

BLACK AND WHITE AND READ ALL OVER: PRESS PROTECTION AFTER *BRANZBURG*

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ABSTRACT

In 1972, the Supreme Court handed the press an apparent resounding defeat in Branzburg v. Hayes, declaring that the Constitution provided reporters no privilege from testifying about their confidential sources. This Note uses previously unpublished materials from the Justices' personal files to illustrate the behind-the-scenes deliberations as the Court shifted in ideology from the pro-press posture established by Justice Hugo Black in the Pentagon Papers case to the anti-privilege position established by Justice Byron White one year later in Branzburg. It also examines the curious concurring opinion of Justice Lewis Powell in Branzburg and subsequent efforts to craft a qualified reporter's privilege, arguing against further weakening press protection.

INTRODUCTION

At a White House press corps dinner in 2005, two *San Francisco Chronicle* reporters stood with President George W. Bush to accept the Edgar A. Poe Award for excellence in news coverage of national significance.¹ Their investigation into the BALCO steroids scandal rocked baseball and other sports and “shook America’s sports world

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1. *BALCO Reporters Win National Recognition; 2 Will Receive Prize at Washington Dinner*, S.F. CHRON., Apr. 10, 2005, at A2. BALCO stands for Bay Area Laboratory Co-Operative.

to its core.”² Congressional hearings opened, Major League Baseball instituted a new steroid-testing policy, and the stories galvanized public sentiment to eliminate cheating in sport.³ “You’ve done a service,” the president, a former owner of baseball’s Texas Rangers, told Mark Fainaru-Wada, heartily shaking hands with the reporter and his co-writer, Lance Williams.⁴

Thirteen months later, the United States Attorney’s Office served the reporters with subpoenas demanding that they testify before a grand jury investigating leaks in the BALCO case and give up their confidential sources.⁵ “[Y]ou’re a little bit shocked when you turn around and get a subpoena from [the] attorney general basically telling you to drop everything you believe in and give up information you promised you wouldn’t,” Fainaru-Wada later explained.⁶ Defying the subpoena, the *Chronicle* reporters refused to testify and were sentenced to eighteen months in prison for their “service.”⁷ Ironically, their sentences were longer than those of any of the principal suspects targeted in the original steroid probe by the FBI.⁸ Unbowed, Fainaru-Wada and Williams refused to testify before the grand jury—one that itself was investigating leaks from another grand jury.⁹ Upon his

2. Mark Fainaru-Wada & Lance Williams, Address at the Meeting of the Commonwealth Club of California (July 7, 2006), available at <http://abclocal.go.com/kgo/story?section=news&id=4625987>. The reporters coauthored a book on the BALCO scandal. MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* (2006).

3. Mark Fainaru-Wada & Lance Williams, *Steroids Scandal: The BALCO Legacy: From Children to Pros, the Heat Is on to Stop Use of Performance Enhancers*, S.F. CHRON., Dec. 24, 2006, at A1. On August 7, 2007, San Francisco Giants slugger Barry Bonds hit his 756th career home run to become Major League Baseball’s all-time leader, surpassing the record of Hank Aaron. George Vecsey, *Bonds Leaves Lasting Mark with No. 756*, N.Y. TIMES, Aug. 8, 2007, at A1 (“He will never outdistance all the footnotes and asterisks and doubts and suspicions in our minds, but Barry Bonds hit those homers, all 756 of them. It’s his record.”).

4. Rick Reilly, *It’s Clear Who’s Getting Creamed*, SPORTS ILLUSTRATED, Oct. 30, 2006, at 78; see also Christine Brennan, *Feds and Steroids: Mixed Signals*, USA TODAY, Sept. 21, 2006, at 2C (reporting that President Bush said, “You’ve done a service”); Susan Sward, *Prize-Winning Journalist Was Always Drawn to Investigative Reporting*, S.F. CHRON., Sept. 22, 2006, at A14 (same).

5. Adam Liptak, *U.S. Subpoenas Newspaper for Sources in Steroid Case*, N.Y. TIMES, May 9, 2006, at A23.

6. Interview by Bob Costas with Mark Fainaru-Wada, on *Costas on the Radio* (Premiere Radio Networks radio broadcast Oct. 9, 2006), available at <http://www.premiereradio.com/news/view/197.html>.

7. Joe Mozingo, *Expose a Scandal, Face a Prison Term*, L.A. TIMES, Nov. 14, 2006, at A1.

8. Lawrence Donegan, *Reporters Who Broke BALCO Story Fight Prison Sentence*, THE GUARDIAN (London), Jan. 11, 2007, (Sports Pages), at 6.

9. Liptak, *supra* note 5.

sentencing, Fainaru-Wada told the court, “I do not wish to spend even a minute in jail. However, I cannot—and will not—betray the promises I have made over the past three years” to confidential sources.¹⁰ After the reporters were sentenced, twenty-four states, news organizations, academics, attorneys, and others filed briefs on their behalf.¹¹ The court stayed their imprisonment, pending appeal.¹² One week before the Ninth Circuit Court of Appeals planned to hear their argument, prosecutors dropped charges against the reporters when a defense lawyer admitted he leaked the information.¹³

Fainaru-Wada and Williams were excoriated by a few fellow journalists who questioned their relationship with a source who exploited the leaks.¹⁴ Yet much of the material that made the BALCO case relevant to sports fans like President Bush would not have been made public but for their reports. As Professor Alexander Bickel famously wrote, “[T]he presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources. . . . [T]he press is a morally neutral, even an unconcerned, agent as regards the provenance of newsworthy material that comes to hand.”¹⁵ In court filings, federal prosecutors tried to convince a judge to force the *Chronicle* reporters to testify by noting they “may . . . have a profit motive” in the publication of their book, and their articles had little value.¹⁶ Allowing prosecutors to determine

10. Bob Egelko, *Silence Means Prison, Judge Tells Reporters*, S.F. CHRON., Sept. 22, 2006, at A1.

11. Sabin Russell, *States, News Groups Back Chronicle's BALCO Reporters*, S.F. CHRON., Dec. 12, 2006, at A17.

12. T.J. Quinn et al., *Reporters Still Facing Jail*, DAILY NEWS (New York, NY), Dec. 23, 2006, at 65.

13. Jesse McKinley, *Reporters Avoid Jail in BALCO Case*, N.Y. TIMES, Feb. 15, 2007, at D2.

14. See, e.g., Tim Rutten, *Regarding Media: Protect Public Interest, Not Journalists' Self-Interest*, L.A. TIMES, Feb. 17, 2007, at E1 (“To assert any form of journalistic privilege in a situation like that is something far worse than moral obtuseness. Conspiring with somebody you know is actively perverting the administration of justice to your mutual advantage is a betrayal of the public interest . . .”).

15. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 81 (1975).

16. Bob Egelko, *Feds Urge Judge: Force Reporters to Testify*, S.F. CHRON., June 22, 2006, at A1 (citing a filing by federal prosecutors in response to a motion by the *Chronicle* to quash the subpoena). In the government’s motion, assistant U.S. attorneys revealed contempt for the articles in question and degraded the reporters’ professional judgment. “In contrast, the ‘leaked information’ served only to titillate and hold up to public ridicule those athletes who admitted using steroids before the grand jury.” *Id.*

journalistic ethics through selective subpoenas, however, is akin to allowing reporters to draft the Model Rules of Professional Conduct.

Since the Supreme Court took up the issue of a reporter's privilege not to testify as to the identity of sources in 1972 in *Branzburg v. Hayes*,¹⁷ the legal and reportorial landscape has shifted significantly.¹⁸ The press has, to a greater or lesser degree, enjoyed a privileged status among professions since the nation's founding through its inclusion in the First Amendment. Thomas Jefferson famously wrote in 1787 that "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."¹⁹ In the First Congress, James Madison likewise said, "[T]he freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."²⁰ Justice Potter Stewart, who authored a stern dissent in *Branzburg*,²¹ noted that the press is "the only organized private business that is given explicit constitutional protection."²² Yet even noted First Amendment lawyer and press champion Floyd Abrams declares that "[f]rom a distance of two centuries, the intentions of those who drafted the First Amendment are not at all obvious."²³ If they were, presumably there would be more clarity on when and why reporters, like Fainaru-Wada and Williams, face jail time for refusing to betray hard-won confidences. Through appeals to historical and structural press protections, attorneys for the press were initially able to make lemonade out of the sour decision laid at their feet by the

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

18. For a detailed legal analysis of the *Branzburg* opinion and its aftereffects, see generally Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39 (2005); and Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005).

19. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd ed., 1955).

20. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

21. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (stating that the Court's opinion "invites . . . authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government").

22. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975).

