolf v. United States, 201 F. App'x 430, 432 (9th Cir. 2006); New York Times Co. v. Gonzales, 459 F.3d 160, 172–74 (2d Cir. 2006); Wen Ho Lee v. Dep't of Justice, 413 F.3d 53, 57–61 (D.C. Cir. 2005); *In re* Grand Jury Subpoena, Miller, 397 F.3d 964, 968–81 (D.C. Cir. 2005); *In re* Special Proceedings, 373 F.3d 37, 44–45 (1st Cir. 2004); McKevitt v. Pallasch, 339 F.3d 530, 531–33 (7th Cir.

every state court,[5] reporters haled before a federal judge may have no recourse save prison.

Devastating as *Branzburg* has been for the so-called "journalist's privilege," its negative impact has been far broader. *Branzburg* is one of the Supreme Court's earliest newsgathering decisions and arguably the most influential.[6] Although the press has been successful in persuading the courts to find First Amendment protection for its editorial product, it has been far less successful with regard to protection for newsgathering.[7] The *Branzburg* precedent epitomizes the frustration of the press in attempting to secure First Amendment, or even statutory, protection for newsgathering, and this Article explores one of the primary reasons for that failure: the inability of the diverse elements that constitute "the press" to agree on the appropriate scope of such protection.

The legislative debates between media organizations advocating an absolute privilege and those seeking only a qualified privilege have been widely reported.[8] Far less well known are the conflicts among the various media personalities and organizations that participated in the *Branzburg* litigation. These conflicts, this Article submits, are at least partly responsible for the *Branzburg* precedent, which effectively foreclosed the possibility of an expansive First Amendment privilege for newsgathering.

This Article examines the *Branzburg* case as an example of strategic litigation initiated or pursued by mainstream media organizations as part of a continuing effort to shape the First Amendment doctrine under which journalists practice their craft. Part II presents the factual background of the three cases that were consolidated in the *Branzburg* opinion, as well as brief procedural timelines and synopses of the opinions in the cases. This Article focuses throughout on what is by far the most important of the three—*Caldwell v. United States*.[9] Part III examines more closely the values of the reporters and editors who decided to take these cases all the way to the United States Supreme Court through the arguments that were presented on their behalf. Part IV assesses the benefits of success, the costs of failure, and the probability of either outcome as they might have been

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2003); *In re* Grand Jury Subpoenas Fainaru-Wada, 438 F. Supp. 2d 1111, 1115–18 (N.D. Cal. 2006); United States v. Libby, 432 F. Supp. 2d 26, 43–48 (D.D.C. 2006).

[5] Complete information on state shield laws is available at The Reporters Committee for Freedom of the Press Web site, Privilege Compendium page, http://www.rcfp.org/privilege/.

[6] Only *Estes v. Texas*, 381 U.S. 532, 539–40 (1965), is earlier, and a quick LexisNexis search shows that courts claimed to follow *Branzburg* five times (107–21) as often as *Estes*.

[7] *See* Eric B. Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247, 255 (2007) (finding that of the seventy content regulation cases decided by the Court, the press won forty-three and lost twenty-seven; in the twenty-four newsgathering cases, the press won only six and lost eighteen).

[8] *See infra* Part V.B.

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

calculated by the parties at the time. Part V looks at the opinion itself and the equally unavailing legislative efforts that followed. Finally, the Article offers tentative conclusions about the miscalculations that left the press with such a disastrous precedent on the books.

This is not an extended case note on *Branzburg* or a contemplation of the journalist's privilege, shield laws, and the like. Much has already been written along those lines.[10] Rather, this is part of the author's continuing study of the press as a political institution attempting to exercise its influence through the litigation process.

More important, this Article features the first-person account of Earl Caldwell, the *New York Times* reporter whose coverage of the Black Panther movement and heroic refusal to testify about his news sources before a federal grand jury brought this issue to the Court's attention.

II. BACKGROUND

A. The Caldwell Case

Earl Caldwell was born in Clearfield, Pennsylvania, and attended the University of Buffalo as a business major until, as an African-American, he became disillusioned by racism in the insurance industry.[11] On returning to Clearfield, Caldwell landed a job at the local newspaper, *The Progress*, where he became a sports editor.[12] From there, he moved on to the Lancaster *Intelligencer-Journal*, and then to the Rochester, N.Y., *Democrat and Chronicle*, where he first began writing on racial issues.[13] In 1965, he began reporting for the *New York Herald Tribune*, moving briefly to the *New York Post* when the *Herald Tribune* closed. He joined *The New York Times* in 1967.[14]

Caldwell was one of a number of black reporters hired in the mid- and late 1960s by the mainstream press to cover race relations, particularly the urban

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[10] *See* Rex S. Heinke & Galit Avitan, *Reconciling* Branzburg *and* Daily Mail*: A Proposal for a Qualified Reporters' Privilege*, 32 OHIO N.U. L. REV. 503, 503–07 (2006); Leila Wombacher Knox, Note, *The Reporter's Privilege: The Necessity of a Federal Shield Law Thirty Years After* Branzburg, 28 HASTINGS COMM. & ENT. L.J. 125, 137–44 (2006); Kristina Spinneweber, Comment, *Branzburg, Who? The Existence of a Reporter's Privilege in Federal Courts*, 44 DUQ. L. REV. 317, 318–22 (2006).

[11] Biographical information on Earl Caldwell comes from the Robert C. Maynard Institute for Journalism Education, where Caldwell is a founding director. Earl Caldwell Biography, http://www.mije.org/historyproject/Biography-EarlCaldwell (last visited Dec. 1, 2009). Additional information comes from the author's interview with Earl Caldwell. *See* Interview with Earl Caldwell in New York, N.Y. (Feb. 11, 2009) [hereinafter Caldwell Interview] (notes on file with author).

[12] Earl Caldwell Biography, *supra* note 11.

[13] *Id.*

[14] *Id.*

rioting that was largely inaccessible to white reporters.[15] Gene Roberts points out that, until then, only a handful of black reporters worked on white dailies—thirty-one in 1955, according to *Ebony* magazine.[16] Caldwell recalls that the new influx of black reporters, who were hired to cover not only the riots but also the dramatic changes occurring in the black community, led to the formation of the New York Association of Black Journalists, which played a critical part in his story.[17]

In the fall of 1968, the *Times* assigned Caldwell to cover the Black Panther Party in the San Francisco Bay area, and he developed a confidential relationship with the Panthers that enabled him to write stories "that no one else in the country could have written."[18] Caldwell's stories from that time evince his access to Panther headquarters and personalities that could not help but attract official attention. One provided the following description:

> In the back room of an apartment deep in the Fillmore slum a bearded youth in an Afro hair style uncovered a stack of rifles that was only partly hidden in a dark corner.
>
> He said nothing but began wrapping the weapons in robes and old blankets, preparing to transport them to Oakland, where [Huey] Newton has been jailed for nearly a year.
>
> Some were high-powered lever action rifles. Others appeared to be automatic weapons.
>
> "The verdict [in the Newton trial] is irrelevant," the youth said. "The sky is the limit."[19]

Yet another story related the following details:

> It is well past midnight and quiet out on Shattuck Avenue. The liquor store on the corner is empty, and the lights are already out in the barbeque shop next door.
>
> But up in the middle of the block, up there in the two-story brownstone that the Black Panther party occupies, a dash of yellow light slips through an upstairs window.
>
> They are still there, up there in those cluttered, noisy rooms behind windows covered with huge steel plates and walls lined with bulging, dusty sandbags.[20]

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[15] *See* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 396 (2006).

[16] *Id.* at 365.

[17] Caldwell Interview, *supra* note 11.

[18] MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 37 (1979).

[19] Earl Caldwell, *Angry Panthers Talk of War and Unwrap Weapons*, N.Y. TIMES, Sept. 10, 1968, at 30.

[20] Earl Caldwell, *Declining Black Panthers Gather New Support from Repeated Clashes with Police*, N.Y. TIMES, Dec. 14, 1969, at 64.

In late 1969, the FBI began calling Caldwell every day, asking him to spy on his sources. Caldwell refused to cooperate, and, on the advice of bureau chief Wallace Turner, eventually stopped answering the telephone.[21] "They were hounding me for over a month," according to Caldwell, who said that FBI callers warned the office manager: "'You tell him this is not a game. We're not playing with him. He don't want to talk to us? He can tell it in court.'"[22]

When a federal marshal initially came to the *Times* bureau with a subpoena, Caldwell was out.[23] Turner urged him to destroy his files and then do some reporting from Alaska until it all blew over.[24] Caldwell did destroy most of the files, which he had been saving to write a book and included information on Panthers he had not written about in the newspapers. ("Panthers I keep in my pocket," he called them.)[25] But once the material was destroyed, he "didn't have it in [his] heart" to go to Alaska.[26]

On February 2, 1970, Caldwell was served with a subpoena *duces tecum* ordering him to appear before a federal grand jury in the Northern District of California.[27] He was told to bring his notes and recorded interviews with the Panther leadership and to testify as to the purposes and activities of the Party.[28] Caldwell believes the FBI broke into the *Times* bureau or tapped its telephones, or both, because some of the Panthers named in the subpoena had been "in his pocket" and never written about.[29] In any event, he objected to the scope of the subpoena, and his scheduled appearance was postponed.[30] On March 16, however, he received a second subpoena, without the requirement that he produce documents.[31] Caldwell and the *Times* moved to quash on the ground that requiring Caldwell to testify before the grand jury would "suppress vital constitutional interests."[32]

Caldwell was supported by a number of affidavits from *New York Times* and *Newsweek* reporters, as well as an amicus curiae brief from CBS News, with

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[21] Caldwell Interview, *supra* note 11.

[22] *Id.*; *see also* VAN GERPEN, *supra* note 18, at 37–38.

[23] Caldwell Interview, *supra* note 11.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Motion to Quash Grand Jury Subpoenas, *in* Sup. Ct. App. of Records and Briefs for Branzburg v. Hayes, 408 U.S. 665 (1972) [hereinafter *Branzburg* App.], Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57), at 4.

[28] *Id.*

[29] Caldwell Interview, *supra* note 11.

[30] Caldwell v. United States, 434 F.2d 1081, 1083 n.2 (9th Cir. 1970).

[31] Subpoena to Testify Before the Grand Jury, *in Branzburg* App., *supra* note 27, *Caldwell*, 402 U.S. 942 (No. 70-57), at 4, 21.

[32] Motion to Quash Grand Jury Subpoenas, *supra* note 27, at 4. James Goodale, then General Counsel of The New York Times Co., says the Times intervened as owner of the work product of its reporter. *See* James C. Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 735 (1975).

affidavits from its leading correspondents;[33] the government filed three memoranda in opposition to the motion to quash, each supported by affidavits.[34]

Behind the scenes, however, all was not harmonious. According to Caldwell, the *Times* initially hired the San Francisco law firm Pillsbury, Madison & Sutro to defend him.[35] According to Caldwell, when he met with John Bates, the attorney assigned to his case, Bates told him, "We've got a tremendous problem with law and order out here . . . probably some of your material should be given to the FBI."[36] Bates told Caldwell to bring all his material to the office and to meet with Times Company Executive Vice President Harding Bancroft, who was flying out to oversee the case, so they could decide what should be turned over.[37]

Determined to find his own lawyer, Caldwell sought help from the New York Association of Black Journalists.[38] That connection led him to the NAACP Legal Defense Fund (LDF), which found the perfect lawyer for the case.[39] Anthony G. Amsterdam had handled a number of death penalty cases for LDF[40] and, in 1969, had helped in the appeal of Black Panther Bobby Seale.[41] He was teaching at Stanford Law School at the time and agreed to hear Caldwell's story.[42]

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[33] Affidavits Attached to Motion to Quash, *in Branzburg* App., *supra* note 27, *Caldwell*, 402 U.S. 942 (No. 70-57), at 9–61.

