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Introduction

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

In the 1972 case of Branzburg v. Hayes, 2 the Supreme Court held that the First Amendment does not protect journalists who refuse to reveal their confidential sources or newsgathering product in response to a federal grand jury subpoena. That decision has remained vital for 35 years and has reverberated through a number of recent high-profile

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cases. Despite some form of protection in nearly every state court, reporters haled before a federal judge may have no recourse save prison.

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

The legislative debates between those media organizations advocating an absolute privilege and those seeking only a qualified privilege have been widely reported. Far less well known are the conflicts among the various media personalities and organizations that participated in the Branzburg litigation. These conflicts, I submit, are at least partly responsible for the

3 See, e.g., Wolf v. United States, No. 06-1643 (9th Cir. Sept. 8, 2006); In re Grand Jury Subpoenas to Mark Fainaru-Wada and Lance Williams (BALCO), No. CR 06-90225 JSW (N.D. Cal. Sept. 25, 2006); United States v. Libby, No. 06-MS-123 (RBW) (D.D.C. May 26, 2006); N.Y. Times v. Gonzales, 459 F.3d 160 (2d Cir. 2006); Hatfill v. New York Times, 2007 U.S. Dist. LEXIS 7295 (E.D.Va.); Wen Ho Lee v. Dept. of Justice, 413 F.3d 53 (2005); In re Grand Jury Subpoena (Judith Miller, Matthew Cooper and Time Inc.), 397 F.3d 964 (D.C. Cir. 2006); In re Special Proceedings (James Taricani), 373 F.3d 37 (1st Cir. 2004); McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).

4 Complete information on state shield laws is available at Reporters Committee for Freedom of the Press, Privilege Compendium, http://www.rcfp.org/privilege/.

5 Only Estes v. Texas, 381 U.S. 532 (1965), is earlier, and a quick Lexis search shows that courts claimed to follow Branzburg nearly five times as often as Estes, 104-21.

6 Eric B. Easton, The Press as Interest Group: Mainstream Media in the United States Supreme Court, 14 UCLA ENT. L. REV. 247 (2007). The study found that, of the 70 content regulation cases decided by the Court, the press won 43 and lost 27; in the 24 newsgathering cases, the press won only 6 and lost 18.

7 See infra Part IVB.
Branzburg precedent, which effectively foreclosed the possibility of an expansive First Amendment privilege for newsgathering.

This article examines the Branzburg case as an example of strategic litigation, initiated or pursued by mainstream media organizations as part of a continuing effort to shape the First Amendment doctrine under which journalists practice their craft.

Part I presents the factual background of the three cases that were consolidated in the Branzburg opinion, as well as brief procedural timelines and synopses of the opinions in the cases. Throughout, the article will focus on one of those cases – United States v. Caldwell – by far the most important of the three. Part II examines more closely the values of the reporters and editors who decided to take these cases all the way to the United States Supreme Court through the arguments that were presented on their behalf. Part III assesses the benefits of success, the cost of failure, and the probability of either outcome as they might have been calculated by the parties at the time. Part IV looks at the opinion itself and the equally unavailing legislative efforts that followed. Finally, I offer some tentative conclusions about the miscalculations that left the press with such a disastrous precedent on the books.

This is not an extended case note on Branzburg, nor a contemplation of reporters’ privilege, shield laws, and the like. Much has already been written along those lines. Rather, this is part of the author’s continuing study of the press as a political institution attempting to exercise its influence through the litigation process.

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8 434 F.2d 1081 (9th Cir. 1970).
More importantly, this article features the first-person account of Earl Caldwell, the New York Times reporter whose coverage of the Black Panther movement and heroic refusal to testify about his news sources before a federal grand jury brought this issue to the Court’s attention. The author is grateful to Mr. Caldwell for providing a window on this seminal case.

Part I – Background

A. The Caldwell Case

Earl Caldwell was born in Clearfield, Pa., and attended the University of Buffalo as a business major until, as an African-American, he became disillusioned by racism in the insurance industry. On returning to Clearfield, Caldwell landed a job on the local newspaper, The Progress, where he became sports editor. From there, he moved on to the Lancaster Intelligencer-Journal, and then to the Rochester, N.Y., Democrat and Chronicle, where he first began writing on racial issues. In 1965, he began reporting for the New York Herald Tribune, moving briefly to the New York Post when the Herald Tribune closed. He joined The New York Times in 1967.\textsuperscript{10}

Caldwell was one of a number of black reporters hired in the mid- to late 1960s by the mainstream press to cover race relations, particularly the urban rioting that was largely inaccessible to white reporters.\textsuperscript{11} Gene Roberts points out that, until then, only a handful of black reporters worked on white dailies – 31 in 1955, according to Ebony


\textsuperscript{11}G\textsc{ene} R\textsc{oberts} & H\textsc{ank} K\textsc{libanoff}, T\textsc{he} R\textsc{ace} B\textsc{eat} 396 (2006).
Caldwell recalls the new influx of black reporters hired to cover, not only the riots, but also the dramatic changes occurring in the black community, led to the formation of the New York Association of Black Journalists, which would play a critical part in his story.\(^\text{13}\)

In the fall of 1968, the *Times* assigned Caldwell to cover the Black Panther Party in the San Francisco Bay area, and he developed a confidential relationship with the Panthers that enabled him to write stories “that no one else in the country could have written.”\(^\text{14}\) Caldwell’s stories from the period point to access to Panther headquarters and personalities that could not help but attract official attention.

In the black room of an apartment deep in the Fillmore slum a bearded youth in an Afro hair style uncovered a stack of rifles that was only partly hidden in a dark corner. He said nothing but began wrapping the weapons in robes and old blankets, preparing to transport them to Oakland, where [Huey] Newton has been jailed for nearly a year. Some were high-powered lever action rifles. Others appeared to be automatic weapons. “The verdict [in the Newton trial] is irrelevant,” the youth said. “The sky is the limit.”\(^\text{15}\)

It is well past midnight and quiet out on Shattuck Avenue. The liquor store on the corner is empty, and the lights are already out in the barbeque shop next door. But up in the middle of the block, up there in the two-story brownstone that the Black Panther party occupies, a dash of yellow light slips through an upstairs window. They are still there, up there in those cluttered, noisy rooms behind windows covered with huge steel plates and walls lined with bulging, dusty sandbags.\(^\text{16}\)

In late 1969, the FBI began calling Caldwell every day, asking him to spy on his sources. Caldwell refused to cooperate, and, on the advice of bureau chief Wallace Turner, eventually stopped answering the telephone. “They were hounding me for over a

\(^{12}\) Id. at 365.
\(^{13}\) Caldwell Interview.
month,” Caldwell says, warning “‘We’re not playing. This is not a game. If you won’t talk to us, you’ll tell it to the court.’”

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

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

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17 Caldwell Interview. See also VAN GERFEN, supra note 14, at 37-38.
18 Caldwell Interview.
20 Id.
21 Caldwell Interview.
22 Motion to Quash Grand Jury Subpoena, United States v. Caldwell, No. 70-57 (U.S. March 17, 1970), App. at 4. James Goodale, then General Counsel of The New York Times Company, says the Times
Caldwell was supported by a number of affidavits from *New York Times* and *Newsweek* reporters, as well as an amicus curiae brief from CBS News, with affidavits from its leading correspondents; the government filed three memoranda in opposition to the motion to quash, each supported by affidavits.

Behind the scenes, however, all was not nearly so harmonious. According to Caldwell, the *Times* initially hired the San Francisco law firm Pillsbury, Madison & Sutro to defend him. When he met with John Bates, the attorney assigned to his case, Caldwell recalls that the lawyer told him, “We have a problem out here with law and order. I’m sure that some of your material ought to be turned over to the FBI.” Bates told Caldwell to bring all of his material to the office, meet with Times Co. Executive Vice President Harding Bancroft, who was flying out to oversee the case, and together they would decide what should be turned over.

Determined to find his own lawyer, Caldwell sought help from the New York
Association of Black Journalists. That connection led him to the NAACP Legal Defense Fund (LDF), who found the perfect lawyer for the case. Anthony G. Amsterdam had done a number of death penalty cases for LDF and, in 1969, had helped in the appeal of Black Panther Bobby Seale. He was teaching at Stanford Law School at the time, and agreed to hear Caldwell’s story.27

Caldwell was initially reluctant to talk with another white lawyer, but he had nowhere else to turn. He called Amsterdam around midnight and drove to his home in Los Altos. When Amsterdam told Caldwell he had a “legal right to refuse” to testify, Caldwell was thrilled. Amsterdam took the case pro bono, and he, not Caldwell, attended the strategy meeting with Bancroft the next day. When Caldwell arrived some hours later, Bancroft indicated that he was delighted with Amsterdam and wanted to hire him. Amsterdam refused to accept money from the paper.28

On April 6, the District Court denied the motion to quash, but issued a protective order limiting the scope of Caldwell’s testimony to information given to him for publication.29 The court also stayed the effective date of its order pending appeal to the U.S. Court of Appeals for the Ninth Circuit,30 but the appeal was dismissed by the Ninth Circuit “apparently on the ground that the District Court order was not appealable.”31

Caldwell received yet a third subpoena on May 22, 1970, and the District Court again ordered attendance under the protective order.32 When Caldwell refused to appear, fearing for his personal safety if he had to appear before the grand jury in secret, the

27 Caldwell Interview.
28 Id. See also Nadya Labi, A Man Against the Machine, The Law School: The Magazine of the New York University School of Law, Autumn 2007, p. 16.
30 Id.
31 See Caldwell v. United States, 434 F.2d 1081, 1084 n. 2 (9th Cir. 1970).
32 Id.
District Court found Caldwell in contempt;\(^{33}\) Caldwell again appealed to the Ninth Circuit.