23. FLOYD ABRAMS, *SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT* xii (2005).

Supreme Court in *Branzburg*. Increasingly, however, they are unable to fend off multiplying subpoenas for reporters' notes.²⁴

This Note uses previously unpublished materials from the files of Supreme Court Justices to lay bare the disintegration of press protection as the Court has shifted in ideology and argues against further erosion of a qualified reporter's privilege after *Branzburg*. Although the ambiguous *Branzburg* opinion denies an absolute constitutional right for reporters to refuse to reveal sources, this Note finds that a careful reading of the opinion—keeping in mind the Justices' reasoning—mandates both judicial and prosecutorial discretion when compelling journalists to testify. Part I features an in-depth look at the decisions behind the *Branzburg* decision, including notes from various Justices' files. It also includes an examination of a previously unpublished concurring opinion by Chief Justice Warren Burger in *Branzburg*. Part II examines the transition in Supreme Court jurisprudence from Justice Hugo Black, who wrote for the majority in favor of the press in the *Pentagon Papers* case,²⁵ to Justice Byron White, who wrote for the majority against the press one year later in *Branzburg*. Part III examines the lack of proper prosecutorial and judicial discretion shown in cases involving reporters compelled to testify before grand juries. A careful reading of the *Branzburg* decision shows that prosecutors must use considerable discretion when subpoenaing reporters. Although the Supreme Court became less protective of the press in the early 1970s, it nevertheless in *Branzburg* relied upon prosecutorial and judicial discretion as the fail-safe in protecting the press and the public's right to know. Judges and prosecutors, however, have ignored that fail-safe, basing their actions on an ultimately misguided interpretation of *Branzburg*.

I. BRANZBURG 360°

Exactly 365 days after the *Pentagon Papers* decision,²⁶ the Court issued its opinion in *Branzburg v. Hayes*.²⁷ The decision combined

24. See David Carr, *The Media Equation: Subpoenas and the Press*, N.Y. TIMES, Nov. 27, 2006, at C1 (quoting Hearst Corporation general counsel Eve Burton as saying, on the increase in subpoenas, “[i]f the government wins [the BALCO] case, every reporter’s notebook will be available to the government for the asking”).

25. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

26. *New York Times Co. v. United States* was decided on June 30, 1971.

27. The decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), was issued June 29, 1972. The year 1972 was a leap year.

three cases involving claims of privilege by reporters, including *Caldwell v. United States*²⁸ and *In re Pappas*.²⁹

The Justices split sharply on whether reporters have a constitutional privilege to refuse to testify before a grand jury. Writing for a 5–4 majority, Justice Byron White held that no constitutional privilege exists, either absolute or qualified.³⁰ Justice Lewis Powell, although joining the majority, wrote a concurring opinion that sought to split the atom by proposing a case-by-case balancing test.³¹ The dissenting Justices tersely found that reporters do have a constitutional privilege to refuse to identify confidential sources.³² Mindful of the blistering dissent, which referenced the “Court’s crabbed view of the First Amendment,”³³ the majority hinged its analysis on the discretion of judges and prosecutors and noted that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.”³⁴

Trailing only *Roe v. Wade*,³⁵ some scholars have pronounced *Branzburg* the Burger Court’s second-most controversial decision.³⁶

28. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

29. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

30. *Branzburg*, 408 U.S. at 667 (“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.”); *see also* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[T]he First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source.”).

31. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

32. *Id.* at 712 (Douglas, J., dissenting) (“It is my view that there is no ‘compelling need’ that can be shown which qualifies the reporter’s immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime.”); *id.* at 725 (Stewart, J., dissenting) (noting a reporter’s “constitutional right to a confidential relationship with his source”).

33. *Id.* at 725 (Stewart, J., dissenting).

34. *Id.* at 708 (majority opinion) (“Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.”).

35. *Roe v. Wade*, 410 U.S. 113 (1973).

36. *See* Alpheus Thomas Mason, *Whence and Whither the Burger Court? Judicial Self-Restraint: A Beguiling Myth*, 41 REV. POL. 3, 21 (1979) (“Except for its ruling outlawing state abortion laws, no decision of the Burger Court has aroused deeper concern among citizens and dissenting justices than *Branzburg v. Hayes*.”).

The “ambiguously” decided³⁷ case was the product of deep divisions and heated debate within the Court, as illustrated by the Justices’ private papers.

A. *The Press*

In the late 1960s, *Louisville Journal-Courier* reporter Paul Branzburg uncovered local hashish manufacturing and a burgeoning drug trade.³⁸ When subpoenaed to testify about his sources before grand juries, Branzburg refused for fear of disclosing his hard-won confidences.³⁹ Branzburg was no ordinary reporter at a regional daily newspaper. He was a Harvard Law School graduate who would go on to be a top journalist at the *Detroit Free Press*.⁴⁰

The Court joined Paul Branzburg’s case with those of Earl Caldwell, a *New York Times* reporter who covered the Black Panther Party and other militant groups and refused to give up notes and tape recordings of interviews, and Paul Pappas, a television reporter who refused to testify before a grand jury about what he had learned inside a Black Panthers headquarters.⁴¹

After the Supreme Court’s ruling, Paul Branzburg was sentenced to six months in prison, but the Michigan governor refused to extradite the reporter back to Kentucky, and he never served a day in jail.⁴² “When the legal drama finally ended, I still had not revealed my sources,” Branzburg said in 1992.⁴³ “I knew all along it would end that way.”⁴⁴

B. *The Majority*

In conference after oral argument, it quickly became apparent that the reporters would receive little sympathy from the Court. Chief Justice Warren Burger and Justices White, Harry Blackmun, and William Rehnquist were disinclined to grant any privilege, let alone

37. ABRAMS, *supra* note 23, at 69.

38. Branzburg, 408 U.S. at 667; FRANCIS WILKINSON, *ESSAYS IN ESSENTIAL LIBERTY: FIRST AMENDMENT BATTLES FOR A FREE PRESS* 91 (1992).

39. WILKINSON, *supra* note 38, at 91–93.

40. *Id.*

41. Branzburg, 408 U.S. at 672–73, 675–76.

42. WILKINSON, *supra* note 38, at 93.

43. *Id.*

44. *Id.*

one with a constitutional dimension.⁴⁵ Justice Powell would join them, to an uncertain degree.⁴⁶ White addressed the conference, saying, “Presently, I don’t think I’d establish any privilege at all . . . I would not in any event allow a privilege to the extent of keeping confidential what [he] has seen [of an] actual crime.”⁴⁷ Chief Justice Burger, according to Douglas’s conference notes, said it was a matter of common law, not constitutional law.⁴⁸ “He was witness to [a] criminal act,” Burger said, according to Douglas.⁴⁹ “No constitutional protection.”⁵⁰

Blackmun’s private notes reveal his inner thoughts on the case. Among the things he listed under “Am impressed by,” Blackmun included “For 200 years we have got along all right,” “We are concerned here with crime,” “Can assert his defenses just as everyone else can,” and “We should be able to handle this short of a constitutional privilege—yet Kentucky’s treatment bothers me.”⁵¹

“Why has this never been raised before in over 200 years?” Blackmun wrote.⁵² “What this case seems to amount to, for me, is an all out attack on the grand jury system.”⁵³ Blackmun wrote that he “hesitate[s] to impinge on the grand jury function or to expand First Amendment rights in this context.”⁵⁴

Rehnquist, new to the Court like Powell, took an originalist position. “Framers no contemplate,” Rehnquist stated, according to

45. See Conference Notes of Justice Harry A. Blackmun in *Branzburg v. Hayes* (Feb. 25, 1972) (unpublished manuscript, on file with the Harry A. Blackmun Papers, Library of Congress, Box 138) [hereinafter Blackmun, Conference Notes in *Branzburg*]; Conference Notes of Justice William O. Douglas in *Branzburg v. Hayes* (Feb. 25, 1972) (unpublished manuscript, on file with the William O. Douglas Papers, Library of Congress, Box 1547) [hereinafter Douglas, Conference Notes in *Branzburg*]; Conference Notes of Justice Lewis F. Powell, Jr., in *Branzburg v. Hayes* (Feb. 25, 1972) (unpublished manuscript, on file with the Lewis F. Powell, Jr., Papers, Powell Archives, Washington & Lee University School of Law, Box 147) [hereinafter Powell, Conference Notes in *Branzburg*].

46. See *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

47. BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 165 (1990).

48. Douglas, Conference Notes in *Branzburg*, *supra* note 45.

49. *Id.*

50. *Id.*

51. Blackmun, Conference Notes in *Branzburg*, *supra* note 45, Box 139. Blackmun often used shorthand, but his words are spelled out in this Note. Indecipherable words and phrases have been omitted.

