

1974

## Constitutional Law- Freedom of the Press- Virginia Recognizes a Newsman's Qualified First Amendment Privilege of Confidentiality of Information and Identity of Source

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### Recommended Citation

*Constitutional Law- Freedom of the Press- Virginia Recognizes a Newsman's Qualified First Amendment Privilege of Confidentiality of Information and Identity of Source*, 9 U. Rich. L. Rev. 171 (1974).

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# RECENT DECISIONS

**Constitutional Law—FREEDOM OF THE PRESS—VIRGINIA RECOGNIZES A NEWSMAN'S QUALIFIED FIRST AMENDMENT PRIVILEGE OF CONFIDENTIALITY OF INFORMATION AND IDENTITY OF SOURCE—*Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974).**

The first amendment to the United States Constitution guarantees our basic freedoms of speech and press.<sup>1</sup> In recent years newsmen have been subpoenaed with increasing frequency to testify before grand juries, legislative committees, administrative hearings and in criminal and civil cases.<sup>2</sup> When subpoenaed they have argued that the first amendment is a shield which protects them from compelled disclosure of confidential information and identity of source.<sup>3</sup>

While the first amendment argument is a relatively recent development, the newsmen's refusal to disclose confidential sources based on a claim of privilege is not new.<sup>4</sup> Some of the earlier arguments advanced in support

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1. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U. S. CONST. amend. I. The Constitution of Virginia 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 the General Assembly shall not pass any law abridging the freedom of speech or of the press. . . ." VA. CONST. art. I, § 12.

2. On March 5, 1970 Senator Thomas H. McIntyre of New Hampshire reacted to "the recent wave of broad and sweeping subpoenas which have issued from the Justice Department," by introducing a bill for the creation of a testimonial privilege for newsmen. S. 3552, 91st. Cong., 2d Sess. (1970); 116 CONG. REC. 6102 (1970) (remarks of Senator McIntyre and the text of the bill). See *Branzburg v. Hayes*, 408 U.S. 665, 699 n.38 (1972); Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667 n.1 (1971); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. J. 317 n.1 (1970). See also Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 250 (1974) (Senator Ervin's article is an excellent in depth study of the question of a newsman's privilege especially in the area of proposed federal legislation).

3. It has been argued that freedom of the press includes the right to gather news, and, in turn, the right to gather news implies the right to confidential sources which are an integral part of the news-gathering process. *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1972) (dissenting opinion of Justice Stewart). The Virginia Supreme Court holds with this position.

[A]s a news-gathering mechanism, a newsman's privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment. *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431 (1974).

See also *Branzburg v. Hayes*, 408 U.S. 665, 699 n.37, 732 n.14 (1972); Note, 80 YALE L.J. 317, 343 (1970).

4. As early as 1722 in this country James Franklin, older brother of Benjamin Franklin, was jailed for a month because he refused to identify the author of a political article published in his newspaper. See B. FRANKLIN, *AUTOBIOGRAPHY* 30 (H. Weld ed. 1848). See also Blasi, *The*

of such a privilege are the journalists' code of ethics,<sup>5</sup> forfeiture of estate,<sup>6</sup> employer's regulations,<sup>7</sup> relevance,<sup>8</sup> and fifth amendment protection from

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*Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 n.1 (1971); Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 234 (1974). For a sketch of the early common law development of confidential sources in England see D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 309-311 (1969) (hereinafter cited as D'Alemberte).

One of the earliest recorded cases in which the question of a journalist's privilege was raised was in a hearing before a United States House of Representatives Committee in 1857. James W. Simonton, a Washington correspondent for the *New York Daily Times* had written a news story alleging that certain members of the House had taken bribes for votes on certain land grant legislation. Simonton was called to testify before the House Committee and when he refused to identify his confidential sources he was held in contempt of Congress. CONG. GLOBE, 34th Cong., 3d Sess. 274-77, 403-13, 426-32, 434-45, 630 (1857). See also D'Alemberte, *supra* note 4, at 312; Ervin, *supra* note 2, at 235.