According to Caldwell, the Times Company was furious at the appeal. The company ordered him back to New York to discuss the matter with General Counsel James Goodale. Caldwell remembers Goodale “wagging his finger in front of my face, saying ‘you keep pushing it and you’re going to get a bad law written.’”\(^{34}\) Goodale’s prediction would ultimately come true, but not in the Ninth Circuit. Caldwell, who did not attend the argument, said Amsterdam persuaded the court that ruining Caldwell’s career and risking his life was too high a price for a grand jury appearance where no confidences would be revealed.\(^{35}\)

The Ninth Circuit reversed on November 16, 1970, ordering the contempt judgment vacated and holding that “where it has been shown that the public’s First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness’s presence before the judicial process properly can issue to require attendance.”\(^{36}\) The United States petitioned for certiorari, which was granted on May 3, 1971, along with petitions from Paul Branzburg and Paul Pappas, whose cases are discussed below.\(^{37}\)

\(^{33}\) Order, United States v. Caldwell, No. 70-57 (U.S. June 5, 1970), App. at 112.

\(^{34}\) Caldwell Interview.

\(^{35}\) Id. Goodale says one of the reasons that Amsterdam decided to appeal the appearance issue after winning a qualified privilege in the district court was an apprehension that the government might possibly penetrate the privilege proposed there by Caldwell in some unknown respect, forcing testimony, albeit of an extremely limited nature, from Caldwell. Goodale, supra note 22, at 719 n. 47 (citing personal correspondence from Amsterdam).

\(^{36}\) Caldwell v. United States, 434 F.2d at 1089.

\(^{37}\) 402 U.S. 942 (1971). Caldwell opposed the petition for certiorari on several grounds, none of which were or are particularly compelling. Indeed, the brief merely “suggests that this case presents an inopportune occasion for the exercise of the certiorari jurisdiction.” Brief in Opposition to the Petition for a Writ of
B. The Branzburg Case

In 1969, Paul Branzburg was a 27-year-old reporter for the Louisville *Courier-Journal*, where he served as a member of a special assignment group doing investigative journalism. Branzburg had received an A.B. from Cornell University in 1963, a J.D. from Harvard Law School in 1966, and an M.S. *Cum Laude* from Columbia University Graduate School of Journalism in 1967. His investigative work on the use of narcotics and other issues had been recognized on numerous occasions, and he was nominated twice for the Pulitzer Prize based on stories dealing with drugs and agricultural subsidies.

On November 15, 1969, the *Courier-Journal* carried a story by Branzburg describing his observations of two Louisville “hippies” synthesizing hashish from marijuana in a makeshift lab. Branzburg wrote: “‘I don’t know why I’m letting you do this story,’ [Larry] said quietly. ‘To make the narcs (narcotics detectives) mad, I guess. That’s the main reason.’ However, Larry and his partner asked for and received a promise that their names would be changed.” The article also included a photograph of hands working with hashish.

Branzburg was subpoenaed shortly thereafter by the Jefferson County grand jury; he appeared, but declined to identify the “Larry” and “Jack” of his story. Branzburg’s...
counsel, Edgar A. Zingman, argued that Kentucky’s shield law permitted Branzburg to protect his sources, but Judge J. Miles Pound rejected the argument and directed Branzburg to answer the question. Zingman objected, citing both the shield law and the press clause of the First Amendment, and petitioned the Court of Appeals for an injunction against enforcement of Pound’s order. The petition urged the Court to grant relief based on the state shield law, the state constitution, and the United States Constitution “as an interference with the exercise of freedom of the press [which] would permit courts to destroy that confidential relationship which is essential to a free press…”

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

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43 Ky. Rev. Stat. § 421.100. The statute provides that “No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.”


46 Id.


49 434 F.2d 1081 (9th Cir. 1970). See infra Part IIA.


51 Id. at 24 n. 1. In that footnote, the court held that Branzburg had abandoned the constitutional argument and so limited its consideration to the statutory interpretation of protected “sources” under the Kentucky

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to stay the order pending petition for certiorari\textsuperscript{52} was denied.\textsuperscript{53}

Even before the revised opinion was issued, Branzburg had published two more controversial stories based on observations and interviews with Kentucky drug users.\textsuperscript{54}

Once again, he was subpoenaed, this time to appear before the Franklin County Grand Jury,\textsuperscript{55} and once again, he refused, submitting instead a motion to quash the subpoena.\textsuperscript{56}

At the same time, he filed another petition with the Kentucky Court of Appeals for injunctive relief.\textsuperscript{57}

Judge Henry Meigs denied the motion subject to issuance of a protective order in accordance with \textit{Caldwell}.\textsuperscript{58} After hearing arguments from Branzburg and the Commonwealth, Meigs issued the protective order, which limited the testimony Branzburg would be required to give to his personal observation of criminal activity. Specifically, he would not be required to reveal confidential sources or anything told him in confidence.\textsuperscript{59}

That same day, the Kentucky Court of Appeals denied the petition for injunctive relief\textsuperscript{60} and issued its opinion three days later.\textsuperscript{61} The Court of Appeals went to great

\footnotesize\textsuperscript{52} Motion for an Order Staying the Effective Date of the Court’s Order, Branzburg v. Hayes, 408 U.S. 665 (No. 70-85), App. at 29.
\textsuperscript{55} Franklin Circuit Court Grand Jury Subpoena, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85), App. at 42.
\textsuperscript{56} Motion to Quash Grand Jury Subpoena, Branzburg v. Hayes, 408 U.S. 665 (1972)(No. 70-85), App. at 43.
\textsuperscript{57} Petition for Temporary and Permanent Restraining Order and Writ of Prohibition, Branzburg v. Hayes, 408 U.S. 665 (1972)(No. 70-85), App. at 47.
\textsuperscript{58} Order (Jan. 18, 1971), Branzburg v. Hayes, 408 U.S. 665 (1972)(No. 70-85), App. at 45.
\textsuperscript{60} Order Denying Prohibition and Mandatory Relief, Branzburg v. Hayes, 408 U.S. 665 (1972)(No. 70-85), App. at 54.
lengths to distinguish Branzburg’s case from the new *Caldwell* decision in the Ninth Circuit on their respective facts. The court also expressed “misgivings” about the rule announced in *Caldwell* as a “drastic departure from the generally recognized rule” that journalists’ sources are not privileged under the First Amendment. Once again, Branzburg’s motion to stay the order was denied. Branzburg’s petition for certiorari was granted by the United States Supreme Court on May 3, 1971, along with petitions in the *Caldwell* and *Pappas* cases.

### C. The *Pappas* Case

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

Pappas apparently took his story back to the station after receiving permission to return to Panther headquarters. He returned around 9 p.m. and was allowed to enter and

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62 *Id.* at 57-59.
63 Motion for an Order Staying the Effective Date of the Court’s Order and Motion for a Temporary Writ of Prohibition, Branzburg v. Hayes, 408 U.S. 665(1972)(No. 70-85), App. at 61-62.
67 408 U.S. at 672.
68 *Id.*
remain inside the headquarters on condition that he not to disclose anything he saw or heard there. If, as the Panthers anticipated, the police raided the headquarters, Pappas would be free to report and photograph that as he wished. The raid never occurred, and Pappas wrote nothing further about the three hours he spent at Panther headquarters that night.\textsuperscript{69}

Two months later, Pappas was summoned to appear before the Bristol County Grand Jury, where he claimed a First Amendment privilege to decline to answer any questions about his observations and conversations at Panther headquarters that night.\textsuperscript{70} When he was again directed to appear before the grand jury a few days later, he filed a motion to quash on First Amendment grounds and because he feared “that any future possibilities of obtaining information to be used in my work would be definitely jeopardized, inasmuch as I wouldn’t be trusted or couldn’t gain anyone’s confidence to acquire any information in reporting the news as it is.”\textsuperscript{71} Pappas also said he feared for his personal safety.\textsuperscript{72}

