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Legislation Note: House Bill 1363: Testimonial Privilege for Newsmen

LEGISLATION NOTE: HOUSE BILL 1363: TESTIMONIAL PRIVILEGE FOR NEWSMEN

In June, 1972, the Supreme Court ended years of speculation about whether the First Amendment gives newsmen a testimonial privilege to protect the identity of confidential news sources. The Court answered in the negative. This decision stimulated a campaign in the press for statutory protection, an alternative specifically suggested and approved by the Court in the *Branzburg v. Hayes* opinion.[1] Shield bills were considered in Congress and in the legislatures of most of the states, including Oklahoma. Several states enacted shield laws and at first the press heralded each new law as a victory. But as laws accumulated, newsmen began to take a second look at the newly-acquired shield privilege and found it less shiny than they had hoped. The shield laws almost uniformly had holes which limited their protective potential and exposed the press to future legislative interference. Disillusioned with the statutes, privilege-seekers began to consider alternatives, with the result that by the middle of 1973 states which had withheld the statutory protection seemed more likely to satisfy the hopes of newsmen than states which had obligingly passed shield laws.

Oklahoma was among the states which refused to enact legislation. This note examines the Oklahoma experience in the context of the national effort for source protection and explores the possibilities for statutory protection for newsmen in Oklahoma in the future. Such an examination entails: (1) a summary history of the search for source protection in Oklahoma and elsewhere; (2) an analysis of the protection afforded by shield laws and a comparison of the Oklahoma bill with laws in other states; (3) an analysis of the current disenchantment with statutory protection and a discussion of possible alternatives; and (4) an examination of the situation in Oklahoma in the light of national disillusionment and in light of

[1] 408 U.S. 665 (1972).

a novel statutory approach proposed by a leading Oklahoma newsman.

Denied Constitutional protection by the *Branzburg* decision, advocates of the testimonial privilege vigorously pursued alternative protection. Until recently, the effort concentrated on the enactment of shield laws in Congress and in the states. Press groups and trade journals claimed that shield laws were essential to protect the free flow of information essential to a free society; that without shield legislation, news sources would be afraid to talk.[2] Advocates pointed to the breaking Watergate scandal as evidence of the public's need for confidential news informants and to the spectacle of newsmen serving indeterminant jail sentences for refusing to reveal sources as evidence of the immediacy of the danger. Fifty-

[2] There is not complete agreement on the extent to which newsmen rely on confidential news sources. For results of surveys revealing wide differences in press practice see Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969) and Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L.R. 229 (1971). For a recent study concluding that sources probably dried up in the wake of *Branzburg* but containing much data to the contrary, see Long, *Are News Sources Drying Up?*, QUILL, March, 1973, at 10. For a study which concludes that the volume of subpoenas to newsmen has increased significantly in recent years, see Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970).

The arguments in opposition to the grant of a testimonial privilege are based on several grounds. For an argument based on fear of abuse of the privilege see EDITOR AND PUBLISHER, March 24, 1973, at 8, and April 7, 1973, at 26. For an argument based on equal protection grounds, see State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968), *cert. denied*, 392 U.S. 905 (1968). For the traditional view that society is entitled to every man's evidence, see 8 WIGMORE, ON EVIDENCE, § 2192 (McNaughton rev. 1961). For a summary of the arguments, see Branzburg v. Hayes, 408 U.S. 665, 691-708 (1972).

nine bills were introduced in Congress[3]; five states passed shield bills[4]; numerous other states considered protective legislation[5]; seventeen states already had shield laws on the books.[6]

Oklahoma was one of the few holdouts. The history of the Oklahoma bill is instructive. As introduced, the Oklahoma bill provided an absolute privilege, one of the most generous in the nation. The original bill provided:

> No person shall be compelled in any proceeding or hearing to disclose any information or the source of any information procured or obtained by him while he was engaged in publishing, gathering, writing, editing, photographing or broadcasting news and employed by or acting for any newspaper, magazine, periodical, wire service or federally-licensed broadcast facility.[7]

As amended in committee, the House bill provides that "the privilege herein conferred shall not apply when such person is a witness to the commission of a crime and provided further

[3] NEWSWEEK, April 2, 1973, at 57. For a list of sponsors, see EDITOR AND PUBLISHER, January 27, 1973, at 13.

