

# Tulsa Law Review

---

Volume 11 | Number 2

---

1975

## Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen

Ben Singletary

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Ben Singletary, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 Tulsa L. J. 258 (1975).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol11/iss2/5>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# NOTES AND COMMENTS

## BRANZBURG REVISITED: THE CONTINUING SEARCH FOR A TESTIMONIAL PRIVILEGE FOR NEWSMEN

*A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both.*

*Writings of James Madison*

The right of a newsman<sup>1</sup> to conceal the source and substance of confidential information given to him in his newsgathering capacity has been the subject of intense debate and judicial controversy over the past three years. Proponents of the privilege have invariably rested their claim on one of three bases; (1) that a common law testimonial privilege should be recognized, (2) that the first amendment to the United States Constitution should be interpreted to grant protection for journalists or (3) that the individual states should be permitted, at their discretion, to provide statutory shield legislation.<sup>2</sup>

To date, no jurisdiction has recognized a common law privilege for journalists.<sup>3</sup> Advocates of a constitutional privilege suffered a severe setback in 1972 when the United States Supreme Court ruled in *Branzburg v. Hayes*<sup>4</sup> that a newsman's first amendment guarantees of freedom of speech and press are not abridged by compelling him to disclose the source of confidential information before a grand jury. In the wake of

---

1. "Newsman" is used interchangeably with "reporter" and "journalist" in this comment to refer to those individuals regularly engaged in the gathering, compilation and dissemination of information to the public through their employment in some media capacity. There is no standard definition of a newsman used by the courts and states.

2. For a unique argument advocating federal legislation granting newsmen a privilege against compulsory disclosure based on the commerce clause (journalism as a feature of interstate commerce) see Note, *State Newsmen's Privilege Statutes: A Critical Analysis*, 49 NOTRE DAME LAW. 150, 161 (1973).

3. Arguments for a common law privilege will not be dealt with in this comment due to a lack of judicial recognition of such a privilege in any American jurisdiction. For a discussion of cases rejecting the privilege see 7 A.L.R.3d 591 (1966). See also 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961). Wigmore rejects the idea of a common law privilege for journalists.

4. 408 U.S. 665 (1972).

*Branzburg*, several states<sup>5</sup> passed legislation affording a qualified statutory privilege to newsmen. In 1974, Oklahoma became the twenty-sixth state<sup>6</sup> to adopt such protection.<sup>7</sup>

This comment has four objectives: (1) to explore the conflicting premises underlying the entire area of controversy—the right of the public to the free flow of information as opposed to the obligation of every citizen to give testimony; (2) to examine the present status of the constitutional privilege in light of cases subsequent to *Branzburg*; (3) to evaluate existing state privilege statutes and their effectiveness as shields for newsmen; and (4) to focus on the Oklahoma statute, as yet judicially uninterpreted, and offer some insight into the protection an Oklahoma newsman can expect under the law as it now stands.

### I. ARGUMENTS FOR AND AGAINST A CONSTITUTIONAL PRIVILEGE

Generally, the issue of a newsman's privilege arises in the following situations: (a) where a public official or an investigatory body of the state subpoenas a newsman to testify or to produce documents revealing a confidential source of information or some undisclosed information itself; (b) where a private civil litigant seeks to learn the source of information relating to the cause of action in which he is involved; or (c) where a defendant in a criminal case subpoenas the newsman's product for use in his defense.<sup>8</sup> Arguments in favor of a testimonial privilege are frequently grounded in the free flow of information protected by the first amendment.<sup>9</sup> This reasoning generally follows one of

---

5. DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1975-76); MINN. STAT. ANN. §§ 595.021-025 (Supp. 1975-76); NEB. REV. STAT. §§ 20-144 to -146 (1974); N.D. CENT. CODE § 31-01-06.2 (Supp. 1975); ORE. REV. STAT. §§ 44.510-540 (1973); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -3 (Supp. 1975); TENN. CODE ANN. §§ 24-113 to -115 (Supp. 1975).