52. *Id.*

53. *Id.*

54. *Id.*

Blackmun's shorthand.⁵⁵ But Rehnquist ultimately may have been in a compromised position on the case, having served as the Justice Department's primary spokesman for its policy of subpoenaing reporters during investigations into the Black Panthers and other militant groups while he was assistant attorney general.⁵⁶ Rehnquist refused to recuse himself from the case and "showed no consciousness of impropriety."⁵⁷

Interestingly and perhaps as a result of Burger's appeal to common law, the Justices consulted a 1963 British case on the subject, and several included it in their related case files.⁵⁸ In *Attorney-General v. Mulholland*,⁵⁹ the Queen's Bench stated:

Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed by a judge The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered.⁶⁰

Thus, the common law, according to their lordships in deciding *Mulholland*, accords journalists consideration similar to clergy, doctors, or those in fiduciary positions. The inclusion of the term "necessary question" in the *Mulholland* case indicates that under the law of England, questions put to reporters to reveal sources must be necessary to justice. It indicates an evidentiary privilege could be accorded reporters, and its inclusion in the Justices' case files may help explain the similar position taken by Justice Lewis Powell in his notable concurrence.

55. *Id.*

56. JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 240 (1974).

57. *Id.* at 241.

58. See Justice William J. Brennan's Copy of the Queen's Bench Opinion in *Attorney-General v. Mulholland*, in the *Branzburg v. Hayes* Case File (undated) (unpublished manuscript, on file with the William J. Brennan, Jr., Papers, Library of Congress, Box I:261); Justice Thurgood Marshall's Copy of the Queen's Bench Opinion in *Attorney-General v. Mulholland*, in the *Branzburg v. Hayes* Case File (undated) (unpublished manuscript, on file with the Thurgood Marshall Papers, Library of Congress, Box 83). Brennan's celebrated year-end case histories, alas, do not include a review of *Branzburg*. See Jim Newton, *The Brennan Memos*, SLATE, Jan. 9–11, 2007, <http://www.slate.com/id/2156940> (excerpting Brennan's "extraordinary annual memoranda documenting the court's work").

59. *Att'y-Gen. v. Mulholland*, (1963) 2 Q.B. 477.

60. *Id.* at 489–90 (finding no common-law reporter's privilege).

C. *The Wild Card*

Few Supreme Court opinions have caused more head scratching, even among contemporaneous brethren, than Justice Lewis Powell's three-quarter page concurrence in *Branzburg*.⁶¹ Although he joined the majority in rejecting a constitutional privilege, Powell did so only assuming a base level of judicial and prosecutorial discretion. He suggested a balancing test for an evidentiary privilege:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.⁶²

From the moment it appeared, Powell's opinion has been treated as everything from the controlling opinion to a side note akin to dictum. The "singularly opaque,"⁶³ "oddball"⁶⁴ opinion led some to consider the Court "really split 4-1-4, with Justice Powell's lone concurrence bearing the greatest weight of the Court's authority."⁶⁵ Combined with Powell's later concurrence in *Zurcher v. Stanford Daily*,⁶⁶ the opinion "left the constitutional waters of press privilege somewhat murky."⁶⁷

Powell's comments in conference clarify the reasoning behind his opinion. He said, "It would be unwise to give the press any constitutional privilege and we're writing on a clean slate, so we don't have to give constitutional status to newsmen. I'd leave it to the legislatures to create one."⁶⁸ Although he voted with the majority in *Branzburg*, he wrote, "I don't agree with much of Ky. opinion but if

61. *Branzburg v. Hayes*, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring); see Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1953–54 (2006) (discussing the confusion surrounding the authority of Justice Powell's *Branzburg* concurrence).

62. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

63. James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 709 (1975).

64. Stephen Bates, *Getting to the Source: The Curious Evolution of Reporters' Privilege*, SLATE, Dec. 26, 2003, <http://www.slate.com/id/2093187> (last visited Sept. 27, 2007).

65. WILKINSON, *supra* note 38, at 104.

66. *Zurcher v. Stanford Daily*, 436 U.S. 547, 576 (1978) (upholding a search warrant for the files of a student newspaper in an attempt to get photographs of alleged illegal activity).

67. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 19 (1991).

68. SCHWARTZ, *supra* note 47, at 165.

there is no 1st Amend. Privilege, this is merely a state case.”⁶⁹ Likewise, he voted to affirm in *Pappas*, even though he wrote, “I don’t like [the] opinion or result.”⁷⁰ He continued, “[A]s I have concluded there is no *constitutional privilege*, I have no choice but to affirm.”⁷¹ Powell joined White’s majority opinion, but drafted his concurrence to “emphasize what seems to me to be the limited nature of the Court’s holding.”⁷²

Justice Stewart quickly redrafted his dissent to account for Powell’s ambiguous concurrence.⁷³ The second draft—the published version of the dissent—called Powell’s separate opinion “enigmatic”⁷⁴ and stated that “[t]he disclaimers in Mr. Justice Powell’s concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.”⁷⁵

Powell’s private writings reveal his own less-than-absolute position. His notes immediately after argument show that although he did not believe there was an absolute constitutional privilege, he felt that a court must engage in “balancing First Amendment interests against the other interests involved.”⁷⁶ Powell wrote in longhand on his notes in *Caldwell*:

My vote turned on my conclusion—after hearing arguments of counsel & re-reading principal briefs—that we should not establish a constitutional privilege. If we did this, the problems that would flow from it would be difficult to foresee: e.g. applying a privilege of

69. Powell, Conference Notes in *Branzburg*, *supra* note 45, Box 146, 70-85.

70. Conference Notes of Justice Lewis F. Powell, Jr., in *In re Pappas* (Feb. 25, 1972) (unpublished manuscript, on file with the Lewis F. Powell, Jr., Papers, Powell Archives, Washington & Lee University School of Law, Box 146).

71. *Id.*

72. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring).

73. Changes from the first draft of the dissent to the second draft reflect this hasty adjustment. Compare First Draft, Dissent of Justice Potter Stewart in *Branzburg v. Hayes* (June 23, 1972) (unpublished manuscript, on file with the Thurgood Marshall Papers, Library of Congress, Box 83), with Second Draft, Dissent of Justice Potter Stewart in *Branzburg v. Hayes* (June 23, 1972) (unpublished manuscript, on file with the Thurgood Marshall Papers, Library of Congress, Box 83) [hereinafter Stewart, *Branzburg* Dissent, Second Draft].

74. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting); see also Stewart, *Branzburg* Dissent, Second Draft, *supra* note 73 (including Justice Stewart’s revised language from the first draft of his dissent).

75. *Branzburg*, 408 U.S. at 746 n.36.

76. Tentative Impressions of Justice Lewis F. Powell, Jr., in *Branzburg v. Hayes* (Feb. 23, 1972) (unpublished manuscript, on file with the Lewis F. Powell, Jr., Papers, Powell Archives, Washington & Lee University School of Law, Box 146).

const. dimensions to grand juries [sic], petite juries, congressional committees, etc. . . . And who are “newsmen”—how to define?”⁷⁷

But, Powell added, “I will make clear in an opinion . . . that there is a *privilege* analogous to an evidentiary one, which courts should recognize & apply in case by case to protect confidential information.”⁷⁸

Unfortunately, Powell’s private notes offer little further guidance about the exact dimensions of the evidentiary privilege that should be accorded reporters. Unlike his voluminous notes on later cases like *Regents of the University of California v. Bakke*,⁷⁹ Powell’s archived material on *Branzburg* fills just one thin folder.⁸⁰ His *Caldwell* and *Pappas* files hold little more.⁸¹

It does seem clear that Powell never entirely agreed with the majority opinion, despite joining it. Anthony Lewis, the *New York Times* writer and legal scholar with whom Powell often corresponded, wrote the Justice in 1975 to compliment his First Amendment jurisprudence.⁸² “[Y]our opinions in this area are something special,” Lewis wrote. “The dialogue with Justice White is especially interesting, starting with *Branzburg*.”⁸³ Mr. Lewis’s letter shows that many of those close to Powell believed the Justice never fully joined White’s absolute rejection of a reporter’s privilege.

77. Conference Notes of Justice Lewis F. Powell, Jr., in *United States v. Caldwell* (Feb. 25, 1972) (unpublished manuscript, on file with the Lewis F. Powell, Jr., Papers, Powell Archives, Washington & Lee University School of Law, Box 146) [hereinafter Powell, Conference Notes in *Caldwell*].

78. *Id.*

79. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

80. Lewis F. Powell, Jr., Papers, Powell Archives, Washington & Lee University School of Law, Box 146. Powell had been seated for just forty-eight days when *Branzburg* was argued on Feb. 23, 1972. Powell and Rehnquist took the oath of office on Jan. 7, 1972. Paul C. Bartholomew, *The Supreme Court of the United States, 1971–1972*, 25 W. POL. Q. 761, 761 (1972). Although his judicial philosophy may have differed from his predecessor’s, Powell took two of Black’s clerks for the term in 1972. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 242 (1994).

81. Lewis F. Powell, Jr., Papers, Powell Archives, Washington & Lee University School of Law, Box 146.

82. Letter from Anthony Lewis to Justice Lewis F. Powell, Jr., (Mar. 31, 1975) (on file with the Lewis F. Powell, Jr., Papers, Washington & Lee University School of Law, Box 120).

83. *Id.* The case name is underlined in the original letter.

