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Phillip Randolph Roach Jr.

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THE NEWSMAN'S CONFIDENTIAL SOURCE PRIVILEGE IN VIRGINIA

*Phillip Randolph Roach, Jr.**

I. INTRODUCTION

The two hundredth anniversary celebration of the United States Constitution in 1987 provided an excellent opportunity to reflect upon how we now interpret the political doctrines that influenced the founding fathers in forming our government. At the time of the American Revolution, the basic tenets and freedoms that were written into the Declaration of Independence, and later incorporated into the Bill of Rights through the efforts of James Madison and George Mason of Virginia were considered essential human rights.¹

One of these basic tenets, contributing to the creation and growth of our nation, is the freedom of the American press. Even before Thomas Jefferson wrote the Declaration of Independence, George Mason, in his Virginia Declaration of Rights, stated: "[T]he freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments."² Jefferson later relied upon Mason's Declaration of Rights in drafting the Declaration of Independence.³ Mason's work was also incorporated into the United States Constitution in 1791 as the Bill of Rights⁴ and into numerous state constitutions as well.⁵

* Staff Attorney, Court of Appeals of Virginia; B.A., 1982, University of Virginia; J.D., 1985, T.C. Williams School of Law.

1. DIVISION OF HUMANITIES AND SECONDARY ADMINISTRATION, VIRGINIA DEPARTMENT OF EDUCATION, *THE ROAD TO INDEPENDENCE: VIRGINIA 1763-1783* (n.d.) [hereinafter *THE ROAD TO INDEPENDENCE*]; M. SAVELLE & D. WAX, *A HISTORY OF COLONIAL AMERICA 780-81* (3d ed. 1973).

2. *THE ROAD TO INDEPENDENCE*, *supra* note 1, at 46-47.

3. *Id.* Jefferson stated: "A bill of rights . . . is what the people are entitled to against every government on earth, general or particular, and what no government should refuse, or rest on inference." M. SAVELLE & D. WAX, *supra* note 1, at 781.

4. U. S. CONST. amend. I states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

5. See, e.g., VA. CONST. art. I, § 12 which provides:

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for

A frequently overlooked and relatively recent manifestation of this freedom is the growing belief among journalists that they have a right to withhold the identity of confidential sources of information. Many journalists have gone to jail rather than yield to a court order requiring them to reveal the identity of a confidential informant.⁶ In fact, the public's recognition of this pledge provides a wealth of news tips to newspapers and television stations across the country. Moreover, journalists are convinced that if the free flow of information diminishes as a result of court-ordered disclosure of their sources' identities, they will be reduced to printing public relations handouts and press releases.⁷ Reporters such as Jack Anderson and Clark R. Mollenhoff contend that their articles exposing government corruption would have been impossible without their reliance on confidential informants.⁸

However, there are practical needs for disclosure that a newsman's confidential source privilege would substantially frustrate,⁹ including the public's interest in effective law enforcement and the defendant's right to compel testimony in his own behalf.¹⁰ Yet the United States Supreme Court has recently declined to decide a number of cases on appeal which have presented some of these important issues.¹¹

This article will examine the competing interests in recognizing a newsman's confidential source privilege and discuss the justifications used to protect as well as reveal the identity of a newsman's

the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press.

6. H. SIMONS & J. CALIFANO, *THE MEDIA AND THE LAW* 12 (1976).

7. *Id.*

8. *Id.* at 12-13.

9. See generally Dixon, *The Constitution is Shield Enough for Newsmen*, 60 A.B.A. J. 707, 708 (1974); Lewis, *First Amendment Hubris*, N.Y. Times, Apr. 19, 1981, § 4, at 15, col. 1 (discussing the need for disclosure to prevent reporters, particularly one from *The Washington Post* who lied about a child drug addict, from winning Pulitzer Prizes for fabricated stories). But see N.Y. Times, Apr. 26, 1981, § 4, at 22, col. 4 (editorial supporting the need to protect the identity of a reporter's confidential sources).

10. U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process for obtaining witnesses in his favor"

11. See, e.g., *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir.), cert. denied, 107 S. Ct. 79 (1986); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5 (2d Cir.), cert. denied, 459 U.S. 909 (1981); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, cert. denied, 459 U.S. 907 (1982); see also Cullen, *Circumventing Branzburg: Absolute Protection for Confidential News Sources*, 18 SUFFOLK U.L. REV. 615, 637 (1984).

confidential sources. It will also analyze how the legislatures and the courts have attempted to deal with these competing interests, both on the federal and state levels. Finally, this article will consider the present status of this privilege in Virginia.

II. HISTORY OF THE NEWSMAN'S PRIVILEGE

Proponents of a confidential source privilege for journalists have attempted to justify its existence in numerous ways.¹² First, they have tried to establish the basis for the privilege in the legislatures, by supporting the adoption of state or federal shield laws, creating a privilege similar to an attorney-client,¹³ physician-patient,¹⁴ or priest-penitent privilege.¹⁵ Secondly, these proponents have turned to the courts to establish this privilege based upon a common law or first amendment rationale.¹⁶ Reporters have also refused to identify a confidential source based on the fifth amendment.¹⁷ However, each approach has met with varying degrees of success.

12. See generally, Comment, *The Emerging Constitutional Privilege to Conceal Confidential News Sources*, 6 U. RICH. L. REV. 129 n.4 (1971).

13. See, e.g., VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1986); see also W. BRYSON, HANDBOOK ON VIRGINIA CIVIL PROCEDURE 212-13 (1983); Note, *The Attorney-Client Privilege*, 19 U. RICH. L. REV. 559 (1985).

14. See, e.g., VA. CODE ANN. § 8.01-399 (Repl. Vol. 1984). However, in Virginia, the physician-patient privilege is qualified and no such privilege exists in a criminal prosecution. See *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), cert. denied, 425 U.S. 994 (1976).