6. States with privilege statutes prior to *Branzburg* include ALA. CODE tit. 7, § 370 (1960); ALASKA STAT. §§ 09.25.150-220 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1975-76); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West Supp. 1975); IND. ANN. STAT. § 34-3-5-1 (Burns Supp. 1975); KY. REV. STAT. ANN. § 421.100 (1970); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975); MD. CTS. & JUD. PRO. CODE ANN. § 9-112 (1974); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. § 93-701-4 (Supp. 1974); NEV. REV. STAT. § 49.275 (1971); N.J. STAT. ANN. § 2A:84A-21 (1976); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975-76); OHIO REV. CODE ANN. § 2739.12 (1971); PA. STAT. ANN. tit. 28, § 330 (Supp. 1975-76).

7. OKLA. STAT. tit. 12, § 385.1 (Supp. 1975).

8. Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 119, 120 (1970).

9. For an in-depth treatment of arguments favoring a constitutional privilege for newsmen see Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969) [hereinafter cited as Guest & Stanzler].

two lines: (1) It is contended that the first amendment embraces protection of the public's right to be informed. When a newsman is compelled to divulge the source of information imparted in confidence, one of his newsgathering techniques,<sup>10</sup> reliance on confidential sources, is severely impaired. As a result, the public suffers through a diminished flow of information.<sup>11</sup> (2) While the first amendment does not specifically protect newsgathering, the Supreme Court has declared that freedom of the press is to be given its most sweeping scope.<sup>12</sup> Therefore, compulsory disclosure is an impediment to newsgathering and indirectly a restraint on freedom of the press prohibited by the first amendment.

A second argument favoring the privilege is that informants will refuse to come forward with information in the absence of a guarantee of anonymity. This reluctance is attributable not only to the informant's fear that a subpoenaed newsman might reveal his identity,<sup>13</sup> but also to his knowledge that a journalist who does not betray his confidence might well go to jail. To prevent this, the informant may simply keep the information to himself.<sup>14</sup>

Similarly, a third argument broaches the reporter-source relationship from the standpoint of the reporter. In the absence of a privilege, the reporter may be hesitant to rely on confidential information in controversial areas where the likelihood of a grand jury investigation exists. Faced with a subpoena to testify, the newsman must choose between equally undesirable alternatives of breaching a confidence or being held in civil contempt. In addition, he is forced to elect between responsiveness to the court and his profession's code of ethics.<sup>15</sup>

---

10. For a breakdown of reliance on sources as a newsgathering technique in newspapers, magazines, television and radio see Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, table IV at 249 (1971) [hereinafter cited as Blasi].

11. "The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public." *Branzburg v. Hayes*, 408 U.S. at 725 (Stewart, J., dissenting).

12. *E.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

13. Blasi asked a cross section of newsmen if they would be willing to go to jail to protect an important source relationship they thought should be privileged but was not under existing law, knowing the sentence could vary between thirty days to six months. Out of almost 1000 respondents, 68.4 percent said yes, 14.4 percent said no, and 17.2 percent did not answer the question. The results indicate strong reluctance by most newsmen to reveal a source. Blasi, *supra* note 10, at 276.

14. Guest & Stanzler, *supra* note 9, at 46.

15. "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies." *THE NEWSPAPER AND SOCIETY* 567 (G. Bird & F. Merwin eds. 1946).