5. One of the earliest cases where a newsman refused to disclose a confidential source on the ground that it violated a canon of journalistic ethics was *In Re Wayne*, 4 Hawaii 475 (1914), wherein the newsman refused to identify his source of a report regarding government corruption. In 1934 the American Newspaper Guild adopted a canon of ethics which provided *inter alia* that a newspaperman must refuse to reveal confidential information or identity of a source in court or before any other judicial or investigatory body. G. SELDES, FREEDOM OF THE PRESS 371 (1935). See generally, Annot., 7 A.L.R. 3d 591, 592 (1966); D'Alemberte, *supra* note 4, at 315; Ervin, *supra* note 2, at 236. For an excellent discussion of this argument see Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 69-74 (1950) (This includes an interesting incident in Hopewell, Va. in 1931).

The adoption of this code of ethics may have stirred activity in some state legislatures. Between 1935 and 1950 ten states passed some type of privilege statute: Alabama, 1935; Arizona, 1937; Arkansas, 1936; California, 1935; Indiana, 1941; Kentucky, 1936; Michigan, 1949; Montana, 1943; Ohio, 1941; Pennsylvania, 1937. See 36 VA. L. REV., *supra*, at 61 n.1 (1950). See also Ervin, *supra* note 2, at 237 n.11. For citations to each of these state statutes see note 17 *infra*. However, it had little apparent effect on the court's position of nonrecognition. See, e.g., *Clein v. State*, 52 So.2d 117 (Fla. 1950); *People ex rel Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936). In a New Jersey case decided ten years after that state had adopted a newsman's privilege statute, see note 11 *infra*, the court held that the statute did not protect the newsman from compelled identification of the means used in obtaining a press release where the source of the press release was known. The court held that since the statute was in derogation of the common law it would be strictly construed. *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943). See also Ervin, *supra* note 2, at 237.

6. This theory was advanced in 1911 when a reporter upon being questioned before a board of police commissioners refused to identify which member of the police department had given him information concerning a certain murder. The newsman argued before the Supreme Court of Georgia that compelling him to answer the question would destroy his means of earning a living and thus cause the forfeiture of his estate. The court rejected this argument. *Plunkett v. Hamilton*, 136 Ga. 72, 81, 70 S.E. 781, 785 (1911). *Accord, In re Wayne*, 4 Hawaii 475 (1914). See also D'Alemberte, *supra*, note 4, at 316-317; 36 VA. L. REV., *supra* note 5, at 68-69. See generally Annot., 7 A.L.R.3d 591, 594 (1966).

7. A newspaperman refused to identify to a grand jury the author of an article contending, that to do so would violate one of the newspaper's regulations. The court refused to accept this argument. *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. 1874). See D'Alemberte, *supra* note 4, at 317; Ervin, *supra* note 2, at 235. See generally Annot., 7 A.L.R. 3d 591, 595 (1966).

8. Newsmen have fared better when using the relevancy argument as grounds for refusing

self-incrimination.<sup>9</sup> With the exception of the self-incrimination argument, no such privilege was recognized at common law.<sup>10</sup> Where the privilege did exist it was entirely the creation of statute, the first of which was passed by Maryland in 1896.<sup>11</sup>

While various arguments had been advanced,<sup>12</sup> it was not until 1958 that the defense of a first amendment privilege of non disclosure of source was raised in *Garland v. Torre*.<sup>13</sup> *Garland* was followed by a plethora of cases

to identify their sources. In *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951), Ethel Rosenberg sought the identity of the newsman's source of information to the effect that she could save herself by cooperating with the authorities. The court held that the reporter was not compelled to answer because the source and the information were irrelevant since the information could be found in the Federal Rules of Criminal Procedure. See *D'Alemberte*, *supra* note 4, at 321, 322; 36 VA. L. REV., *supra* note 5, at 74, 75. See generally Annot., 7 A.L.R.3d 591, 596 (1966).

9. By far the most successful argument raised where applicable has been that of the fifth amendment protection from self-incrimination. A newsman when called before a federal grand jury refused to reveal the identity of the sources used by him in an article on customs frauds on the ground that to do so would tend to incriminate him. The federal district court in an opinion by Judge Learned Hand held him in contempt. *United States v. Burdick*, 211 F. 492 (S.D.N.Y. 1914). However, on appeal the United States Supreme Court held that the newsman's defense was valid and he could not be compelled to answer. *Burdick v. United States*, 236 U.S. 79 (1915). See *D'Alemberte*, *supra* note 4, at 320, 321; 36 VA. L. REV., *supra* note 5, at 67-8.

10. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) and the cases listed therein supporting this proposition. See generally Annot., 7 A.L.R.3d 591 (1966); 58 AM. JUR., *Witnesses* § 546 (1948).

11. MD. ANN. CODE art. 35, § 2 (1971) (first enacted as ch. 249, [1896] *Laws of Md.* 437). It was 1933 before another state passed a newsman's shield statute. N.J. STAT. ANN. § 2A:84A-21 (Supp. 1973) (first enacted as ch. 167, [1933] *N.J. Acts* 349). In the meantime the courts continued in their reluctance to recognize any testimonial privilege. See, e.g., *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897); *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897); *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *In re Wayne*, 4 Hawaii 475 (1914); *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913). See also *Ervin*, *supra* note 2, at 236. See generally Annot., 7 A.L.R.3d 591 (1966).

12. See notes 5, 6, 7, 8, and 9 *supra*.

13. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). This was an action for defamation brought by Judy Garland against Columbia Broadcasting System. The defamatory remarks appeared in an article written by Marie Torre and were attributed to an unidentified C.B.S. executive. When called to testify Miss Torre refused to identify her source claiming a privilege based on the first amendment guarantee of freedom of the press, see note 1 *supra*. The court unanimously rejected this argument and held that the question of the source's identity went to the "heart of the case." The court stated that:

[C]ompulsory 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. . . .

But freedom of the press, precious and vital though it is to a free society, is not an absolute. . . .

[I]t too must give place under the Constitution to a paramount public interest in the fair administration of justice. . . . *Id.* at 548-49 (footnotes and citations omitted).

in which newsmen relying upon the first amendment argument refused to disclose their confidential sources. Most courts followed *Garland* and rejected this argument,<sup>14</sup> although a few did recognize the existence of a qualified privilege.<sup>15</sup>

However poorly newsmen were faring in court, support for some kind of privilege did exist. Various bills calling for the creation of a testimonial privilege for newsmen were introduced in Congress.<sup>16</sup> By 1972 seventeen states had adopted some type of shield statute.<sup>17</sup> In 1970 Attorney General Mitchell issued guidelines limiting the circumstances and instances in which the Justice Department could subpoena newsmen.<sup>18</sup>

The controversy of the newsman's first amendment privilege reached a peak before the United States Supreme Court in 1972 when a trilogy of

14. *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963). There were also cases during this period in which newsmen were compelled to testify even though their particular state had a shield statute. See, e.g., *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964) (narrowly construing California's privilege statute); *Beecroft v. Point Pleasant Printing & Publishing Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964) (narrowly construing New Jersey's privilege statute).

15. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N.D. Cal. 1970); *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971). One court refused to compel a newsman's disclosure on the ground of relevancy. *Thompson v. State*, 284 Minn. 274, 170 N.W.2d 101 (1969) (finding insufficient relevance in questions directed to reporter to compel disclosure).

16. One of the first newsmen's privilege bills, S. 2175, was introduced by Senator Arthur Capper of Kansas on October 30, 1929, see 71 CONG. REC. 5832 (1929). See proposed Congressional legislation up to 1971 cited in *Branzburg v. Hayes*, 408 U.S. 665, 689 n.28 (1972). An analysis of some of this proposed legislation was published in 1966. STAFF OF SENATE COMM. ON THE JUDICIARY, 89th CONG., 2D SESS., THE NEWSMEN'S PRIVILEGE (Comm. Print 1966). For an excellent up to date discussion of proposed Congressional newsmen's privilege legislation see generally Ervin, *supra* note 2.