[4] ILL. ANN. STAT. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1973); NEB. REV. STAT. § 25-12.... (197.. Cum. Supp.); N.D. CENT. § 31-01-06.2 (Supp. 1973); ORE. REV. STAT. § 44.040 (1973-74); TENN. CODE ANN. § 24.11.. (Supp. 197..).

[5] For a summary describing the status of shield legislation in fifty states, see U.P.I. REP., April 26, 1973.

[6] ALA. CODE tit. 7, § 370 (1958); ALASKA STAT. § 09.25.150-.220 (July 1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1972); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West Supp. 1973); IND. ANN. STAT. § 2-1733 (1968); KY REV. STAT. § 421.100 (1972); LA. REV. STAT. § 45:1451-54 (Supp. 1973); MD. ANN. CODE art 35, § 2 (1965); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODE ANN. § 93-701-4 (Supp. 1973); NEV. REV. STAT. § 49.275 (1971); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1973); N.M. STAT. ANN. § 20-1-12.1 (1973); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972); OHIO REV. CODE §§ 2739.04, .11, .12 (1972); PA. STAT. ANN. tit. 28, § 330 (1973).

[7] House Bill 1363, 34th Legislature, 1st Sess. (1973).

that the privilege herein conferred shall not constitute a defense to any action for libel or slander."[8] These conditions made the bill less attractive to newsmen who supported an absolute privilege. When the bill came to the floor of the House for consideration, the conditions mounted up. Amendments restricted the privilege to "legal" newspapers,[9] eliminated photographers from protection, withdrew the protection given confidential information, and required reporters to testify in contempt hearings for refusing to answer subpoenas or grand jury questions.[10] The bill, as so amended, was defeated, but was sent to study committee for review and possible action in the next session.

The Oklahoma experience was typical of that in other states and illustrated the reasons for press disillusionment with shield statutes. Legislatures everywhere were unwilling to grant the absolute privilege demanded by newsmen. Twenty-two states have shield laws. An examination of them reveals that only Michigan provides an absolute privilege comparable to that proposed in the original Oklahoma bill.[11] Other states extend the privilege only under certain conditions. Only four states permit the newsman to keep secret the information received as well as the identity of the source;[12] the others protect only the identity. Five states protect only published material.[13] Five states require disclosure when it would be

[8] House Bill 1363, 34th Legislature, 1st Sess. (1973).

[9] In Oklahoma, a "legal" newspaper must have a paid subscription circulation, must be admitted to the United States mails as second-class matter, and must have published continuously and without interruption for 104 consecutive weeks. OKLA. STAT. tit. 25, § 106 (Supp. 1955).

[10] Tulsa World, March 22, 1973, at B6, col. 2.

[11] MICH. COMP. LAWS ANN. § 767.5a (1968).

[12] *Id.;* N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972); PA. STAT. ANN. tit. 28, § 330 (1973); N.D. CENT. CODE § 31-01-06.2 (Supp. 1973).