[34] Memorandum in Opposition to Motion to Quash Grand Jury Subpoena, *in Branzburg* App., *supra* note 27, *Caldwell*, 402 U.S. 942 (No. 70-57), at 62–79 (includes two supplemental memoranda).

[35] Caldwell Interview, *supra* note 11.

[36] *Id.* Publicly, the *Times* editorialized against the subpoenas, but its support for Caldwell was equivocal:

> People whose jobs, associations, or reputations are at stake cannot be expected to speak freely on an off-the-record basis if they have reason to fear that both their identity and the totality of their remarks will be turned over to the police.
>
> The attendant and even more serious danger is that the entire process will create the impression that the press operates as an investigative agency for government rather than as an independent force dedicated to the unfettered flow of information to the public. . . .
>
> . . . .
>
> This newspaper and all the mass media have the same duties as other organizations or individuals to cooperate in the processes of justice. But neither justice nor democracy will benefit if the subpoena power is misused to abridge the independence and effectiveness of the press.

Subpoenas on the Press, N.Y. TIMES, Feb. 4, 1970, at 42.

[37] Caldwell Interview, *supra* note 11.

[38] *Id.*

[39] *Id.*

[40] *Id.*; *see also* Nadya Labi, *A Man Against the Machine*, THE LAW SCHOOL: THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW, Autumn 2007, at 12.

[41] Labi, *supra* note 40, at 15.

[42] Caldwell Interview, *supra* note 11.

Caldwell was initially reluctant to talk with another white lawyer, but because he had nowhere else to turn, he called Amsterdam about midnight and drove to his home in Los Altos.[43] When Amsterdam told Caldwell he had a "legal right to refuse" to testify, Caldwell was thrilled.[44] Amsterdam took the case pro bono, and he, not Caldwell, attended the strategy meeting with Bancroft the next day.[45] When Caldwell arrived some hours later, Bancroft indicated he was delighted with Amsterdam and wanted to hire him, but Amsterdam refused to accept money from the paper.[46]

On April 6, the district court denied the motion to quash but issued a protective order limiting the scope of Caldwell's testimony to information given to him for publication.[47] The court also stayed the effective date of its order pending appeal to the U.S. Court of Appeals for the Ninth Circuit,[48] but the appeal was dismissed, "apparently on the ground that the District Court order was not appealable."[49]

Caldwell received yet a third subpoena on May 22, 1970, and the district court again ordered attendance under the protective order.[50] Fearing for his personal safety, he refused to appear before the grand jury in secret.[51] The district court found Caldwell in contempt, and he again appealed to the Ninth Circuit.[52]

According to Caldwell, the Times Company was furious at the appeal.[53] The company ordered him back to New York to discuss the matter with General Counsel James Goodale.[54] Caldwell remembers Goodale shaking his finger in front of Caldwell's face, saying, "If you keep pushing this, you're going to get a bad law written."[55] Goodale's prediction would ultimately come true, but not in the Ninth Circuit. Caldwell, who did not attend the argument, said Amsterdam convinced the court that ruining Caldwell's career and risking his life was too high a price for a grand jury appearance where no confidences would be revealed.[56]

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *In re* Caldwell, 311 F. Supp. 358, 360 (N.D. Cal. 1970) (mem.).
[48] *Id.* at 362.
[49] *Caldwell*, 434 F.2d at 1083 n.2.
[50] *Id.*
[51] Caldwell Interview, *supra* note 11.
[52] *Caldwell*, 434 F.2d at 1083 n.2.
[53] Caldwell Interview, *supra* note 11.
[54] *Id.*
[55] *Id.*
[56] *Id.* Goodale says "one of the reasons that Amsterdam decided to appeal the appearance issue after winning a qualified privilege in the district court was an apprehension that the government might possibly penetrate the privilege proposed there by Caldwell in some unknown respect, forcing testimony, albeit of an extremely limited nature, from Caldwell." Goodale, *supra* note 32, at 719 n.47 (citing personal correspondence from Amsterdam).

The Ninth Circuit reversed on November 16, 1970, ordering the contempt judgment vacated and holding that "where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before [the] judicial process properly can issue to require attendance."[57] The United States petitioned for certiorari, which was granted on May 3, 1971, along with petitions from Paul Branzburg and Paul Pappas, whose cases are discussed below.[58]

B. The Branzburg Case

In 1969, Paul Branzburg was a twenty-seven-year-old reporter for the Louisville *Courier-Journal*, where he served as a member of a special assignment group doing investigative journalism.[59] Branzburg had received an A.B. from Cornell University in 1963, a J.D. from Harvard Law School in 1966, and an M.S. cum laude from Columbia University Graduate School of Journalism in 1967.[60] His investigative work on the use of narcotics and other issues had been recognized on numerous occasions, and he was nominated twice for the Pulitzer Prize based on stories dealing with drugs and agricultural subsidies.[61]

On November 15, 1969, the *Courier-Journal* carried a story by Branzburg describing his observations of two Louisville "hippies" synthesizing hashish from marijuana in a makeshift lab.[62] Branzburg wrote: "'I don't know why I'm letting you do this story,' [Larry] 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."[63] The article also included a photograph of hands working with hashish.[64]

Branzburg was subpoenaed shortly thereafter by the Jefferson County grand jury. He appeared, but declined to identify the "Larry" and "Jack" of his story.[65]

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[57] *Caldwell*, 434 F.2d at 1089.

[58] Caldwell v. United States, 402 U.S. 942 (1971), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); *see also* Branzburg v. Hayes, 402 U.S. 942 (1971), *aff'd* 408 U.S. 665; *In re* Pappas, 402 U.S. 942 (1971), *aff'd sub nom. Branzburg*, 408 U.S. 665. Caldwell opposed the petition for certiorari on several grounds, none of which was or is particularly compelling. Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970) (No. 70-57). Indeed, the brief merely "suggests that this case presents an inopportune occasion for the exercise of the certiorari jurisdiction." *Id.*

[59] Affidavit of Paul M. Branzburg, *in Branzburg* App., *supra* note 27, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85), at 51–52.

[60] *Id.*

[61] *Id.*

[62] Paul M. Branzburg, *The Hash They Make Isn't To Eat*, THE COURIER-JOURNAL, Nov. 15, 1969.

[63] *Id.* at 3–4.

[64] *Branzburg*, 408 U.S. at 667.

[65] *Id.* at 668.

Branzburg's counsel, Edgar A. Zingman, argued that Kentucky's shield law[66] permitted Branzburg to protect his sources, but Judge J. Miles Pound rejected the argument and directed Branzburg to answer the question.[67] Zingman objected, citing both the shield law and the press clause of the First Amendment, and petitioned the Court of Appeals for an injunction against enforcement of Pound's order.[68] The petition urged the court to grant relief based on the state shield law, the state constitution, and the United States Constitution as "an interference with the exercise of freedom of the press [which] would permit courts to destroy that confidential relationship which is essential to a free press . . . ."[69]

The Court of Appeals granted a temporary restraining order the same day,[70] but a year later denied the petition over a single dissent.[71] Branzburg filed a motion to reconsider[72] based on the newly issued opinion of the United States Court of Appeals for the Ninth Circuit in *Caldwell v. United States*.[73] In January 1971, the Court of Appeals issued a revised opinion without substantive change.[74] The court did not address the constitutional issue, and *Caldwell* was never mentioned by name.[75] A further motion to stay the order pending petition for certiorari[76] was denied.[77]

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[66] The statute 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." KY. REV. STAT. § 421.100 (2009).

[67] Order, *In re:* 141087, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (1972) (No. 70-85), at 6.

[68] Petition for Temporary and Permanent Restraining Order and Writ of Mandamus, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 8–11.

[69] *Id.*

[70] Order of the Court Granting Temporary Restraining Order, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 12.

[71] Opinion of the Court by Commissioner Vance Dismissing Petition for Writ of Prohibition and Writ of Mandamus, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 13.

[72] Motion to Reconsider, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 21.

[73] 434 F.2d 1081 (9th Cir. 1970).

[74] Opinion of the Court by Commissioner Vance, *supra* note 71, at 22.

[75] *Id.* at 24 n.1. In that footnote, the court held that Branzburg had abandoned the constitutional argument and it therefore limited its consideration to the statutory interpretation of protected "sources" under the Kentucky shield law. The United States Supreme Court would later reject that view, holding the constitutional question was properly preserved for appeal. *See* Branzburg v. Hayes, 408 U.S. 665, 671 n. 6. (1972).

[76] Motion for an Order Staying the Effective Date of the Court's Order, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 29.

[77] Order (modified Jan. 22, 1971), *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 29.

Even before the revised opinion was issued, Branzburg had published two more controversial stories based on observations and interviews with Kentucky drug users.[78] Once again, he was subpoenaed, this time to appear before the Franklin County grand jury.[79] Once again he refused, submitting instead a motion to quash the subpoena.[80] At the same time, he filed another petition with the Kentucky Court of Appeals for injunctive relief.[81]

Judge Henry Meigs denied the motion subject to issuance of a protective order in accordance with *Caldwell*.[82] After hearing arguments from Branzburg and the Commonwealth, Meigs issued the protective order, which limited the testimony Branzburg would be required to give to his personal observation of criminal activity.[83] Specifically, he would not be required to reveal confidential sources or anything told him in confidence.[84]

That same day, the Kentucky Court of Appeals denied the petition for injunctive relief[85] and issued its opinion three days later.[86] The Court of Appeals went to great lengths to distinguish Branzburg's case from the new *Caldwell* decision in the Ninth Circuit on their respective facts.[87] The court also expressed "misgivings" about the rule announced in *Caldwell* as a "drastic departure from the generally recognized rule" that journalists' sources are not privileged under the First Amendment.[88] Once again, Branzburg's motion to stay the order[89] was

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[78] Paul M. Branzburg, *Pot Problem Byproduct: Disrespect for the Law*, THE COURIER-JOURNAL & TIMES (Louisville, Ky.), Jan. 10, 1971; Paul M. Branzburg, *Rope Turns to Pot: Once an Industry, Kentucky Hemp Has Become a Drug Problem*, THE COURIER-JOURNAL & TIMES, Jan. 10, 1971.

[79] Franklin Circuit Court Grand Jury Subpoena, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 29.

[80] Motion to Quash Grand Jury Subpoena, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 43.

[81] Petition for Temporary and Permanent Restraining Order and Writ of Prohibition, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 47.

[82] Order, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 45.

[83] Protective Order, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 46.

[84] *Id.*

[85] Order Denying Prohibition and Mandatory Relief, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 54.

[86] Opinion for the Court by Commissioner Vance Denying Petition for Order of Prohibition, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 55.

[87] *Id.* at 57–59.

[88] *Id.* at 59.

[89] Motion for an Order Staying the Effective Date of the Court's Order and Motion for a Temporary Writ of Prohibition, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 61–62.

denied.[90] As noted above, Branzburg's petition for certiorari was granted by the United States Supreme Court on May 3, 1971.

C. The Pappas Case

The *Pappas* case also involved reporting on the Black Panther movement of the early 1970s.[91] Paul Pappas was a television reporter and photographer for WTEV-TV in New Bedford, Massachusetts,[92] working out of the station's office in East Providence, Rhode Island.[93] On July 30, 1970, he was called to New Bedford to cover civil disorders there from the Panther perspective.[94] He was given an address for the Party's storefront headquarters, and after one false start he threaded his way through the barricades and gained entry.[95] There, about 3 p.m., he recorded and photographed a prepared statement read by one of the Panther leaders.[96]

Pappas apparently took his story back to the station after receiving permission to return to Panther headquarters.[97] He returned about 9 p.m. and was allowed to enter and remain inside the headquarters on the condition that he not disclose anything he saw or heard there.[98] If, as the Panthers anticipated, the police raided the headquarters, Pappas would be free to report and photograph as he wished.[99] The raid never occurred, and Pappas wrote nothing further about the three hours he spent at Panther headquarters that night.[100]

Two months later, Pappas was summoned to appear before the Bristol County grand jury, where he claimed a First Amendment privilege to decline to answer any questions about his observations and conversations at Panther headquarters that night.[101] When he was again directed to appear before the grand jury a few days later, he filed a motion to quash on First Amendment grounds because he feared "that any future possibilities of obtaining information to be used in my work would be definitely jeopardized, inasmuch as I wouldn't be trusted or couldn't gain anyone's confidence to acquire any information in reporting the news as it is."[102] Pappas also said he feared for his personal safety.[103]

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[90] Order, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 63.