D. The Dissenters

Justice Potter Stewart authored the dissent in *Branzburg*, finding a constitutional privilege for reporters and excoriating “[t]he Court’s crabbed view of the First Amendment.”⁸⁴ Justices William Brennan and Thurgood Marshall joined the dissent. Justice William O. Douglas filed a separate dissent also finding a constitutional privilege but focusing on Earl Caldwell, the *New York Times* reporter.⁸⁵

Justice Stewart had been a reporter both while in college at Yale and at the *Cincinnati Times-Star*.⁸⁶ *Time* magazine offered him a position, but he went to law school instead.⁸⁷ By dissenting in *Branzburg*, Stewart was effectively reversing his circuit court position in *Garland v. Torre*.⁸⁸ But, as Justice Stewart said in conference, “constitutional law develops in a hurry.”⁸⁹ Stewart was “tentative,”⁹⁰ but reportedly said, “[t]he First Amendment requires some kind of qualified privilege for confidences to reporters.”⁹¹ In the dissent, Stewart famously warned against “annex[ing] the journalistic profession as an investigative arm of government.”⁹²

The other Justices who joined Stewart were less predisposed to accepting the press’ arguments. “I no like reporters,” was Justice William Brennan’s first statement at the conference, as summarized in Blackmun’s shorthand.⁹³ “But press is important to be free.”⁹⁴

84. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

85. *Id.* at 724–25 (Douglas, J., dissenting).

86. Tinsley E. Yarbrough, *Justice Potter Stewart: Decisional Patterns in Search of Doctrinal Moorings*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 375, 390 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

87. *Id.*

88. *Garland v. Torre*, 259 F.2d 545, 549–50 (2d Cir. 1958) (finding no constitutional privilege for a reporter to refuse to disclose the name of an informant in a defamation case involving actress Judy Garland). Justice Powell’s conference notes state that Stewart said his “views have evolved since *Garland v. Torre*.” Powell, Conference Notes in *Caldwell*, *supra* note 77.

89. Conference Notes of Justice Harry A. Blackmun in *United States v. Caldwell* (Feb. 25, 1972) (unpublished manuscript, on file with the Harry A. Blackmun Papers, Library of Congress, Box 138) [hereinafter Blackmun, Conference Notes in *Caldwell*].

90. Powell, Conference Notes in *Caldwell*, *supra* note 77.

91. SCHWARTZ, *supra* note 47, at 165.

92. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

93. Blackmun, Conference Notes in *Caldwell*, *supra* note 89.

94. *Id.*

Brennan supported the privilege for reporters, even though it “may not be absolute (as Hugo [Black] thought).”⁹⁵

Justice Thurgood Marshall said he thought “the press exaggerates the importance of [confidentiality],” but joined the dissent anyway.⁹⁶ At conference, he argued for a qualified privilege and said the reporter had a choice: “Go to [the grand jury] first or . . . move to quash at outset—with burden on newsman.”⁹⁷ He “cannot tell the grand jury to go to hell,” Marshall said.⁹⁸

In his separate dissent, Justice William O. Douglas stated that “a newsman has an absolute right not to appear before a grand jury,” but he confined his dissent to the *Caldwell* case.⁹⁹ Douglas wrote at least seven drafts of his dissent, focusing on “privacy of association” as much as press freedom.¹⁰⁰ Douglas’s conference notes offer little insight into his reasoning. They are little more than one-liners from each Justice and do not elaborate on his own thoughts at the time.¹⁰¹

Blackmun privately scoffed at Douglas’s dissenting analysis, reading with a critical eye and making caustic comments in the margins.¹⁰² When Douglas noted that reporter Caldwell is “black,” Blackmun underlined the passage and wrote “So?” nearby.¹⁰³ At the end of Douglas’s circulated dissent, Blackmun wrote, “The strong last [paragraphs] are weakened by the first nine!”¹⁰⁴ When Douglas wrote about the “amazing position that First Amendment rights are to be balanced against other needs or conveniences of government,” Blackmun underlined “*amazing*” and noted, “Only to WOD [William

95. Powell, Conference Notes in *Caldwell*, *supra* note 77.

96. SCHWARTZ, *supra* note 47, at 165.

97. Powell, Conference Notes in *Caldwell*, *supra* note 77.

98. Blackmun, Conference Notes in *Caldwell*, *supra* note 89.

99. *Branzburg v. Hayes*, 408 U.S. 665, 711–12 (1972) (Douglas, J., dissenting). Douglas stated that his view of the First Amendment was close to that of Professor Alexander Meiklejohn, who declared that it is “an absolute.” *Id.* at 713.

100. *Id.* at 715. Douglas’s papers include seven drafts of his dissent, with sections cut and pasted throughout. The seventh draft is virtually identical to his published dissent. Compare Seventh Draft, Dissent of Justice William O. Douglas in *United States v. Caldwell* (Apr. 1972) (unpublished manuscript, on file with the William O. Douglas Papers, Library of Congress, Box 1547), with *Branzburg*, 408 U.S. at 711–12 (Douglas, J., dissenting).

101. Douglas, Conference Notes in *Branzburg*, *supra* note 45.

102. Justice Harry A. Blackmun’s Copy of Fourth Draft, Dissent of Justice William O. Douglas in *United States v. Caldwell* (May 30, 1972) (unpublished manuscript, on file with the Harry A. Blackmun Papers, Library of Congress, Box 139).

103. *Id.*

104. *Id.*

O. Douglas].”¹⁰⁵ When Douglas wrote “that the fences of the law and the tradition that has protected the press are broken down,” Blackmun wrote, “They were never up to this point.”¹⁰⁶

E. The Chief Justice Speaks . . . Softly

After the *Branzburg* dissenters circulated their first draft and Powell wrote his concurrence, Chief Justice Burger—perhaps sensing the deepening divisions on the Court—fired back with a curt, two-page concurring opinion that scolded the dissenters without advancing much new argument.¹⁰⁷ Indeed, his never-before-published concurrence contains just one footnote.¹⁰⁸

It is unclear exactly why Burger did not publish his opinion, because his papers remain closed to the public.¹⁰⁹ Yet his unpublished concurrence offers a stinging rebuke to the dissenters, and perhaps the Chief Justice did not wish to air the division so publicly. The dissent “takes a great leap and assert[s], without any foundation in history or other authority” that there is a reporter’s privilege, Burger wrote.¹¹⁰ “Surely,” the Chief Justice wrote, “the matter is not quite so simple.”¹¹¹

At conference, Burger said that no one, “except the President of the U.S.” could claim privilege from a grand jury subpoena.¹¹² “He must go.”¹¹³ His draft concurrence said:

An integral and what I consider mistaken step in the analysis of the three dissenters is the assumption that there is some constitutional right to gather news in a particular manner—in this case a constitutional right to refuse a grand jury subpoena or to refuse to give testimony before the grand jury.¹¹⁴

105. *Id.*

106. *Id.*

107. Draft Concurrence of Chief Justice Warren E. Burger in *Branzburg v. Hayes* (June 26, 1972) (unpublished manuscript, on file with the William J. Brennan, Jr., Papers, Library of Congress, Box I:263) [hereinafter Burger, Draft Concurrence in *Branzburg*].

108. *Id.*

109. Burger’s papers are closed to the public until the year 2026. The College of William and Mary, Warren E. Burger Online Exhibit, <http://swem.wm.edu/exhibits/burger/index.cfm> (last visited Sept. 27, 2007).

110. Burger, Draft Concurrence in *Branzburg*, *supra* note 107, at 1.

111. *Id.*

112. SCHWARTZ, *supra* note 47, at 165.

113. Blackmun, Conference Notes in *Caldwell*, *supra* note 89.

114. Burger, Draft Concurrence in *Branzburg*, *supra* note 107.

Burger's draft opinion stated, "If there were any genuine, or even plausible, basis for the sweeping claim made here for reporters, one might well ask how a free press has flourished in America as no where else in the world for nearly 200 years, without the protection now asserted to be indispensable."¹¹⁵

Burger then answered his own question in his attempt to marshal the dissenters to his view. "The answer lies in part at least in the fact that by and large, the confidentiality of sources has been respected and governments have not sought needlessly to disturb the reporter-informant relationship."¹¹⁶ Here, the Chief Justice implies that a privilege might be found when the government widely fails to respect the importance of a reporter's vow of confidentiality. In drafting his criticism of the dissent, Burger assumed that prosecutors would use considerable discretion in seeking subpoenas and that judges would do likewise when upholding them.

II. FROM BLACK TO WHITE

In the October 1971 term, when *Branzburg* was decided, the Supreme Court underwent a dramatic shift. Justices Hugo Black and John Harlan left the Court in September 1971 and died shortly thereafter.¹¹⁷ They were replaced by Lewis F. Powell, Jr., and William Rehnquist, respectively.¹¹⁸ Black, who served on the high Court from 1937 to 1971,¹¹⁹ took an "absolutist" position on the First Amendment.¹²⁰ Black thought that "we must overprotect speech in order to protect speech that matters."¹²¹ With his departure came a more pragmatic Court, one less inclined to grant broad protections to

115. *Id.* at 2.