[13] ALA. CODE tit. 7, § 370 (1958); ARK. STAT. ANN. § 43-917 (1964); KY. REV. STAT. § 421.100 (1972); MD. ANN. CODE art. 35, § 2 (1965); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1973).

in the "public interest."[14] Three states require disclosure when it would "serve the ends of justice".[15] Several states have unique limitations. Arkansas requires disclosure if the party seeking it can show bad faith or malice in the journalist.[16] The New Mexico statute permits the courts to require disclosure but specifies that the determination is to be made with "due regard to the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove."[17] The Illinois statute is similar.[18] Tennessee grants the privilege but may withdraw it if the information is available no other way.[19]

The Pennsylvania statute includes a condition of the kind which makes newsmen especially leery of limited privileges: the privilege is conferred on radio and television newsmen only if "the radio or television station maintains and *keeps open for inspection* (emphasis added) for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast."[20] From such a provision, it is feared, it is a short step to requiring reporters to keep (and to produce for grand juries, legislative committees, etc.) their notes, tapes, drafts, and manuscripts.

Some statutes are fraught with the threat of future conditions. Nebraska's governor signed a law in April, only on

[14] ALASKA STAT. § 09.25.160 (July 1973); ARK. STAT. ANN. § 43-917 (1964); LA. REV. STAT. § 45-1453 (Supp. 1973); ILL. ANN. STAT. ch. 51, § 117 (Smith-Hurd Supp. 1973); TENN. CODE ANN. § 24.11.. (Supp. 19....).

[15] ALASKA STAT. § 09.25.160 (July 1973); N.M. STAT. ANN. § 20-1-12.1 (1973); N.D. CENT. CODE § 31-01-06.2 (Supp. 1973).

[16] ARK. STAT. ANN. § 43-917 (1964).

[17] N.M. STAT. ANN. § 20-1-12.1 (1973).

[18] ILL. ANN. STAT. ch. 51, §§ 116-117 (Smith-Hurd Supp. 1973).

[19] TENN. CODE ANN. § 24.11. (Supp. 19....).

[20] PA. STAT. ANN. tit. 28 § 330 (1973).

condition that its sponsor introduce amendments in the next legislature.[21]

To newsmen, by far the most frightening feature of statutes is also the one common to them all: the fact that the statute must define "newsman" and "news media." Common requirements are that a newsman be regularly employed by by a newspaper[22] or that his connection with the media be for "gain or livelihood."[23] Such definitions almost certainly exclude free-lance writers, scholars, authors of books, researchers, speechwriters, and itinerate pamphleteers like Tom Paine. Definitions of "news media" may be even more specific. New York defines a qualifying newspaper as:

> [A] paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.[24]

The laws of Illinois, Indiana, Louisiana, New Mexico, and Pennsylvania are only slightly less detailed.[25] The New York statute is the only one that undertakes to define news: "written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting public welfare."[26]

Congress has proved no more willing than the states to provide an absolute privilege. At first, press hopes were high that a federal absolute shield law would be enacted and would

[21] NEB. REV. STAT. § 25-12.... (197.. Cum. Supp.)
[22] ALASKA STAT. § 09.25.220 (July 1973); LA. REV. STAT. § 45:1453 (Supp. 1973); N.M. STAT. ANN. § 20-1-12.1 (1973).
[23] IND. ANN. STAT. § 2-1733 (1968); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972).
[24] N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972).
[25] ILL. ANN. STAT. ch. 51, § 112 (Smith-Hurd Supp. 1973); IND. ANN. STAT. § 2-1733 (1968); N.M. STAT. ANN. § 20-1-12.1 (1973); PA. STAT. ANN. tit. 28, § 330 (1958).
[26] N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972).

fill the gaps left by the *Branzburg* decision and by state statutes. The American Newspaper Publishers Association drafted a Free Flow of Information Act which would protect all persons from disclosing the source or content of any published or unpublished "information obtained in the gathering, receiving, or processing of information for any medium of communication to the public." The protection would extend to federal and state proceedings.[27] The bill was introduced in Congress but it soon became apparent that no such unlimited privilege would be approved. In the Senate, judiciary subcommittee chairman Sam Ervin preferred his own bill which included the witness-to-a-crime provision which was in the Oklahoma bill.[28] Representative Robert W. Kastenmeier, chairman of the House committee considering the bill, was convinced that an absolute bill would have no chance in Congress.[29] The compromise bill reported out of the House committee presented a novel two-tier approach. It would prohibit a grand jury or other investigating body from requiring a newsman to testify but would force testimony in a trial court if the court found his information indispensible to the case and unavailable from any other source.[30]