15. See, e.g., VA. CODE ANN. § 8.01-400 (Repl. Vol. 1984).

16. Comment, *Developments in the News Media Privilege: The Qualified Approach Becoming Common Law*, 33 ME. L. REV. 401 (1981).

17. See Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 301 (1979). However, the courts have been reluctant to accept the fifth amendment rationale as a basis for a privilege. See Comment, *supra* note 12, at 129. It is not so much a journalistic privilege, but one of a citizen, and it has, therefore, fallen into disfavor as a defense. Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 301 (1979).

In Virginia, if the reporter is not the defendant in a criminal case, he may be called to testify and cannot avoid taking the stand by asserting his fifth amendment privilege. *Worrells v. Commonwealth*, 212 Va. 270, 183 S.E.2d 723 (1971). He must take the stand and assert the privilege to each question which calls for an incriminating response. See R. BACIGAL, VIRGINIA CRIMINAL PROCEDURE, §§ 7-11 to 7-12 (1983). The witness must demonstrate to the trial court "(1) . . . how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case." *North American Mortgage Investors v. Pomponio*, 219 Va. 914, 919, 252 S.E.2d 345, 348-49 (1979) (quoting *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952)). Whether the witness can validly assert the privilege is a matter for the trial court's determination. *Id.* at 918, 252 S.E.2d at 348 (citing *Heligman v. United States*, 407 F.2d 448, 450-51 (8th Cir.), cert. denied, 395 U.S. 977 (1969)). See generally BACIGAL, *supra* at §§ 7-11 to 7-15.

A. *Common Law Argument*

The earliest reported case in which a newsman refused to reveal the identity of his confidential source was *Ex Parte Nugent*,¹⁸ decided in 1848. Since that time, reporters have tried to persuade the courts to adopt a common-law newsman's privilege.¹⁹ However, the state courts have never been receptive to this argument and, in fact, no state without a statutorily created protection has ever recognized a newsman's confidential source privilege at common law.²⁰ On the other hand, recent decisions in the federal courts indicate a growing acceptance of a federal common-law privilege. The adoption of the Federal Rules of Evidence in 1975 seemed to provide an opening for the creation of a journalist's privilege, at least to the extent that Rule 501 allows federal courts to apply privileges governed by the principles of common law as interpreted "in light of reason and experience."²¹ Relying on Rule 501, the Court of Appeals for the Third Circuit, in *Riley v. City of Chester*,²² stated: "The strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy . . . leads us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."²³ This federal common-law

18. 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375) (opinion does not indicate whether the reporter made a specific claim for a newsman's privilege).

19. See Comment, *supra* note 17, at 302 (a history of major cases illustrating failed attempts to establish a common-law privilege for newsmen).

20. See *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. dismissed*, 402 U.S. 901 (1971); see also Annotation, *Privilege of Newsgatherer Against Disclosure of Confidential Sources of Information*, 99 A.L.R.3d 37 (1980) (jurisdictions refusing to recognize a newsman's privilege at common law in absence of an applicable statute).

21. FED. R. EVID. 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

22. 612 F.2d 708 (3d Cir. 1979).

23. *Id.* at 715; see also Note, *Evidentiary Privilege: The Development of Federal Common Law Press Privilege—Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), 6 U. DAYTON L. REV. 251 (1981).

privilege was reaffirmed in *United States v. Cuthbertson*,²⁴ in which the court extended the privilege to criminal cases.

The Federal Rules of Evidence, and any common-law privilege derived from them, apply only in federal question cases²⁵ since Rule 501 requires federal courts to apply state privilege law in diversity cases.²⁶ In addition, the newsman's reliance on common-law principles as the source of a confidential source privilege has fallen into disfavor since the decision of *Garland v. Torre*²⁷ in 1958. Journalists now rely more on first amendment arguments²⁸ and state shield laws.²⁹

B. *First Amendment Argument*

Since journalists have been rather unsuccessful in arguing a newsman's confidential source privilege exists through the common law, they have turned to the first amendment as a basis for withholding confidential information.³⁰ The first case to test this argument was *Garland v. Torre*,³¹ in which Judy Garland deposed Marie Torre, a columnist whose article, published in the *New York Herald Tribune* on January 10, 1957, contained statements alleged to be false, defamatory, and highly damaging to Garland's professional reputation. Torre refused to name the sources used for the statements printed in her article and the district court held her in contempt.³² Justice Potter Stewart, speaking for the majority of the Court of Appeals for the Second Circuit, partially agreed with Torre's first amendment argument that disclosure of confidential information might "entail an abridgment of press freedom by imposing some limitation upon the availability of news."³³ However,

24. 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

25. See *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975); see also Comment, *supra* note 16, at 404-06.

26. FED. R. EVID. 501; see also Comment, *supra* note 16, at 405.

27. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); see *infra* notes 31-34 and accompanying text.

28. See *infra* notes 30-43 and accompanying text.

29. See *infra* notes 44-49 and accompanying text.

30. See *supra* note 4. For a good discussion of the historical background of the first amendment as a basis for a newsman's privilege, see Comment, *The Newsmen's Privilege and the Right to Compulsory Process—Establishing an Equilibrium*, 48 *FORDHAM L. REV.* 694 (1980).

31. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

32. *Id.* at 547.

33. *Id.* at 548 (footnote of court omitted).

since the requested information "went to the heart of the plaintiff's claim," the court held that the Constitution provided no protection.³⁴ In addition, the Supreme Court's decision in *New York Times v. Sullivan*,³⁵ which limited the ability of public officials to obtain relief in a libel action, seems to lend support to the limited first amendment privilege recognized in *Garland*.³⁶

The most often cited case concerning a first amendment basis for a newsman's privilege is *Branzburg v. Hayes*.³⁷ In *Branzburg*, the Supreme Court stated: "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not."³⁸ Yet the majority also said that it was not suggesting "that news gathering does not qualify for First Amendment protection"³⁹ because its decision was limited to the grand jury context.⁴⁰ Moreover, the Court's holding applies only when the grand jury proceeding is instituted in good faith and not for purposes of official harassment.⁴¹ As a result, the majority of state and federal courts considering similar issues since *Branzburg* have limited the Supreme Court's holding to grand jury contexts and have recognized a qualified first amendment-based newsman's privilege in other areas.⁴² The extent

34. *Id.* at 550.