[91] Branzburg, 408 U.S. at 672.

[92] *See* VAN GERPEN, *supra* note 18, at 39.

[93] *Branzburg*, 408 U.S. at 672.

[94] *Id.*

[95] VAN GERPEN, *supra* note 18, at 39.

[96] *Branzburg*, 408 U.S. at 672.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*; *see also* VAN GERPEN, *supra* note 18, at 39 ("A police raid did not occur that evening and Pappas kept his promise: He did not write a story about his visit.").

[101] *Branzburg*, 408 U.S. at 673.

[102] Brief for Petitioner at 9, *In re* Pappas, 402 U.S. 942 (1971) (No. 70-94).

[103] VAN GERPEN, *supra* note 18, at 40.

The motion to quash was denied by the trial judge, who noted the absence of a shield law in Massachusetts and held there was no constitutional privilege.[104] "Pappas does not have any privilege and must respond to the subpoena and testify to such questions as may be put to him by the Grand Jury relating to what he saw and heard, and the identity of any persons he may have seen."[105] The case was reported by the superior court directly to the Supreme Judicial Court of Massachusetts for an interlocutory ruling.[106]

Despite receiving "helpful and thorough briefs . . . filed by Massachusetts and New York attorneys on behalf of a number of broadcasting, television, and news gathering interests,"[107] the Supreme Judicial Court on January 29, 1971, refused to follow *Caldwell*, on which Pappas and amici "seem[ed] greatly to rely on . . . ."[108] To follow that opinion, the court said, would be to engage in "judicial amendment of the Constitution or judicial legislation."[109] The court concluded that the Superior Court was correct in holding that Pappas had no privilege.[110] As it did in *Branzburg* and *Caldwell*, the United States Supreme Court granted Pappas's petition for certiorari on May 3, 1971.[111]

D. In the Supreme Court

The three cases were thoroughly briefed in the United States Supreme Court, and oral arguments were conducted on February 22, 1972, in *Caldwell*, and the very next day in *Branzburg* and *Pappas*.[112] On June 29, 1972, the Court issued its opinion, with Justice Byron R. White writing for the Court.[113] The decision has been described and analyzed many times,[114] including by this author.[115] This Article returns to the opinion in Part V; for now, it will suffice to say that the Court reversed *Caldwell* and affirmed *Branzburg* and *Pappas*, finding no testimonial privilege for reporters in the First Amendment.[116] While Justice White

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[104] Report of Superior Court for Bristol County, *in Branzburg* App., *supra* note 27, *In re* Pappas, 402 U.S. 942 (No. 70-94), at 6–8.

[105] *Id.* at 8.

[106] *Id.*

[107] *In re* Pappas, 266 N.E.2d 297, 299 n.2 (Mass. 1971).

[108] *Id.* at 301–02.

[109] *Id.* at 302.

[110] *Id.* at 304.

[111] *In re* Pappas, 402 U.S. 942, 942 (1971).

[112] Branzburg v. Hayes, 408 U.S. 665, 665 (1972).

[113] *Id.*

[114] *See supra* note 10 and accompanying text.

[115] Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1149–50 (1997).

[116] *Branzburg*, 408 U.S. at 708.

acknowledged that news gathering qualifies for some measure of First Amendment protection,[117] the Court was deeply divided as to the scope of that protection.

Writing in dissent, Justice Douglas would have found that journalists have "an absolute right not to appear before a grand jury . . . ."[118] Also in dissent, Justice Stewart, joined by Justices Brennan and Marshall, would have affirmed the balancing test in *Caldwell*.[119] Justice Powell, in a concurring opinion, interpreted Justice White's opinion for the Court as requiring courts to strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[120]

Although Powell's concurring opinion is sometimes seen as a fifth vote for an undefined reporter's privilege,[121] Justice White's opinion[122] is more widely viewed as a stunning defeat for the press with lasting precedential consequences.[123] Yet mainstream media organizations initiated the litigation that led to the *Branzburg* decision. Mainstream media organizations made the decision to appeal all of these cases to the United States Courts of Appeals and two of them to the United States Supreme Court. And mainstream media organizations provided the theoretical foundation for all the appeals through party and amicus briefs. That makes *Branzburg* an excellent candidate to further explore how the press makes strategic litigation decisions.

III. JOURNALISTIC VALUES

In each of the cases considered in this Article, the reporters—Earl Caldwell, Paul Branzburg, and Paul Pappas—were confronted with three choices: (1) testify before the grand jury, breaking one or more promises of confidentiality; (2) refuse to testify and risk being jailed for contempt of court; or (3) litigate the issue to avoid either testifying or going to jail. Assuming their employers would pay for

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[117] *Id.* at 681("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.").

[118] *Id.* at 712 (Douglas, J., dissenting).

[119] *See id.* at 747 (Stewart, J., dissenting).

[120] *Id.* at 710 (Powell, J., concurring).

[121] *See, e.g.*, *In re* Roche, 448 U.S. 1312, 1315 (1980) (expressing the view that *Branzburg* stands for the proposition that the First Amendment provides some degree of protection for a reporter's confidences); *see also* Goodale, *supra* note 32, at 709 (discussing Justice Powell's concurrence as supporting a "qualified newsman's privilege" judged on a case-by-case basis).

[122] *Branzburg*, 408 U.S. at 667 (White, J., joined by Burger, C.J., Blackmun, Powell, & Rehnquist, J.J).

[123] *See, e.g.*, Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 110 (2002) (discussing how reporters were unable to convince the Court to recognize a constitutional privilege to "protect their confidential sources and information").

litigation, the reporters' choices were not surprising. But litigation costs money, not only in attorney fees and court costs, but also in lost productivity and general distraction. The logical economic choice for their employers would be to encourage the reporters to testify. As noted above, the Times Company initially opposed Caldwell's refusal to comply with the subpoena[124] and his appeal to the Ninth Circuit, but there is no indication that financial considerations played a role in that decision.[125] Moreover, the company ultimately joined Caldwell's motion to quash the original subpoena.[126]

In the end, all three cases were litigated, suggesting that the personal or journalistic values at stake transcended economics. Caldwell's fear for his personal safety certainly weighed heavily in his desire to litigate rather than appear or testify, but he never believed his employer shared that concern.[127] Nor was fear Caldwell's sole motivation; appearing before the grand jury would, at minimum, deprive him of the access he needed to fulfill his self-described "mission to tell the truth, to tell the story."[128] The briefs and oral arguments presented in the three cases suggest three core journalistic values that might be considered fundamental:

1. Satisfying the public's "right to know";
2. Upholding the reporter's ethical responsibility;
3. Preventing press entanglement with government.[129]

This Article turns to the filings to see how these three values were asserted as journalistic justifications for finding a reporter's privilege in the First Amendment.

A. Right to Know

Much has been written, pro and con, about the public's so-called "right to know."[130] Often, the question is framed as whether the First Amendment's press clause contemplates something more than the absence of governmental restriction on the right to publish the information one already knows, including an affirmative right to acquire information in the public interest. Whatever the legal soundness of that proposition, it is axiomatic that the journalistic enterprise depends utterly upon

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[124] *See supra* notes 36–58 and accompanying text.

[125] *See supra* notes 36–58 and accompanying text.

[126] *See supra* notes 27–58 and accompanying text. John Bates of Pillsbury, Madison & Sutro represented the *Times*.

[127] Caldwell Interview, *supra* note 11.

[128] *Id.*

[129] *See, e.g.*, Brief of the New York Times Co. et al. as Amici Curiae at 2–4, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57) (arguing in favor of a qualified privilege); Brief for the Am. Newspaper Publishers Ass'n as Amicus Curiae at 4–5, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85) (urging the Court to adopt an absolute privilege to ensure separation of new sources from government).

[130] *See, e.g.*, Eric B. Easton, *Public Importance: Balancing Proprietary Rights and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 141 (2003) (arguing that "the First Amendment's penumbral 'right to know' is the source of a 'public importance test'").

the public's right to know in justifying not only its "preferred position"[131] in our democratic society, but its very existence.[132]

In each of the three *Branzburg* cases, the argument growing out of this value goes something like this: requiring reporters to testify before grand juries would undermine any promise of confidentiality that a reporter might extend to sources of information, thus have a chilling effect on sources' willingness to provide information that the public has a right to know. One or another version of this argument is not only present in each of the cases, it is central to all of them. Paul Branzburg's argument to the Supreme Court states the argument this way:

> A. Newsgathering activities are essential to the effective functioning of a free press, and as such are protected by the First Amendment to the Constitution of the United States. A significant portion of such newsgathering activities is the development by individual reporters of confidential informants who give information to the reporter with the understanding that some or all of the information or the source of such information will not be revealed.
>
> B. The courts below are attempting to force the Petitioner to appear before a grand jury to answer questions pertaining to the identities of such informants and unpublished information received from them. Such compelled testimony will inevitably discourage these and other informants from contacting and talking to reporters, as well as discourage the reporter from publishing information gathered from such sources. This inability of the press to be able to obtain such information, or its reluctance to use such information, is a severe abridgment of the freedom of the press protected by the First Amendment.[133]

In his brief for *The New York Times* and other amici on Caldwell's behalf, noted attorney and Yale law professor Alexander Bickel stated the case even more succinctly:

> The people's right to be informed by print and electronic news media is thus the central concern of the First Amendment's Freedom of Speech and of the Press Clause. . . . [If] an obligation is imposed by law on a reporter of news to disclose the identity of confidential sources . . . the reporter's access to news, and therefore the public's access, will be severely constricted and in some circumstances shut off. The reporter's access *is* the public's access. . . . The issue here is the public's right to

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[131] *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

[132] BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 17 (2001) ("The primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.").

[133] Brief for Petitioner Paul M. Branzburg at 9, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85).

> know. That right is the reporter's by virtue of the proxy which the Freedom of the Press Clause of the First Amendment gives to the press on behalf of the public.[134]

In its brief supporting Branzburg, the American Newspaper Publishers Association (ANPA) argued similarly that "but for the assurance of confidence, many controversial issues presented in the daily newspapers of this country would otherwise never reach the typesetting stage."[135] And at oral argument, Branzburg's attorney, Edgar Zingman, insisted that "it is necessary to the functioning of the press, and it has been a part of the process of the press, that such confidences be given, and those confidences are the condition upon which information is available to the public."[136]

In *Pappas* and *Caldwell*, the argument is pressed, not only by the parties and amici, but through affidavits from prominent individual journalists. Pappas's petition for certiorari contains the following footnote:

> In an *amicus* brief filed in this case by the Columbia Broadcasting System, Inc., before the Massachusetts Supreme Judicial Court, correspondents Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather and Marvin Kalb submitted affidavits strongly asserting the necessity of preserving confidentiality in newsgathering and demonstrating that the betrayal of news sources and private communications would seriously diminish the effectiveness of reporting and the amount and nature of news available to the public. Example after example was given, from talks with bartenders to discussions with the President of the United States, in which it was essential to preserve confidentiality.[137]

These affidavits, which were originally submitted as part of the record in *Caldwell*, along with others from *New York Times* and *Newsweek* reporters,[138] prompted the Massachusetts court to remark upon the "substantial news media pressure for adoption" of a reporter's privilege.[139] Indeed, more than twenty major news organizations filed amicus briefs supporting the three reporters in these

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[134] Brief of the New York Times Co. et al., *supra* note 129, at 16.

[135] Brief for the Am. Newspaper Publishers Ass'n, *supra* note 129, at 8.

[136] Transcript of Oral Argument, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85), *reprinted in* 74 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 678 (Philip B. Kurland & Gerhard Casper eds., 1975).