Finally, proponents of the privilege point to the potential abuse of the subpoena power if newsmen are required to disclose confidential information.<sup>16</sup> It is not difficult to envision how the government, armed with an unfettered subpoena power, could effectively deter politically embarrassing news "leaks" from inside sources. For instance, under the guise of an investigation into a newsman's allegations of governmental corruption, a grand jury could be convened and the reporter forced to reveal the source of his accusations. The mock investigation could then be terminated and the "leak" effectively sealed.<sup>17</sup>

Opponents of the privilege usually advance three basic arguments.<sup>18</sup> First, it is contended that recognition of a newsman's privilege will hamper judicial administration by reducing the availability of admissible testimony. "A court of law more easily can reach a fair consideration of the issues through compulsory testimony."<sup>19</sup> A second argument, allied to the first, is that the privilege could easily be abused, resulting in the frustration of justice. A journalist could fan public indignation and force an investigation into an area on the basis of accusations made by a confidential informant and then rely on his testimonial privilege to frustrate the very investigation he was responsible for instigating.<sup>20</sup> Finally, opponents argue there is a lack of evidence that without a privilege a newsman's sources will dry up.<sup>21</sup> In the absence of such evidence, they claim, any privilege becomes not a shield for informants but a sword for journalistic irresponsibility.<sup>22</sup>

---

16. Blasi reports that one of the most commonly voiced complaints of newsmen is the frequency with which press subpoenas are issued. Blasi, *supra* note 10, at 261.

17. Guest & Stanzler relate an actual incident of this abuse of the grand jury process. An Atlanta newspaper printed an exposé on the sale of narcotics within the state prison based on information from an anonymous physician. A grand jury was convened and the editor of the newspaper was cited for contempt for refusing to reveal his source's identity. The editor claimed the purpose of the hearing was geared more toward uncovering his source than investigating the alleged drug peddling. The doctor insisted the editor expose him rather than go to jail. Once his identity was disclosed, the proceeding was terminated without further investigation into the allegations. Guest & Stanzler, *supra* note 9, at 45-46.

18. For an extensive treatment of arguments rejecting a newsman's privilege see Beaver, *The Newsman's Code, the Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968) [hereinafter cited as Beaver].

19. Guest & Stanzler, *supra* note 9, at 24.

20. Beaver, *supra* note 18, at 257.

21. *Id.* at 251-52. *But see* Caldwell v. United States, 434 F.2d 1081, 1085 (9th Cir. 1970) where the court found that "'compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyse and publish the news.'" *Accord*, Blasi, *supra* note 10, on the case of Anthony Ripley at 262.

22. Beaver, *supra* note 18, at 256.

## II. THE EVOLVING QUALIFIED PRIVILEGE

Most observers felt *Branzburg*<sup>23</sup> tolled the death knell for any privilege grounded in the Constitution. Certainly, the Supreme Court made it quite clear that in the grand jury context a newsman has no first amendment privilege to withhold confidential information. "We are asked to create another testimonial privilege by interpreting the First Amendment to grant newsmen a [testimonial privilege] that other citizens do not enjoy. This we decline to do."<sup>24</sup> Subsequent decisions over the past three years, however, have caused considerable confusion as to how *Branzburg* is to be interpreted.<sup>25</sup> Some have rekindled hope that at least a qualified privilege for newsmen may yet be found in the first amendment.

*Lightman v. State*,<sup>26</sup> decided less than two months after *Branzburg*, involved a claimed testimonial privilege under both a state statute<sup>27</sup> and

23. The *Branzburg* opinion was a 5-4 decision, involving a trilogy of cases consolidated for appeal to the Supreme Court. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. App. 1971) involved a reporter for the *Louisville Courier-Journal* who wrote an article about his observations of two men synthesizing hashish from marijuana. He was subpoenaed but refused to reveal the identity of the two hashish makers. Reporter *Branzburg* also sought review of the denial of his motion to quash a second subpoena relating to a later story he wrote concerning conversations and observations with unnamed drug users in Frankfort, Kentucky.

*In re Pappas*, 266 N.E.2d 297 (Mass. 1971) concerned a television newsman-photographer who gained entrance to a Black Panther headquarters on the condition he would not disclose anything he saw or heard inside the building. The Supreme Court granted *Pappas*' writ of certiorari after a denial of his motion to quash a subpoena seeking his testimony on observations at the meeting.

*Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970) involved a *New York Times* reporter who was subpoenaed to appear before a grand jury to testify about the aims, purposes and activities of the Black Panthers, an organization he had been assigned to cover. The United States petitioned for certiorari after the Court of Appeals for the Ninth Circuit reversed a contempt order against *Caldwell* by a district court.

The Supreme Court affirmed the *Branzburg* and *Pappas* holdings and reversed the *Caldwell* decision.

24. 408 U.S. at 690.

25. *State v. St. Peter*, 315 A.2d 254 (Vt. 1974) limited *Branzburg* to situations where there are no alternative means to acquire the desired information. *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972) and *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) expanded *Branzburg* to any situation involving a grand jury proceeding. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974) extended *Branzburg* to civil cases while *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972) limited *Branzburg* to criminal proceedings. *United States v. Nixon*, 417 U.S. 682 (1974) held that *Branzburg* was not confined to reporters but could be expanded to other individuals.

26. 15 Md. App. 713, 294 A.2d 149, *aff'd* 266 Md. 550, 295 A.2d 212 (1972). A reporter for a Baltimore newspaper wrote an article on his observations in an Ocean City pipe shop where pipes for smoking hashish and marijuana were sold. The shop allowed customers to smoke some marijuana in a selected pipe before making a purchase. The reporter was subpoenaed by a grand jury to disclose the name of the shop and its proprietor.

27. MD. CTS. & JUD. PRO. CODE ANN. § 9-112 (1974).

the first amendment. The Maryland court found that the newsman failed to qualify for protection under the state statute,<sup>28</sup> and summarily dismissed the asserted first amendment privilege, relying on *Branzburg* as dispositive of any constitutional argument. "That no such violation of the federal constitutional guarantees exists in such circumstances has now been made clear by the Supreme Court of the United States in *Branzburg v. Hayes* . . ."<sup>29</sup> The court also ruled that any broadening of a testimonial privilege could only be done by the legislature.<sup>30</sup>

In *In re Bridge*,<sup>31</sup> a New Jersey court refused to exempt confidential information given to a newsman by a public official from the *Branzburg* rule. *Bridge*, held to have waived his statutory privilege,<sup>32</sup> contended that unless the identity of a public official and any information provided by the official but not published were protected by the first amendment, the " 'government' will have an effective tool to prevent its wrongdoings from being brought to the attention of the public . . ."<sup>33</sup> The court rejected this argument, as well as *Bridge's* plea for a balancing of interests test, on the basis of *Branzburg*.<sup>34</sup>

On the other hand, in *Baker v. F & F Investment*,<sup>35</sup> a federal class action suit by blacks involving racial discrimination in the sale of housing, a district court refused to extend *Branzburg* to civil actions. The court held that absent the grand jury context, a journalist could not

28. The court held the statutory privilege was not intended to extend protection to a newsman from testifying about his personal observations.

29. 15 Md. App. at —, 294 A.2d at 157.

30. This holding is in response to the Supreme Court's language in *Branzburg* that it was powerless to bar a state court from construing its own state's constitution to recognize either a qualified or absolute newsman's privilege. 408 U.S. at 706. On this basis the Maryland court could have interpreted their state statute as protecting even the personal observations of a newsman.

31. 120 N.J. Super. 460, 295 A.2d 3 (Super. Ct. App. Div. 1972). Reporter *Bridge* wrote an article concerning an alleged offer of a bribe to a member of the Newark Housing Authority. When a grand jury investigating the bribe attempt subpoenaed *Bridge* to appear, he moved to quash the subpoena.

32. The court held *Bridge* waived his privilege under N.J. STAT. ANN. § 2A:84A-29 (1976) by disclosing part of the privileged matter in his story without coercion and with knowledge of his privilege. 120 N.J. Super. at —, 295 A.2d at 6.

33. 120 N.J. Super. at —, 295 A.2d at 6.

34. *Bridge* asserted the court should implement the balancing test suggested by Justice *Powell* in his concurring opinion in *Branzburg*:

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.