35. 376 U.S. 254 (1964).

36. See Eckhardt & McKey, *Reporter's Privilege: An Update*, 12 CONN. L. REV. 435, 436 (1980); Comment, *supra* note 16, at 406-07.

37. 408 U.S. 665 (1972) (a consolidation of three separate cases, each of which concerned whether a reporter could be required to disclose the source of confidential information in a grand jury context). Space limitations in this article prevent a detailed analysis of the *Branzburg* decision. However, there are a number of articles that review this case and its impact on subsequent decisions. See, e.g., S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS § 3.01-.05 (1982); Eckhardt & McKey, *supra* note 36; Comment, *supra* note 16; Comment, *The Newsman's Privilege after Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160 (1976) [hereinafter *Federal Shield Law*]; Note, *The Rights of Sources—The Critical Element in the Clash over Reporter's Privilege*, 88 YALE L.J. 1202 (1979).

38. 408 U.S. at 667.

39. *Id.* at 681.

40. "The sole issue before us is the obligation of reporters to respond to *grand jury subpoenas* as other citizens do and to answer questions relevant to an investigation into the commission of crime." *Id.* at 682 (emphasis added).

41. *Id.* at 707-08.

42. See, e.g., *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974); see also Goodale, Putan & Smeall, *Review of Privilege Cases*, 2 NINTH ANNUAL COMMUNICATIONS LAW INSTITUTE 331, 376-423 (1981); Comment, *supra* note 16, at 408.

of protection afforded to newsmen⁴³ is uncertain because *Branzburg* failed to establish a guiding constitutional principle to distinguish privileged from nonprivileged communications.

C. *Shield Law Argument*

Many state legislatures have passed statutes, known as shield laws, which specifically afford newsmen a privilege that prevents forced disclosure of any information they received in confidence.⁴⁴ The purpose of these laws is to encourage the free flow of information between informants and the press, especially when the informant will only divulge such information if assured that his name will not be released to the public.⁴⁵ The Supreme Court has stated that both Congress and the state legislatures are free to enact shield laws for newsmen at their discretion.⁴⁶ However, almost one-half of the states have never taken advantage of this opportunity nor has Congress passed a comprehensive federal shield law.⁴⁷ Of course, the legislatures that have passed shield laws have encountered difficulties in determining whether the privilege should be absolute or qualified and who should be considered a "newsman" for purposes of the statute.⁴⁸ In addition, the courts may restrict the scope and effectiveness of the laws through their interpretations of the statutes on a case-by-case basis.⁴⁹

43. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 760 (1977).

44. For a more detailed analysis of state and federal legislative efforts to deal with the newsman's privilege, see *infra* notes 68-85 and accompanying text.

45. See Note, *Shield Statutes: A Changing Problem in Light of Branzburg*, 25 WAYNE L. REV. 1381, 1395 (1979).

46. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned . . . There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.

Id.

47. See *infra* notes 80-85 and accompanying text.

48. See *infra* notes 75-79 and accompanying text.

49. See *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978); Comment, *supra* note 17, at 303 (stating that "the biggest single constraint upon the benefit of legislatively enacted press shields . . . [may be] the restrictive interpretations placed upon them by state courts").

III. NEWSMAN'S PRIVILEGE IN VIRGINIA

Newsmen in Virginia recognize the importance of confidential informants. The code of ethics adopted by the Society of Professional Journalists in 1975 at its national convention states that journalists "acknowledge the newsman's ethic of protecting confidential sources of information."⁵⁰ However, the journalists' recognition of the privilege is not decisive. The existence of a privilege in Virginia is determined by the court—not by the witness—with the party claiming the privilege having the burden of proving that he is entitled to its protection.⁵¹

A. *Virginia's Limited Basis for a Newsman's Privilege*

Except for the first amendment to the United States Constitution, there is a general lack of authority in Virginia concerning the confidential source privilege. Article I, section 12 of the Virginia Constitution does prohibit the restraint of freedom of speech and of the press,⁵² but the courts have never relied upon this section in deciding whether a newsman's privilege exists in Virginia. In addition, Rule 4:1 of the Rules of the Supreme Court of Virginia allows discovery of materials that are "not privileged,"⁵³ but communications to a journalist have never been clearly recognized in Virginia as being privileged. Moreover, there is no shield law in Virginia that prevents forced disclosure of a newsman's confidential information. Nor are there guidelines from the Virginia Attorney Gen-

50. CODE OF ETHICS (Society of Professional Journalists, Sigma Delta Chi 1973), reprinted in VIRGINIA STATE BAR, NEWS MEDIA HANDBOOK ON VIRGINIA LAW AND COURTS 8-12, 8-13 (2d ed. 1976) [hereinafter NEWS MEDIA HANDBOOK]. But see *Clein v. State*, 52 So. 2d 117, 120 (Fla. 1950), ("Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, . . . it must yield when in conflict with the interests of justice,—the private interest involved must yield to the interests of the public").

51. See *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943) (discussing the attorney-client privilege); C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 63 (1983).