116. *Id.*

117. Anthony Lewis, *Give Me Liberty: Individual Rights in a Time of War*, 13 MEDIA L. & POL'Y 6, 6 nn.1-2 (2004).

118. *E.g.*, Alan B. Morrison, *The Rehnquist Choice*, 55 STAN. L. REV. 1457, 1457 (2003) (reviewing JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2001)).

119. JOHN P. FRANK, *INSIDE JUSTICE HUGO L. BLACK: THE LETTERS* 1 (2000).

120. *E.g.*, Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 978 (2003).

121. Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 294.

the press even though “[p]ress law . . . is largely a creature of the seventies.”¹²²

The shift in First Amendment jurisprudence was apparent in the *Branzburg* decision. With the absolutist Black gone, the majority fell in line with Justice Byron White, whose personal pique with the press may have influenced his judicial philosophy on cases involving journalists and media organizations.¹²³ The fate of press protection had shifted from Black to White, and lower courts have been confused and contradictory ever since.¹²⁴

A. Justice Black

When the Court granted certiorari in *Branzburg*,¹²⁵ attorneys for the press figured they had four Justices on their side. “Justices Hugo Black, William O. Douglas, William J. Brennan and Thurgood Marshall all seemed to us to be likely votes,” press counsel Floyd Abrams later wrote.¹²⁶ Justice Potter Stewart, a former reporter himself, would also come out solidly for the press, despite some of his more conservative inclinations on most civil liberties.¹²⁷ In June 1971, Justice Black selected his clerks for the upcoming term, “indicating that he intended to carry on”¹²⁸ even though he had been “too old and decrepit to marshal a Court” in the *Pentagon Papers* case the year before.¹²⁹

Born and raised in central Alabama, Hugo Black made a “Horatio Alger rise to the top.”¹³⁰ Black’s work as a boy in Alabama at both conservative and Populist papers may have shaped his views

122. A.E. Dick Howard, *The Burger Court and the First Amendment: A Framework*, in *THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS* 129, 135 (Bill F. Chamberlin & Charlene J. Brown eds., 1982).

123. See, e.g., DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 383 (1998) (recounting an article calling White the “Javert of the American press” and accusing him of “pursu[ing] our editors and publishers with . . . cold fury”).

124. See *infra* Part III.

125. Justice Black was still on the Court when *Branzburg* was granted certiorari on May 3, 1971. See *Branzburg v. Hayes*, 402 U.S. 942, 942 (1971) (mem.).

126. ABRAMS, *supra* note 23, at 3.

127. Yarbrough, *supra* note 86, at 390.

128. Mason, *supra* note 36, at 10.

129. FRANK, *supra* note 119, at 38.

130. Hugo L. Black, Jr., *Foreword* to *INSIDE JUSTICE HUGO L. BLACK: THE LETTERS*, *supra* note 119, at vii, viii.

on the press.¹³¹ Black and his brother worked a number of odd jobs growing up, but “[t]he boys’ most rewarding job was as the ‘printer’s devil’ at competing local newspapers. Because of their literacy, the boys qualified to set type, letter by letter, creating the galleys of hand-driven presses.”¹³² Not only did Black set type, he sometimes wrote short news stories covering events in town or at the courthouse.

Perhaps because of his childhood experiences, Black’s judicial philosophy belied his sometimes rocky relationship with the press. Indeed, “Black owed his whole political, and therefore his judicial, career to his ability to surmount a formidable opposition and a hostile press”¹³³ His son said, “The press certainly had no reason to expect him to be their champion, considering the treatment he received at their hands during his lifetime.”¹³⁴ Black had never “quite forgiven the press for the way he was treated” when his ties to the Ku Klux Klan as a young man in Alabama were brought up after his appointment to the Court, and he felt that “rich Republicans controlled the press.”¹³⁵ Still, Black’s “conviction grew with each passing year that [the words of the First Amendment] mean more to the preservation of our democratic republic than any others.”¹³⁶ With this conviction, he granted the press broad protection.

With respect to First Amendment guarantees, Black was famous for his pronouncement, “No law means no law.”¹³⁷ In the *Pentagon Papers* case, Solicitor General Erwin Griswold (perhaps unwisely) challenged Black on this point, stating

Now Mr. Justice You say that “no law” means “no law,” and that should be obvious. I can only say . . . that to me it is equally obvious that “no law” does not mean “no law,” and I would seek to persuade the Court that this is true.¹³⁸

131. STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION 84 (2005).

132. *Id.*

133. GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 270 (1977).

134. HUGO L. BLACK, JR., MY FATHER: A REMEMBRANCE 185 (1975).

135. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 614 (1997).

136. BLACK, JR., *supra* note 134, at 183–84.

137. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45 (1968).

138. ABRAMS, *supra* note 23, at 40.

Griswold's "Alice in Wonderland" argument¹³⁹ failed to persuade the Court, and Black "listened to it with evident delight."¹⁴⁰

Black's broad First Amendment interpretation was apparent in his other opinions as well. Black wrote a famous concurrence in *New York Times v. Sullivan*,¹⁴¹ the "crown jewel of First Amendment law."¹⁴² And in his *Bridges v. California*¹⁴³ opinion, Black stated, "[T]he First Amendment does not speak equivocally It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."¹⁴⁴

But reliance on Black may have been questionable for press advocates in *Branzburg*. Had he lived, Black likely would have sided with the press position. Yet Black drew a thick, bright line between speech and conduct, absolutely protecting the former while offering the latter little protection.¹⁴⁵ In a series of lectures at Columbia University in 1968, Black stated, "In giving absolute protection to free speech, . . . I have always been careful to draw a line between speech and conduct."¹⁴⁶ In *Bridges v. California*, Black weighed speech and conduct carefully in the context of criminal trials. "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."¹⁴⁷ A well-pleaded argument by the government, focusing on the conduct of reporters in refusing to appear before a legitimately convened grand jury in a criminal probe, may have made the Alabama absolutist think twice before rubber-stamping the reporters' argument.

Despite this potential reservation, Black consistently took strong positions in favor of press protections while on the bench. "The Government's power to censure the press was abolished so that the press would remain forever free to censure the Government," he

139. NEWMAN, *supra* note 135, at 616. See LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 185 (Random House 2002) (1865) ("When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'").

140. ABRAMS, *supra* note 23, at 40.

141. *New York Times Co. v. Sullivan*, 376 U.S. 254, 293–97 (1964) (Black, J., concurring).

142. ABRAMS, *supra* note 23, at xvi.

143. *Bridges v. California*, 314 U.S. 252 (1941).

144. *Id.* at 263.

145. William C. Warren, *Foreword* to BLACK, *supra* note 137, at ix, x (1968) ("[Black] carefully distinguishes conduct not protected by the First Amendment, such as picketing or demonstrating, even though utilized to communicate ideas.").

146. BLACK, *supra* note 137, at 53.

147. *Bridges*, 314 U.S. at 260.

wrote in the *Pentagon Papers* case.¹⁴⁸ “In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly.”¹⁴⁹

Some commentators believe that *Branzburg* and other press defeats before the high Court “would not have survived the scrutiny of former Justices Hugo Black and William O. Douglas [together].”¹⁵⁰ With Black gone, the tide for the press had turned.¹⁵¹

B. Justice White

Justice Byron White, known even to his clerks as “terse and gruff,”¹⁵² treated no one with more disdain than journalists. White was “anathema to the press,” a Justice Department colleague recalled.¹⁵³ Beginning during his time as an All-American on the University of Colorado football team, White was hounded by reporters looking for scoops on the most successful scholar-athlete ever to play college football.¹⁵⁴ Later, his retirement from the Court in 1993 was greeted with a general sigh of relief from the Fourth Estate¹⁵⁵ and even a caustic good riddance from many corners.¹⁵⁶ He viewed the press with

148. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

149. *Id.*

150. Floyd Abrams, *The Burger Court and the First Amendment: An Analysis*, in *THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS*, *supra* note 122, at 138, 142.

151. Black’s relationship with Justice White was not close. “With [Justice] White, there was a real gulf of approach; there was respect, but no empathy.” FRANK, *supra* note 119, at 62. There is little documentation of their working relationship because, unfortunately, many of Black’s papers—some six hundred binders worth—were burned within months of his death. S. Sidney Ulmer, *Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices*, 35 J. POL. 286, 289 (1973). Although all his conference notes and sensitive files were burned, some of Justice Black’s papers are preserved in the Manuscript Division of the Library of Congress. Black was buried with several “10 cent copies of the Constitution in his suit pocket.” BLACK, JR., *supra* note 134, at 266.

152. *Biographical Study Unveils Some of Justice Byron White’s Mystery*, U. CHI. CHRON. Oct. 29, 1998, <http://chronicle.uchicago.edu/981029/hutchinson.shtml> (quoting former clerk and biographer Dennis Hutchinson).