408 U.S. at 710 (*Powell*, J., concurring) (footnote omitted). The majority opinion in *Branzburg* recognized no such test.

35. 470 F.2d 778 (2d Cir. 1972).

be required to disclose his sources where the information sought did not go to the heart of the plaintiff's claim.<sup>36</sup>

*Democratic National Committee v. McCord*<sup>37</sup> followed the *Baker* decision in denying compulsory disclosure in a civil action. Reporters for *The New York Times*, *The Washington Post*, *The Washington Star-News* and *Time Magazine* were subpoenaed by the Committee for the Re-election of the President and others to appear for depositions and to bring with them all documents, tapes, photographs and other evidence relating to the Watergate break-in. District Judge Charles Richey, noting the noncriminal nature of the pending cases, granted a motion to quash the subpoenas, citing the absence of any evidence that the information sought was material to the case or that alternative sources of evidence had been exhausted.

*The Unique Circumstances and Great Public Importance of These Cases Compel a Finding by the Court That Movants Are Entitled to At Least a Qualified Privilege Under the First Amendment to the United States Constitution. . . .*

. . . .

. . . This Court cannot blind itself to the possible "chilling effect" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public. This Court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government no amount of legal theorizing could allay the public suspicions engendered by its actions and by the matters alleged in these lawsuits.<sup>38</sup>

In *Dow Jones & Co. v. Superior Court*,<sup>39</sup> the court refused to extend the qualified first amendment privilege concept to Massachusetts. A reporter for *The Wall Street Journal* wrote an article quoting an unnamed town official as saying a certain named developer was using a town "anti-snob zoning law" to blackmail town officials. The developer brought a libel action against Dow Jones and the newsman and took an oral deposition of the reporter to discover the name of the quoted official. The reporter refused to answer and the court compelled disclosure. *Dow Jones* was distinguished by the court from *Baker* as involving a party deponent and confidential information central to the plaintiff's case. The court also expanded the *Branzburg* ruling by holding

---

36. *Id.* at 783.

37. 356 F. Supp. 1394 (D.D.C. 1973).

38. *Id.* at 1396-97 (emphasis in original, footnote omitted).

39. 303 N.E.2d 847 (Mass. 1973).



that a Massachusetts newsman has no qualified first amendment privilege in a criminal or civil action.<sup>40</sup>

*In re Lewis*<sup>41</sup> did little to clarify the confusing application of the *Branzburg* doctrine. Lewis, a broadcaster for a California radio station, was served by a federal grand jury with a subpoena duces tecum for a communiqué received by the station from the New World Liberation Front, an underground terrorist organization. The contents of the communiqué had been made public by the radio station<sup>42</sup> and concerned bombings and threats of future bombings in the Los Angeles area. Lewis refused to comply with the subpoena and was found guilty of civil contempt. In reaching that determination, the federal court appeared to rely on the balancing test expressed in Justice Powell's concurring opinion in *Branzburg*<sup>43</sup> to find Lewis had no testimonial first amendment privilege.

[I]t is clear and evident beyond doubt that, in striking the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice, the Government has met its burden by establishing beyond any reasonable doubt that the Government's interest in the subject matter of the investigation is "immediate, substantial, and subordinating"; that there is "a substantial connection" between the information it seeks to have the witness compelled to supply and the overriding Governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted Governmental interest [sic]. . . . [F]urther that the Court finds and concludes as a matter of law that the balance between any possible burden on Mr. Lewis is overwhelmingly outweighed in its balance by the overruling and subverted public interest in law enforcement . . . .<sup>44</sup>

---

40. "We intend no implication by what we have just said that, in some future case, it would be within the trial judge's 'discretion' to determine that a qualified newsman's privilege exists which permits at least some protection of a journalist's confidential sources. We have this day reaffirmed that no such privilege exists." *Id.* at 850.

41. 384 F. Supp. 133 (C.D. Cal. 1974).

42. The disclosure deprived Lewis of protection under the California privilege statute. See note 32 *supra* for a similar waiver in New Jersey.