It was further apparent that even if an unqualified bill were to emerge from Congress, Presidnt Nixon would veto it.[31]

In the light of these legislative prospects, it is clear that the press cannot expect absolute shield laws. It is also clear that without press support legislatures will not provide even qualified laws. So the future of shield legislation depends on

[27] For text of proposal, see EDITOR AND PUBLISHER, Jan. 6, 1973, at 9.
[28] NEWSWEEK, April 2, 1973, at 57.
[29] EDITOR AND PUBLISHER, April 21, 1973, at 96.
[30] See summary in EDITOR AND PUBLISHER, June 23, 1973, at 13. An editorial in the same issue says "the obvious loophole of 'compelling and overriding public interest' is open to such wide interpretation by attorneys and jurists as to make the whole bill an exercise in futility", *id.*, at 6.
[31] NEWSWEEK, April 2, 1973, at 58.

whether the press will agitate for the conditional laws which the legislatures are willing to pass.

The fact that twenty-one states have shield laws hedged with such conditions indicates that, at least in the past, newsmen regarded such measures as preferable to no law at all. Recently, however, there is evident a growing wariness of such conditional privileges. Sigma Delta Chi, the national journalism fraternity, an early and vociferous proponent of shield legislation, noted in a May editorial in its journal that "More than a few newsmen who once were pushing for an absolute shield law are now having second thoughts as to whether this is really the answer to the press' problems with government."[32] *Editor and Publisher,* a leading trade journal, reported that "Whereas, a few months ago majority sentiment of newspaper editors seem to support an unqualified or absolute bill in Congrss to protect the confidential sources and information of reporters — and to stop the rash of subpoenas, contempts and jailings — the pendulum appears to have swung to opposition by the majority of editors to any legislation at all in this area."[33]

There are several reasons for this new attitude. First, shield laws have not provided substantial protection. Second, newsmen have begun to fear that such statutes furnish a legislative precedent for interference with freedom of the press. Finally, a review of recent court decisions and a reappraisal of the *Branzburg* decision have led press spokesmen to believe that the courts may yet prove a source of protection at once more certain than statutes and devoid of any meddling precedents or conditional strings.

In several notable instances shield laws have not provided sufficient protection. The most notorious cases involving the jailing of newsmen occurred in states having privilege statutes. William Farr spent forty-six days in jail because he did not

[32] QUILL, May, 1973, at 5.
[33] EDITOR AND PUBLISHER, May 19, 1973, at 4.

qualify for the protection of the California statute, one of the broadest in the nation.[34] Peter Bridge went to jail for ten days because of a technical requirement of the New Jersey statute.[35] Branzburg himself had the "protection" of a statute in Kentucky.[36] Courts denied the privilege in these instances by narrowly construing the statutes. Only in Pennsylvania has liberal construction been the rule.[37] Elsewhere, newsmen have been held to the letter of the statute.

In a recent speech, Katherine Graham, publisher of the *Washington Post* explained press fears of a legislative precedent for interference with the press. Mrs. Graham's remarks were made shortly after two *Post* reporters received Pulitzer prizes for their invstigative reporting of the Watergate scandal, a job that was accomplished without benefit of a shield law. Mrs. Graham pointed out:

> The trouble is that Congress might easily get into the habit of concerning itself with the press. One indication of this came during recent Senate hearings, when Senator Gurney of Florida warned that legislation to protect the press 'provides a precedent for legislation to regulate it.' His specific thought was a national commission to establish a code of ethics for journalists and to investigate claims of unfair coverage. 'We might call it the Truth in News Commission,' he said.
>
> You don't have to go very far down that road to see where it leads. If Congress gets too accustomed to entertaining the press as a petitioner or a special interest group, we will be in for a stormy season of

[34] For a summary of the *Farr* case see EDITOR AND PUBLISHER, April, 14, 1973, at 11. A 1973 revision of the California statute clarified the technicality on which Farr was excluded from the privilege; under the revised statute, Farr would have qualified for the privilege.