52. See *supra* note 5.

53. VA. SUP. CT. R. 4:1(b)(1) (Repl. Vol. 1986) states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

eral⁵⁴ as there are on the federal level concerning the issuance of subpoenas against reporters and search warrants against their offices.⁵⁵ Finally, the Supreme Court of Virginia has rejected this privilege as being part of Virginia's common law.⁵⁶

B. *Supreme Court of Virginia on a Newsman's Privilege*

*Brown v. Commonwealth*⁵⁷ is the only case decided by the Supreme Court of Virginia dealing with a newsman's privilege. In *Brown*, the defendant was convicted of second degree murder.⁵⁸ On the day after the killing, Helaine Patterson, of the *Free Lance Star*, reported that the victim was shot in the head while walking through a junkyard with a companion after they apparently surprised two unknown men already on the property. Patterson further reported that the information came from "a spokesman in the Stafford County Sheriff's Department."⁵⁹ The investigating officer testified that he talked to a female reporter from the *Free Lance Star* the morning after the shooting, but he denied making any of the statements attributed to the spokesman.⁶⁰

After unsuccessfully attempting to learn the identity of the confidential source by filing a motion for discovery and inspection and subpoenaing "John Doe and Richard Roe, Spokesmen for Stafford County Sheriff's Department," the defendant subpoenaed the author of the article. Patterson refused to reveal the identity of her

54. VA. CODE ANN. § 2.1-118 (Repl. Vol. 1987) states:

The Attorney General shall give his advice and render official advisory opinions in writing only when requested in writing to do so by one of the following: the Governor; a member of the General Assembly; a judge of a court of record or a judge of a court not of record; the State Corporation Commission; an attorney for the Commonwealth; a county attorney in those counties in which such office has been created; a clerk of a court of record; a city or county sheriff; a city or county treasurer or similar officer; a commissioner of the revenue or similar officer; a chairman or secretary of an electoral board; the head of a state department, division, bureau, institution or board.

In any event, even if the Attorney General issued an advisory opinion on the subject, which seems unlikely, it would not be binding on the courts or the General Assembly. See *Forest Hills Early Learning Center, Inc. v. Lukhard*, 540 F. Supp. 1046 (E.D. Va. 1982), *aff'd in part, vacated in part and remanded*, 728 F.2d 230 (4th Cir. 1984).

55. See 28 C.F.R. § 50.10 (1976) (U.S. Attorney General guidelines concerning issuance of subpoenas to newsmen); see *infra* notes 86-115 and accompanying text.

56. See *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974).

57. 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974). (*Brown* involved a reporter who was subpoenaed to testify in a criminal trial).

58. *Id.* at 756, 204 S.E.2d at 430.

59. *Id.* at 755, 204 S.E.2d at 430.

60. *Id.* at 756, 204 S.E.2d at 430.

source, asserting a first amendment privilege. The trial court, balancing "freedom of the press and the right of the defendant to compel disclosure," did not require Patterson to reveal her source.⁶¹

On appeal, the Supreme Court of Virginia recognized that a newsman's privilege is "an important catalyst to the free flow of information guaranteed by the freedom of the press clause of the First Amendment," and is a "*privilege* related to the first amendment and not a first amendment *right*, absolute, universal, and paramount to all other rights."⁶² The court continued, saying that the privilege of confidentiality should yield "only when the defendant's need is essential to a fair trial," and that must be determined from the facts and circumstances in each case.⁶³ The court concluded that:

When there are reasonable grounds to believe that information in the possession of a newsman is material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a mitigation of the penalty attached, the defendant's need to acquire such information is essential to a fair trial; when such information is not otherwise available, the defendant has a due process *right* to compel disclosure of such information and the identity of the source; and any *privilege* of confidentiality claimed by the newsman, must, upon pain of contempt, yield to that right.⁶⁴

In *Brown*, the defendant was trying to impeach the credibility of a prosecution witness by proving that the witness had made prior inconsistent statements. However, the court held that when the right to impeach the testimony of a witness collides with the newsman's privilege of confidentiality, the privilege will prevail unless the inconsistent statements are material to the case, as defined above.⁶⁵

The Supreme Court of Virginia adopted a balancing test similar

61. *Id.*

62. *Id.* (citing *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972)).

63. *Id.* at 757, 204 S.E.2d at 431.

64. *Id.* (citing *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974)) (emphasis in original). See also VA. CONST. art. I, § 8, stating: "That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor"

65. 214 Va. at 758, 204 S.E.2d at 431.

to that proposed by Justice Powell in his concurring opinion in *Branzburg*.⁶⁶ Thus, a party in Virginia seeking a reporter's confidential information must demonstrate that: (1) the information is reasonably believed to be material to the case; (2) it is otherwise unavailable; and (3) it is essential to the conduct of the trial.

This case serves as the only basis for the existence of a qualified newsman's privilege in Virginia. It is important to note that this decision involved a third-party subpoena in a criminal case and arguably, there remains an open question as to how the court would consider a journalist's privilege in a civil context, or if the journalist were an actual party in the case. Also the Supreme Court of Virginia has never ruled on the legality of obtaining a search warrant to search a newspaper's office for evidence, rather than using a subpoena to obtain this information.⁶⁷

IV. OPEN QUESTIONS IN VIRGINIA: HOW OTHER JURISDICTIONS HAVE DEALT WITH A NEWSMAN'S PRIVILEGE

A. *Shield Laws*

1. State Efforts

When journalists were unsuccessful in getting the courts to recognize a common-law newsman's privilege, they turned to the legislatures for enactment of state shield laws. The first shield law was enacted by the Maryland legislature in 1896.⁶⁸ New Jersey, the next state to follow suit, waited thirty-seven years before taking similar action.⁶⁹ There are presently twenty-six states with shield laws that protect the identity of newsmen's confidential sources and their information, each with varying degrees of protection.⁷⁰

66. See *Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring).

67. But see *infra* notes 86-115 and accompanying text.

68. See Comment, *supra* note 17, at 302. The statute is reported to have been prompted by the jailing of *Baltimore Sun* reporter John T. Morris for 17 days in December 1886 and January 1887 for refusing to reveal the identity of his source for an article. *Id.* n.40.

69. *Id.* at 302.