[137] Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts at 12 n.9, *In re* Pappas, 408 U.S. 665 (1972) (No. 70-94).

[138] Affidavits Attached to Supplemental Memorandum of *The New York Times* and *Newsweek*, *in Branzburg* App., *supra* note 27, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57), at 37–50.

[139] *In re* Pappas, 266 N.E.2d 297, 303 n.11 (Mass. 1971).

cases[140]—each emphasizing the "right to know" value and the threat to that value by a chilling effect on sources or self-censorship by reporters.[141]

B. Ethical Responsibility

If the "right to know" value provided the principal justification for finding a reporter's privilege in the First Amendment, the "ethical responsibility" value might be seen as a normative supplement to the instrumentalism of "right to know." As the current version of the Society of Professional Journalists (SPJ) Code of Ethics makes clear, journalists are expected to keep their promises of confidentiality to sources.[142] Because the normative argument is far less compelling to a court, however, it is barely mentioned within the *Branzburg* advocacy documents.

The "ethical responsibility" notion does surface in the Radio Television News Directors Association (RTNDA) brief, at least in a footnote:

> Until now reporters have often risked contempt convictions in challenging compulsory process for the disclosure of confidential information; they have been encouraged to do so by a belief that there is First Amendment underpinning for their position, *as well as by moral commitments to informants*. In this manner confidential relationships have been supported by the reporter's fulfillment of his promise not to betray confidences, even though several lower courts have refused to recognize a constitutional privilege. If, however, the Supreme Court were to rule in such a way as to remove or seriously compromise the legal

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[140] The organizations were the American Broadcasting Co., American Newspaper Publishers Association, American Newspaper Guild, American Society of Newspaper Editors, Associated Press Broadcasters' Association, Associated Press Managing Editors Association, Association of American Publishers, Authors League of America, Columbia Broadcasting System, Chicago Daily News, Chicago Sun-Times, Chicago Tribune Co., Dow Jones, National Press Photographers Association, National Broadcasting Co., Newsweek, New York Times, Radio Television News Directors Association, Sigma Delta Chi, Washington Post Co., and a coalition of religious broadcasters, as well as the American Civil Liberties Union. *See infra* notes 248, 251–254, 256–260.

[141] *See, e.g.*, Brief for New York Times Co. et al., *supra* note 129, at 35 ("[R]equiring a reporter to disclose information obtained in confidence would chill . . . a substantial flow of news to the public.").

[142] SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), http://www.spj.org/ethicscode.pdf ("Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability. Always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.").

> underpinning of *this basic ethic of journalists*, a reporter would not be so likely to guarantee confidentiality unconditionally.[143]

Notwithstanding this decidedly minimal treatment in the *Branzburg* cases, the "ethical responsibility" rationale exists independently within the journalism community. Ironically, evidence of this comes from the betrayal of a confidential source that led to another Supreme Court opinion written by Justice White.[144] In *Cohen v. Cowles Media*, reporters for the *Minneapolis Star Tribune* and *St. Paul Pioneer Press*, among others, accepted an offer by Dan Cohen, a Republican campaign operative, for information concerning Marlene Johnson, the Democratic-Farmer-Laborite candidate for lieutenant governor of Minnesota, in exchange for a promise of confidentiality.[145] Cohen then provided the reporters with court records showing the candidate had two trivial arrests, leading to dismissed charges in one case and a vacated conviction in the other.[146]

Editors at both papers independently decided to print the story, not of the candidate's indiscretions, but of Cohen's "dirty trick" and, over their reporters' protests, to identify Cohen by name.[147] As the author has previously noted:

> While the *Pioneer Press* editors buried Dan Cohen's name deep in the story, the *Star Tribune* editors featured it, apparently reasoning that the value of the story, if any, lay in Cohen's conduct, not Johnson's. The *Star Tribune* also attacked Cohen in its editorial pages, but neither paper reported that it had broken a promise of confidentiality with Cohen.[148]

Ultimately, the United States Supreme Court upheld Cohen's claim for damages against the newspapers for breaking their promise of confidentiality.[149]

From the editors' perspective, the public's "right to know" trumped the reporters' "ethical responsibility" to keep their promises. From the protesting reporters' perspective, the reverse was true. Either way, this episode shows that these values are independent, although related, and both are fundamental; the *Cohen* case is still debated in newsrooms today.

C. Government Entanglement

The third journalistic value found in the *Branzburg* documents is an aversion to serving as, or at least being perceived as, an agent of the government. Again,

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[143] Brief for Radio Television News Directors Ass'n as Amicus Curiae Supporting Respondent at 7 n.4, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57) (emphasis added).

[144] Cohen v. Cowles Media, 501 U.S. 663 (1991).

[145] Easton, *supra* note 115, at 1153–54.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Cohen*, 501 U.S. at 670.

this value is related to the "right to know," but it has implications beyond newsgathering to suggest an effect on reporting as well. Indeed, two of Kovach and Rosenstiel's nine "elements of journalism" stress independence: independence from faction and independence from power.[150]

As discussed in ANPA's amicus brief in *Caldwell*, "the subpoenas involved in these appeals pierce the wall traditionally separating the press and the government."[151] ANPA quoted extensively on that point from the Ninth Circuit opinion:

> If the Grand Jury may require appellant to make available to it information obtained by him in his capacity as news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes.[152]

The Newspaper Guild's brief in *Caldwell* and *Pappas* also quoted the Ninth Circuit passage and further asserted that widespread use of the press as a government agency was responsible for increasing violence against reporters by police and participants during public demonstrations.[153] "Not only does the prolific use of the subpoena impress a governmental function on the press; the practice, in addition to the destruction of communication with confidential news sources, significantly impairs the ability of the newsman to report public events of great significance."[154]

Still another danger of "government entanglement" caught the ACLU's attention: abuse of the grand jury process to harass reporters. Once conceived as a buffer between the state and the people, the civil liberties group said, grand juries have increasingly become "rubber stamps" for prosecutors and "instrument[s] for police investigation."[155]

> The prosecutor simply sits back, waits for the reporter to investigate and then causes the grand jury to issue a sweeping subpoena, regardless of the effects on the journalist's relationship to his confidential sources.

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[150] KOVACH & ROSENSTIEL, *supra* note 132, at 94, 112.

[151] Brief for the Am. Newspaper Publishers Ass'n, *supra* note 129, at 8–9.

[152] *Id.* at 9 (citing Caldwell v. United States, 434 F.2d 1081, 1086 (9th Cir. 1970)).

[153] Brief for the Am. Newspaper Guild et al. as Amici Curiae Supporting Respondents at 7, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57), and *In re* Pappas, 402 U.S. 942 (1971) (No. 70-94).

[154] *Id.*

[155] Brief for the Am. Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 28, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57).

> Equally dangerous is the possibility that overbroad grand jury subpoenas will be used to penalize reporters who write news stories which the government finds objectionable and to deter such stories in the future.[156]

All of the foregoing demonstrates convincingly that the cases consolidated in *Branzburg v. Hayes* involved values the press considers fundamental to its constitutional role. A successful outcome in the litigation would have yielded statutory or constitutional interpretations that would have vindicated those values and greatly facilitated the work of all journalists. But that alone is not enough to justify the time and treasure the press put into this case. Part IV examines the relative costs, benefits, and likelihood of success of the *Branzburg* litigation.

IV. STRATEGY

As noted above, the fact that these cases were litigated at all suggests that fundamental values were at stake. This Part posits that the decision to pursue these cases also depended on the parties' assessment of the benefits of success, the costs of failure, and the probability of either outcome. We begin by exploring the factors that may have led the media lawyers to think they could win.

A. Probability of Success

To reconstruct the participants' perception as to the probability of success or failure in the *Branzburg* cases, this section first examines precedent and related doctrines—particularly in the lower courts, where prior decisions may be binding and where stare decisis and other canons of jurisprudence are more compelling than in the highest courts. Second, this section analyzes judicial preferences, including political ideology, judicial philosophy, and attitudes toward the press, from the litigants' perspective. Finally, this section looks at public policy, as articulated in statutes and executive practices.

1. Precedent

As a general proposition, precedent and other jurisprudential considerations should have operated to discourage the litigants from pursuing these cases. But the *Caldwell* decision in the Ninth Circuit may well have created the impression in the Branzburg and Pappas camps that the weight of precedent could be overcome.[157]

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[156] *Id.* at 29.

[157] Pappas specifically told the Supreme Judicial Court of Massachusetts that he would file a petition for certiorari "[i]n view of the conflict between the decision of our court in the Matter of Paul Pappas and the decision of the Federal Court in the Matter of Caldwell vs. United States." Application for Stay of the Order of the Supreme Judicial Court, *in Branzburg* App., *supra* note 27, *In re* Pappas, 402 U.S. 942 (1971) (No. 70-94), at 24.

The most widely cited judicial precedent rejecting the reporter's testimonial privilege was *Garland v. Torre*,[158] an appeal from a criminal contempt holding. In the underlying case, singer Judy Garland had filed a libel claim against the Columbia Broadcasting System based on allegedly defamatory statements about her that appeared in a New York *Herald Tribune* column.[159] The statements were attributed to an unnamed CBS executive, and columnist Marie Torre refused to identify the source of the statements when the court ordered her to do so.[160] In an opinion authored by then Judge (later Justice) Potter Stewart, a Second Circuit panel declined to find a constitutional privilege that would protect Torre's source.[161]

The court accepted the "hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news."[162] But the court pointed out that the freedom so abridged is not absolute, saying, "What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom."[163] Quoting Chief Justice Hughes's admonition that giving testimony is the duty of every citizen,[164] the court extended the principle to the press. "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice."[165]

Although *Garland* was not binding on any of the courts involved in the *Branzburg* cases, Judge Stewart had noted that no previous court had found a reporter's privilege in the absence of a statute.[166] Although proponents of the privilege tried to distinguish *Garland*,[167] the precedents overwhelmingly favored compelling reporters' testimony, and, of course, Judge Stewart had become Justice Stewart.

The Ninth Circuit opinion in *Caldwell* was issued eleven days before the Kentucky Court of Appeals denied Paul Branzburg's motion to quash in *Branzburg v. Pound*. Ten days later, Branzburg filed a motion to reconsider that decision in light of the *Caldwell* holding.[168] The court reissued its original opinion,

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[158] 259 F.2d 545 (2d Cir. 1958).
[159] *Id.* at 547.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 548.
[163] *Id.*
[164] *Id.* at 549 (quoting Blackmer v. United States, 284 U.S. 421, 438 (1932)).
[165] *Id.*
[166] *Id.* at 550.
[167] *See, e.g.*, Brief for Petitioner, *supra* note 102, at 39 (distinguishing Garland).
[168] Motion to Reconsider, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 655 (1972) (No. 70-85), at 21–22.

adding only a footnote to assert that Branzburg had abandoned his constitutional argument, rendering *Caldwell* irrelevant without mentioning it.[169]

By the time *Branzburg v. Meigs*[170] reached the Kentucky Court of Appeals, *Caldwell* had been integrated into Branzburg's case. As noted above, the court both distinguished *Branzburg* from *Caldwell* on their facts and expressed "misgivings" about the rule announced in *Caldwell*.[171] Nevertheless, the *Caldwell* decision may well have given Branzburg's team the confidence that, in taking the case up to the Supreme Court, the weight of precedent would be a much closer call.

In Massachusetts, meanwhile, Pappas relied on the protective order granted by the district court in *Caldwell* to support his motion to quash.[172] Superior Court Justice Frank E. Smith noted that reliance, but otherwise did not address the new case in ruling that Pappas had no privilege.[173] By the time the Supreme Judicial Court reviewed Smith's ruling, the Ninth Circuit opinion in *Caldwell* had been out for about six weeks. Again, as discussed above, the precedent did not move the court,[174] but it may well have encouraged Pappas to press on.