The motion to quash was denied by the trial judge, who noted the absence of a shield law in Massachusetts and held there was no constitutional privilege. “Pappas does not have any privilege and must respond to the subpoena and testify to such questions as may be put to him by the Grand Jury relating to what he saw and heard, and the identity of any persons he may have seen.”\textsuperscript{73} The case was reported by the superior court directly to the Supreme Judicial Court of Massachusetts for an interlocutory ruling.\textsuperscript{74}

\textsuperscript{69} Id. See also \textit{Van Gerpen}, \textit{supra} note 14, at 39.
\textsuperscript{70} 408 U.S. at 673.
\textsuperscript{71} Brief for Petitioner at 9, In the Matter of Paul Pappas, No. 70-94 (U.S. July 17, 1971).
\textsuperscript{72} \textit{Van Gerpen}, \textit{supra} note 14, at 40.
\textsuperscript{73} Report, In the Matter of Paul Pappas, No. 70-94 (U.S. Oct. 16, 1970), Index. at 3.
\textsuperscript{74} Id.
Despite receiving “helpful and thorough briefs… filed by Massachusetts and New York attorneys in behalf of a number of broadcasting, television, and news gathering interests,” the Supreme Judicial Court on January 29, 1971, rejected *Caldwell*, on which Pappas and amici “seemed greatly to rely on.” To follow that opinion, the court said, would be to engage in “judicial amendment of the Constitution or judicial legislation.” The court concluded that the Superior Court was correct in holding that Pappas had no privilege. As it did in *Branzburg* and *Caldwell*, the United States Supreme Court granted Pappas’s petition for certiorari on May 3, 1971.

D. In the Supreme Court

The three cases were thoroughly briefed in the United States Supreme Court, and oral arguments were conducted on February 22, 1972, in *Caldwell*, and the very next day in *Branzburg* and *Pappas*. On June 28, 1972, the Court issued its opinion, with Justice Byron R. White writing for the Court. The decision has been described and analyzed many times, including this author’s own analysis. We return to the opinion in Part IV; for now, it will suffice to say that the Court reversed *Caldwell* and affirmed *Branzburg* and *Pappas*, finding no testimonial privilege for reporters in the First Amendment. While Justice White acknowledged that news gathering qualifies for some measure of

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75 In the Matter of Paul Pappas, 266 N.E.2d 297, 299 n. 2 (Mass. 1971).
76 *Id.* at 610-12.
77 *Id.* at 612.
80 See supra note 9.
First Amendment protection, the Court was deeply divided as to the scope of that protection.

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

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

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82 408 U.S. at 667 (“We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”)

83 *Id.* at 712 (Douglas, J., dissenting).

84 *Id.* at 747 (Stewart, J., dissenting).

85 *Id.* at 710 (Powell, J., concurring).

86 See, e.g., Justice Brennan’s order in *In re Roche*, 448 U.S. 1312, 1315 (1980), expressing the view that *Branzburg* stands for the proposition that the First Amendment provides some degree of protection for reporter’s confidences. See also Goodale, *supra* note 22, at 709.

87 For himself, Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.
Part II – Journalistic Values

In each of the cases considered in this article, the reporters – Earl Caldwell, Paul Branzburg, and Paul Pappas – were confronted with three choices: (1) testify before the grand jury, breaking one or more promises of confidentiality; (2) refuse to testify and risk being jailed for contempt of court; or (3) litigate the issue to avoid either testifying or jail. Assuming their employers would pay for litigation, the reporters’ choices were not surprising. But litigation costs money, not only in attorney fees and court costs, but also in lost productivity and general distraction. The logical economic choice for their employers would be to encourage the reporters to testify. As noted above, the Times initially opposed Caldwell’s refusal to comply with the subpoena and his appeal to the Ninth Circuit, but there is no indication that financial considerations played a role in that decision. Moreover, the Times ultimately joined Caldwell’s motion to quash the original subpoena.

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

89 See supra text accompanying notes 33-34.
90 See supra note 22 and accompanying text. John Bates if Pillsbury, Madison & Sutro represented the Times.
91 Caldwell Interview.
92 Id.
journalistic values that might be considered fundamental:

1. Satisfying the public’s “right to know”
2. Upholding the reporter’s ethical responsibility
3. Preventing press entanglement with government

We turn to the filings to see how these three values were asserted as journalistic justifications for finding a reporter’s privilege in the First Amendment.

A. Right to Know.

Much has been written, pro or con, about the public’s so-called “right to know.”93

Often, the question is framed as whether the First Amendment’s press clause contemplates something more than the absence of governmental restriction on the right to publish the information one already knows, including an affirmative right to acquire information in the public interest. Whatever the legal soundness of that proposition, it is axiomatic that the journalistic enterprise depends utterly upon the public’s right to know to justify, not only its “preferred position”94 in our democratic society, but its very existence.95

In each of the three Branzburg cases, the argument growing out of this value goes something like this: requiring reporters to testify before grand juries would undermine any promise of confidentiality that a reporter might extend to sources of information, and thus have a chilling effect on their willingness to provide information that the public has

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94 See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)(“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”)
95 BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 17(2001) ( “The primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.”) [hereinafter ELEMENTS].
a right to know. One or another version of this argument is not only present in each of the cases, it is central to all of them. Paul Branzburg’s argument to the Supreme Court states the argument this way:

Newsgathering activities are essential to the effective functioning of a free press, and as such are protected by the First Amendment to the Constitution of the United States. A significant portion of such newsgathering activities is the development by individual reporters of confidential informants who give information to the reporter with the understanding that some or all of the information or the source of such information will not be revealed.

The courts below are attempting to force the Petitioner to appear before a grand jury to answer questions pertaining to the identities of such informants and unpublished information received from them. Such compelled testimony will inevitably discourage these and other informants from contacting and talking to reporters, as well as discourage the reporter from publishing information gathered from such sources. This inability of the press to be able to obtain such information, or its reluctance to use such information, is a severe abridgment of the freedom of the press protected by the First Amendment.\textsuperscript{96}

In his brief for the \textit{New York Times} and other amici on Caldwell’s behalf, noted attorney and Yale law professor Alexander Bickel stated the case even more succinctly:

The people’s right to be informed by print and electronic news media is thus the central concern of the First Amendment’s Freedom of Speech and of the Press Clause. [If] an obligation is imposed by law on a reporter of news to disclose the identity of confidential sources… the reporter’s access to news, and therefore the public’s access, will be severely constricted and in some circumstances shut off. The reporter’s access \textit{is} the public’s access…. (emphasis in original) The issue here is the public’s right to know. That right is the reporter’s by virtue of the proxy which the Freedom of the Press Clause of the First Amendment gives to the press on behalf of the public.\textsuperscript{97}

In its brief supporting Branzburg, the American Newspaper Publishers Association (ANPA) argued similarly that “but for the assurance of confidence, many

\textsuperscript{96} Brief for Petitioner Paul M. Branzburg at 9, Branzburg v. Hayes, 408 U.S. 665 (1972)(No. 70-85).
\textsuperscript{97} Brief of the New York Times Co., et al., as \textit{Amici Curiae} at 16, United States v. Caldwell, No. 70-57 (U.S. Sept. 18, 1971).
controversial issues presented in the daily newspapers of this country would otherwise
never reach the typesetting stage.”98 And at oral argument, Branzburg’s attorney, Edgar
Zingman, insisted that “it is necessary to the functioning of the press, and it has been a
part of the process of the press, that such confidences be given, and those confidences are
the condition upon which information is available to the public.”99

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

In an amicus brief filed in this case by the Columbia Broadcasting
System, Inc., before the Massachusetts Supreme Judicial Court,
correspondents Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather
and Marvin Kalb submitted affidavits strongly asserting the necessity of
preserving confidentiality in newsgathering and demonstrating that the
betrayal of news sources and private communications would seriously
diminish the effectiveness of reporting and the amount and nature of news
available to the public. Example after example was given, from talks with
bartenders to discussions with the President of the United States, in which
it was essential to preserve confidentiality.100

These affidavits, which were originally submitted as part of the record in
Caldwell, along with others from New York Times and Newsweek reporters,101 prompted
the Massachusetts court to remark upon the “substantial news media pressure for
adoption” of a reporter’s privilege.102 Indeed, amicus briefs supporting the three reporters
in these cases were filed at one or another point in the proceedings by more than 20 major

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98 Brief for Amicus Curiae the American Newspaper Publishers Association at 8, Branzburg v. Hayes, 408
ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 678 (Philip B.
Kurland & Gerhard Casper, eds. 1975).
100 Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts
at 12 n. 9, In the Matter of Paul Pappas, No. 70-94 (U.S. March 4, 1971).
102 266 N.E.2d at 303 n. 11.
news organizations\textsuperscript{103} – each emphasizing the “right to know” value and the threat to that value by a chilling effect on sources or self-censorship by reporters.