[35] *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (Super. Ct. App. Div. 1972), *cert. denied,* 41 U.S.L.W. 3503 (U.S. April 20, 1973).

[36] 408 U.S., at 669.

[37] PA. STAT. ANN. tit. 28, § 330 (1958).

> review, regulation and friendly suggestions which could be absolutely disastrous.[38]

Mrs. Graham's views were echoed by Pulitzer-prize-winning investigative reporter Clark Mollenhoff. Mollenhoff explained that the

> danger comes in the demands of a large number of legislators for a definition of 'legitimate newsmen' and 'legitimate news media' to be shielded from disclosure of confidential sources. Once the definition is drawn, some person or group of persons will have to be empowered to determine who are 'legitimate newsmen' and what are 'legitimate news media'. . . . Any government role in naming or selecting the men to make the decision as to who are 'legitimate newsmen' has the major drawback of permitting government to have 'a little control' over the press.[39]

Oklahoma, where media support was never unanimous, opposition focused on this very point. A leader of the opposition to the bill was Ralph Sewall, past national president of Sigma Delta Chi, part-time Oklahoma City University law student, and, at the time, assistant managing editor of the *Oklahoma City Times*. Sewall stressed his fear that "a shield law might be the slipping of a bureaucratic nose under the tent of press freedom."[40]

Thus, opinion crystallized that any bill might jeopardize freedom of the press by establishing the right of legislatures to tinker with press functions; that, while an absolute privilege might be worth the price, a conditional privilege was not. Since legislatures seemed unwilling to confer absolute privileges, newsmen were forced to consider other alternatives.

[38] Address by Katherine Graham, Press-Enterprise Lecture Series, University of California, Riverside, April 9, 1973. Printed as pamphlet, Freedom and Responsibility of the Press, by Press-Enterprise Co., Riverside, Calif., at 12.

[39] Human Events, Feb. 24, 1973, at 14, col. 3.

[40] Sewall, *Shield Law Could Be Handicap to Newsmen,* OKLAHOMA PUBLISHER, January, 1973, at 3.

Besides the courts, possibilities for source protection are reliance on prosecutors' self-restraint and newsmen's promises to go to jail rather than reveal a source's identity.

The ultimate protection newsmen can offer their sources is a promise that, rather than reveal, they will go to jail. A 1971 study found that 68.4% of newsmen surveyed said they would go to jail for up to six months to protect news sources.[41] Another study concluded that the newsman's discretion and his willingness to go to jail were considered more important as a guarantee to sources than were legal privileges.[42] This ultimate weapon lost some of its potency last fall when *Los Angeles Times* reporter William Farr was given an indefinite sentence for contempt because he refused to say which of six attorneys in the Charles Manson murder case leaked information about a Manson plot to kill Frank Sinatra, Elizabeth Taylor, and other Hollywood celebrities. It seemed possible that Farr would be locked up until he agreed to reveal his source. Farr was released only by means of a special order from Justice William O. Douglas.[43] The possibility of coercive sentences necessarily weakens the assurances newsmen can give their sources. According to Justice Douglas, federal law permits no such incarceration by federal courts,[44] but he refused to speculate on the legitimacy of the California practice.[45]

There are no reported cases in Oklahoma of newsmen receiving contempt citations, but in other contexts, Oklahoma courts have ruled indefinite sentences illegal,[46] so the promise to go to jail may be a viable alternative for Oklahoma newsmen.