70. ALA. CODE § 12-21-142 (Repl. Vol. 1986); ALASKA STAT. §§ 09.25.150 -.160 (1983); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 16-85-510 (1987); CAL. EVID. CODE § 1070 (West Supp. 1988); DEL. CODE ANN. tit. 10 §§ 4320-4326 (1974); ILL. ANN. STAT. ch. 110, pp. 8-901 to -909 (Smith-Hurd 1984); IND. CODE ANN. § 34-3-5-1 (Burns Repl. Vol. 1986); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1972); LA. REV. STAT. ANN. §§ 45:1451—:1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Cum. Supp. 1987); MICH. COMP. LAWS ANN. § 767.5a. (West Supp. 1987); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1988); MONT. CODE ANN. §§ 26-1-901 to -903 (1986); NEB. REV. STAT. §§ 20-144 to -147 (1983); NEV. REV. STAT. ANN. § 49.275 (Michie 1986); N.J. STAT. ANN. §§ 2A:84A-21 to

By the time the Supreme Court handed down its decision in *Branzburg*, nineteen states had passed some form of shield law⁷¹ and twelve of those offered an absolute privilege to newsmen.⁷² After the Court in *Branzburg* encouraged states to pass their own shield laws, seven more states enacted them, and several of the others substantially strengthened already existing ones.⁷³

However, Virginia has not yet passed a newsman's shield law. If a reporter refuses to reveal his confidential source, and no compromise is reached, the reporter must choose between testifying or facing a contempt citation for refusing to disclose his source.⁷⁴

Even if Virginia enacts a shield law, the General Assembly will undoubtedly face many of the same problems that other legislatures have encountered.⁷⁵ Some of the difficult decisions it must make include: (1) who will be covered by the statute,⁷⁶ (2) what information the journalist will be allowed to keep confidential and what must be disclosed,⁷⁷ and (3) how far the privilege should ex-

-21.1 (West Supp. 1987); N.M. R. EVID. 11-514; N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04-.12 (Baldwin 1984); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1984); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS § 9-19.1-1 to -3 (1985); TENN. CODE ANN. § 24-1-208 (Repl. Vol. 1980); see also Goodale, Putan & Smeall, *supra* note 42, at 483-500 (listing of state statutes and major cases interpreting them).

71. NEWS MEDIA HANDBOOK, *supra* note 50, at 5-4; Comment, *supra* note 17, at 303.

72. NEWS MEDIA HANDBOOK, *supra* note 50, at 5-4.

73. Comment, *supra* note 17, at 303.

74. NEWS MEDIA HANDBOOK, *supra* note 50, at 5-5. This source also reports that, since this practice has been adopted in Virginia, it has worked well enough so that neither the media nor the bar has lobbied the General Assembly for passage of a shield law.

75. See generally NEWS MEDIA HANDBOOK, *supra* note 50, at 5-4; Dixon, *supra* note 9, at 710.

76. The term "press" traditionally covers the written media of newspapers and magazines and is also thought to encompass radio, television, and the wire services. See Note, *supra* note 45, at 1392. Some state shield laws recognize all categories of the press. See, e.g., CAL. EVID. CODE § 1070 (West Supp. 1988); IND. CODE ANN. § 34-3-5-1 (Burns Repl. Vol. 1986). However, some statutes only afford a privilege to "reporters"—a rather vague term that is often difficult for the courts to apply. See, e.g., DEL. CODE ANN. tit. 10, §§ 4320-4326 (1974). In addition, if the statute covers "professional journalists," see, e.g., N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988), it tends to favor only the legitimate media at the expense of limited periodicals, newsletters, and freelance contributors. See Note, *supra* note 45, at 1393.

77. See Note, *supra* note 45, at 1394-95 (discussing whether the statute should protect the information given to the reporter as well as the identity of the informant); FRIEND, *supra* note 51, § 63 (discussing whether the privilege should cover written as well as oral communications); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (addressing whether a journalist should be allowed a privilege as to what he sees as well as what he is told).

tend.⁷⁸ Then the journalists must hope the courts will not severely limit the privilege through judicial interpretation of the statute.⁷⁹

2. Federal Efforts

Because of great differences among state shield laws, many journalists have turned to Congress seeking enactment of a federal shield law that would create a uniform privilege for newsmen. It has been argued that such a federal statute could be made binding on the states through Congress' authority to regulate interstate commerce⁸⁰ or by the enforcement clause of the fourteenth amendment.⁸¹

The first proposal for a federal shield law was introduced in 1929 by Senator Arthur Capper of Kansas. Since that time, almost every other session of Congress has received a similar bill.⁸² In fact, ninety-nine proposals were introduced in either the House or the Senate between 1973 and 1978. Of these ninety-nine, sixty-five were introduced in the first session of the Ninety-third Congress—the first session to meet after the *Branzburg* decision.⁸³ However, none of the proposals have ever passed.

That a federal law has never been enacted in this area is attributable to the voluntary guidelines promulgated by the United States Attorney General and the Privacy Protection Act of 1980, both of which regulate the issuance of subpoenas to reporters by federal officers.⁸⁴ In addition, Congress suffers from the same problems that have plagued the state legislatures in trying to pass a shield law.⁸⁵

78. In considering how far the privilege should extend, one should note that a newsman's absolute privilege could be inconsistent with the public's interest in criminal investigations. Dixon, *supra* note 9, at 710.

79. *See supra* note 49.

80. U. S. CONST. art. I, § 8, states, in part: "The Congress shall have power . . . [t]o regulate commerce . . . among the several States." Congress has used its authority under the interstate commerce clause to regulate the press. *See, e.g.*, *Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *see also infra* note 111 and accompanying text.

81. U. S. CONST. amend. XIV, § 5. *See also Federal Shield Law, supra* note 37, at 188.

82. NEWS MEDIA HANDBOOK, *supra* note 50, at 5-4.

83. Comment, *supra* note 17, at 310 n.49.

84. *See infra* notes 86-115 and accompanying text.