153. See HUTCHINSON, *supra* note 123, at 449 (quoting Edwin O. Guthman, Press Sec’y, U.S. Dep’t of Justice).

154. *Id.* at 43 (calling it “Whizzermania”).

155. The “Fourth Estate” is common shorthand for the press. *E.g.*, Howard Kurtz, *Survey Finds Angst-Strained Wretches in the Fourth Estate*, WASH. POST, May 24, 2004, at C1.

156. See HUTCHINSON, *supra* note 123, at 382–84 (noting that White was derided as “both a knave and a fool”).

“scorn” and “disdain.”¹⁵⁷ A verse sung to White at his retirement party went: “He knows the First Amendment/He learned it up at Yale/But when he writes opinions/Reporters go to jail.”¹⁵⁸ When he referred to “snoops” in *California v. Greenwood*,¹⁵⁹ “many in the press assumed that he was referring, with some feeling, to them.”¹⁶⁰

White, who grew up poor in the beet fields of Wellington, Colorado, had little contact with the press before he arrived in Boulder to star on the gridiron for the Buffaloes.¹⁶¹ He arrived with “no clippings,” none of the oft-sensationalized newspaper accounts that followed star athletes of the day.¹⁶² Soon enough, his exploits on the football field would earn him the nickname “Whizzer” White, “a name he did not seek, did not like, and could not shake.”¹⁶³ Despite his aversion to publicity, “White was irresistible copy” as he became the most famous scholar-athlete in America.¹⁶⁴ Even as a Rhodes Scholar at Oxford, White was “dogged constantly by tabloid reporters.”¹⁶⁵ After clerking and moving back to Denver in 1947, he told a friend he had just three goals: “[T]o practice law, raise a family, and keep my name out of the goddamn newspapers.”¹⁶⁶

Perhaps as a result of his experiences, Justice White was “unwilling to accept” Black’s absolutist First Amendment position, because, in his view, it meant that “the press remains completely unaccountable for its actions.”¹⁶⁷ And White’s pragmatism led him to take “positions not clearly defined in terms of the alignments so important to Justice Black.”¹⁶⁸ Unlike Black, “White . . . was no fan of press claims for broad First Amendment protection.”¹⁶⁹ White’s view of the press was a “far cry from the traditional Fourth Estate image of

157. *Id.* at 5.

158. *Perspectives on White: A Roundtable*, 79 A.B.A. J. 68, 69 (1993).

159. *California v. Greenwood*, 486 U.S. 35, 40 (1988).

160. HUTCHINSON, *supra* note 123, at 450.

161. *Id.* at 14–18.

162. *Id.* at 25.

163. *Id.* at 39.

164. *Id.* at 67.

165. *Id.* at 5.

166. *Id.*

167. Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 440 (1993).

168. Carl Brent Swisher, *History’s Panorama and Justice Black’s Career*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 37 (Stephen Parks Strickland ed., 1967).

169. ABRAMS, *supra* note 23, at 71.

the press,”¹⁷⁰ and rather more akin to a traditional commercial enterprise.¹⁷¹

But it is perhaps possible to extrapolate too much from White’s personal interactions with the press. “It is tempting to suppose . . . that Justice White’s experiences with nosy reporters in his days as a national sports celebrity left him hostile to the media. That view probably overstates the case,” writes former White clerk John C. P. Goldberg.¹⁷² Although “White felt used and demeaned—commodified—by the media,”¹⁷³ he may not have been as hostile toward the press as conventional wisdom suggests. It is probable that no other Supreme Court Justice gave more interviews over a lifetime than White. This started in his college years and continued through his days as a Rhodes Scholar, as a professional football player and Kennedy Justice Department official, and even after his retirement from the Court. Although White “hated” reporters, he gave dozens, if not hundreds, of interviews. As biographer Dennis Hutchinson describes, White had “unvarnished frankness with the press.”¹⁷⁴

In *Branzburg*, White pummeled claims of a constitutional privilege for reporters. But he then went on to caution against “[o]fficial harassment of the press” designed “to disrupt a reporter’s relationship with his news sources.”¹⁷⁵ “[N]ews gathering is not without its First Amendment protections,” White noted, for “without some protection for seeking out the news, freedom of the press could be eviscerated.”¹⁷⁶ The *Branzburg* opinion “reaffirms White’s consistency and evenhandedness in cases involving the press.”¹⁷⁷

Similarly, some of White’s later judicial decisions recognized the importance of the Fourth Estate. Just two years after *Branzburg*, in

170. BOLLINGER, *supra* note 67, at 54.

171. Vincent A. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 593 (“[White] characterized the press as a private-interest group rather than an institution with a central function to perform in the constitutional system of checks and balances.”).

172. John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White’s Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1501 (2003).

173. *Id.* at 1508.

174. See HUTCHINSON, *supra* note 123, at 87. In his biography of White, Hutchinson cites one hundred different newspapers, magazines, and television broadcasts, many of which contain first-person interviews with the football player-scholar-Supreme Court Justice. *Id.* at 536–38.

175. *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972).

176. *Id.* at 681, 707.

177. HUTCHINSON, *supra* note 123, at 361.

Miami Herald Publishing Co. v. Tornillo,¹⁷⁸ White wrote eloquently of the favored position of the press.¹⁷⁹ “[T]he First Amendment erects a virtually insurmountable barrier between government and the print media,” White wrote.¹⁸⁰ The Court, he said, “remain[s] intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation’s press.”¹⁸¹ Although certainly no First Amendment absolutist, White did recognize that the press had an important and favored role to play in society.

III. BRANZBURG’S LEGACY

The *Branzburg* decision, rightly, was initially seen as a sound rebuke to the press.¹⁸² But through wily lawyering, the press partially managed to snatch a narrow victory from the jaws of defeat for a while. Attorneys for media organizations nibbled around the edges of *Branzburg*, with *New York Times* counsel James C. Goodale commenting just three years later on the “developing qualified privilege for newsmen.”¹⁸³ By 2007, forty-nine states and the District of Columbia had some form of protection for journalists by statute or case law.¹⁸⁴ Ironically, it is highly unlikely that the local prosecutor who sought the testimony of reporter Branzburg in the early 1970s would do so in similar circumstances since the passage of a “shield” law in Kentucky.¹⁸⁵

Yet the inroads achieved after *Branzburg* were short lived. Federal authorities—specifically federal prosecutors emboldened by

178. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

179. *Id.* at 259–63 (White, J., concurring) (finding that newspapers have complete editorial control of their publications on First Amendment grounds).

180. *Id.* at 259.

181. *Id.*

182. See Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1115 (2002) (noting “the apparently resounding defeat in *Branzburg* for the press”).

183. Goodale, *supra* note 63, at 709.

184. Stone, *supra* note 18, at 42; Sean Hill & Elizabeth Soja, *Reigniting the Debate*, THE NEWS MEDIA & LAW, Summer 2007, at 16, 17, available at <http://www.rcfp.org/news/mag/31-3/con-reigniti.html>. (“[A]ll the . . . states, except for one, recognize some form of a privilege for journalists.”) The only state that has not recognized a privilege, either by statute or case law, is Wyoming. Nestler, *supra* note 18, at 226.

185. See KY. REV. STAT. ANN. § 421.100 (LexisNexis 2006) (forbidding forced disclosure of “the source of any information procured or obtained by [a journalist], and published in a newspaper or by a radio or television broadcasting station”).

recent decisions interpreting *Branzburg*—have led the charge against reporters. Since 2005, “it is . . . de rigueur to round up the reporters, haul them before a court, and threaten them with heavy fines and jail sentences if they don’t cough up names and details concerning their sources.”¹⁸⁶ There is a particular minefield for reporters in the federal-state divide. Reporters covering a breaking story often pay little heed to the potential jurisdictional turns a case may take down the line. Often it is unclear whether a case will be prosecuted federally or on the state level. In such instances, a reporter depending upon a state privilege instead may be haled into federal court depending upon jurisdictional questions wholly outside the scope of a reporter’s inquiry.

Even in 1982, Floyd Abrams surmised that “[t]he area of confidential sources remains the single one most likely to provoke confrontation in the future.”¹⁸⁷ Some twenty years later, Abrams said, “a spate of leak investigations” shows “a purposeful decision made by federal prosecutors . . . that the disclosure in one leak investigation after another of who provided information to the press is more important than the press’s ability to gather news and report it to the public.”¹⁸⁸ Federal prosecutors, emboldened in part by misguided dicta by Judge Richard Posner, are wrongly interpreting *Branzburg*. They fail to recognize the principle that a majority of circuits established before Judge Posner entered the debate—that *Branzburg* is a complicated decision that mandates some level of prosecutorial and judicial discretion.