\textbf{B. Ethical Responsibility}

If the “right to know” value discussed above provided the principal justification for finding a reporter’s privilege in the First Amendment, the “ethical responsibility” value might be seen as a normative supplement to the instrumentalism of “right to know.”

As the current version of the Society of Professional Journalists (SPJ) Code of Ethics makes clear, journalists are expected to keep their promises of confidentiality to sources.\textsuperscript{104} Because the normative argument is far less compelling to a court, however, it is barely mentioned within the \textit{Branzburg} advocacy documents.

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

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


\textsuperscript{104} Society of Professional Journalists Code of Ethics, http://www.spj.org/ethicscode.asp ( “Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability. Always question sources’ motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.”)
guarantee confidentiality unconditionally (emphasis added).\footnote{105}

Notwithstanding this decidedly minimal treatment in the \textit{Branzburg} cases, the “ethical responsibility” rationale exists independently within the journalism community. Ironically, the evidence comes from the betrayal of a confidential source the led to another Supreme Court opinion written by Justice White. In \textit{Cohen v. Cowles Media},\footnote{106} reporters for the \textit{Minneapolis Star Tribune} and \textit{St. Paul Pioneer Press}, among others, accepted an offer by Dan Cohen, a Republican campaign operative, for information concerning Marlene Johnson, the Democratic-Farmer-Laborite candidate for lieutenant governor of Minnesota, in exchange for a promise of confidentiality.\footnote{107} Cohen then provided the reporters with court records showing the candidate had two trivial arrests, leading to dismissed charges in one case and a vacated conviction in the other.

Editors at both papers independently decided to print the story, not of the candidate’s indiscretions, but of Cohen’s “dirty trick” and, over their reporters’ protests, to identify Cohen by name.\footnote{108} While the \textit{Pioneer Press} editors buried Dan Cohen's name deep in the story, the \textit{Star Tribune} editors featured it, apparently reasoning that the value of the story, if any, lay in Cohen's conduct, not Johnson's. The \textit{Star Tribune} also attacked Cohen in its editorial pages, but neither paper reported that it had broken a promise of confidentiality with Cohen. Ultimately, the United States Supreme Court upheld Cohen’s claim for damages against the newspapers for breaking their promise of confidentiality.\footnote{109}

From the editors’ perspective, the public’s “right to know” trumped the reporters’

\footnotetext[105]{Brief for Radio Television News Directors Ass’n as Amicus Curiae at 7 n. 4, United States v. Caldwell, No. 70-57 (U.S. filing date unreadable).}
\footnotetext[106]{501 U.S. 663 (1991).}
\footnotetext[107]{Two Wrongs, supra note 81, at 1153-54.}
\footnotetext[108]{Id.}
\footnotetext[109]{501 U.S. at 670.}
“ethical responsibility” to keep their promises. From the protesting reporters’ perspective, the reverse was true. Either way, this episode shows that these values are independent, if related, and both are fundamental; the Cohen case is still debated in newsrooms today.

C. Government Entanglement

The third journalistic value found in the Branzburg documents is an aversion to serving as, or at least being perceived as, an agent of the government. Again, this value is not unrelated to the “right to know,” but has implications beyond newsgathering to suggest an effect on reporting as well. Indeed, two of Kovach and Rosenstiel’s nine “elements of journalism” stress independence: independence from faction and independence from power.110

As discussed in ANPA’s amicus brief in Caldwell, “the subpoenas involved in these appeals pierce the wall traditionally separating the press and the government.”111 ANPA quoted extensively on that point from the Ninth Circuit opinion:

If the Grand Jury may require appellant to make available to it information obtained by him in his capacity as news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant’s investigative efforts to their own behalf – to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes.112

The Newspaper Guild’s brief in Caldwell and Pappas also quoted the Ninth Circuit passage, and further asserted that widespread use of the press as a government

110 ELEMENTS, supra note 95, at 97, 112.
111 Brief for Amicus Curiae the ANPA, supra note 98, at 8-9.
112 434 F.2d at 1086, quoted in Brief for Amicus Curiae the ANPA, supra note 98, at 9.
agency was responsible for increasing violence against reporters by police and participants during public demonstrations. “Not only does the prolific use of the subpoena impress a governmental function on the press; the practice, in addition to the destruction of communication with confidential news sources, significantly impairs the ability of the newsman to report public events of great significance.”  

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

The prosecutor simply sits back, waits for the reporter to investigate and then causes the grand jury to issue a sweeping subpoena, regardless of the effects on the journalist’s relationship to his confidential sources. Equally dangerous is the possibility that overbroad grand jury subpoenas will be used to penalize reporters who write news stories which the government finds objectionable and to deter such stories in the future.  

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

114 Brief for the American Civil Liberties Union et al. as Amicus Curiae at 28-29, in United States v. Caldwell, 70-57 (U.S. Oct. 6, 1971).
115 Id. at 29.
Part III – Strategy

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

A. Probability of Success

To reconstruct the participants’ perception as to the probability of success or failure in the *Branzburg* cases, we will first examine precedent and related doctrine, particularly in the lower courts, where prior decisions may be binding and *stare decisis* and other canons of jurisprudence are more compelling than in the highest courts. Second, we will analyze judicial preferences, including political ideology, judicial philosophy, and attitude toward the press, from the litigants’ perspective. Finally, we will look at public policy, as articulated in statutes and executive practices.

1. Precedent.

As a general proposition, precedent and other jurisprudential considerations should have operated to discourage the litigants from pursuing these cases. But the *Caldwell* decision in the Ninth Circuit may well have created the impression in the *Branzburg* and *Pappas* camps that the weight of precedent could be overcome.\(^{116}\) The most widely cited judicial precedent rejecting the reporter’s testimonial privilege was

\(^{116}\) Pappas specifically told the Supreme Judicial Court of Massachusetts that he would file a petition for certiorari “[i]n view of the conflict between the decision of our court in the Matter of Paul Pappas and the decision of the Federal Court in the Matter of Caldwell vs. United States.” Application for Stay of the Order of the Supreme Judicial Court, In the Matter of Paul Pappas, No. 70-94 (U.S. May 10, 1971), Index at 24.
Garland v. Torre, an appeal from a criminal contempt holding. In the underlying case, singer Judy Garland had filed a libel claim against the Columbia Broadcasting System based on allegedly defamatory statements about her that appeared in a New York Herald Tribune column. The statements were attributed to an unnamed CBS executive, and columnist Marie Torres refused to identify the source of the statements when ordered to do so by the court. In an opinion authored by then Judge, later Justice Potter Stewart, a Second Circuit panel declined to find a constitutional privilege that would protect Torres’s source.

The court accepted the “hypothesis that compulsory disclosure of a journalist’s confidential sources of information entail an abridgment of press freedom by imposing some limitation upon the availability of news.” But the court pointed out that the freedom so abridged is not absolute. “What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom.”

Quoting Chief Justice Hughes’s admonition that giving testimony is the duty of every citizen, the court extended the principle to the press. “If an additional First Amendment liberty – the freedom of the press – is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.”

Although Garland was not binding on any of the courts involved in the

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117 259 F.2d 545 (2d Cir. 1958).
118 Id. at 547.
119 Id. at 548.
120 Id.
121 Id. at 549 (quoting Hughes, C.J., in Blackmer v. United States, 284 U.S. 421 (1932)).
122 Id.
Branzburg cases, Judge Stewart had noted that no previous court had found a reporter’s privilege in the absence of a statute. While proponents of the privilege tried to distinguish Garland, the precedents overwhelmingly favored compelling reporters’ testimony, and, of course, Judge Stewart had become Justice Stewart.

The Ninth Circuit opinion in Caldwell was issued eleven days before the Kentucky Court of Appeals denied Paul Branzburg’s motion to quash in Branzburg v. Pound. Ten days later, Branzburg filed a motion to reconsider that decision in light of the Caldwell holding. The court reissued its original opinion, adding only a footnote to assert that Branzburg had abandoned his constitutional argument, rendering Caldwell irrelevant without mentioning it.

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

In Massachusetts, meanwhile, Pappas relied on the protective order granted by the District Court in Caldwell to support his motion to quash. Superior Court Justice Frank E. Smith noted that reliance, but otherwise did not address the new case in ruling that Pappas had no privilege. By the time the Supreme Judicial Court reviewed Smith’s

123 Id. at 550.
125 Motion to Reconsider, Branzburg v. Hayes, 408 U.S. 655 (No. 70-85), App. at 21-22.
127 Branzburg v. Meigs, 503 S.W. 2d 748, 750 (Ky. 1971).
128 See supra text accompanying note 62.
ruling, the Ninth Circuit opinion in *Caldwell* had been out for about six weeks. Again, as discussed above, the precedent did not move the court, but may well have encouraged Pappas to press on.