17. ALA. CODE tit. 7, § 370 (Recomp. 1958); ALASKA STAT. § 09.25.150 (1973 Cum. Supp.); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1973); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West Supp. 1973); IND. CODE § 34-3-5 (1971) (amended, P.L. 319, 1973 Ind. Acts 1731); KY. REV. STAT. ANN. § 421.100 (1971); LA. REV. STAT. ANN. §§ 45.1451-54 (Supp. 1973); MD. ANN. CODE art. 35, § 2 (1971); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. §§ 93-601 to 602 (1964); NEV. REV. STAT. § 49.275 (1971); N.J. STAT. ANN. §§ 2A:84A-21, -29 (Supp. 1973); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1973); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1973); OHIO REV. CODE ANN. § 2739.12 (Page 1954), § 2739.04 (Supp. 1972); PA. STAT. ANN. tit. 28, § 330 (Supp. 1973). See *Branzburg v. Hayes*, 408 U.S. 665, 689 n.27 (1972). For an analysis of the statutes see D'Alemberte, *supra* note 4, at 326-39; Nelson, *supra* note 2, at 669-70.

18. The guidelines provide for the issuance of subpoenas to newsmen only where (1) the information requested is essential to a successful investigation of a serious crime; (2) the suspicion that a crime has been committed is substantiated by sources other than the press; (3) the information is not available from other sources; (4) the subpoena is limited and

cases were joined under the title of *Branzburg v. Hayes*.<sup>19</sup> These cases involved the question of whether an abridgment of freedom of speech and press resulted when newsmen were subpoenaed to appear and testify before state or federal grand juries.<sup>20</sup> Finding no abridgment, the Court refused to interpret the first amendment as granting newsmen a testimonial privilege.<sup>21</sup> However, Justice Powell, the fifth member of the 5-4 majority, in his concurring opinion concluded that the court's holding was limited and newsmen would be protected in their confidential source relationships by the first amendment in circumstances where the proper balance is struck.<sup>22</sup>

Justice Stewart, in his dissent, relies on cases which prohibit the government from using unnecessarily broad means which interfere with the first amendment interest in achieving its permissible ends.<sup>23</sup> In recognizing a newsman's qualified privilege, Justice Stewart set forth a three pronged test: first, probable cause to believe the newsman had relevant information; second, that the information could not be obtained by means less destructive of first amendment rights; and third, that the government has "a compelling and overriding interest in the information."<sup>24</sup>

Justice Douglas, dissenting only on the *Caldwell* portion of the case, declared that the first amendment provides a newsman with absolute protection from being compelled to appear before a grand jury except where the newsman was involved in a crime, and even then he could be protected from testifying by the fifth amendment.<sup>25</sup>

While refusing to flatly recognize a newsman's first amendment privilege of confidential information and identity of source *Branzburg* left Congress, the state legislatures,<sup>26</sup> and the state<sup>27</sup> and federal courts<sup>28</sup> free to respond

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reasonable in time and scope; and (5) there is express authorization from the Attorney General, "emergency situation" excepted. See *Branzburg v. Hayes*, 408 U.S. 665, 707 n.41 (1972). See also Dixon, *The Constitution Is Shield Enough for Newsmen*, 60 A.B.A.J. 707 (June 1974); Ervin, *supra* note 2, at 252-53.

19. 408 U.S. 665 (1972). This case joined *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971).

20. 408 U.S. at 667.

21. *Id.* at 690.

22. *Id.* at 709-10.

23. *Id.* at 733-34. See, e.g., *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965); *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943).

24. 408 U.S. at 740.

25. *Id.* at 712.

26. Eight states have passed shield statutes since *Branzburg*. See DEL. CODE ANN. tit. \_\_\_\_\_, § \_\_\_\_\_ (enacted as ch. 163, 59 Del. Laws \_\_\_\_\_) (1973); ILL. REV. STAT. ch. 51, §§ 111-19 (1971); ch. 735, 1973 Minn. Laws 2201 (tentatively codified as MINN. STAT. §§ 595.021:025); NEB. REV.

in their own way, consistent with the first amendment, to conditions and problems in their respective areas.<sup>29</sup>

In the recent case of *Brown v. Commonwealth*,<sup>30</sup> Virginia's Supreme Court considered the problem and became the second state to judicially recognize the existence of a "qualified privilege" to be limited in scope by careful balancing with the criminal defendant's sixth amendment rights and his rights under the Virginia Constitution to "call for evidence in his favor."<sup>31</sup>

The defendant, Charles Willie Brown, on trial for murder, sought to have the court compel a newspaper reporter to reveal the identity of the source

STAT. §§20-144 to 147 (Supp. 1973); N.D. CENT. CODE § 31-01-06.2 (Supp. 1973); ORE. REV. STAT. § 44. \_\_\_\_ (1973) (section number not yet assigned); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -3 (Supp. 1972); TENN. CODE ANN. § \_\_\_\_ (provision enacted at 1973 session of General Assembly; citation unavailable).