A. *Posner’s Perplexity*

Scholarly and popular authors have traced the reemergence of pressing reporters to testify to dicta found in a 2003 opinion authored by influential Seventh Circuit Judge Richard Posner.¹⁸⁹ In *McKevitt v.*

186. Theodore B. Olson, Commentary, *A Much-Needed Shield for Reporters*, WASH. POST, June 29, 2006, at A27.

187. Abrams, *supra* note 150, at 143.

188. ABRAMS, *supra* note 23, at 281.

189. For examples in law reviews, see Erik W. Laursen, *Putting Journalists on Thin Ice: McKevitt v. Pallasch*, 73 U. CIN. L. REV. 293, 294 (2004); Jaynie Randall, *Freeing Newsgathering from the Reporter’s Privilege*, 114 YALE L.J. 1827, 1829–34 (2005); Leslie Siegel, *Trampling on the Fourth Estate*, 67 OHIO ST. L.J. 469, 494–95 (2006); and West, *supra* note 61, at 1952 n.7. For examples in the popular press, see Bates, *supra* note 64, and Jeffrey Toobin, *Name That Source: Why Are the Courts Leaning on Journalists?*, NEW YORKER, Jan. 16, 2006, at 30, 34.

Pallasch,¹⁹⁰ Posner sought to flatten decisions in the majority of other circuits finding at least a qualified reporter's privilege.¹⁹¹ It may be no coincidence that the leading prosecutorial efforts to compel reporters to testify emerged from the U.S. Attorney's Office in Chicago,¹⁹² where Posner holds court.

Posner calls Powell's concurrence in *Branzburg* a "notorious example"¹⁹³ of "casting the essential fifth vote for the 'majority' opinion while also writing a separate opinion qualifying the Court's opinion."¹⁹⁴ This, Posner says, is a "bad practice because it leaves the reader uncertain whether the majority opinion or the concurring opinion should be regarded as the best predictor of how the Court would decide a similar case in the future."¹⁹⁵

Judge Posner is known, celebrated, and reviled for his dicta.¹⁹⁶ In *McKevitt*, his penchant for professing opinions on matters not essential to the case at hand led him to inveigh against courts that find even a qualified privilege for reporters. "A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope," a perplexed Posner wrote.¹⁹⁷ He then summarily disregarded cases decided in *seven* other circuits as contrary to his own reading of *Branzburg*.¹⁹⁸ Posner went on to dismiss press concerns of

190. *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

191. *Id.* at 534–35 (rejecting First Amendment protection for reporters against subpoenas in a criminal defendant's attempt to obtain nonconfidential records from biographers of a government witness).

192. See Katharine Q. Seelye, *Journalists Say Threat Of Subpoena Intensifies*, N.Y. TIMES, July 4, 2005, at C1.

193. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 95 n.191 (2005).

194. *Id.* at 95.

195. *Id.*

196. *E.g.*, Chi. Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 799–800 (1994) ("Judge Posner's opinions are notable for the frequency with which they digress—in dicta of the most elaborate and extended sort—from what appears to be the main point.").

197. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).

198. *Id.* The seven cases in question rely upon a variety of legal analyses and policy considerations in reaching at least a qualified privilege for journalists. See, *e.g.*, *In re Madden*, 151 F.3d 125, 128–29 (3d Cir. 1998) ("[T]he privilege recognizes society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public."); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) ("[T]his privilege was justified because the balance of interests favored the press in civil libel cases, unlike the grand jury proceedings considered in *Branzburg*."); *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993) ("[T]he privilege recognizes society's interest in protecting the integrity of the

“harassment, burden, [and] using the press as an investigative arm of the government.”¹⁹⁹ Instead, Posner wrote, because “these considerations were rejected by *Branzburg* even in the context of a confidential source, these courts may be skating on thin ice.”²⁰⁰

Posner’s selective reading of *Branzburg* correctly noted that Powell fully joined the majority opinion.²⁰¹ But in casting aside the considered opinions of seven other circuit courts, Posner failed to appreciate that *Branzburg* is a complex decision that leaves room for a potential reporter’s privilege. The holding of *Branzburg* explains that there is no constitutional privilege for reporters to be found in the First Amendment.²⁰² Justice White’s majority opinion also states, however, that prudential and evidentiary concerns drive part of this finding.²⁰³ White amply shows his concern in these areas by his admission that “we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.”²⁰⁴ Presumably, if the deterrent effect became widespread, the press argument would be strengthened.

B. *Breaking News*

The *San Francisco Chronicle* reporters at the center of the swirling BALCO case are but two examples of a growing trend. Federal prosecutors are increasingly willing to seek to compel

newsgathering process, and in ensuring the free flow of information to the public.”); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988) (showing concern for “protection of confidential sources or information”); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (“[The privilege] emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public.”); *In re Grand Jury Proceedings*, 810 F.2d 580, 584–86 (6th Cir. 1987) (“[C]ourts should . . . make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony”); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (“[I]nformation may only be compelled from a reporter claiming privilege if . . . it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.”).

199. *McKevitt*, 339 F.3d at 533.

200. *Id.*

201. *Id.* at 531.

202. See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 670 (2005).

203. *Branzburg v. Hayes*, 408 U.S. 665, 693–94 (1972) (commenting on the “[e]stimates of the inhibiting effect of such subpoenas” and dismissing as “speculative” the injury the press could suffer). The dissenting opinions, naturally, accepted the reporters’ claims of injury as more concrete.

204. *Id.* at 693.

reporters to give up their sources, using grand jury investigations to wield subpoenas.²⁰⁵

The incredibly politically charged case surrounding *New York Times* reporter Judith Miller and the leaked disclosure of the identity of CIA officer Valerie Plame is perhaps the highest profile example.²⁰⁶ Many in the media abandoned Miller, feeling she had been a patsy for the Bush administration in the run-up to the Iraq war and in the resulting chaos.²⁰⁷ Whether this was legitimate criticism or not, Miller ultimately spent eighty-five days in jail for refusing to disclose the source of the leak—even though she had never written a story identifying Plame.²⁰⁸ Judging Miller's case,²⁰⁹ District of Columbia Circuit Judge David B. Sentelle said that despite Justice Powell's concurrence and the decisions of other courts, the Supreme Court in *Branzburg* broadly rejected any claims to a reporter's privilege.²¹⁰ "The Highest Court has spoken and never revisited the question," Sentelle wrote. "Without doubt, that is the end of the matter."²¹¹

Perhaps emboldened by this affirmation, the Justice Department subpoenaed a "secret" document obtained by the American Civil Liberties Union²¹² and the telephone records of *New York Times* reporters in an investigation into Islamic charities.²¹³ And in

205. See, e.g., Editorial, *Pentagon Papers Revisited; The Bush Administration's Ever-Expanding War on the First Amendment*, WASH. POST, Dec. 15, 2006, at A34 ("[N]ot since the Nixon administration has the government so aggressively sought to crack down—not just on leakers, but on reporters and others who obtain leaked material.").

206. E.g., Robert Scheer, Commentary, *Embedded over Her Head in Washington*, L.A. TIMES, Aug. 23, 2005, at B13.

207. E.g., Maureen Dowd, Commentary, *Woman of Mass Destruction*, N.Y. TIMES, Oct. 22, 2005, at A17.

208. Marie Brenner, *Lies and Consequences*, VANITY FAIR, Apr. 2006, at 204.

209. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

210. *Id.* at 969 (finding no material factual difference between Judith Miller's case and *Branzburg*).

211. *Id.* at 970.

212. Robert Barnes, *For ACLU, a Victory in Standoff with U.S.*, WASH. POST, Dec. 19, 2006, at A9. Barnes quotes ACLU officials as saying the document is "mildly embarrassing" to the government but does not involve serious national security matters. *Id.* The document was an information paper prepared by an Army judge advocate telling soldiers not to photograph prisoners of war or detained enemy combatants. *Id.*

213. Adam Liptak, *Court Clears Way for Prosecutor to Review Records in Times Case*, N.Y. TIMES, Nov. 28, 2006, at A20. There is a facile argument that if the information is available to multiple reporters—who pay nothing for the information—it is probably available to the targets of the investigation, who would potentially pay millions of their alleged secret funds. The two Islamic charities under investigation by the FBI for their links to terror organizations had

December 2006, the Army subpoenaed two journalists to testify in the court-martial of an officer who refused to deploy to Iraq.²¹⁴ The issue also arose in a civil context, most notably in a suit by nuclear scientist Wen Ho Lee, who alleged that government leaks to the media violated his privacy.²¹⁵

It is perplexing, given that press freedom originated in the United States, that certain other countries provide more protection for reporters than does the First Amendment under *Branzburg*.²¹⁶ The Supreme Court has considered changes in state law to reflect “an emerging awareness” among the states on matters of liberty.²¹⁷ Furthermore, the Court has looked to decisions abroad to reinforce its understanding of American law.²¹⁸ Looking to state and international law as tools to interpret the possible First Amendment protection of reporters’ sources seems warranted. When the Court decided *Branzburg* in 1972, only seventeen states had established a reporter’s privilege. By 2007, forty-nine states and many foreign countries recognize varying forms of one.²¹⁹ Perhaps these changes merit a more press-friendly interpretation of *Branzburg*.