[41] Blasi, *supra* note 2, at 276.
[42] Guest and Stanzler, *supra* note 2, at 45.
[43] Farr v. Pitchess, 409 U.S. 1243 (1973).
[44] *Id. But see* 28 U.S.C. § 1826 (permitting federal courts to authorize coercive sentences for the duration of proceedings).
[45] Farr v. Pitchess, 409 U.S. 1243 (1973).
[46] *Cf. Ex Parte* Curtis, 10 Okla. 660, 63 P. 963 (1901); Taylor v. Newblock, 5 Okla. 647, 49 P. 1114 (1897).

The Nixon administration's answer to the problem of source protection was to require prosecutors to use self-restraint in subpoenaing or questioning newsmen. The guidelines promulgated by Attorney General John Mitchell declared that the justice department would issue subpoenas only when there was "sufficient reason" to believe a crime had been committed, "sufficient reason" to believe the information sought essential to a successful investigation, and an unsuccessful attempt to obtain the information from alternative nonpress sources. The final paragraph of the guidelines cautioned that "emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines."[47] These guidelines, while not dissimilar from the statutes in several states, obviously do not provide the kind of certainty which takes the chill off news sources nor anything like the absolute privilege sought by newsmen.

In recent weeks newsmen have turned increasingly to reconsideration of a judicial solution. Katherine Graham concluded that "In the long run it would seem more prudent for the press to put its trust in an enlightened public opinion and the considered second thoughts of the courts."[48] A number of recent decisions gave newsmen reason to believe that the *Branzburg* decision was neither so drastic nor so conclusive as it first appeared.

A recent law review article took the view that the *Branzburg* decision left room for the courts to grant a testimonial privilege in the future.[49] An analysis of the *Branzburg* opinion provides some support for this view. The fact is that the harsh majority opinion in *Branzburg* was joined by only four justices. A concurring opinion by Justice Powell emphasized "the limited nature of the Court's holding." He pointed out

[47] Dept. of Justice Memo No. 692 (Sept. 2, 1970).
[48] Graham, *supra* note 36.
[49] 18 VILL. L. *Rev.* 288 (1972). *But cf.* 4 LOYOLA UNIV. OF CHICAGO L.J. 227 (1971).

"The Court does not hold that newsmen, subpoenaed to testify before a grand jury are without constitutional rights with respect to the gathering of news or in safeguarding their sources." Powell went on to espouse a case-by-case balancing test:

> 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.[50]

A District Court in California recently utilized this aspect of the Branzburg decision. The court granted a newspaper's request for declaratory relief and an injunction to prevent police searches of the newspaper's offices. The court refused to countenance defendants' contention that *Branzburg* denied newspapers any special Fourth Amendment rights. Emphasizing that the *Branzburg* decision "clearly states that the First Amendment protects newspapers in their newsgathering functions," the court referred to Justice Powell's concurrence and noted that his "vote was necessary to the Court's judgment." Relying on a broad interpretation of *Branzburg,* the court held that search warrants could not be issued for the purpose of searching newspaper offices except "when there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; *and* 2) a restraining order would be futile. To stop short of this decision would be to sneer at all the First Amendment has come to represent in our society."[51]

Several other recent decisions encouraged privilege-seekers. A federal judge in the District of Columbia (which has no shield law) quashed a subpoena sought by the Committee

[50] 408 U.S., at 709 (concurring opinion).
[51] Stanford Daily v. Zucher, 353 F. Supp. 124, 133-135 (N.D. Cal. 1972).

to Re-Elect the President. The subpoena required reporters for the *Washington Post, New York Times, Washington Star-News,* and *Time* magazine to appear for depositions and to bring all documents, papers, letters, photographs, and audio and video tapes relating in any way to the "break-in" or other political espionage in the Watergate affair. The court said that it could not "blind itself to the possible 'chilling effect' the enforcement of the subpoenas would have on the flow of information to the press and, thus, to the public." Again citing Justice Powell's concurring opinion in *Branzburg,* the court ordered that no subpoena would issue without a demonstration by movants of a "compelling and overriding interest in the information" sought and inability to obtain the information in other ways.[52]