27. Since *Branzburg*, two state supreme courts have recognized a newsman's qualified privilege absent statute. See *State v. St. Peter*, \_\_\_\_ Vt. \_\_\_\_, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974).

28. Following *Branzburg*, several federal cases have recognized a newsman's qualified privilege. See *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972) (indicated compelled disclosure in a civil case was only proper on proof of an overriding need); *Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (newsmen have at least a qualified privilege not to disclose information in civil cases where the information does not go to the heart of the case and there are alternative sources).

29. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972). On the day after *Branzburg* Senator Alan Cranston introduced a bill providing for an absolute testimonial privilege in both federal and state proceedings. S. 3786, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S 10, 933 (daily ed. June 30, 1974). For an excellent survey of proposed federal legislation since *Branzburg* see Ervin, *supra* note 2, at 256 n.90-91, 261 n.108-10, 269 n.126 (deals with a bill Senator Ervin introduced), 270 n.131. There was wide support in Congress, including 32 Senators and over 100 Congressmen, for some sort of newsmen's privilege. Ervin, *supra* note 2, at 261.

Senate and House subcommittees have been holding hearings on this problem. *Hearings on Newsmen's Privilege Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 292 (1973); *Hearings on Newsmen's Privilege Before Subcomm. No. 3 of the House Judiciary Comm.*, 93d Cong., 1st Sess. 585-87 (1973). See Ervin, *supra* note 2.

Additionally, on October 16, 1973 Attorney General Richardson expanded and made into regulations the Justice Department guidelines for subpoenas to the news media. See Dixon, *The Constitution Is Shield Enough for Newsmen*, 60 A.B.A.J. 707, 710 (June 1974). See also Ervin, *supra* note 2, at 276 N.154.

30. 214 Va. 755, 204 S.E.2d 429 (1974).

31. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ." U.S. CONST. amend. VI. "That in criminal prosecutions a man hath a right to . . . call for evidence in his favor. . . ." VA. CONST. art. I, § 8. This section of the Virginia Constitution has been held to include the right to interview material witnesses. See *Bobo v. Commonwealth*, 187 Va. 774, 48 S.E.2d 213 (1948).

of her news story.<sup>32</sup> The story appeared in a newspaper<sup>33</sup> the day after the killing and contained several statements, allegedly made by an eye witness, which were inconsistent with statements later made by him to police and also with testimony given in court.<sup>34</sup> Brown sought the identity of the confidential source for the purpose of impeaching the prosecution witness.<sup>35</sup> The reporter asserted a first amendment privilege and refused to disclose her source's identity. Finding that a balance must be struck between freedom of the press and the right of a defendant to compel disclosure, the trial court held that on the facts of this particular case, the reporter would not be required to identify her source.<sup>36</sup> The Virginia Supreme Court affirmed the lower court's holding.<sup>37</sup>

Recognizing a newsman's qualified first amendment privilege of confidentiality of information and identity of source, the court distinguished it from a right, "absolute, universal and paramount to all other rights."<sup>38</sup> The court agreed with the trial court that a balance must be struck, and that the newsman's privilege should yield only when necessary to assure the defendant a fair trial.<sup>39</sup>

32. Earlier, Brown had attempted to ascertain the identity of the confidential source by filing a motion for discovery and inspection on the Commonwealth and by subpoenaing "John Doe and Richard Roe, Spokesman for the Stafford County Sheriff's Department." 214 Va. at 756, 204 S.E.2d at 430 (see pp. 3 and 6 of the Appendix filed with the Appellant's Brief in this case).