The BALCO case in particular gives reason to question the necessity of certain reporter subpoenas. In that case, eventually, an FBI investigation found the source of the leak was a defense attorney.²²⁰ Federal authorities made this determination through regular gumshoe investigation—having an informant secretly tape-

“millions of dollars in assets” seized. Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism*, N.Y. TIMES, Dec. 12, 2006, at A24.

214. Bob Egelko, *Army Subpoenas Journalists over Officer’s Quotes*, S.F. CHRON., Dec. 18, 2006, at B1.

215. Paul Farhi, *U.S., Media Settle with Wen Ho Lee*, WASH. POST, June 3, 2006, at A1.

216. See ABRAMS, *supra* note 23, at 280. Abrams notes that the European Court of Human Rights has found a reporter’s privilege. Similarly, in Germany, France, and Austria, among other nations, the government may never force reporters to identify confidential sources. Exceptions are “few and narrow” in Canada, Japan, and New Zealand. In Sweden, “it is a breach of law for journalists to reveal their sources.” *Id.*

217. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (finding that state laws decriminalizing sodomy reflect “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”). *But see id.* at 598 (Scalia, J., dissenting) (stating that “[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior”).

218. See *id.* at 573 (majority opinion) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (a decision by the European Court of Human Rights)).

219. See *supra* note 184 and accompanying text.

220. Josh Peter, *BALCO Leaks Exposed*, YAHOO! SPORTS, Dec. 21, 2006, <http://sports.yahoo.com/top/news?slug=jo-balco122106&prov=yahoo&type=lgns>.

record conversations with the attorney.²²¹ This showed the reporters' testimony was never essential to the case, despite prosecutors' protestations to the contrary.

Even Justice Department insiders have questioned the wisdom and propriety of such prosecutorial actions,²²² and their necessity is dubious. Justice Department officials themselves selectively leaked information in the BALCO case.²²³ Former Solicitor General Theodore B. Olson said, "[T]here is utterly no value in the current state of confusion."²²⁴ Placing reporters under constant threat of subpoena for using confidential sources could amount to an impermissible, indirect prior restraint.²²⁵

C. *An Appeal for Discretion*

Prosecutors and judges relying on Posner's dicta appear to have overstepped the Court's allowance in *Branzburg* by wielding and upholding subpoenas of dubious necessity. From a policy perspective as well, the effort to seek out the testimony of reporters is questionable.

The Court in *Branzburg* rejected an effort to create a constitutional reporter's privilege or to require a compelling governmental interest to seek reporters' testimony and make such subpoenas a last resort in the interest of justice. But if it is not a last resort, why is it not a first resort? That is, what is to stop prosecutors from regularly putting reporters on the stand? Why should they temper their zeal in seeking reporters' testimony? Journalists can always name their source. They are the only ones, aside from the

221. Associated Press, *Report: Lawyer Cited as Source of Leak in BALCO Case*, ESPN NEWS, Dec. 21, 2006, <http://sports.espn.go.com/espn/news/story?id=2705452>.

222. Joe Garofoli, *2 Chronicle Reporters at Center of Media, Government Standoff*, S.F. CHRON., Sept. 20, 2006, at A1 (quoting Mark Corallo, press secretary for former Attorney General John Ashcroft, as saying neither he nor Ashcroft would have approved of subpoenaing the BALCO reporters because "[i]n this case, there is no danger to life or issue of grave national security").

223. See Associated Press, *Graham to be Charged with Obstructing BALCO Probe*, ESPN NEWS, Nov. 2, 2006, <http://sports.espn.go.com/oly/trackandfield/news/story?id=2646248> (citing Justice Department officials "speaking on condition of anonymity . . . because the charges had not been made public").

224. Olson, *supra* note 186 ("[T]he rules regarding what reporters must disclose, and under what circumstances, remain a hopelessly muddled mess.").

225. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (broadly condemning prior restraints on publication absent "a state interest of the highest order" (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979))).

direct source, who know the identity of the leaker. Why should any prosecutor exhaust other avenues? Certainly the press can fight back on the airwaves or on the news pages, because they buy ink by the gallon. Yet in this era of demonization, when surveys rank reporters alongside lawyers at the lower end of trustworthy professions,²²⁶ a prosecutor might be seen as heroic for going after the press. Considering the political launching pad that a U.S. Attorney position can be,²²⁷ the publicity—good or bad—is priceless. But political gain is no reason to convene a grand jury.

Many reporters routinely destroy tape recordings and notes of interviews, until the point they are served with subpoenas.²²⁸ E-mail exchanges and anything stored to a company computer or server, however, may be retrieved if a subpoena is not quashed. E-mails between Fainaru-Wada and BALCO founder Victor Conte were cited extensively in court documents seeking to compel the reporters' testimony.²²⁹

The answer, in the absence of a federal shield law or a constitutional privilege, is discretion. Only a thin layer of judicial and prosecutorial discretion, bolstered by consistent and probing press coverage, prevents the press from becoming an investigative arm of the government. Although he found no privilege for the reporters in the Judith Miller case, District of Columbia Circuit Judge David S. Tatel applied case law and common law to suggest exactly this kind of discretion:

In leak cases, then, courts applying the privilege must consider not only the government's need for the information and exhaustion of

226. See The Harris Poll No. 61 at tbl.1 (Aug. 8, 2006), http://www.harrisinteractive.com/harris_poll/index.asp?PID=688 (finding that journalists rank below athletes and just above members of Congress, while lawyers rank only above actors in public perception of trustworthiness).

227. See, e.g., Adam Liptak, *For Federal Prosecutors, Politics is Ever-Present*, N.Y. TIMES, Mar. 18, 2007, § 4 (Week in Review) at 3 (“[U.S. Attorneys] are political appointees who serve at the pleasure of the president, and they often use their jobs as political steppingstones.”).

228. Cf. Jack Shafer, *Advice for Paranoid Reporters*, SLATE, Apr. 25, 2006, <http://www.slate.com/id/2140499/> (last visited Sept. 27, 2007) (advising reporters to destroy their notes after publication). See generally The Reporters Comm. for Freedom of the Press, *The First Amendment Handbook: Confidential Sources and Information: What to Do When You Are Subpoenaed*, <http://www.rcfp.org/handbook/c04p05.html> (last visited Sept. 27, 2007) (advising reporters to “[n]ever destroy notes, tapes, drafts or other documents once . . . served with [a] subpoena”).

229. Lance Pugmire, *Conte Is Linked to Stories Using Grand Jury Leaks*, L.A. TIMES, June 23, 2006, at D3.

alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.²³⁰

Discretion, however, is more than a suggestion. It is a Supreme Court mandate after *Branzburg*.²³¹ With due regard to Judge Posner, whose dicta can set off new legal strategies and influence other judges to acquiesce to his wisdom, there *is* some protection offered reporters by the Supreme Court.

CONCLUSION

Taken together, the *Branzburg* opinions—both published and unpublished—argue strongly for the careful exercise of discretion by prosecutors and judges in evaluating whether to seek to compel a reporter to testify. As the Supreme Court shifted from Black to White on press protection in the early 1970s, it nevertheless remained convinced that some press protection must exist. This was shown not only by *Branzburg* itself but also by White's opinion in *Tornillo*.²³²

The “relative ordinariness of the case”²³³ involving the BALCO leak belies the intense effort put forth by prosecutors to investigate it. As it became clearer that prosecutors were having difficulty pursuing the high-profile athletes they initially targeted,²³⁴ their attention turned to plugging leaks in their own case. There is extreme danger in an unchecked federal prosecutorial power to subpoena reporters and target the messengers rather than any real culprits.

230. *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1175 (D.C. Cir. 2006) (Tatel, J., concurring).

231. *See supra* Part I.

232. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (“Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer ‘the power of reason as applied through public discussion’ and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation’s press.”).

233. Liptak, *supra* note 5.

234. Popular opinion, although generally condemning steroid use among athletes, also reflected a growing concern about a prosecutorial witch hunt. Comedian Chris Rock joked on *The Late Show with David Letterman* that “[t]he government is not trying to get [Osama] bin Laden. They’re trying to get Barry Bonds.” Mike Penner, *Morning Briefing*, L.A. TIMES, Mar. 14, 2007, at D2.

The previously unpublished private notes of the Supreme Court Justices and Chief Justice Burger's draft opinion show strong prudential and historical sensitivity when they decided *Branzburg*. Although skeptical of any constitutional or common law claims by the reporters, the majority issued their decision assuming a base level of judicial and prosecutorial discretion. But if history is any indication, a new case before the Court—or a debate before Congress on a federal shield law²³⁵—would yield numerous examples of the breakdown in prosecutorial and judicial discretion. In such a case, the Court should mandate the discretion it relied upon in reaching its decision in *Branzburg* and recognize at least a qualified privilege for reporters.

235. Shield laws for reporters have been introduced repeatedly, but never passed, in both the U.S. House of Representatives and Senate. *E.g.*, Walter Pincus, *Senate Panel Freezes Bill on Legal Protection for Reporters*, WASH. POST, Sept. 24, 2006, at A13.