But if the favorable *Caldwell* decisions encouraged Branzburg and Pappas to appeal their cases to the Supreme Court, precedent provides no explanation for Caldwell's decision to incur a contempt judgment by refusing to appear before the grand jury under the district court's protective order. Indeed, we know that Times Company General Counsel James Goodale and Caldwell's attorney, Anthony Amsterdam, looked at the same precedents and reached different conclusions. Amsterdam unequivocally told Caldwell that he had a "right" to refuse to testify,[175] while Goodale vigorously opposed Caldwell's taking the appeal because he feared it would make "bad law."[176] Goodale, the more experienced media lawyer, got the outcome right in the end. But Amsterdam was more in tune with his client's wishes, and the case moved ahead.

2. Judicial Preferences

One possible key to Amsterdam's assertion may have been a sense that the federal courts in California would be as sympathetic as any, anywhere in the country.[177] Judge Zirpoli had been appointed by President John F. Kennedy and

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[169] Branzburg v. Pound, 461 S.W.2d 345, 346 n.1 (Ky. 1971).

[170] Branzburg v. Meigs, 503 S.W. 2d 748, 750 (Ky. 1971).

[171] *See supra* note 88 and accompanying text.

[172] Report of Superior Court for Bristol County, *supra* note 104, at 7.

[173] *Id.* at 7–8.

[174] *See supra* notes 108–109 and accompanying text.

[175] *See supra* note 44 and accompanying text.

[176] *See supra* note 55 and accompanying text.

[177] *Caldwell* is the focus of this discussion because it seems highly unlikely that either Branzburg or Pappas would have been motivated to pursue their cases by the ideology of their states' appellate courts. All seven justices who heard Pappas's case before the Massachusetts Supreme Judicial Court were appointed by Republican governors.

had served about ten years when the *Caldwell* case came up.[178] For much of his career, however, he had been a prosecutor, serving as assistant district attorney for the City and County of San Francisco from 1928–1932, and as assistant United States attorney in Northern California from 1933–1944.[179]

On the Ninth Circuit Court of Appeals, Republican appointees held an eight-to-five edge over Democrats in 1970.[180] The three-judge panel that Caldwell ultimately drew included Eisenhower appointee Charles Merton Merrill[181] and Johnson appointee Walter Raleigh Ely, Jr.,[182] as well as another Eisenhower appointee, William R. Jameson, a U.S. District Judge for the District of Montana, sitting by designation.[183] So if the ideology of the judges was a motivating factor, it was not predictable by party affiliation. Yet the overwhelmingly favorable opinion issued by the Ninth Circuit panel made it all but inevitable that the government would seek and the Supreme Court would grant certiorari.[184]

Presumably, both Amsterdam and Goodale considered the preferences of the Supreme Court justices at some point during the litigation. But that consideration would have been strategically valuable only on or before June 4, 1970, when Caldwell incurred the contempt judgment that formed the basis for his appeal to

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Compare Supreme Judicial Court of Massachusetts, Justices of the Supreme Judicial Court, http://www.massreports.com/justices/alljustices.aspx (last visited Dec. 1, 2009) (listing the justices' respective appointment dates), *with* Former Governors of Massachusetts from 1780, http://www.netstate.com/states/government/ma_formergov.htm (last visited Dec. 1, 2009) (listing the Governors of Massachusetts). Please note, according to the Justices of the Supreme Judicial Court Web site, Jacob Spiegel was appointed in 1960; however, his memorials state he was appointed in 1961, thereby making Governor Vope the appointing governor. *Compare* Supreme Judicial Court of Massachusetts, Justices of the Supreme Judicial Court, http://www.massreports.com/justices/alljustices.aspx (last visited Dec. 1, 2009), *with* Supreme Judicial Court of Massachusetts, Memorials, http://www.massreports.com/memorials/394ma1115.htm (last visited Dec. 1, 2009). The seven justices who heard Branzburg's case before the Kentucky Court of Appeals, the state's only appellate court at the time, were all elected. *See* Commonwealth of Kentucky, Court of Justice, http://courts.ky.gov/courtofappeals (last visited Dec. 1, 2009) (noting that "[f]ourteen judges, two elected from seven appellate court districts, serve on the Court of Appeals"). Having lost decisively at the trial court level, both Branzburg and Pappas were likely to pursue their appeals through the state courts regardless of actual or perceived ideological preferences.

[178] Federal Judicial Center, Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (search for Zirpoli) (last visited Dec. 1, 2009).

[179] *Id.*

[180] *Id.*

[181] Federal Judicial Center, *supra* note 178 (search for Merrill).

[182] *Id.* (search for Ely).

[183] *Id.* (search for Jameson).

[184] *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 85–86 (1998) (suspecting that the Court is "reluctant to ignore disputes that the government wants them to resolve").

the Ninth Circuit.[185] From that moment on, the decision to take the case to the Supreme Court was effectively out of his hands.

The Burger Court in 1970 was ideologically divided into three groups.[186] On the left were Justices Hugo Black and William O. Douglas, very nearly First Amendment absolutists, and usually reliable liberals William Brennan and Thurgood Marshall.[187] On the right were Chief Justice Warren Burger and Justice Harry Blackmun, then called "The Minnesota Twins" for their matched conservatism.[188] In the center were moderate Republicans John Marshall Harlan and Potter Stewart, as well as conservative Democrat Byron White.[189] Justices Lewis Powell and William Rehnquist, who would ultimately hear the *Branzburg* case, had not yet replaced Black and Harlan.

The justices sitting in June 1970 had voted in sixteen press-related cases over the years.[190] Of the eighty-seven votes cast by the nine justices in those sixteen cases, sixty-one votes, or 70 percent of the total, were cast in favor of the press's position; only twenty-six votes, or 30 percent, were cast against the press's position.[191] Amsterdam and Goodale were certainly aware that Black and Harlan were nearing retirement and that Richard Nixon was president, but the likelihood of success must still have looked strong based on ideological preferences in June 1970.

Moreover, Justice White's hostility toward the press had not begun to manifest itself before June 1970. To be sure, he had written one opinion that could be interpreted as denying broadcasters their full First Amendment rights,[192] and two separate opinions[193] expressing reservations against broadly interpreting the standards in *New York Times v. Sullivan*.[194] But the *Red Lion* decision had been

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[185] *See supra* note 52 and accompanying text.

[186] *See infra* notes 188–189 and accompanying text.

[187] *See* CHARLES M. LAMB & STEPHEN C. HALPERN, THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 110, 133 (1991).

[188] *Id.* at 68.

[189] *See id.* at 8, 193, 376.

[190] The identification of press-related cases was taken from Easton, *supra* note 7, at 261.

[191] The voting records came from the Congressional Quarterly, Inc., CQ Press Electronic Library, Supreme Court Collection, http://library.cqpress.com (last visited Dec. 1, 2009).

[192] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 385 (1969) (upholding the personal attack and editorial reply rules of the FCC's "Fairness Doctrine" against challenge by broadcasters).

[193] Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 22–23 (1970) (White, J., concurring in the judgment) (insisting that the press could be held liable for using words that might have both innocent and libelous meanings); Pickering v. Bd. of Educ., 391 U.S. 563, 583 (1968) (White, J., concurring in part and dissenting in part) (refusing to follow the Court's dictum suggesting that proof of harm would be required to fire a public school teacher who made intentionally or recklessly false statements about the school board).

[194] 376 U.S. 254, 279, 283 (1964) (requiring public officials to prove actual malice to prevail in a libel suit).

unanimous against the broadcasters,[195] and White had supported the broadcasters in another important case, *Estes v. Texas*,[196] by dissenting from the opinion that cameras in the courtroom were per se unconstitutional.[197] White also had unequivocally supported *Sullivan* itself and most of its progeny through 1970.[198] Although White's antipathy toward the press is said to date from his football days,[199] its clear expression would only come later.[200] The Court had not heard any newsgathering cases before 1970, and Caldwell's legal team could not have anticipated the strength of White's opposition to extending First Amendment protection to newsgathering activities.[201]

Ironically, Amsterdam must have counted Justice Potter Stewart among the likely opponents of the privilege. After all, he had been the author of the oft-cited *Garland v. Torre*[202] decision when he served on the Second Circuit, and there was no reason to believe he would change his mind.[203] A reasonable head count of the Supreme Court bench at the time would have found Black, Douglas, Brennan, and

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[195] 395 U.S. 367 (1969).

[196] 381 U.S. 532 (1965).

[197] *Id.* at 615–16 (White, J., dissenting).

[198] *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 173–74 (1967) (Brennan, J., dissenting) (joining a dissent more favorable to the press than the majority opinion); Time Inc. v. Hill, 385 U.S. 374, 387–91 (1967); Rosenblatt v. Baer, 383 U.S. 75, 80–81 (1966); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[199] DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 449–50 (1998).

[200] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 390–91 (1974) (White, J., dissenting) ("The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence."); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 263 (1974) (White, J., concurring) ("To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.").

[201] In addition to *Branzburg v. Hayes*, 408 U.S. 665 (1972), see White's majority opinions in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding promises of confidentiality from reporters to sources are enforceable against the press), and *Zurcher v. Stanford Daily*, 436 U.S. 547, 567–68 (1978) (holding neither the First nor Fourth Amendments prohibited the government from using search warrants to recover evidence believed to be in newsrooms); *see also* Houchins v. KQED, Inc., 438 U.S. 1, 11–12 (1978) (White joining the majority and holding that the press has no greater right of access to government-held information than the general public); Pell v. Procunier, 417 U.S. 817, 833–35 (1974) (same); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (same).

[202] 259 F.2d 545 (2d Cir. 1958).

[203] *See supra* note 161 and accompanying text.

Marshall solidly in favor of the privilege; Harlan, Burger, Blackmun, and Stewart solidly against; and White very probably in favor.

In short, if Amsterdam had conducted an analysis of judicial preferences before June 4, 1970, that analysis would have suggested that success was at least as likely as failure, if not more likely, and he would not have been dissuaded from taking the case further. Of course, no one could have predicted the appointments of Powell and Rehnquist to the Supreme Court, much less the pivotal role that Powell would come to play.[204] To Caldwell, however, it was Rehnquist's appointment that was most problematic.[205] Caldwell says the late Fred Graham, legal reporter for the *Times* and later CBS News, told him Rehnquist had been deeply involved in his case while serving in the Department of Justice.[206] And he deeply believes that the Times Company's half-hearted support for his cause undermined Caldwell's efforts to persuade Rehnquist to recuse himself.[207] Had he done so, the 4-4 decision would have affirmed the Ninth Circuit, although it would have had no precedential value.[208]

3. Public Policy

To this point, this Article has suggested that Caldwell may have been encouraged to try for a better First Amendment interpretation from the appellate courts based on the liberal reputation of the Ninth Circuit Court of Appeals generally and the still liberal-leaning United States Supreme Court, which had overwhelmingly supported the press in recent years. It has further suggested that Branzburg and Pappas may well have been encouraged to seek Supreme Court review of their cases, despite the absence of compelling precedent, based on the *Caldwell* decision in the Ninth Circuit.

To help determine how realistic those expectations might have been, this section now turns to public policy considerations. Public policy is broadly defined as the expression of the people's will by the political branches of government through statutes and executive practice.[209] Here, identifying the prevailing public policy requires us to examine the prevalence of reporter's shield laws and the policies of the Department of Justice on issuing subpoenas commanding reporters to testify. The analysis will show that, while only Branzburg had a legitimate expectation based on public policy of a better deal than he got from the courts, all three journalists might have been encouraged by new Department of Justice rules governing reporters' testimony.

Perhaps the best place to begin a discussion of the relevant public policy is Wigmore's hoary dictum that "the public . . . has a right to every man's

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[204] *See supra* note 121 and accompanying text.

[205] Caldwell Interview, *supra* note 11.

[206] *Id.*

[207] *Id.*

[208] *Id.* Caldwell points to a memo posted by Managing Editor Abe Rosenthal stating, "'We all feel bad for Earl Caldwell and the difficult position *he* finds *himself* in.'" *Id.*

[209] *See* BLACK'S LAW DICTIONARY 1267 (8th ed. 2004).

evidence,"[210] quoted in one form or another throughout these cases.[211] All testimonial privileges, whether grounded in statute, common law, or the Constitution, are exceptions to this general rule and, according to traditional principles of interpretation, must therefore be narrowly construed.