33. The news story appeared in the Fredericksburg, Virginia *Free Lance Star*, an afternoon newspaper, under the by-line of Helaine Patterson on June 29, 1972. See 214 Va. at 755, 204 S.E.2d at 430.

34. There were several inconsistencies raised. One, a statement in the article purportedly made by the eye witness, Kearns, originally referring to the two men as "unknown" was inconsistent with the identification of Brown as the murderer made by Kearns to the police on the day after the killing and with testimony to that effect given in court; second, there was an inconsistency as to whether the dead man or the accused had said "Hey". Both Kearns and the investigating officer, who incidentally admitted speaking to a reporter from the *Free Lance Star*, denied making statements similar to those appearing in the news story. See 214 Va. at 756, 204 S.E.2d at 430.

35. McCormick, in discussing impeachment by prior inconsistent statements, states:

When a witness testifies to facts material in a case, the opponent may have available proof that the witness has previously made statements that are inconsistent with his present testimony. . . .

[T]he making of the previous statements may be drawn out in cross-examination of the witness himself, or if on cross-examination the witness has denied making the statement, or has failed to remember it, the making of the statement may be proved by another witness. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 67 (2d ed. 1972) (footnotes omitted).

See *United States v. Liddy*, 354 F. Supp. 208, 212 n.11 (D.D.C. 1972).

36. 214 Va. at 756, 204 S.E.2d at 430.

37. *Id.* at 758, 204 S.E.2d at 431.

38. *Id.*

39. The court held that this necessity for due process purposes must be determined by the

Weighing the privilege of confidentiality with Brown's right to impeach the credibility of the chief prosecution witness, the court said that when this right conflicts with the newsman's privilege of confidentiality the privilege takes precedence except in those circumstances where the alleged inconsistent statements go to the heart of the matter.<sup>40</sup> In this case, the court found that the inconsistent statements did not go to the heart of the matter, and therefore disclosure of the newsman's source was irrelevant and unnecessary for the defendant to receive a fair trial.<sup>41</sup>

The court cited with apparent approval the case of *State v. St. Peter*,<sup>42</sup> wherein the Supreme Court of Vermont recognized a newsman's qualified privilege and set forth two tests which an interrogator in a criminal case must meet before compelling a newsman asserting his first amendment privilege to answer. First, there must be no other adequately available source of information and; second, the information sought must be relevant and material to the issue of guilt or innocence.<sup>43</sup> The Vermont court seems to analogize the newsman's privilege with the privilege accorded law enforcement officers to withhold the names of their informers.<sup>44</sup>

The Virginia and Vermont courts seem to have adopted Justice Powell's position in *Branzburg*, maintaining that there should be a balancing between the newsman's freedom of the press protection and the obligation to testify. If the information sought bears a relationship too remote or

particular facts of each case. The court then went on to provide a test to use when balancing sixth amendment rights against first amendment rights:

. . . [W]hen 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 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. *Id.* at 757, 204 S.E.2d at 431, citing *Vermont v. St. Peter*, \_\_\_ Vt. \_\_\_, 315 A.2d 254 (1974).

40. 214 Va. 758, 204 S.E.2d at 431.

41. *Id.*

42. \_\_\_ Vt. \_\_\_, 315 A.2d 254 (1974).

43. *Id.* at 256.

44. *Roviaro v. United States*, 353 U.S. 53 (1957) (setting forth a law enforcement officer's privilege to withhold the identity of police informants). In making their analogy the Vermont court states:

In the name of public policy in support of law enforcement, this privilege is extended to the point, but no further, that it conflicts with the right of an accused to be confronted by the witnesses against him. Where the identity of an informer in a criminal trial is shown by the accused to be relevant to the issue of guilt or innocence, disclosure must follow. The interest of the enforcement officer in promoting the free flow of criminal intelligence into police hands has thus been accommodated to the constitu-

tenuous to the subject of the investigation then its source should be protected.<sup>45</sup>

Since *Branzburg*, there have been several federal cases which have recognized at least a qualified first amendment privilege of confidentiality for newsmen in civil cases.<sup>46</sup> As of this writing, the Virginia and Vermont decisions stand alone as the only state cases absent statute recognizing such a privilege in criminal cases.<sup>47</sup>