43. 408 U.S. at 710 (Powell, J., concurring). See note 34 *supra*. For a case rejecting the balancing test see *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3, 6 (Super. Ct. App. Div. 1972). For cases adopting the balancing test see *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973) and *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342, 350 (Dist. Ct. App. 1972).

44. 384 F. Supp. at 140 (citations omitted).

Two 1975 decisions have followed the trend toward limiting the application of *Branzburg* to civil actions. *Loadholtz v. Fields*<sup>45</sup> arose in Florida, a state providing no statutory shield protection for newsmen. A reporter wrote a newspaper article quoting an arrested couple who claimed they had been intimidated and harassed by police. In a libel action by the arresting officer against the couple, the reporter was subpoenaed to appear at a deposition to testify about his interview with the couple and submit certain documents. He refused to comply with the subpoena and the plaintiff filed a motion to compel discovery. In denying the motion, the court distinguished *Branzburg* as involving a grand jury subpoena relevant to a criminal investigation. The court cited *Democratic National Committee v. McCord* as consistent with its finding that the first amendment affords a newsman at least a qualified privilege in a civil action where "no 'compelling interest' to justify the compelled disclosure" is advanced.<sup>46</sup>

Equally significant was the *Loadholtz* court's recognition of the "chilling effect" of subpoenas on the flow of information to the press and the public.<sup>47</sup> The plaintiff argued that no confidential source was involved since the defendant was named in the reporter's article. Referring to this distinction as "utterly irrelevant to the 'chilling effect,'" the court found that "the compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants."<sup>48</sup>

In *Apicella v. McNeil Laboratories, Inc.*<sup>49</sup> an action was brought against a drug manufacturer by a patient who claimed permanent disabilities after the drug Innovar was administered as part of the anesthesia procedure during an operation. Both the plaintiff and defendant sought to depose an officer of the *The Medical Letter on Drugs and Therapeutics* in an attempt to discover the source of information in an article published on the dangers of Innovar. The court refused to compel disclosure, despite its finding that at issue in the case was an important public interest in preventing future suffering and its concession that such firsthand evidence may prove impossible to obtain unless the disclosure sought was ordered. The court held that a qualified first amendment privilege protected against disclosure in the absence of a compelling need, demonstrated by a showing that the information

---

45. 389 F. Supp. 1299 (M.D. Fla. 1975).

46. *Id.* at 1303.

47. *Id.* at 1300.

48. *Id.* at 1303.

49. 66 F.R.D. 78 (E.D.N.Y. 1975).

sought was unavailable from other sources. The court's finding that disclosure in the case might affect *The Medical Letter's* ability to obtain the services of consulting physicians in the future<sup>50</sup> is noteworthy in light of *Branzburg*, where the Supreme Court rejected as speculative the argument that sources might dry up.<sup>51</sup>

### III. THE STATUTORY APPROACH

The Court in *Branzburg* expressly left open the option for the individual states to adopt shield legislation.<sup>52</sup> Only seventeen states afforded any protection prior to *Branzburg*; nine more have passed statutes in the subsequent three years.<sup>53</sup> The fact that over half the states now recognize some statutory privilege for newsmen shows an obvious legislative concern for insuring the continued free flow of information. Indeed, three states preface their shield statutes with a declaration that it is the public policy of their state to protect the free flow of information by providing a privilege to newsmen to conceal confidential information and sources.<sup>54</sup>

Unfortunately, the divergent approaches to statutory protection among the states have resulted in disparate treatment on a state to state basis for newsmen relying on the statutory privileges. The lack of uniformity is particularly regrettable in an age when much of the electronic media and a sizeable portion of the print media are devoted to multistate audiences, thereby creating confusing conflict of laws problems.<sup>55</sup>

Of the twenty-six states with shield legislation, only twelve statutes grant the newsman an absolute privilege;<sup>56</sup> that is, once the newsman

---

50. *Id.* at 85.