Of the three jurisdictions involved in this case, only Kentucky had enacted a testimonial privilege for reporters, often called a reporter's shield law.[212] That statute was the principal basis, along with constitutional arguments, for Branzburg's initial request for injunctive relief and subsequent state court appeals.[213] Ultimately, the Court of Appeals ruled that the shield law was inapplicable because it protected only the "source" of Branzburg's information and not his personal observations.[214]

The court took great pains to distinguish the "source" of any information procured by a reporter, whose identity was privileged by the statute, from the "information" itself.[215] Here, Branzburg was not asked to reveal the identity of any informants he may have had, the court said, but rather the identity of persons he saw committing a crime.[216]

> In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as *informants* cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime (emphasis in original).[217]

Otherwise, the court said, a reporter who witnessed the assassination of the president or governor, or a bank robbery in progress, or a forcible rape, could not be required to identify the perpetrator.[218] Chief Justice Edward P. Hill, writing in dissent, rejected that parade of horribles and called the majority view "a strained and unnecessarily narrow construction" of the term source.[219] Hill pointed out that

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[210] 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192 (John T. McNaughton rev. 1961).

[211] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 688 (1972); *In re* Pappas, 266 N.E.2d 297, 299 (Mass. 1971).

[212] KY. REV. STAT. ANN. § 421.100 (LexisNexis 2006). To this day, neither Massachusetts nor the federal government has enacted a similar statute.

[213] Petition for Temporary and Permanent Restraining Order and Writ of Mandamus, *in Branzburg* App., *supra* note 27, *Branzburg*, 408 U.S. 665 (No. 70-85), at 8–11.

[214] Branzburg v. Pound, 461 S.W.2d 345, 347–48 (Ky. Ct. App. 1970).

[215] *Id.* at 347–48.

[216] *Id.* at 348.

[217] *Id.*

[218] *Id.*

[219] *See id.* (Hill, C.J., dissenting).

the statute contained no such limitation and quoted extensively from a Pennsylvania case upholding that state's shield law.

> [I]mportant information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.
>
> The [shield law] is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* than the disclosure of the alleged crime or the alleged criminal.[220]

But Chief Justice Hill was the only state judge in all of these cases to support the privilege. In the *Pappas* case, the Massachusetts Supreme Judicial Court took pains to point out that, "unlike certain other states," Massachusetts had created no reporter's privilege.[221] The court cited opposition to the privilege in the American Law Institute's Model Code of Evidence to support the rejection of both statutory and constitutional privileges.[222] And in the Ninth Circuit, District Judge Jameson's concurring opinion also pointedly noted that Congress had not enacted a shield law as he expressed the view that Judge Zirpoli's protective order might have satisfied Caldwell's constitutional rights.[223]

On the other hand, seventeen states had enacted shield laws by 1970,[224] and several of those enactments had occurred only recently.[225] One could reasonably expect that the Supreme Court might be swayed by the trend in public policy in favor of the privilege. The lawyers would also have been aware of a dramatic development within the Justice Department of President Richard Nixon.

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[220] *Id.* at 349 (Hill, C.J., dissenting) (quoting *In re* Taylor, 193 A.2d 181, 185–86 (Pa. 1963)).

[221] *In re* Pappas, 266 N.E.2d 297, 299 (Mass. 1971).

[222] *Id.* at 299–301.

[223] Caldwell v. United States, 434 F.2d 1081, 1092 (9th Cir. 1970) (Jameson, J., concurring). Jameson's comment regarding Congress's failure to enact a shield law was duly noted by Justice Cutter in his opinion for the Massachusetts Supreme Judicial Court in *Pappas*. 266 N.E.2d at 302.

[224] For a list of state shield laws at the time, see Branzburg v. Hayes, 408 U.S. 691, 689 n.27 (1972).

[225] *Id.*

During the oral arguments before the Ninth Circuit, counsel for the government submitted a press release from Attorney General John N. Mitchell, outlining new guidelines for issuing subpoenas to the news media. As summarized by Judge Jameson, the guidelines "expressly recognized that the 'Department does not approve of utilizing the press as a spring board for investigations.'" It further stated:

> There should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. . . . The government should have unsuccessfully attempted to obtain the information from alternative non-press sources. . . . [S]ubpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information. . . . [S]ubpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material.[226]

While the Justice Department's announcement of the guidelines followed by two months Caldwell's critical decision on June 4, 1970, to refuse to appear, work on the guidelines was well under way before then. And although there is nothing in the record to indicate the extent of their knowledge, there is little doubt that Caldwell and Amsterdam would have known about the guidelines at the time. The guidelines were being drafted by William H. Rehnquist, who was appointed by President Nixon in 1969 to be assistant attorney general in the Office of Legal Counsel,[227] and Jack C. Landau, former Supreme Court reporter for the Newhouse News Service.[228] Landau joined the Nixon Justice Department in 1969, only to leave in April 1970 to return to Newhouse.[229] Landau had been a key figure in the early days of the Reporters Committee for Freedom of the Press, which was

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[226] *Caldwell*, 434 F.2d at 1091–92 n.3 (Jameson, J., concurring) (quoting John N. Mitchell, Free Press and Fair Trial: The Subpoena Controversy, Address Before House of Delegates, American Bar Association (Aug. 10, 1970)). The guidelines were formally published as United States Department of Justice Memorandum No. 692. 39 U.S.L.W. 2111 (Aug. 25, 1970). A complete copy was also published in *The New York Times*, Aug. 11, 1970, p. 24, and attached as an appendix to Levin v. Marshall, 317 F. Supp. 169, 173 (D. Md. 1970).

[227] LII/Legal Information Institute, Cornell University, Supreme Court Collection, http://supct.law.cornell.edu/supct/justices/rehnquist.bio.html (last visited Dec. 1, 2009).

[228] Floyd J. McKay, *First Amendment Guerillas: Formative Years of the Reporters Committee for Freedom of the Press*, 6 JOURNALISM & COMM. MONOGRAPHS 105, 112 (2004).

[229] *Id.*

formed specifically to deal with the *Caldwell* case, and became executive director of the organization not long after his return to Newhouse.[230]

By the time briefs were filed in the United States Supreme Court, the guidelines were being held up by the journalists and amici as the government's recognition that grand jury inquiries could pose First Amendment problems.[231] Perhaps the most extensive use of the guidelines appears in Alexander Bickel's amicus brief in *Caldwell* for the New York Times Co. and other media companies. Acknowledging that the guidelines do not have the force of law, Bickel said they nevertheless "evince most authoritatively a developing consensus of what the law should be."[232]

Thus, taking three critical predictors of success—precedent, preferences, and public policy—as a whole, the press had some reason to believe that it could win the fight for a testimonial privilege under the First Amendment. The *Caldwell* decision in the Ninth Circuit seemed likely to counterbalance older, adverse precedent,[233] there seemed to be five potentially favorable votes on the Supreme Court, and public policy as articulated by several state legislatures and the Department of Justice seemed to be moving in the right direction. Additional factors, such as the strong support of amici[234]—including the American Civil Liberties Union[235]—and some of the nation's best legal talent, must have seemed sufficient to overcome the government's opposition.[236]

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[230] The Reporters Committee for Freedom of the Press, *About the Reporters Committee for Freedom of the Press: A Short History*, http://www.rcfp.org/about.html (last visited Dec. 1, 2009).

[231] Brief for Petitioner, *supra* note 102, at 17; *see also* Brief for Nat'l Broad. Co. as Amici Curiae Supporting Petitioner at 10–11, *In re* Pappas, 402 U.S. 942 (1971) (No. 70-94).

[232] Brief of the New York Times Co. et al., *supra* note 129, at 12.

[233] *See* Brief for Nat'l Broad. Co., *supra* note 231, at 9–10 (citing several similar lower court decisions around the same time, including People v. Rios, No. 75129 (Cal. Super. Ct. July 15, 1970); People v. Dohrn, No. 69-3808 (Cook County, Ill. Cir. Ct. May 20, 1970); Transcript of April 6, 1970 at 18–24, 36, and Transcript of April 7, 1970 at 21, 38–39, 149–51, Air Transp. Ass'n v. Prof'l Air Traffic Controllers Org., No. 70-C-400-410 (E.D. N.Y. April 6–7, 1970); and Transcript of Dec. 4, 1969, Alioto v. Cowles Comm., No. 52150 (N.D. Cal.)).

[234] Some scholarship suggests that disproportionately strong amici support may be counterproductive. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 829 (2000). However, those findings are certainly counterintuitive and probably would have surprised the litigants here. My own research on press cases suggests that support from press amici has been largely irrelevant to the outcome. *See* Easton, *supra* note 7, at 256.

[235] My previous research shows that the press has been far more successful when supported by the ACLU than when opposed by the ACLU, winning 76 percent of its cases with the ACLU on board and losing 83 percent when opposed by the ACLU. Easton, *supra* note 7, at 257.

[236] The federal government, of course, was a party opponent in *Caldwell*, and amicus curiae in *Branzburg* and *Pappas*. *See* Branzburg v. Hayes, 408 U.S. 665, 665–67 (1972). In

Even if some doubts remained about the likelihood of success, important forces within the media apparently concluded that the benefits of pursuing the cases to victory—an absolute or qualified First Amendment privilege—outweighed the costs of defeat. The next section turns to that cost-benefit analysis.

B. Cost-Benefit Analysis

It is hard to overstate how devastating the *Branzburg* precedent has been for newsgathering; the Supreme Court's refusal to find a meaningful First Amendment privilege in that case has been the foundation for numerous decisions minimizing any First Amendment right to gather news.[237] Moreover, the high cost of an adverse decision in *Branzburg* was obviously apparent to Times Company General Counsel James Goodale, who warned Caldwell that his appeal to the Ninth Circuit could make "bad law."[238]

On the other hand, a victory in *Branzburg* must have seemed especially beneficial in light of the Nixon administration's and local prosecutors' unprecedented use of subpoenas for reporters' sources, notes, pictures, and testimony that characterized the late 1960s.[239] Particularly after the 1968 Democratic convention, subpoenas targeting the coverage of anti-Vietnam War activists and Black Power militants like Caldwell's Panthers proliferated.[240] McKay calls the rapid increase in the number of subpoenas "staggering," citing research showing about 500 subpoenas served on reporters between 1970 and 1976, compared to about a dozen between 1960 and 1968.[241]

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either capacity, the government is unquestionably the most formidable opponent the press could face. *See* Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 343 (Herbert M. Kritzer & Susan S. Silbey eds., 2003); Easton, *supra* note 7, at 257; Kearney & Merrill, *supra* note 234, at 829.

[237] *See, e.g.*, Cohen v. Cowles Media, Inc., 501 U.S. 663, 669–70 (1993) (citing *Branzburg*, 408 U.S. at 665, for the proposition "that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (citing *Branzburg*, 408 U.S. at 684, for the proposition that "there is no First Amendment right of access to information"); Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978) (citing *Branzburg*, 408 U.S. at 665, for the proposition that "it does not make a constitutional difference" whether search warrants or subpoenas served on reporters will result in the disappearance of confidential sources or cause the press to suppress the news); Pell v. Procunier, 417 U.S. 817, 834 (1974) (citing *Branzburg*, 408 U.S. at 684–85, for the proposition that "'[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded'").

[238] *See supra* note 55 and accompanying text.

[239] McKay, *supra* note 228, at 111.

[240] *Id.*

[241] *Id.* at 112. For a sense of the magnitude of the subpoena assault, see the list of 120 subpoenas served on reporters from NBC, CBS, and their wholly owned stations included as an Appendix to Brief of the New York Times Co. et al., *supra* note 129.