85. *See supra* notes 75-78 and accompanying text.

B. *Discovery of Confidential Information: Search Warrants or Subpoenas*

1. The Growing Use of Subpoenas

In the late 1960's during the Nixon administration, there was a marked increase in subpoenas issued against reporters.⁸⁶ This increase was largely concentrated in areas generally associated with "radical activities,"⁸⁷ such as Chicago, Los Angeles, New York, and San Francisco. As an illustration, in the first year after *Branzburg*, the *Los Angeles Times*, which was seen as a source of both cheap and expert witnesses,⁸⁸ spent \$200,000 in legal fees just resisting subpoenas.⁸⁹

In an attempt to calm the mounting tensions with the media, in 1970, Attorney General Mitchell issued federal guidelines for issuing subpoenas to newsmen. These guidelines were later codified as regulations in 1973 under Attorney General Richardson.⁹⁰ The guidelines were praised by the United States Supreme Court in *Branzburg* as a means of controlling the potential abuse of subpoenas.⁹¹

However, the regulations govern only Justice Department personnel. They are not binding on state or local officials or private parties.⁹² Moreover, the regulations, at times, have not been strictly followed; between August, 1970, and October, 1972, five of the eleven subpoenas requested under the guidelines were never authorized by the Attorney General.⁹³

86. See 119 CONG. REC. 38,576 (1973) (statement of Sen. Ervin noting the need for a subcommittee study of the recent increase in subpoenas issued under the Nixon administration); see also *Federal Shield Law*, *supra* note 37, at 162-63.

87. *Federal Shield Law*, *supra* note 37, at 163.

88. SIMONS & CALIFANO, *supra* note 6, at 14.

89. *Id.*

90. 28 C.F.R. § 50.10 (1976). The pertinent parts of the regulation state that the Justice Department should first enter into negotiations with the media if a request for a subpoena is contemplated. *Id.* § 50.10(c), (d), (e). A subpoena requires the approval of the Attorney General and will only be issued if: (1) the information sought is essential to a successful investigation, (2) the information is otherwise unobtainable, and (3) the subpoena will be limited in scope to avoid claims of harassment. *Id.* § 50.10(f).

91. *Branzburg v. Hayes*, 408 U.S. 665, 706-07 (1972); see also 119 CONG. REC. 38,587 (1973) (statement of Sen. Ervin commending the regulations as an "effort to restore the balance which once existed between the press and prosecutor").

92. See *Federal Shield Law*, *supra* note 37, at 185.

93. *Hearings on H.R. 717 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 301 (1973), noted in *Federal Shield Law*, *supra* note 37, at 185 n.134.

The issuance of subpoenas in Virginia is controlled by Rule 4:9 of the Rules of the Supreme Court. To obtain the documents of a nonparty witness, the moving party must file a production for inspection request with the clerk of court.⁹⁴ The clerk will then issue a subpoena duces tecum which describes the things to be produced, and the time, place, and period for the production.⁹⁵ The witness is then given an opportunity to comply, or to move the court to quash or modify the subpoena or request the moving party to pay for the costs of production.⁹⁶ If the witness does not comply with the subpoena, the failure to produce will constitute contempt of court.⁹⁷

The scope of production for discovery purposes is the same as that for a party witness.⁹⁸ Therefore, the request must concern "any matter, not privileged, which is relevant to the subject matter involved in the pending action" and which "appears reasonably calculated to lead to the discovery of admissible evidence."⁹⁹ Although there is little case law interpreting the scope of Rule 4:9, it is derived from Federal Rule 34, making federal case law persuasive in its application.¹⁰⁰

2. Curbing the Use of Search Warrants: Congressional Reaction to Search of a Newspaper Office

a. *Zurcher v. Stanford Daily News*

*Zurcher v. Stanford Daily News*¹⁰¹ was the first federal case to decide whether the police can search a non-suspect using a warrant instead of discovering needed information by use of a subpoena duces tecum.¹⁰² The district court held that the search of the school newspaper office in this case was illegal,¹⁰³ but the Supreme

94. VA. SUP. CT. R. 4:9(c) (Repl. Vol. 1987); see also W. BRYSON, *supra* note 13, at 271.

95. W. BRYSON, *supra* note 13, at 270.

96. VA. SUP. CT. R. 4:9(c), :12(b) (Repl. Vol. 1981).

97. VA. CODE ANN. § 18.2-456 (Repl. Vol. 1982); VA. SUP. CT. R. 4:9(d) (Repl. Vol. 1987).

98. W. BRYSON, *supra* note 13, at 271.

99. VA. SUP. CT. R. 4:1(b)(1) (Repl. Vol. 1987).

100. See W. BRYSON, *supra* note 13, at 267. For a general discussion of discovery in Virginia, see W. BRYSON, *DISCOVERY IN VIRGINIA* (1978); COMMITTEE ON CONTINUING LEGAL EDUCATION, *ESSENTIALS OF DISCOVERY IN VIRGINIA*, III-1 to III-15 (1986).

101. 436 U.S. 547 (1978).

102. For a good discussion of the facts of the case and its ramifications, see Comment, *The Privacy Protection Act of 1980: Curbing Unrestricted Third-Party Searches in the Wake of Zurcher v. Stanford Daily*, 14 U. MICH. J. L. REF. 519 (1981).

103. 353 F. Supp. 124, 136 (N.D. Cal. 1972).