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

2. Judicial Preferences.

One possible key to Amsterdam’s assertion may have been a sense that the federal courts in California would be as sympathetic as any, anywhere in the country. Judge Zirpoli had been appointed by President John F. Kennedy and had served about ten years when the *Caldwell* case came up. For much of his career, however, he had been a

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130 See *supra* text accompanying notes 76-77.
131 See *supra* note 28 and accompanying text.
132 We focus on *Caldwell* in this discussion because it seems highly unlikely that either Branzburg or Pappas would have been motivated to pursue their cases by the ideology of their states’ appellate courts. All seven justices who heard Pappas’s case before the Massachusetts Supreme Judicial Court were appointed by Republican governors. And the seven justices who heard Branzburg’s case before the Kentucky Court of Appeals, the state’s only appellate court at the time, were all elected. Having lost decisively at the trial court level, both Branzburg and Pappas were likely to pursue their appeals through the state courts regardless of actual or perceived ideological preferences.
133 Information on the federal judges who heard the *Caldwell* case comes from the Federal Judicial Center, http://www.fjc.gov.
prosecutor, serving as assistant district attorney for the City and County of San Francisco from 1928-1932, and as assistant United States attorney in Northern California from 1933-1944.

On the Ninth Circuit Court of Appeals, Republican appointees held an 8 to 5 edge over Democrats in 1970. The three-judge panel that Caldwell ultimately drew included Eisenhower appointee Charles Merton Merrill and Johnson appointee Walter Raleigh Ely, Jr., as well as William R. Jameson, a U.S. District Judge for the District of Montana, sitting by designation, another Eisenhower appointee. So if the ideology of the judges was a motivating factor, it was not predictable by party affiliation. Yet the overwhelmingly favorable opinion issued by the Ninth Circuit panel made it all but inevitable that the government would seek and the Supreme Court would grant certiorari.\(^{134}\)

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

The Burger Court in 1970 was ideologically divided into three groups. On the left were Justices Hugo Black and William O. Douglas, very nearly First Amendment absolutists, and usually reliable liberals William Brennan and Thurgood Marshall. On the right were Chief Justice Warren Burger and Justice Harry Blackmun, then called “The Minnesota Twins” for their matched conservatism. In the center were moderate


The justices sitting in June 1970 had voted in 16 press-related cases over the years. Of the 87 votes cast by these nine justices in those 16 cases, 61 votes or 70% of the total were cast in favor of the press’s position; only 26 votes or 30% were cast against the press’s position. Amsterdam and Goodale were certainly aware that Black and Harlan were nearing retirement and that Richard Nixon was president, but the likelihood of success must still have looked very strong based on ideological preferences in June 1970.

Moreover, Justice White’s hostility toward the press had not begun to manifest itself before June 1970. To be sure, he had written one opinion that could be interpreted as denying broadcasters of their full First Amendment rights, and two separate opinions expressing reservations against broadly interpreting the standards in New York Times v. Sullivan. But the Red Lion decision had been unanimous against the broadcasters, and White had supported the broadcasters in another important case, Estes v. Texas, by dissenting from the opinion that cameras in the courtroom were per se

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135 The identification of press-related cases was taken from Easton, The Press as Interest Group, supra note 6, Appendix. The voting records came from the CQ Supreme Court Collection, http://library.cqpress.com.
137 Pickering v. Bd. of Educ., 391 U.S. 563, 583 (1968)(White, J., concurring in part, dissenting in part)(refusing to follow the Court’s dictum suggesting that proof of harm would be required to fire a public school teacher who made intentionally or recklessly false statements about the school board), and Greenbelt Coop. Publ. Ass’n v. Bresler, 398 U.S. 6, 23 (White, J., concurring in the judgment)(insisting that the press could be held liable for using words that might have both innocent and libelous meanings).
138 376 U.S. 254 (1964)(requiring public officials to prove actual malice in order to prevail in a libel suit).
139 381 U.S. 532 (1965).
unconstitutional. White had also unequivocally supported Sullivan itself and most of its progeny through 1970. Although White’s antipathy toward the press is said to date from his football days, its clear expression would only come later. The Court had not heard any newsgathering cases before 1970, and Caldwell’s legal team could not have anticipated the strength of White’s opposition to extending First Amendment protection to newsgathering activities.

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

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140 Id. at 615-16 (White, J., dissenting).

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.


To me it is a near absurdity to so deprecate individual dignity, as the Court does in Gertz, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

145 See supra notes 117-122 and accompanying text.
the privilege; Harlan, Burger, Blackmun, and Stewart solidly against; and White very probably in favor.

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

3. Public Policy.

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

146 See supra text accompanying notes 85-86.
147 Caldwell Interview. Caldwell points to a memo posted by Managing Editor Abe Rosenthal saying “‘We all feel bad for Earl Caldwell and the difficult position he finds himself in.’”
Eric B. Easton

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

Perhaps the best place to begin a discussion of the relevant public policy is Wigmore’s hoary dictum that “the public… has a right to every man’s evidence,”148 quoted in one form or another throughout these cases.149 All testimonial privileges, whether grounded in statute, common law, or the Constitution, are exceptions to this general rule and, according to traditional principles of interpretation, must therefore be narrowly construed.

Of the three jurisdictions involved in this case, only Kentucky had enacted a testimonial privilege for reporters, often called a reporter’s shield law.150 That statute was the principal basis, along with constitutional arguments, for Branzburg’s initial request for injunctive relief and subsequent state court appeals.151 Ultimately, the Court of Appeals ruled that the shield law was inapplicable because it protected only the “source”

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149see, e.g., 408 u.s. at 688, 266 n.e.2d 297, 299.
150ky. rev. stat. ann. § 421.100 (lexisnexis 2006). neither massachusetts nor the federal government has enacted one to this day.
151petition for temporary and permanent restraining order and writ of mandamus, branzburg v. hayes, 408 u.s. 665 (1972)(no. 70-85), app. at 8.
of Branzburg’s information and not his personal observations. 152

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

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as informants cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime (emphasis in original). 153

Otherwise, the court said, a reporter who witnessed the assassination of the president or governor, or a bank robbery in progress, or a forcible rape, might not be required to identify the perpetrator. 154 Chief Justice Edward P. Hill, writing in dissent, rejected that parade of horribles and called the majority view “a strained and unnecessarily narrow construction” of the term “source.” 155 Hill pointed out that the statute contained no such limitation and quoted extensively from a Pennsylvania case upholding that state’s shield law.

[Important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to fully and completely protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

153 Id. at 348.
154 Id.
155 Id. (Hill, C.J., dissenting).
The [shield law] is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal (emphasis is Hill’s).\(^{156}\)

But Chief Justice Hill was the only state judge in all of these cases to support the privilege. In the *Pappas* case, the Massachusetts Supreme Judicial Court took pains to point out that, “unlike certain other states,” Massachusetts had created no reporter’s privilege.\(^{157}\) The court cited opposition to the privilege in the American Law Institute’s Model Code of Evidence to support the rejection of both statutory and constitutional privileges.\(^{158}\) And in the Ninth Circuit, District Judge Jameson’s concurring opinion also pointedly noted that Congress had not enacted an shield law as he expressed the view that Judge Zirpoli’s protective order might have satisfied Caldwell’s constitutional rights.\(^{159}\)

On the other hand, 17 states had enacted shield laws by 1970,\(^{160}\) and several of those enactments had occurred only recently.\(^{161}\) One could reasonably expect that the Supreme Court might be swayed by the trend in public policy in favor of the privilege. The lawyers would also have been aware of a dramatic development within the Justice Department of President Richard Nixon.

During the oral arguments before the Ninth Circuit, counsel for the government

\(^{156}\) *Id.* at 349 (quoting *In re Taylor,* 193 A.2d 181).


\(^{158}\) *Id.* at 299-300.

\(^{159}\) 434 F.2d at 1092 (Jameson, J., concurring). Jameson’s comment regarding Congress’s failure to enact a shield law was duly noted by Justice Cutter in his opinion for the Massachusetts Supreme Judicial Court in Pappas. 266 N.E.2d at 302.

\(^{160}\) For a list of state shield laws at the time, see 408 U.S. at 691 n. 27.

\(^{161}\) *Id.* (Louisiana, 1964; New Mexico, 1967; Alaska, 1967; Nevada, 1969; and New York, 1970.)
submitted a press release from Attorney General John N. Mitchell outlining new guidelines for issuing subpoenas to the news media. As summarized by Judge Jameson, the guidelines “expressly recognized that the ‘Department does not approve of utilizing the press as a spring board for investigations,’” and provided inter alia, that,

There should be sufficient reason to believe that the information sought is essential to a successful investigation – particularly with reference to directly establishing guilt or innocence…. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources…. [Subpoenas] should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information…. [S]ubpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material.162

While the Justice Department’s announcement of the guidelines follows by two months Caldwell’s critical decision on June 4, 1970, to refuse to appear, work on the guidelines was well underway before then. And although there is nothing in the record to indicate the extent of their knowledge, there is little doubt that Caldwell and Amsterdam would have known about the guidelines at the time. The guidelines were being drafted by William H. Rehnquist, who was appointed by President Nixon in 1969 to be assistant attorney general in the Office of Legal Counsel,163 and Jack C. Landau, former Supreme Court reporter for the Newhouse News Service.164 Landau joined the Nixon Justice

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Department in 1969, only to leave in April 1970 to return to Newhouse.\textsuperscript{165} Landau had been a key figure in the early days of the Reporters Committee for Freedom of the Press, which was formed specifically to deal with the \textit{Caldwell} case, and became executive director of the organization not long after his return to Newhouse.