51. 408 U.S. at 693.

52. "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." *Id.* at 706.

53. See notes 5-7 *supra*.

54. MINN. STAT. ANN. §§ 595.021-.025 (Supp. 1975-76); NEB. REV. STAT. § 20-144 (1974); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975).

55. For examples of potential problems see Note, *State Newsmen's Privilege Statutes: A Critical Analysis*, 49 NOTRE DAME LAW. 150, 160 (1973).

56. ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1975-76); CAL. EVID. CODE § 1070 (West Supp. 1975); IND. ANN. STAT. § 34-3-5-1 (Burns Supp. 1975); KY. REV. STAT. ANN. § 421.100 (1970); MD. CTS. & JUD. PRO. CODE ANN. § 9-112 (1974); MICH. COMP. LAW ANN. § 767.5a (1968); MONT. REV. CODES ANN. § 93-701-4 (Supp. 1974); NEB. REV. STAT. §§ 20-144 to -146 (1974); NEV. REV. STAT. § 49.275 (1973); N.J. STAT. ANN. § 2A:84A-21 (1976); OHIO REV. CODE ANN. § 2739.12 (1971); ORE. REV. STAT. §§ 44.510-.540 (1973); PA. STAT. ANN. tit. 28, § 330 (Supp. 1975-76).

meets the criteria set forth in the statute he cannot be divested of the privilege even though an overriding need for disclosure is shown. The other fourteen statutes afford only a qualified testimonial privilege that can be overcome and the newsmen thereby compelled to testify upon various findings by the court.<sup>57</sup>

Fourteen statutes provide protection only against revealing the source of confidential information,<sup>58</sup> while ten others extend the privilege to shield unpublished information as well.<sup>59</sup> Michigan's uninterpreted statute could fall into either category, protecting "communications between reporters . . . and their informants."<sup>60</sup> Minnesota's statute also enjoys an unclassified status, since it protects unpublished information only if it "would tend to identify the person or means through which the information was obtained."<sup>61</sup>

Four states have very restrictive statutes, requiring that the source of confidential information may be withheld only if the information given by the source has been published.<sup>62</sup> A few of the states exempt defamation actions based on confidential material from coverage under their privilege statutes.<sup>63</sup>

57. *E.g.*, ALASKA STAT. §§ 09.25.150-220 (1973) (newsmen may be divested of his privilege if withholding the testimony would result in a miscarriage of justice or be contrary to the public interest); ARK. STAT. ANN. § 43-917 (1964) (if it is shown that the article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975) (if disclosure is essential to the protection of the public interest); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975-76) (if any general or specific law to the contrary exists); N.D. CENT. CODE § 3-01-06.2 (Supp. 1975) (if failure to disclose will cause a miscarriage of justice).

58. ALA. CODE tit. 7 § 370 (1960); ALASKA STAT. §§ 09.25.150-220 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1975-76); ARK. STAT. ANN. § 43-917 (1964); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1975-76); IND. ANN. STAT. § 34-3-5-1 (Burns Supp. 1975); KY. REV. STAT. ANN. § 421.100 (1970); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975); MD. CTS. & JUD. PRO. CODE ANN. § 9-112 (1974); NEV. REV. STAT. § 49.275 (1973); N.J. STAT. ANN. § 2A:84A-21 (1976); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); OHIO REV. CODE ANN. § 2739.12 (1971); PA. STAT. ANN. tit. 28, § 330 (Supp. 1975-76).

59. CAL. EVID. CODE § 1070 (West Supp. 1975); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); MONT. REV. CODES ANN. § 93-701-4 (Supp. 1974); NEB. REV. STAT. §§ 20-144 to -146 (1974); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975-76); N.D. CENT. CODE § 31-01-06.2 (Supp. 1975); OKLA. STAT. tit. 12, § 385.1 (Supp. 1975); ORE. REV. STAT. §§ 44.510-.540 (1973); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -3 (Supp. 1975); TENN. CODE ANN. §§ 24-113 to -115 (Supp. 1975).