In light of this discussion and the fact that *Branzburg* was decided by a 5-4 margin, it is quite likely that if such cases as *Brown* or *St. Peter* were to reach the United States Supreme Court the privilege recognized therein would be approved with Justice Powell voting along with at least a 5 member majority.<sup>48</sup>

Before *Branzburg*, newsmen seemed to have been waiting for the courts to recognize their first amendment argument; however, with the disappointment of *Branzburg* behind them they turned to Congress to seek protection.<sup>49</sup> While the activity in Congress continues, newsmen can once again turn to the courts with renewed hope in their pursuit of a privilege. In light of *Brown* and *St. Peter* in the state courts; *Baker v. F and F*

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tional rights of a defendant on trial. — Vt. —, 315 A.2d at 256 (citations omitted). Virginia recognizes the prosecution's privilege to withhold the identity of its informers. *Delastation v. Boyce*, 152 Va. 368, 147 S.E. 267 (1929). See C. McCORMICK, *supra* note 46, at 236-238.

45. See *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972).

46. See note 28 *supra*.

47. However, during the same period there have been several state cases construing their respective shield statutes. See *Lightman v. Maryland*, 15 Md. App. 713, 294 A.2d 149 (1972), *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (1972), *cert. denied*, 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973).

48. In *United States v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972) the United States Court of Appeals for the District of Columbia granted a stay of execution of a contempt judgment handed down by District Court Judge John J. Sirica against newsmen John Lawrence, Jack Nelson, and Ronald J. Ostrow [*United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972)], when they refused to reveal confidential information dealing with "Watergate," Judge Leventhal said:

In making an estimate of the probability of success on appeal, I begin with the premise that the *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell as the fifth Justice of the majority. That opinion holds, as I understand it, that there is no universal constitutional privilege of a newsman to keep confidential the identity of his source and the content of their revelations. The assertion of that privilege may, however, come to involve a question under the First Amendment freedom of the press, and in such case there will be need for balancing that assertion against the need for the material in the interest of society. . . . 478 F.2d at 586-87 (citations omitted).

49. See note 29 *supra*.

*Investments*<sup>50</sup> and *Democratic National Committee v. McCord*,<sup>51</sup> in the federal courts; and the large number of subpoenas issued to newsmen in connection with national problems such as Watergate, it is likely that the United States Supreme Court once again will have to consider the newsman's rights and duties in this area of the law. In this respect the newsman's position has recently been strengthened by writers who, opposed to a nationally legislated newsman's privilege, have contended that the first amendment is shield enough for newsmen.<sup>52</sup> Others opposed to an absolute statutory privilege have asked, *quis custodiet ipsos custodes*—who will watch the watchdog?<sup>53</sup>

W.A.B. Jr.

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50. 470 F.2d 778 (2d Cir. 1972).

51. 356 F. Supp. 1394 (D.D.C. 1973).

52. See Dixon, *The Constitution Is Shield Enough for Newsmen*, 60 A.B.A.J. 707 (June 1974) (Mr. Dixon is Assistant Attorney General of the United States in charge of the Office of Legal Counsel, on leave from the faculty of the George Washington University Law Center, and is a member of the Council of the Administrative Conference of the United States. Mr. Dixon has also testified before Senator Ervin's subcommittee hearings on freedom of the press. Ervin, *supra* note 2, at 266 n.119). See also Califano, *The First Amendment Is Enough Shielding the Press*, NEW REPUBLIC, May 5, 1973.

53. Editorial, *Quis Custodiet Custodes*, 56 J. AM. JUD. Soc'y 225 (January 1973). This editorial in discussing the ramifications of *Branzburg* maintains that if there is trust and cooperation between the courts and the press there should be no problem. If this trust and cooperation is lacking someone will have to have the final word. For now the courts have the final word. The editorial concludes by recognizing that a "free press is a watchdog over all institutions, including those of the government itself;" but then queries if the press has the last word "*quis custodiet ipsos custodes*—who will watch the watchdog?" *Id.* at 227.