Of course, it is not possible to quantify and analyze the cost of a disastrous precedent in *Branzburg* versus the benefits of permanent relief from the threat of subpoenas. But it is entirely possible that a rough cost-benefit calculation, tempered by the probability of success, may have influenced the decision of most—but not all—media participants to ask the Supreme Court for a qualified, rather than absolute, testimonial privilege. An absolute privilege, going beyond the ruling of the Ninth Circuit, beyond even the benefits of most state shield laws, would have been the most desirable, yet least likely, outcome in the case. Thus, prudence would have dictated a reasoned argument for a qualified privilege—a somewhat less desirable, but far more likely, outcome—except for those participants who calculated that the benefits of an absolute shield outweighed the cost of losing the case altogether.

The initial response to the subpoenas by Caldwell and the *Times*—a plea in the alternative to quash the subpoenas or issue a protective order[242]—certainly reflected a degree of caution. Even after the split between Caldwell and the *Times*, Caldwell's opposition to the government's petition for certiorari suggests they were reasonably satisfied with the Ninth Circuit opinion.[243] Caldwell's brief in opposition suggested the Court could best confront "the vexing and difficult First Amendment problems presented by grand jury subpoenas addressed to newsmen . . . after more than one lower court has grappled with them."[244]

In his brief to the Supreme Court, Amsterdam argued for a qualified privilege, but with a strong presumption of confidentiality.[245] He insisted that a "compelling state interest" was required by the First Amendment to force a reporter to appear before a grand jury.[246] "The elements of such a showing are at least three," he said:

> (1) The 'information sought must be demonstrably relevant to a clearly defined, legitimate subject of governmental inquiry . . . .'
>
> (2) It must affirmatively appear that the inquiry is likely to turn up material information, that is: (a) that there is some factual basis for pursuing the investigation, and (b) that there is reasonable ground to conclude that the particular witness subpoenaed has information material to it . . . [and]
>
> (3) The information sought must be unobtainable by means less destructive of First Amendment freedoms.[247]

The New York Times also insisted on a "compelling interest" standard as amicus in the Supreme Court proceeding.[248] Joined by NBC, CBS, and ABC, by

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[242] Caldwell v. United States, 311 F. Supp. 358, 360 (N.D. Cal. 1970).

[243] *See* Brief in Opposition to the Petition for a Writ of Certiorari, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57).

[244] *Id.* at 3.

[245] *See* Brief for Respondent at 81, *Caldwell*, 402 U.S. 942 (No. 70-57).

[246] *Id.*

[247] *Id.* at 82–84.

[248] Brief of the New York Times Co. et al., *supra* note 129, at 8.

the Chicago *Sun-Times* and *Daily News*, by the Associated Press Managing Editors and Broadcasters' Associations, and by the Association of American Publishers, the *Times* urged the Court to require the government to "clearly demonstrate a compelling and overriding interest in the information" before requiring a reporter to testify.[249] The *Times* went on to explain that such a standard would preclude requiring a reporter's testimony "with respect to a category of crimes that cannot be deemed 'major,' as for example crimes variously characterized as 'victimless,' 'regulatory,' and 'sumptuary.'"[250]

Other amici urged a similar standard. For example, the *Chicago Tribune* sought to limit testimony to evidence "so important that non-production thereof would cause a miscarriage of justice."[251] The Radio Television News Directors Association characterized the desired standard as "irreparable harm," rather than "compelling interest," and said "the Court should adopt a standard which in the normal situation would raise no more than the slightest possibility of later disclosure."[252] A "compelling need" standard was urged by the Authors League of America[253] and a coalition of religious groups.[254]

But even if one assumes that these groups advocated a balancing test, albeit with a very high standard, because they believed the benefits of an absolute privilege were outweighed by the cost of defeat,[255] other media organizations reached the opposite conclusion. The American Newspaper Publishers Association, for example, openly broke with the *Times* and joint amici as to the standard required:

> Nothing short of an absolute privilege, under the First Amendment, vested in professional newsmen to refuse to testify before any tribunal about any information or source of information derived as a result of their reportorial functions will create the certainty needed to generate confidence in their promises, whether express or implied, to preserve either a source's anonymity or privacy, and thus guarantee the right of the public to be fully informed.[256]

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[249] *Id.*

[250] *Id.*

[251] Brief for Chicago Tribune Co. as Amicus Curiae at 18, Caldwell v. United States, 402 U.S. 942 (1971) (No. 70-57).

[252] Brief for Radio Television News Directors Ass'n, *supra* note 143, at 10.

[253] Brief of the Authors League of Am., Inc., as Amicus Curiae at 7, *Caldwell*, 402 U.S. 492 (1971) (No. 70-57).

[254] Brief of Office of Communication of The United Church of Christ et al. as Amici Curiae at 22, *Caldwell*, 402 U.S. 492 (No. 70-57).

[255] Of course, there may be other, non-strategic reasons for advocating a qualified privilege, including a sincere belief that reporters should have to testify under some circumstances.

[256] Brief for the Am. Newspaper Publishers Ass'n, *supra* note 129, at 4.

ANPA was joined in that position by the *Washington Post* and *Newsweek*;[257] the American Society of Newspaper Editors, Dow Jones, and Sigma Delta Chi;[258] and the National Press Photographers Association.[259] Even the venerable ACLU suggested that because reporters should only be required to testify to their knowledge concerning a planned, future crime of violence, "it may be preferable for the Court to adopt something approximating an absolute privilege, leaving to another day the carving out of possible exceptions."[260]

Whether one believes that the media representatives' advocacy of an absolute or qualified privilege was a reasonable proxy for their strategic cost-benefit analyses, or sincere expressions of their views of the law, it is clear that the press was a "house divided" on the desired scope of the testimonial privilege they sought. This failure to speak with one voice may have diluted the message being sent to the Court that such a privilege, whatever its scope, was commanded by the First Amendment. It would certainly have that effect in the legislative arena.[261] In the end, *Branzburg v. Hayes* was a stunning defeat,[262] with long-lasting implications for First Amendment doctrine.

V. *BRANZBURG* AND THE LEGISLATIVE AFTERMATH

A. The Branzburg *Opinion*

Paul Pappas's reply brief before the Supreme Court quotes a then-new report by University of Michigan Law School Professor Vincent Blasi for a then-new organization called Reporters Committee for Freedom of the Press, which had been organized in response to the *Caldwell* case:[263]

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[257] Brief of the Washington Post Co. and Newsweek, Inc., as Amici Curiae in Support of Respondent at 4, *Caldwell*, 402 U.S. 492 (No. 70-57).

[258] Brief of Am. Soc'y of Newspaper Editors et al. as Amici Curiae in Support of Respondent at 24, *Caldwell*, 402 U.S. 492 (No. 70-57).

[259] Brief of the National Press Photographers Ass'n as Amicus Curiae at 2, *Caldwell*, 402 U.S. 492 (No. 70-57).

[260] Brief of the Am. Civil Liberties Union et al., *supra* note 155, at 23.

[261] *See infra* Part V.B.

[262] Caldwell believes to this day that lukewarm support from *The New York Times* was responsible for the defeat. Caldwell Interview, *supra* note 11. He told the author that the late Fred Graham, then-Supreme Court and Justice Department reporter for the *Times*, had evidence that William Rehnquist had prejudged his case while at Justice and that appropriate pressure from the *Times* would have forced Rehnquist to recuse himself from the case. *Id*.

[263] McKay, *supra* note 228, at 108. As chronicled by McKay, a member of the organization's steering committee from 1976 to 1986, the RCFP grew out of a 1970 meeting of thirty-five to forty reporters at Georgetown University who gathered specifically to discuss the *Caldwell* case. *See id.* at 108–09. *Caldwell* was seen as the most visible example of a dramatic increase in the use of subpoenas served on reporters in an effort to tap into the radical movements of the late 1960s and early 1970s. *See id.* at 111. In the aftermath of *Branzburg*, the RCFP played a major role in advocating for an absolute

> Nothing, in the opinion of every reporter with whom I discussed the matter, would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit's *Caldwell* holding. Several newsmen told me that initially they were extremely worried about the subpoena spate of two years ago, but that now their anxieties have greatly subsided as a result of the strong stand taken by the journalism profession and the tentative victories in court. However, a Supreme Court declaration that the first amendment is in no wise abridged by the practice of subpoenaing reporters would, these newsmen assert, set off a wave of anxiety among sources. The publicity and imprimatur that would accompany such a Court holding would, in the opinion of these reporters, create an atmosphere even more uncongenial to source relationships than that which occurred two years ago, when the constitutional question remained in doubt.[264]

Unfortunately, Blasi proved more prophetic than persuasive. With lip service to "some" First Amendment protection for newsgathering,[265] Justice White proceeded to list all the First Amendment values that were *not* at issue in these three cases:

> [N]o 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 . . . . 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 a crime.[266]

Framing the issue thus told the entire story.

Emphasizing that "'the publisher of a newspaper has no special immunity from the application of general laws,'"[267] a theme he would return to in other newsgathering cases,[268] White further minimized the protection accorded

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federal shield law, and, in the view of some, its no-compromise stance was a major reason why no federal legislation was ever enacted. *See id.* at 126.

[264] Reply Brief at 13, *In re* Pappas, 402 U.S. 942 (1971) (No. 70-94). Blasi's study is treated at length in Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1972).

[265] *See supra* note 117.

[266] Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972).

[267] *Id.* at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

[268] *See* cases cited *supra* note 201.

newsgathering by undermining the "right to know" value on which it is predicated: "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[269] Citing the absence of a reporter's privilege under either the common law or the "prevailing constitutional view,"[270] White noted that, while "[a] number of states" have provided a statutory privilege, "the majority have not done so, and none has been provided by federal statute."[271]

> 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.[272]

White gave particularly short shrift to Branzburg's claim of privilege.

> 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.[273]

For the others, White said, "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."[274]

Even assuming some informants will refuse to talk to reporters, White continued,

> [W]e 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.[275]

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[269] 408 U.S. at 684.
[270] *Id.* at 685–86.
[271] *Id.* at 689.
[272] *Id.* at 690–91.
[273] *Id.* at 692.
[274] *Id.* at 693.
[275] *Id.* at 695.

One by one, White rebutted and rejected each of the arguments raised by the reporters, returning finally to clarify the scope of First Amendment protection for newsgathering.

> [G]rand 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 the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.[276]

That was the extent of the concession won by the press in *Branzburg v. Hayes*—far less than the Ninth Circuit opinion or even the original District Court's protective order. Even though numerous shield law bills have been introduced in Congress since *Branzburg*,[277] enactment has always been considered a long shot, and all First Amendment protections for newsgathering activities might well be stronger if *Branzburg* had never reached the United States Supreme Court.

But if *Branzburg* was a strategic miscalculation, one cannot say that pursuit of a testimonial privilege for journalists was irrational or irresponsible. From the perspective of the key actors at the time, the odds favoring success were at least even, and important segments of the press saw prospective benefits of victory as greater than the downside costs. Perhaps the best thing to come out of the case was the Reporters Committee for Freedom of the Press, which is today the premier legal information clearing house and litigator representing working journalists.

B. The Legislative Fiasco

According to Floyd McKay, principal chronicler of the Reporters Committee's early years, the *Caldwell* case was the precipitating factor in the formation of the committee in 1970.[278] Thirty-five to forty reporters attended a meeting at Georgetown University to discuss *Caldwell* and other cases.[279] Led by J. Anthony Lukas and Fred Graham of *The New York Times* and Jack Nelson of the *Los Angeles Times*, the group took the name Reporters Committee for Freedom of the Press and created a steering committee of eleven colleagues.[280]

What distinguished the Reporters Committee from other media organizations that became involved in *Caldwell* and its companion cases was its insistence that working reporters, not editors or publishers, would call the shots.[281] "Reporters needed their own advocacy group," James Doyle of the *Washington Star* told

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[276] *Id.* at 707–08.

[277] *See infra* Part V.B.

[278] McKay, *supra* note 228, at 108.