Court reversed, stating that nothing in the fourth amendment "suggests that a third-party search warrant should not normally issue."¹⁰⁴ This decision has been widely criticized¹⁰⁵ because of the generally recognized principle that subpoenas are less of an intrusion on one's privacy interests than search warrants since subpoenas give more notice than a warrant and offer the subpoenaed party a chance to quash the subpoena.¹⁰⁶

b. Privacy Protection Act of 1980

As a direct result of the *Zurcher* holding, Congress passed the Privacy Protection Act of 1980¹⁰⁷ to limit the issuance of search warrants directed toward the news media.¹⁰⁸ Hearings by the Subcommittee on the Constitution of the Senate Judiciary Committee began on June 22, 1978, less than one month after the Supreme Court decision in *Zurcher*.¹⁰⁹ The Privacy Protection Act, which took effect on January 1, 1981, was the first federal legislative response to the judicial treatment of the newsman's privilege.¹¹⁰ It was designed to cover both state and federal officials, as evidenced by Congress' invocation of its authority pursuant to the interstate commerce clause to have the law reach the actions of the states.¹¹¹

Under Title I of the Act, Part A, Congress declared that "it shall be unlawful for a government officer . . . to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication . . ."¹¹²

104. 436 U.S. at 554.

105. Comment, *supra* note 102, at 524 nn.36-37; *see also*, W. LAFAVE, SEARCH AND SEIZURE § 4.1 (1978).

106. For an analysis of the privacy interests concerning both search warrants and subpoenas, *see* COMMITTEE ON CIVIL RIGHTS, *Legislative Response to Zurcher v. Stanford Daily*, 35 REC. A.B. CITY N.Y. 415 (1980).

107. 42 U.S.C. § 2000aa (1982).

108. S. REP. No. 874, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3950.

109. *Id.* at 3954.

110. Comment, *supra* note 16, at 409.

111. 42 U.S.C. § 2000aa; *see also* Comment, *supra* note 16, at 409.

112. 42 U.S.C. § 2000aa(a). "Work product materials," according to the Act, means, materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;

If a search warrant is requested, the person possessing the materials will be given adequate opportunity to respond with evidence as to why the material sought should not be subject to seizure.¹¹³ Part B of Title I also provides for civil damages if the Act is violated.¹¹⁴ In addition, Title II of the Act instructs the Attorney General of the United States to issue guidelines governing federal employees in order to comply with the Act.¹¹⁵ The guidelines have no effect on actions of state and local officials, but state officials are still held responsible to the original Act.

C. *Newsman's Privilege in Civil Cases*

The Supreme Court of Virginia has never ruled on the extent of a privilege for newsmen in civil cases, but other jurisdictions have sustained this type of privilege more often in civil cases than in criminal cases.¹¹⁶ One reason for this trend is that civil trials do not involve the defendant's right to compulsory process under the sixth amendment.¹¹⁷ In addition, the interest involved is a personal right, whereas criminal cases concern the public's interest in the complete investigation of a crime.¹¹⁸

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions or theories of the person who prepared, produced, authored, or created such material.

Id. § 2000aa-7(b).

113. *Id.* § 2000aa(c).

114. *Id.* § 2000aa-6.

115. *Id.* § 2000aa-11 to -12. Attorney General guidelines issued pursuant to the Privacy Protection Act of 1980 can be found at 28 C.F.R. § 59 (1982).

The purpose of the guidelines set forth in this part is to assure that federal officers and employees do not use search and seizure to obtain documentary materials in the possession of disinterested third parties unless reliance on alternative means would substantially jeopardize their availability (*e.g.*, by creating a risk of destruction, etc.) or usefulness (*e.g.*, by detrimentally delaying the investigation, destroying a chain of custody, etc.).

Id. § 59.1(b).

116. *See, e.g.*, *Gilbert v. Allied Chemical Corp.* 411 F. Supp. 505, 510 (E.D. Va. 1976), where the court stated:

In the context of a civil trial, the rationales for forcing a newsman to reveal his confidences are much less weighty than those involved in criminal proceedings. For example, in such a context, one cannot validly contend that a newsman is concealing the criminal conduct of his source, or shielding the anonymity of criminal figures.

See also Goodale, Putan & Smeall, *supra* note 42, at 476-82 (how the federal circuit courts have decided this issue); Comment, *supra* note 17, at 314-18; Note, *supra* note 45, at 1391.

117. *See supra* note 10.

118. Note, *supra* note 45, at 1391.

There are a number of persuasive federal cases concerning civil action that the Supreme Court of Virginia might rely upon if this issue comes before it. These cases should be persuasive since they interpreted the Federal Rules of Civil Procedure, which provides a basis for Rule 4 of the Rules of the Supreme Court of Virginia.¹¹⁹

1. Libel Actions

Courts often make a distinction between libel and nonlibel actions in deciding whether to compel disclosure from a journalist. Judges are more likely to grant a motion for forced disclosure in a libel case than in other civil actions.

Although the public person libel plaintiff may have alternative means to show constitutional malice, the plaintiff may be precluded from obtaining the only evidence in his or her favor if the reporter is not compelled to identify the primary or sole source for the defamatory material. In particular, disclosure may be required if the reporter is a defendant in the libel case and can use the privilege as a shield to protect himself or herself from liability.¹²⁰

For example, the United States Supreme Court made a distinction in libel cases when it held in *Herbert v. Lando* that the first amendment privilege does not prevent a plaintiff from discovering a reporter's editorial process in order to establish actual malice.¹²¹

However, a recent case decided by the Court of Appeals for the Fourth Circuit, *LaRouche v. National Broadcasting Company*,¹²² allowed the reporter's privilege to stand. In this case, Lyndon LaRouche sued NBC for defamation.¹²³ LaRouche alleged that NBC defamed him by broadcasting his statements that he believed Jews were responsible for all the evils in the world and that he had once proposed the assassination of President Carter and several of Carter's aides.¹²⁴ LaRouche filed several motions to compel discovery of the sources of the information for the story, or, in the alternative to prevent NBC from relying at trial on the information

119. T. BOYD, E. GRAVES & L. MIDDLEDITCH, VIRGINIA CIVIL PROCEDURE § 10.1 n.1 (1982).

120. METCALF, *supra* note 37, at 3-36 to 3-37 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 405 U.S. 1041 (1981); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981)).