By the time briefs were filed in the United States Supreme Court, the guidelines were being held up by the journalists and amici as the government’s recognition that grand jury inquiries could pose First Amendment problems.\textsuperscript{166} Perhaps the most extensive use the guidelines appears in Alexander Bickel’s amicus brief in \textit{Caldwell} for the \textit{New York Times} and other media companies. Acknowledging that the guidelines do not have the force of law, Bickel said they nevertheless “evince most authoritatively a developing consensus of what the law should be.”\textsuperscript{167}

Thus, taking three critical predictors of success – precedent, preferences, and public policy – as a whole, the press had some reason to believe that it could win the fight for a testimonial privilege under the First Amendment. The \textit{Caldwell} decision in the Ninth Circuit seemed likely to counterbalance older, adverse precedent;\textsuperscript{168} there seemed to be five potentially favorable votes on the Supreme Court; and public policy as articulated by several state legislatures and the Department of Justice seemed to be

\begin{footnotes}
\footnote{McKay, \textit{supra} note 163, at 112.}
\footnote{Brief for Petitioner at 17, In the Matter of Paul Pappas, No. 70-94 (U.S. July 17, 1971). \textit{See also} Amicus Curiae Brief of National Broadcasting Co. at 10-11, In the Matter of Paul Pappas, No. 70-94 (U.S. March 17, 1971).}
\footnote{Brief of the New York Times et al.... as Amicus Curiae at 12, United States v. Caldwell, No. 70-57 (U.S. Sept. 18, 1971).}
\footnote{The NBC Brief, \textit{supra} note 166, at 9-10, also cites several similar lower court decisions around the same time, including People v. Rios, No. 75129 (Cal. Super. Ct. July 15, 1970); People v. Dohrn, No. 69-3808 (Cook Cnty., Ill., Cir. Ct. May 20, 1970); Air Transp. Ass’n v. PATCO, No. 70-C-400-410 (E.D.N.Y. April 6-7, 1970)(transcript); and Alioto v. Cowles Comm., No. 52150 (N.D. Cal. Dec. 4, 1969).}
\end{footnotes}
moving in the right direction. Additional factors, such as the strong support of amici—
including the American Civil Liberties Union—and some of the nation’s best legal
talent, must have seemed sufficient to overcome the government’s opposition.

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

B. Cost-Benefit Analysis

It is hard to overstate how devastating the Branzburg precedent has been for
newsgathering; the Supreme Court’s refusal to find a meaningful First Amendment
 privilege in that case has been the foundation for numerous decisions minimizing any
First Amendment right to gather news. Moreover, the high cost of an adverse decision
in Branzburg was obviously apparent to Times Co. General Counsel James Goodale, who

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169 Although some scholarship suggests that disproportionately strong amici support may be counter
productive, see Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the
Supreme Court, 148 U.Penn. L. Rev. 743, 829 (2000), those findings are certainly counterintuitive and
would probably have surprised the litigants here. My own research on press cases suggests that support
from press amici has been largely irrelevant to the outcome. See Easton, The Press as Interest Group,
supra note 6, at 256.

170 My previous research shows that the press has been far more successful when supported by the ACLU
than when opposed by the ACLU, winning 75% of its cases with the ACLU on board and losing 83% when
opposed by the ACLU. Easton, The Press as Interest Group, supra note 6, at 257.

171 The federal government, of course, was a party opponent in Caldwell, and amicus curiae in Branzburg
and Pappas. In either capacity, the government is unquestionably the most formidable opponent the press
could face. See Herbert M. Kritzer, The Government Gorilla: Why Does Government Come Out Ahead in
Appellate Courts?, in IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD? (Herbert M. Kritzer &
Susan S. Silbey eds., 2003); Kearney & Merrill, supra note 145 at 829; Easton, The Press as Interest
Group, supra note 6, at 257.

proposition “that generally applicable laws do not offend the First Amendment simply because their
enforcement against the press has incidental effects on its ability to gather and report the news.”);
Houchins v. KQED, Inc., 438 U.S. 1, 10-11 (1978) (citing Branzburg for the proposition that “there is no
First Amendment right of access to information…”); Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978)
citing Branzburg for the proposition that “it does not make a constitutional difference” whether search
warrants or subpoenas served on reporters will result in the disappearance of confidential sources or cause
the press to suppress the news); Pell v. Procunter, 417 U.S. 817, 834 (1974) (citing Branzburg for the
proposition that “newsmen have no constitutional right of access to prisons or their inmates beyond that
afforded the general public.”).
warned Caldwell that his appeal to the Ninth Circuit could make “bad law.”¹⁷³

On the other hand, a victory in *Branzburg* must have seemed especially beneficial in light of the Nixon administration’s and local prosecutors’ unprecedented use of subpoenas for reporters’ sources, notes, pictures, and testimony that characterized the late 1960s. Particularly after the 1968 Democratic convention, subpoenas targeting the coverage of anti-Vietnam War activists and Black Power militants like Caldwell’s Panthers proliferated. McKay calls the rapid increase in the number of subpoenas “staggering,” citing research showing about 500 subpoenas served on reporters between 1970 and 1976, compared to about a dozen between 1960 and 1968.¹⁷⁴

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

¹⁷³ See supra text accompanying note 34.
¹⁷⁴ McKay, supra, note 163, at 112 (citing Curt Matthews, *Journalism’s Full Court Press, WASH. JOURNAL REV.* (March 1982) at 40). For a sense of the magnitude of the subpoena assault, see the list of 120 subpoenas served on reporters from NBC, CBS, and their wholly owned stations included as an Appendix to Brief of the New York Times et al., as Amici Curiae at AI-1 to AI-121, United States v. Caldwell, No. 70-57 (U.S. Sept. 18, 1971).
The initial response to the subpoenas by Caldwell and the Times – a plea in the alternative to quash the subpoenas or issue a protective order – certainly reflected a degree of caution. Even after the split between Caldwell and the Times, Caldwell’s opposition to the government’s petition for certiorari suggests they were reasonably satisfied with the Ninth Circuit opinion. Caldwell’s Brief in Opposition suggested the Court could best confront “the vexing and difficult First Amendment problems presented by grand jury subpoenas addressed to newsmen…after more than one lower court has grappled with them.”

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

(1) The “information sought” must be demonstrably relevant to a clearly defined, legitimate subject of governmental inquiry. 

(2) It must affirmatively appear that the inquiry is likely to turn up material information, that is: (a) that there is some factual basis for pursuing the investigation, and (b) that there is reasonable ground to conclude that the particular witness subpoenaed has information material to it…[and]

(3) The information sought must be unobtainable by means less destructive of First Amendment freedoms.

The New York Times also insisted on a “compelling interest” standard as amicus in the Supreme Court proceeding. Joined by NBC, CBS and ABC, by the Chicago Sun-
Times and Daily News, by the Associated Press Managing Editors and Broadcasters’ Associations, and by the Association of American Publishers, the Times urged the Court to require the government to “clearly demonstrate a compelling and overriding interest in the information” before requiring a reporter to testify.\textsuperscript{179} The Times went on to explain that such a standard would preclude requiring a reporter’s testimony “with respect to a category of crimes that cannot be deemed ‘major,’ as for example crimes variously categorized as ‘victimless,’ ‘regulatory,’ and ‘sumptuary.’”\textsuperscript{180} Other amici urged a similar standard. For example, the Chicago Tribune sought to limit testimony to evidence “so important that non-production thereof would cause a miscarriage of justice.”\textsuperscript{181} The Radio Television News Directors Association characterized the desired standard as “irreparable harm,” rather than “compelling interest,” and said “the Court should adopt a standard which in the normal situation would raise no more than the slightest possibility of later disclosure.”\textsuperscript{182} A “compelling need” standard was urged by the Authors League of America\textsuperscript{183} and a coalition of religious groups.\textsuperscript{184}