The Second Circuit upheld a district court's grant of privilege as within the court's discretion. Black plaintiffs representing all Chicago Blacks against sixty sellers of residential property sought discovery of the identity of the source for a magazine article on blockbusting. The Second Circuit said that the privilege grant was not an abuse of the trial court's discretion when the journalist was not a party to the action, other sources of information were available, and the true identity of the source did not go to the heart of the claim.[53]

A Georgia court went further than any others by endorsing "the God-given right and constitutional guarantee to pursue a career without being hampered". The court refused a law firm's request that a newsman be forced to reveal his sources for a story about gambling raids on the building housing the law firm.[54]

In Chicago, a federal judge quashed subpoenas issued by criminal defendants for reporters' tapes, photographs, and

[52] Democratic Nat'l. Comm. v. McCord, 41 U.S.L.W. 2520 (D.D.C. April 22, 1973).
[53] Baker v. F & F Invs., 41 U.S.L.W. 2347 (2d Cir. Dec. 7, 1972).
[54] Noted in EDITOR AND PUBLISHER, May 26, 1973, at 12.

notes because he found the material "irrelevent and unnecessary" in the preparation of a defense.[55]

On the other side of the coin, courts have recently refused the privilege in several situations. In Maryland a newsman was held in contempt when he refused to say where or from whom he had purchased marijuana in investigating for a story on drug traffic.[56] A New York court held that while newsmen need not tell a grand jury the identity of any source who supplied them with information, they must testify about events which they personally observed, including identities of persons observed.[57] In Delaware a court denied a news photographer's motion to quash a subpoena to turn over a photo taken of the defendant as he was uttering the abusive language for which he was arrested.[58] In New Jersey a newsman was forced to reveal all the information given him by a source when he had published a story revealing part of the information and the source's identity.[59]

While the first set of cases must encourage newsmen, the existence of the second group indicates that, unless and until the Supreme Court provides a clearer mandate for the balancing test, the judicial alternative will not provide the security and certainty required for a free flow of information from sources.

Without Supreme Court clarification, hope for an ad hoc court-created privilege may be stymied by the new Federal Rules of Evidence. The rules do not recognize the newsman's testimonial privilege.[60] More important, the rules are stated

[55] Noted in EDITOR AND PUBLISHER, Jan. 20, 1973, at 44.
[56] Lightman v. Md., 266 Md. 550, 294 A.2d 149 (Ct. Spec. App. 1972), *cert. denied,* 41 U.S.L.W. 3570 (U.S. April 24, 1973).
[57] People by Fischer v. Dan, ...N.Y.2d...., ...N.E.2d ___, 342 N.Y.S.2d 731 (1973).
[58] Petition of McGowan, 298 A.2d 339 (Del. Super. Ct. 1972).
[59] *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (Super. Ct. App. Div. 1972), *cert. denied,* Bridge v. N.J., 41 U.S.L.W. 3503 (U.S. April 20, 1973).
[60] FED. R. EVID. 501.

in the negative: a privilege which is not provided in the rules is not recognized by the rules. Nor is there any provision generally adopting state-created privileges. The advisory committee note to Rule 501 states that state privileges should not be recognized in federal question litigation nor in federal criminal prosecutions and, while the court has a choice whether to recognize state privileges in diversity cases, the advisory committee favors non-recognition.[61]

The viability of a judicial alternative depends ultimately on the Supreme Court, and, more specifically, on Justice Powell. Four justices strenously opposed the decision in *Branzburg*.[62] Justice Powell's concurring opinion stopped far short of espousing the hard line of the majority. It does not seem unlikely that Justice Powell would join the four *Branzburg* dissenters in approving a plea for a privilege based on a balancing test.

