Does the Constitution (Still) Protect the Identity of a

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A reporter's or newsroom's best bet to quash an otherwise valid subpoena to appear in a state proceeding is a state shield statute (such as North Carolina). If, however, the subpoena was issued at the federal law, such as from a United States Attorney or a fed era grand jury, or if you are in a state that lacks a shield statute (such as Texas), then your only choice is to rely on the muddled outcome of a thirty-six-year-old United Supreme Court precedent. Despite its age, the value of this case to reporters remains uncertain.

In Branzburg v. Hayes, the Court held 5-4 that reporters served with a grand jury subpoena in a criminal matter do not have a First Amendment privilege against testifying.

Branzburg actually decided three different cases, each of which involved a similar set of facts. In one of the cases, a reporter in Kentucky had published an investigative piece on the local drug trade in which he had personally observed people producing and using illegal drugs. The other two cases involved reporters who had been covering the activities of the Black Panther Party. In all three cases, local law enforcement officials who were pursuing criminal investigations sought to compel the reporters to reveal their confidential sources to a grand jury.

Justice Byron White, writing for the majority, accepted the reporters' argument that if journalists are regularly forced to disclose the identity of their confidential sources, those sources will soon dry up and the reporters will be unable to do their job. The question, Justice White said, is whether this potential burden on the rights of the press outweighs the legitimate needs of law enforcement officials to investigate and prosecute crimes. In the end, White said:

[W]e 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.

In the end, White said, reporters remain regular citizens and must comply with a legitimate subpoena just as any other citizen.

Justice Powell wrote a concurring opinion that reporters have used in both state and federal courts to argue that the Constitution in fact gives qualified protection, even though Justice White perhaps did not intend recognize such protection. Justice Powell made clear in his opinion that despite the majority holding, law enforcement officials do not have a carte blanche "to annex the news media as an investigative arm of government." The critical passage of his opinion reads as follows:

If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Branzburg is often described as a "4-1-4" case, meaning that there were four votes on either side of the issue, with one vote straddled both sides. Justice Powell's concurrence is the "1" here, and it is his call for a careful balancing by courts that would open the door in later years to **some** courts finding a qualified privilege in Branzburg.

The form of that privilege—adopted by many state legislatures in shield laws—was outlined in Justice Stewart's dissent. He wrote that, contrary to the majority opinion, the First Amendment demanded greater scrutiny of government attempts to compel reporters' testimony. Justice Stewart outlined a three-part analysis:

Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties.

In one form or another, this three-part showing forms the basis of many shield statutes that provide a qualified privilege to reporters, thereby giving them some protection from compelled disclosure of confidential (and in some cases non-confidential) sources and source material. In

addition, it is the foundation of the proposed federal shield statute that is making its way, s-l-o-w-l-y, through Congress.

In recent years, several federal courts have refused to find a federal constitutional privilege in Branzburg, which calls into question just how much protection that case offers. In two high-profile cases in the District of Columbia, federal district court judges ordered reporters to disclose confidential sources relating to the Valerie Plame leak investigation and a civil lawsuit brought by Wen Ho Lee. These decisions were upheld on appeal. In addition, a federal district court in San Francisco ordered reporters to disclose their source in connection with the BALCO investigation. The Reporters Committee has cataloged recent federal subpoenas that gave rise to court challenges.

The lesson of these cases is that a reporter cannot count on protection--even qualified protection--from a federal subpoena that seeks the identity of a confidential source or other source materials. This makes the passage of a federal shield law all the more critical.