But even if one assumes that these groups advocated a balancing test, albeit with a very high standard, because they believed that the benefits of an absolute privilege were

\begin{itemize}
\item \textsuperscript{179} Brief of the New York Times et al., as Amici Curiae at 8, United States v. Caldwell, No. 70-57 (U.S. Sept. 18, 1971).
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Brief for Chicago Tribune Co. as Amicus Curiae at 18, United States v. Caldwell, No. 70-57 (U.S. Sept. 20, 1971).
\item \textsuperscript{182} Brief for Radio Television News Directors Ass’n, as Amicus Curiae at 10, United States v. Caldwell, No. 70-57 (U.S. Sept. 20, 1971).
\item \textsuperscript{183} Brief of the Authors League of America, Inc., as Amicus Curiae at 7, United States v. Caldwell, No. 70-57 (U.S. filing date unreadable).
\item \textsuperscript{184} Brief of Office of Communication, of The United Church of Christ, et al., as Amici Curiae at 22, United States v. Caldwell, No. 70-57 (U.S. filing date unreadable).
\end{itemize}
outweighed by the cost of defeat, other media organizations reached the opposite conclusion. The American Newspaper Publishers Association, for example, openly broke with the *Times* and joint amici as to the standard required:

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

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

Whether one believes that the media representatives’ advocacy of an absolute or qualified privilege was a reasonable proxy for their strategic cost-benefit analyses, or sincere expressions of their views of the law, it is clear that the press was a “house divided” on the desired scope of the testimonial privilege they sought. This failure to

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185 Of course, there may be other, non-strategic reasons for advocating a qualified privilege, including a sincere belief that reporters should have to testify under some circumstances.
188 Brief of the American Society of Newspaper Editors et al., as Amici Curiae at 24, United States v. Caldwell, No. 70-57 (U.S. Sept. 17, 1971).
189 Brief of the National Press Photographers Ass’n, as Amici Curiae at 2, United States v. Caldwell, No. 70-57 (U.S. Sept. 17, 1971).
190 Brief of the American Civil Liberties Union et al., as Amici Curiae at 23, United States v. Caldwell, No. 70-57 (U.S. Oct. 6, 1971).
speak with one voice may have diluted the message being sent to the Court that such a privilege, whatever its scope, was commanded by the First Amendment. It would certainly have that effect in the legislative arena. In the end, *Branzburg v. Hayes* was a stunning defeat, with long-lasting implications for First Amendment doctrine.

**Part IV – *Branzburg* and the Legislative Aftermath**

**A. The *Branzburg* Opinion**

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

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

191 *See infra* Part IVB.
192 Caldwell believes to this day that lukewarm support from the *New York Times* was responsible for the defeat. He told the author that the late Fred Graham, then Supreme Court and Justice Department reporter for the *Times*, had evidence that William Rehnquist had prejudged his case while at Justice and that appropriate pressure from the *Times* would have forced Rehnquist to recuse himself from the case. Caldwell Interview.
193 McKay, *supra* note 163, at 108. As chronicled by McKay, a member of the organization’s steering committee from 1976 to 1986, the RCFP grew out of a 1970 meeting of 35-40 reporters at Georgetown University who gathered specifically to discuss the *Caldwell* case. *Caldwell* was seen as the most visible example of a dramatic increase in the use of subpoenas served on reporters in an effort to tap into the radical movements of the late 1960s and early 1970s. In the aftermath of *Branzburg*, the RCFP played a major role in advocating for an absolute federal shield law, and, in the view of some, its no-compromise stance was a major reason why no federal legislation was ever enacted. *See id.* at 126.
that which occurred two years ago, when the constitutional question remained in doubt.\textsuperscript{194}

Unfortunately, Blasi proved more prophetic than persuasive. With lip service to “some” First Amendment protection for newsgathering,\textsuperscript{195} Justice White proceeded to list all the First Amendment values that were not at issue in these three cases:

[N]o intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material…. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of a crime.\textsuperscript{196}

Framing the issue thus told the entire story.

Emphasizing that “‘the publisher of a newspaper has no special immunity from the application of general laws,’”\textsuperscript{197} a theme he would return to in other newsgathering cases,\textsuperscript{198} White further minimized the protection accorded newsgathering by undermining the “right to know” value on which it is predicated: “[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”\textsuperscript{199} Citing the absence of a reporter’s privilege under either the common law or the “prevailing constitutional view,”\textsuperscript{200} White noted that, while “a number of states” have provided a statutory privilege, “the majority have not done so, and

\textsuperscript{195} See supra note 82.
\textsuperscript{196} 408 U.S. at 681-82 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-133 (1937)).
\textsuperscript{197} 408 U.S. at 683.
\textsuperscript{198} See cases cited supra note 144.
\textsuperscript{199} 408 U.S. at 684.
\textsuperscript{200} Id. at 685-86.
none has been provided by federal statute.”

On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

White gave particularly short shrift to Branzburg’s claim of privilege. “Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.” For the others, White said, “the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.”

Even assuming some informants will refuse to talk to reporters, White continued, “we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.”

One by one, White rebutted and rejected each of the arguments raised by the reporters, returning finally to clarify the scope of First Amendment protection for newsgathering. “[G]rand jury investigations if instituted or conducted other than in good

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201 Id. at 689.
202 Id. at 690-91.
203 Id. at 692.
204 Id. at 693.
205 Id. at 696.
faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.”

That was the extent of the concession won by the press in \textit{Branzburg v. Hayes} – far less than the Ninth Circuit opinion or even the original District Court’s protective order. Even though numerous shield law bills have been introduced in Congress since \textit{Branzburg},\textsuperscript{207} enactment has always been considered a long shot, and all First Amendment protections for newsgathering activities might well be stronger if \textit{Branzburg} had never reached the United States Supreme Court.

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

\textbf{B. The Legislative Fiasco}

According to Floyd McKay, principal chronicler of the Reporters Committee’s early years, the \textit{Caldwell} case was the precipitating factor in the formation of the Committee in 1970.\textsuperscript{208} Thirty-five to 40 reporters attended a meeting at Georgetown

\textsuperscript{206} \textit{Id.} at 707-708.
\textsuperscript{207} \textit{See infra} Part IVB.
\textsuperscript{208} McKay, \textit{supra} note 163, at 108.
University to discuss Caldwell and other cases.\(^{209}\) Led by J. Anthony Lucas and Fred Graham of the New York Times, Jack Nelson of the Los Angeles Times, the group took the name Reporters Committee for Freedom of the Press and created a steering committee of eleven colleagues.\(^{210}\)

What distinguished Reporters Committee from other media organizations that became involved in Caldwell and its companion cases was its insistence that working reporters, not editors or publishers, would call the shots. “Reporters needed their own advocacy group,” James Doyle of the Washington Star told McKay in an interview, “and we could not be sure publishers would do the job.”\(^{211}\) Indeed, the Times lawyers’ initial reaction to the Caldwell case seemed indicative of a philosophical difference between working journalists and their managers,\(^ {212}\) although the split over absolute versus qualified privilege had not yet broken down along those lines – at least in the Supreme Court briefs.\(^ {213}\)

Whatever the basis for that split, it was to prove fatal to enacting a statutory remedy for the Branzburg decision. By the time that decision was handed down in 1972, the Reporters Committee was being led by Jack Landau, a reporter-lawyer for Newhouse News Service, who had returned to his Supreme Court beat after a brief stint in the Nixon Justice Department.\(^{214}\) Landau’s aggressive advocacy for an absolute privilege in the

\(^{209}\) Id. at 109. See also Joe Holley, Jack Landau; Founded Reporter Group, Wash. Post, Aug. 17, 2008, at C7 (obituary).

\(^{210}\) McKay, supra note 163, at 109.

\(^{211}\) Id.

\(^{212}\) Id. at 111. See also supra text accompanying note 88.

\(^{213}\) Although the new Reporters Committee was “emerging as the leading advocate of the ‘no compromise’ position on reporter confidentiality, McKay, supra note 163, at 112, both the American Newspaper Publishers Association and the American Society of Newspaper Editors also urged an absolute privilege. See supra text accompanying notes 152-163. Later, however, ANPA would split with Reporters Committee to support compromise legislation. See infra text accompanying note 231.

\(^{214}\) McKay, supra note 163, at 112-13. See supra text accompanying notes 164-65.
years following the *Branzburg* decision, and his unwillingness to compromise with media organizations willing to accept some qualifications, must bear a fair portion of the blame – or credit – for Congress’s failure to enact a shield law in the early 1970s, when reaction to the Nixon administration’s contempt for the press and *Branzburg* made such enactment most likely.  

Reacting to what he called “the recent wave of broad and sweeping subpoenas which have issued from the Justice Department,” Sen. Thomas H. McIntyre (D-N.H.) introduced the first testimonial privilege bill of the decade on March 5, 1970.  

Although McIntyre’s bill died in committee, Sen. James Pearson (R-Kan.) introduced another shield bill, S.1311, in the beginning of the 92nd Congress in January 1971.  

According to Sen. Sam Ervin (D-N.C.), the most authoritative reporter of this legislative process, the Pearson bill “met with less than urgent response,” with the press adopting a “‘wait and see’ attitude” toward the bill pending resolution of the *Caldwell* case.  