The shift in opinion among national press spokesmen will undoubtedly have an impact on the future of the Oklahoma shield bill. National fervor was crucial to introduction of last session's bill. Oklahoma newsmen have seldom faced the prospect of grand jury or judicial probing and supporters of the bill found it difficult to generate much agitation even for the absolute shield bill.[63] Without strong national urging it seems unlikely that Oklahoma newsmen will press for renewed consideration of the qualified bill defeated last session, and, given the climate of national opinion, such urging will not be forthcoming.

An interesting alternative for Oklahoma newsmen, and one that deserves national press consideration, was proposed by Ralph Sewall, an Oklahoma press spokesman who opposed shield legislation. Sewall's proposal would protect sources by providing a jury trial for any person charged with direct con-

[61] *Id.*, Advisory Committee Note.
[62] JJ. Douglas, Stewart, Brennan, Marshall.
[63] Interview with Ralph Sewall, June 23, 1973.

tempt.[64] This proposal would cover newsmen who disobeyed court orders to disclose the identities of sources. Sewall believes that the advantage in his solution is that it would shield newsmen when they should, in his view, have protection — when they expose corruption or when they protect a witness who fears for his own safety if he appears directly in the case. Sewall admits that juries probably would not protect newsmen when they seek to cover up a crime, but Sewall thinks that newsmen should not be protected in such situations.

Sewall's remedy would give newsmen approximately the same privilege as the committee version of the Oklahoma bill and the Ervin bill, but it would give the privilege without strings. More it would give the privilege to everyone who could convince a jury that his source deserved protection and not confine it to persons gainfully employed by regularly published newspapers having second-class mailing licenses. It would achieve a qualified privilege without imposing inflexible and precedent-setting limitations and without defining "newsman" or "news media." Presumably, it would protect the flow of news in areas where the public most needs facts likely to be available only confidentially — in cases of governmental and political corruption. The proposal also avoids a clash with the Federal Rules of Evidence. For all these reasons, the proposal has much to recommend it.

However, since the privilege would be available only on a case-by-case, jury-by-jury basis, the proposal does not offer sources the prior certainty of anonymity which is said to be necessary for the free flow of information. Of course, this objection applies to all measures except absolute privilege statutes.

A more serious problem with the Sewall proposal is that it would require an unprecedented abrogation of a court's

[64] Sewall, *supra* note 40.

power to summarily punish direct contempts.[65] Historically, such power has been regarded as inherent in the courts and as essential to protect their dignity and smooth administration. Today the power has been somewhat eroded by the Supreme Court's declaration that a jury trial is required for non-petty contempts.[66] Even so, it seems unlikely that the legislature will lightly deprive the courts of this power and it is by no means certain that the courts would find such legislation valid. These are formidible problems, requiring extensive examination. Here it is important only to note that in the difficult area of newsmen's testimonial privileges the Sewall proposal seems to offer the best solution for confidential sources, newsmen, and the public.

[65] The law in the contempt area is confused. It is not clear whether a newsman's refusal to disclose a source is a civil or criminal contempt. This determination is crucial to discussion of the propriety of summary punishment, the right to a jury trial, and the possibility of coercive sentences. A jury trial is guaranteed for non-petty criminal contempts. Frank v. U.S., 395 U.S. 147, *reh, den.*, 396 U.S. 869 (1969). It is not clear when jury trial is available for non-criminal contempts. Coercive sentences have been traditionally used in civil contempts but not in criminal ones. Thus if a contempt is classified as "direct criminal" it implies the possibility of summary punishment, but not for more than six months or $500; otherwise, a jury trial is guaranteed; and it seems to imply that no coercive sentence will be imposed. A "direct civil contempt" is not clearly susceptible to summary punishment, but neither is a jury trial clearly guaranteed, and coercive punishments are a real possibility.

[66] Frank v. United States, 395 U.S. 147, *reh. denied,* 396 U.S. 869 (1969).