121. 441 U.S. 153 (1979); *see also* *Eckhardt & McKey*, *supra* note 36, at 460-63.

122. 780 F.2d 1134 (4th Cir.), *cert. denied*, 107 S. Ct. 79 (1986).

123. *Id.* at 1134, 1136.

124. *Id.* at 1136-37.

from the confidential sources. The district court denied the motions.¹²⁵

In affirming, the Fourth Circuit stated that a motion to compel discovery, even when it concerns a journalist's confidential source, "is addressed to the sound discretion of the district court."¹²⁶ The court of appeals stated that, in deciding whether a journalist's privilege will protect a news source, a district court must balance the interest involved, determining: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information."¹²⁷ The court found no error in the district court's order because LaRouche had not "exhausted reasonable alternative means of obtaining this same information."¹²⁸

2. Nonlibel Actions

Both state and federal judges are more likely to deny a request for compelled disclosure of information from journalists in nonlibel civil cases than in any other area.¹²⁹ These actions have included such diverse areas as antitrust,¹³⁰ breach of contract,¹³¹ civil rights and discrimination,¹³² labor,¹³³ personal injury,¹³⁴ and securities cases.¹³⁵

125. *Id.* at 1137.

126. *Id.* at 1139 (citing *Baker v. F & F Investment*, 470 F.2d 778, 781 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958)). The Virginia Supreme Court, relying upon federal authority, has also held that the "granting or denying of a request under Rule 34 [now Rule 4:1, General Provisions Concerning Discovery] is a matter within the trial court's discretion and will be reversed only if the action taken was improvident and affected substantial rights." *Rakes v. Fulcher*, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970) (citing *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963)).

127. *LaRouche*, 780 F.2d at 1139 (citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)).

128. *Id.*

129. METCALF, *supra* note 37, at 3-35, 3-36.

130. *See, e.g.*, *Solargen Elec. Motor Car Corp. v. American Motors Corp.*, 506 F. Supp. 546 (N.D.N.Y. 1981); *Gulliver's Periodicals, Ltd. v. Charles Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978).

131. *See In re IBP Confidential Business Documents Litig.*, 7 Media L. Rep. (BNA) 2127 (N.D. Iowa 1981).

132. *See Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Poirier v. Carson*, 537 F.2d 823 (5th Cir. 1972); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

133. *See Maurice v. NLRB*, 7 Media L. Rep. (BNA) 2221 (S.D.W. Va. 1981), *vacated on other grounds*, 691 F.2d 182 (4th Cir. 1982).

134. *See, e.g.*, *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976).

135. *In re Forbes Magazine*, 494 F. Supp. 780 (S.D.N.Y. 1980). *See generally* METCALF, *supra* note 37, at 3-35 to 3-38.

In *Gilbert v. Allied Chemical Corporation*,¹³⁶ information was subpoenaed from a radio and television station in Richmond concerning broadcasts they made about Kepone contamination in Virginia.¹³⁷ The court, responding to a motion to quash, stated that the first amendment "provides newsmen a privilege from revealing their confidential news sources in civil proceedings that may be abrogated only in rare and compelling circumstances."¹³⁸ The court stated further that the gain in information must be weighed against the restricted access that newsmen would experience to informational sources in the future,¹³⁹ and that the moving party must show that the only practical access to the crucial information is through the newsman's source.¹⁴⁰ The court granted the motion to quash insofar as it related to the disclosure of confidential information and news sources. However, the court denied the motion which related to material the news agencies had collected from nonconfidential sources and used in draft scripts and nonbroadcast film. The court held that a reporter's slant on a story or editorial is generally not afforded a first amendment privilege.¹⁴¹

In *United States v. Steelhammer*, the Court of Appeals for the Fourth Circuit vacated contempt charges against reporters who refused to reveal information that they personally *saw* at a United Mine Workers rally.¹⁴² However, on rehearing en banc, the Fourth Circuit held that the district court properly required the reporters to respond to questioning, and held them in contempt for refusing to do so, but no further punishment of the reporters was allowed for other reasons.¹⁴³

136. 411 F. Supp. 505 (E.D. Va. 1976).

137. *Id.* at 507.

138. *Id.* at 508 (citing *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974)).

139. 411 F. Supp. at 510.

140. *Id.*

141. *Id.* at 511; *cf. Herbert v. Lando*, 441 U.S. 153 (1979).

142. 539 F.2d 373 (4th Cir. 1976).

143. 561 F.2d 539 (4th Cir. 1977).

V. CONCLUSION

A limited confidential source privilege for newsmen is now recognized by most jurisdictions in this country. The courts, including the Supreme Court of Virginia, have been reluctant to establish this privilege at common law and are presently looking to the first amendment of the United States Constitution for its justification.

In addition, many state legislatures have passed shield laws which directly afford newsmen this privilege. These statutes are designed to maintain the free flow of information to the public. However, the protection they provide varies greatly from state to state and Congress has never passed a federal shield law that would create a uniform privilege. The problems involved in passing a statute that satisfies both the media and the courts have contributed to this lack of a federal shield law. The Privacy Protection Act of 1980, designed to control the abuse of search warrants by government officials against journalists' offices and complemented by the regulations of the United States Attorney General, has helped to fill this void. The privilege, nevertheless, is still not clearly defined.

Virginia presently recognizes a qualified first amendment newsman's privilege in criminal cases. However, this privilege must yield when it conflicts with the defendant's right to due process. It is unclear how the court would consider such a privilege in a civil case, but, presumably, the privilege is less susceptible to attack since the public's strong interest in deterring crime is not a factor for the courts to consider. However, in absence of a state shield law, newsmen in Virginia still stand a good chance of facing court ordered disclosure of confidential sources if the party to the suit has no other practical access to the crucial information, it is material and relevant to the issues, and it is essential to the determination of the case.