Ervin’s Judiciary Subcommittee on Constitutional Rights held hearings on the Pearson bill in September and November 1971. Months earlier, the White House and Justice Department had begun taking more conciliatory approach to the issuance of subpoenas against reporters, and Ervin recalls that “most press spokesmen who

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215 Although a number of states had already enacted shield laws, see infra notes 139-40, and accompanying text, and similar bills had been introduced unsuccessfully in nearly every Congress since 1929, VAN GERGEN, supra note 14, at 148, popular support for a shield law had never been higher than immediately after the *Branzburg* decision was handed down. McKay, supra note 163, at 115.  
217 S.1311, 92nd Cong. (1971); Ervin, supra note 216, at 253.  
218 Ervin, supra note 216, at 253. The government’s cert. petition in *Caldwell* was pending at the time. See infra text accompanying note 37.  
219 In February, Attorney General John Mitchell issued a statement “regret[ting]” any misunderstanding arising from the issuance of subpoenas to the press and promising that, “in the future, no subpoenas will be issued to the press without a good faith attempt by the Department to reach a compromise acceptable to both parties…” Ervin, supra note 216, p. 251 (citing Text of Mitchell Statement About Press, N.Y. Times, Feb. 6, 1970, at 40. Mitchell’s press spokesman at the time was Jack Landau. McKay, supra note 163, at
commented on the Pearson bill recommended that Congress proceed cautiously. Most urged that a statutory privilege be enacted only if the Court refused to recognize a constitutional privilege." Indeed, Ervin says the subpoena problem "seemed to come last in the minds of most witnesses." The bill went nowhere in 1971.

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

Ervin notes that “public’s attention was not really drawn” to the issue until two

112. At a press conference in May, President Nixon said he took a “very jaundiced view” of subpoenaing the notes of reporters or taking action requiring reporters to reveal their sources. Ervin, supra note 216, at 254 (citing President’s News Conference of May 1, 1971, in 7 WEEKLY COMP. PRES. DOC. 703, 705 (1971). Also in May, Mitchell told an interviewer he had no objection to legislation protection reporters’ notes. Ervin, supra note 216, at 252. Finally, in August, Mitchell’s Justice Department issued restrictive guidelines to U.S. Attorneys regarding subpoenas for journalists. See infra notes 141-142 and accompanying text. As noted therein, the guidelines were originally drafted by Landau.

220 Ervin, supra note 216, at 154-55.
221 Id.
224 Id.
reporters were jailed in the fall of 1972 for refusing to reveal their sources.\textsuperscript{229} “The attitude of the press began to harden,” Ervin says, and more groups began urging an absolute privilege.\textsuperscript{230} The American Newspaper Publishers Association, which supported an absolute privilege, spearheaded a new press alliance called the Ad Hoc Coordinating Committee, which tried to draft a bill acceptable to all factions.\textsuperscript{231} The Joint Media Committee, finding that a qualified bill no longer commanded a majority of its members, issued a statement stressing the urgency of legislative relief.\textsuperscript{232}

In November 1972, President Nixon told American Society of Newspaper Editors that he did not think federal legislation was warranted at this time, further inflaming the situation, and in December, another reporter was briefly jailed for failing to produce unpublished tapes of a confidential interview.\textsuperscript{233} When the 93rd Congress convened in January, eight bills and one joint resolution were introduced in the Senate, and 56 bills were introduced in the House.\textsuperscript{234} There was only one problem: “the great number of proposals demonstrated disagreement” among the legislators, and that, in turn, “only reflected the divergence in the press.”\textsuperscript{235} The Ad Hoc Coordinating Committee, created to find common ground, produce six different bills, revealing differences not only in philosophy but also in estimates of what kind of legislation could pass.\textsuperscript{236} Even Anthony Amsterdam complicated the picture by suggesting that a judicial hearing should be

\textsuperscript{229} Ervin, supra note 216, at 256. Ervin is referring to Peter Bridge of the Newark News and William Farr of the Los Angeles Examiner, who served 20 and 46 days, respectively, for refusing to reveal confidential sources. \textit{Id.}

\textsuperscript{230} \textit{Id.} at 258 (citing resolutions calling for enactment of an absolute privilege by American Society of Newspaper Editors, Sigma Delta Chi, Radio Television News Directors Association, and American Newspaper Publishers Association).

\textsuperscript{231} \textit{Id.}

\textsuperscript{232} \textit{Id.} at 259. The reporter was John Lawrence, Washington Bureau Chief of the \textit{Los Angeles Times}.

\textsuperscript{233} \textit{Id.} The reporter was John Lawrence, Washington Bureau Chief of the \textit{Los Angeles Times}.

\textsuperscript{234} \textit{Id.} at 261.

\textsuperscript{235} \textit{Id.}

\textsuperscript{236} \textit{Id.} at 262.
required before issuing a subpoena to reporters, an “interesting” concept, says Ervin, but one that “represented a new, complicated, and untested legal innovation, which reduced its political acceptability in Congress.”

Ervin admits to being conflicted himself; he introduced his own qualified privilege bill at the beginning of a new round of hearings, then found himself persuaded by Reporters Committee for Freedom of the Press, that any effective legislation would have to cover the states as well as the federal government. His new bill, however, contained an exception for testimony regarding crimes committed in the reporter’s presence, which drew fire from both the Reporters Committee and the Joint Media Committee. Even after a dozen subpoenas were issued during the hearings to news organizations in a libel action filed by the Committee to Re-Elect the President (CREEP), the “fragmented press could not coalesce” behind one approach to legislation in either the Senate or the House.

“It did seem clear,” Ervin said, “that unless the press groups themselves could achieve some unanimity on the issue, it was likely to fail without any effort from its opponents.” And so it did. The Eighth and Second Circuit Courts of Appeal had

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237 Id. at 263.
238 Id. at 267-68.
239 Id. at 271 n. 132.
240 Id. at 269.
241 Id. at 270.
242 Id.
243 Cervantes v. Time, Inc., 464 F.2d 986, 992-93 (8th Cir. 1972) (“We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws. Such a course would also overlook the basic philosophy at the heart of the summary judgment doctrine.”)
244 Baker v. F&F Investment Co., 470 F.2d 778, 784-85 (2nd Cir. 1972) (“Manifestly, the Court’s concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes Branzburg from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will
both declined to force reporters to reveal their confidential sources, notwithstanding
Branzburg.\textsuperscript{245} Now, in March 1973, Judge Charles Richey granted a motion to quash the
dozen subpoenas issued to news organizations by CREEP in the Watergate matter,\textsuperscript{246} and
prosecutors around the country had begun to show some restraint.\textsuperscript{247} Ervin notes that
Watergate itself demonstrated to some previous supporters that the press could do its job
without a statutory privilege.\textsuperscript{248} Despite Rep. Robert Kastenmeier’s success in forging a
compromise bill in his House Judiciary subcommittee, he could not get a majority of the
media representatives to support it.\textsuperscript{249} The legislative effort crumbled.

Conclusion

In the foregoing, we have examined \textit{Branzburg v. Hayes} as part of a continuing
evolution into the mobilization of the press to shape First Amendment doctrine through
strategic litigation. In \textit{Branzburg}, the press failed, despite several favorable indicators,
and that failure had grave implications for any First Amendment right to gather news.
While it is impossible to say conclusively why a Supreme Court decision goes this way
or that, we can safely suggest that differences within the press, between Earl Caldwell
and the \textit{New York Times}, indeed, between reporters and their bosses generally,\textsuperscript{250} and
between advocates of an absolute versus a qualified privilege, did not help the press make

\textsuperscript{245} Ervin, \textit{supra} note 216, at 272.
\textsuperscript{246} Democratic Nat’l Comm. v. McCord, Civil Nos. 1233-72, 1847-72, 1854-72 (D.D.C., filed Mar. 22,
\textsuperscript{247} Ervin, \textit{supra} note 216, at 273.
\textsuperscript{248} \textit{Id.} at 274 (citing Sen. Alan Cranston’s questioning the need for a privilege in light of the Watergate
revelations.)
\textsuperscript{249} \textit{Id.} at 275.
\textsuperscript{250} McKay recounts a story told by Jack Landau, when Landau solicited Marshall Field, publisher of the
Chicago Sun-Times, for financial support for Reporters Committee for Freedom of the Press. After
Landau’s pitch, Field replied, “Well, Mr. Landau, I’m not really very comfortable funding a group that
calls itself the Reporters Committee.”
its case. The latter division proved to be even more significant when the issue moved to the legislative arena.

The tragedy of *Branzburg v. Hayes* was the failure of the Court to adopt Anthony Amsterdam’s argument that, for First Amendment purposes, the distinction between news gathering and publishing is an artificial one, advanced by the government to divide and conquer.\(^\text{251}\) The lesson of *Branzburg v. Hayes* and its aftermath is that a “house divided” is not likely to be effective in molding constitutional doctrine or winning a legislative privilege.

\(^{251}\) Brief for Respondent at 48-49, United States v. Caldwell, No. 70-57 (U.S. Sept. 20, 1971).