[279] *Id.* at 109; *see also* Joe Holley, Obituary, *Jack Landau; Founded Reporter Group*, WASH. POST, Aug. 17, 2008, at C7 (describing the formation of the RCFP).

[280] McKay, *supra* note 228, at 109.

[281] *See id.*

McKay in an interview, "and we could not be sure publishers would do the job."[282] Indeed, the *Times* lawyers' initial reaction to the *Caldwell* case seemed indicative of a philosophical difference between working journalists and their managers, although the split over absolute versus qualified privilege had not yet broken down along those lines—at least in the Supreme Court briefs.[283]

Whatever the basis for that split, it was to prove fatal to enacting a statutory remedy for the *Branzburg* decision. By the time that decision was handed down in 1972, the Reporters Committee was led by Jack Landau, a reporter-lawyer for Newhouse News Service who had returned to his Supreme Court beat after a brief stint in the Nixon Justice Department.[284] Landau's aggressive advocacy for an absolute privilege in the years following the *Branzburg* decision, and his unwillingness to compromise with media organizations willing to accept some qualifications, must bear a fair portion of the blame—or credit—for Congress's failure to enact a shield law in the early 1970s, when reaction to the Nixon administration's contempt for the press and *Branzburg* made such enactment most likely.[285]

"[R]eacting to what he called 'the recent wave of broad and sweeping subpoenas which have issued from the Justice Department,'" Sen. Thomas H. McIntyre (D-N.H.) introduced the first testimonial privilege bill of the decade on March 5, 1970.[286] Although McIntyre's bill died in committee, Sen. James Pearson (R-Kan.) introduced another shield bill, S. 1311, in the beginning of the 92nd Congress in January 1971.[287] According to Sen. Sam Ervin (D-N.C.), the most authoritative reporter of this legislative process, the Pearson bill was "met with a less than urgent response," and the press adopted a "'wait and see' attitude" toward the bill pending resolution of the *Caldwell* case.[288]

Ervin's Judiciary Subcommittee on Constitutional Rights held hearings on the Pearson bill in September and October 1971.[289] Months earlier, the White House

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[282] *Id.*

[283] Although the new Reporters Committee was "emerging as the principal advocate of the 'no compromise' position on reporter confidentiality," McKay, *supra* note 228, at 112, both the American Newspaper Publishers Association and the American Society of Newspaper Editors also urged an absolute privilege. *See supra* text accompanying notes 255–258. Later, however, ANPA would split with the Reporters Committee to support compromise legislation. *See infra* note 302 and accompanying text.

[284] *See* McKay, *supra* note 228, at 112–13; *supra* text accompanying notes 228–230.

[285] Although a number of states had already enacted shield laws, *see supra* notes 224–225 and accompanying text, similar bills had been introduced unsuccessfully in nearly every Congress since 1929. *See* VAN GERPEN, *supra* note 18, at 147–48. Popular support for a shield law had never been higher than immediately after the *Branzburg* decision was handed down. *See* McKay, *supra* note 228, at 115.

[286] Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 251–52 (1973–74) (citing S. 3552, 91st Cong. (1970)).

[287] *Id.* at 253 (citing S. 1311, 92d Cong. (1971)).

[288] *Id.* at 253–54. The government's certiorari petition in *Caldwell* was pending at the time. *See supra* text accompanying note 58.

[289] *Id.* at 254.

and Justice Department had begun taking a more conciliatory approach to the issuance of subpoenas against reporters,[290] and Ervin recalls that "most press spokesmen who commented on the Pearson bill recommended that Congress proceed cautiously. Most urged that a statutory privilege be enacted only if the Supreme Court refused to recognize a constitutional privilege."[291] Indeed, Ervin says, "the subpoena problem seemed to come last in the minds of most witnesses."[292] The bill went nowhere in 1971.[293]

When the *Branzburg* decision came down in June 1972, Senator Alan Cranston (D-Cal.) immediately introduced legislation providing an absolute shield for journalists in both "federal and state proceedings."[294] But the press was irreparably divided. The inactive Joint Media Committee was "revived for the purpose of drafting new legislation" embodying a qualified privilege.[295] Their bill was introduced by Senator Walter Mondale (D-Minn.) on August 17[296] and Representative Charles Whalen (R-Ohio) on September 5.[297] Ervin introduced his own qualified privilege bill on August 16.[298] No new hearings were held in the Senate, and although the House Judiciary Committee held a series of hearings in late September, Congress adjourned without taking action.[299]

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[290] In February, Attorney General John Mitchell issued a statement "regret[ting]" any misunderstanding arising from the issuance of subpoenas to the press and promising that, "in the future, no subpoenas will be issued to the press without a good faith attempt by the Department to reach a compromise acceptable to both parties." Ervin, *supra* note 286, at 251 (citing N.Y. TIMES, Feb. 6, 1970, at 40). Mitchell's press spokesman at the time was Jack Landau. McKay, *supra* note 228, at 112. At a press conference in May, President Nixon said he took a "very jaundiced view" of subpoenaing the notes of reporters or taking action requiring reporters to reveal their sources. Ervin, *supra* note 286, at 254 (citing The President's News Conference, 7 WEEKLY COMP. PRES. DOC. 703, 705 (May 1, 1971)). Also, in May, Mitchell told an interviewer he had no objection "to legislation protecting" reporters' notes. *Id.* at 252. Finally, in August, Mitchell's Justice Department issued restrictive guidelines to U.S. attorneys regarding subpoenas for journalists. *See supra* notes 226–228 and accompanying text. As noted therein, the guidelines were originally drafted by Landau. *Id.*

[291] Ervin, *supra* note 286, at 254–55.

[292] *Id.* at 255.

[293] *See id.* at 254–255.

[294] Ervin, *supra* note 286, at 255 (citing S. 3796, 92d Cong. (1972)).

[295] *Id.* at 256. Members included "the American Society of Newspaper Editors, the Associated Press Managing Editors Association, Sigma Delta Chi (the national journalism society), the National Press Photographers Association, and the Radio Television News Directors Association." *Id.*

[296] *Id.* (citing S. 3932, 92d Cong. (1972)).

[297] *Id.* (citing H.R. 16527, 92d Cong. (1972)).

[298] *Id.* (citing S. 3925, 92d Cong. (1972)).

[299] *Id.* (citing Hearings on Newsman's Privilege Before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong. (1972)).

Ervin notes that "the public's attention was not really drawn" to the issue until two reporters were jailed in the fall of 1972 for refusing to reveal their sources.[300] "[T]he attitude of the press began to harden," Ervin says, and more groups began "urging an absolute" privilege.[301] The American Newspaper Publishers Association, which supported an absolute privilege, spearheaded a new press alliance called the Ad Hoc Coordinating Committee, which tried to draft a bill acceptable to all factions.[302] The Joint Media Committee, finding that a qualified bill "no longer commanded a majority" of its members, issued a statement stressing the urgency of legislative relief.[303]

In November 1972, President Nixon told the American Society of Newspaper Editors that he did not think "federal legislation was warranted 'at this time,'" further inflaming the situation, and in December, another reporter briefly was jailed for failing to produce unpublished tapes of a confidential interview.[304] When the 93rd Congress convened in January, eight bills and one joint resolution were introduced in the Senate, and fifty-six bills were introduced in the House.[305] There was only one problem: "the great number of proposals demonstrated disagreement" among the legislators, and that, in turn, "only reflected the divergence in the press."[306] The Ad Hoc Coordinating Committee, created to find common ground, produced six different bills, revealing differences not only in philosophy, but also in estimates of what kind of legislation could pass.[307] Even Anthony Amsterdam complicated the picture by suggesting that a judicial hearing should be required before issuing a subpoena to reporters, an "interesting" concept, says Ervin, but one that "represented a new, complicated, and untested legal innovation, which reduced its political acceptability in Congress."[308]

Ervin admits to being conflicted himself; he introduced his own qualified privilege bill at the beginning of a new round of hearings, and then found himself convinced by the Reporters Committee on Freedom of the Press that any effective legislation would have to cover the states as well as the federal government.[309] His new bill, however, contained an exception for testimony regarding crimes committed in the reporter's presence, which drew fire from both the Reporters

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[300] *Id.* at 256–57. Ervin is referring to Peter Bridge of the *Newark News* and William Farr of the *Los Angeles Herald Examiner*, who served twenty and forty-six days, respectively, for refusing to reveal confidential sources. *Id.*

[301] *Id.* at 258 (noting resolutions calling for enactment of an absolute privilege by the American Society of Newspaper Editors, Sigma Delta Chi, the Radio Television News Directors Association, and the American Newspaper Publishers Association).

[302] *Id.*

[303] *Id.* at 258–59.

[304] *Id.*

[305] *Id.* at 261.

[306] *Id.*

[307] *Id.* at 261–62.

[308] *Id.* at 263.

[309] *Id.* at 267–68.

Committee and the Joint Media Committee.[310] Even after a dozen subpoenas were issued during the hearings to news organizations "in a libel action filed by the Committee to Re-Elect the President" (CREEP),[311] the "fragmented press [could] not coalesce behind one approach" to legislation in either the Senate or the House.[312]

"It did seem clear," Ervin said, "that unless the press groups themselves could achieve some unanimity on the issue, it was likely to fail without any effort from its opponents."[313] And so it did. The Eighth[314] and Second[315] Circuit Courts of Appeals had both declined to force reporters to reveal their confidential sources, notwithstanding Branzburg.[316] In March 1973, Judge Charles Richey granted a motion to quash ten subpoenas issued to news organizations by CREEP in the Watergate matter,[317] and prosecutors around the country had begun to show some restraint.[318] Ervin notes that Watergate itself demonstrated to some previous supporters that the press could do its job without a statutory privilege.[319] Despite Representative Robert Kastenmeier's success in forging a compromise bill in his House Judiciary subcommittee, he could not get a majority of the media representatives to support it.[320] The legislative effort crumbled.

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[310] *Id.* at 270–71 & n.132.

[311] *Id.* at 269.

[312] *Id.* at 270.

[313] *Id.*

[314] Cervantes v. Time, Inc., 464 F.2d 986, 992–93 (8th Cir. 1972) ("We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws. Such a course would also overlook the basic philosophy at the heart of the summary judgment doctrine.") (citations omitted).

[315] Baker v. F & F Inv. Co., 470 F.2d 778, 784–85 (2d Cir. 1972) ("Manifestly, the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.").

[316] Ervin, *supra* note 286, at 272.

[317] *See* Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1399 (D.D.C. 1973); *supra* note 309 and accompanying text.

[318] Ervin, *supra* note 286, at 273.

[319] *Id.* at 274.

[320] *Id.* at 274–75.

VI. CONCLUSION

This Article has examined *Branzburg v. Hayes* as part of a continuing exploration into the mobilization of the press to shape First Amendment doctrine through strategic litigation. In *Branzburg*, the press failed, despite several favorable indicators, and that failure had grave implications for any First Amendment right to gather news. Although it is impossible to say conclusively why a Supreme Court decision goes this way or that, we can safely suggest that differences within the press, between Earl Caldwell and *The New York Times*, indeed, between reporters and their bosses generally,[321] and between advocates of an absolute versus a qualified privilege, did not help the press make its case. The latter division proved to be even more significant when the issue moved to the legislative arena.

The tragedy of *Branzburg v. Hayes* was the failure of the Court to adopt Anthony Amsterdam's argument that, for First Amendment purposes, the distinction between news gathering and publishing is an artificial one, advanced by the government to divide and conquer.[322] The lesson of *Branzburg v. Hayes* and its aftermath is that a "house divided" is not likely to be effective in molding constitutional doctrine or winning a legislative privilege.

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[321] McKay recounts a story told by Jack Landau about when Landau solicited Marshall Field, publisher of the *Chicago Sun-Times*, for financial support for the Reporters Committee for Freedom of the Press. After Landau's pitch, Field replied, "Well, Mr. Landau, I'm not really very comfortable funding a group that calls itself the *Reporters* Committee." McKay, *supra* note 228, at 122–23.

[322] Brief for Respondent at 48–49, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-57).