60. MICH. COMP. LAWS ANN. § 767.5a (1968).

61. MINN. STAT. ANN. §§ 595.021-.125 (Supp. 1975-76).

62. ALA. CODE tit. 7, § 370 (1960); KY. REV. STAT. ANN. § 421.100 (1970); MD. CTS. & JUD. PRO. CODE ANN. § 9-112 (1974); N.J. STAT. ANN. §§ 2A:84A-21, 2A:84A-29 (1976).

63. ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1975-76); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975); MINN. STAT. ANN. §§ 595.021-.025 (Supp. 1975-76);

Two of the major problems with shield laws concern who and what is protected under the statutes. Protection may be as limited as extending only to a person employed by a newspaper<sup>64</sup> or as broad as encompassing employees of newspapers, periodicals, press associations, radio and television stations and wire services.<sup>65</sup> Some statutes are unquestionably outdated; for example, the 1949 Arkansas statute protects newspapermen and employees of radio stations but makes no mention of the television media.<sup>66</sup>

### *Who is Protected?*

Most statutes share a common problem; while all intend to protect basically the same group of individuals—newsmen coming into contact with confidential sources in the course of their profession—few attempt to define exactly who qualifies for that status. Serious problems of interpretation arise when statutes purport to privilege “any editor, reporter, or other writer,”<sup>67</sup> “a person engaged in newspaper, radio, television or reportorial work,”<sup>68</sup> or a “person connected with, employed by or engaged in any medium of communication to the public.”<sup>69</sup> Conceivably even copyboys and printsetters could be entitled to protection under such broadly worded statutes.<sup>70</sup> If the intent behind shield laws is to shelter only employees engaged in a newsgathering capacity, statutory language should explicitly limit protection to that group. Unfortunately, only seven statutes define the terms “reporter” and “newsman.”<sup>71</sup>

Current employment as a newsman appears to be required to entitle one to protection under ten statutes.<sup>72</sup> Thirteen states expressly

---

OKLA. STAT. tit. 12, § 385.1 (Supp. 1975); ORE. REV. STAT. §§ 44.510-.540 (1973); TENN. CODE ANN. §§ 24-113 to -115 (Supp. 1975).

64. N.J. STAT. ANN. § 2A:84A-21 (1976).

65. IND. ANN. STAT. § 34-3-5-1 (Burns Supp. 1975).

66. ARK. STAT. ANN. § 43-917 (1964).

67. *Id.*

68. ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1975-76).

69. ORE. REV. STAT. §§ 44.510-.540 (1973).

70. The most flagrant abuser of the broadly worded statute is Illinois. That state's statute protects “any person” from being forced to disclose a source of information obtained by a reporter during the course of his employment. Presumably, a reporter could divulge his source to anyone, whether a newsman or not, and that person would still qualify for shield protection under the Illinois law. ILL. ANN. STAT. ch. 51, § 111 (Smith-Hurd Supp. 1975-76).

71. ALASKA STAT. §§ 09.25.150-220 (1973); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975); NEB. REV. STAT. §§ 20-144 to -146 (1974); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975-76); OKLA. STAT. tit. 12, § 385.1 (Supp. 1975).

72. While not all of the statutes below expressly mandate current employment for

provide inclusion under their statutes to anyone who was a newsmen at the time the confidential information was received, though not at the time the privilege is claimed.<sup>73</sup> Arizona, Michigan and Ohio could fall into either category, depending on the interpretation given to the wording of their statutes. There is no ready rationale behind divesting a newsmen of his privilege on the termination of his employment regarding confidential matter that came into his possession while employed. The same interests for protecting the source are present in either situation. Those states that do not expressly extend protection beyond employment should reevaluate their position. At the very least, states with shield statutes worded in terms of present employment that wish to limit protection to present employment should clarify their statutes by amendment. Otherwise, newsmen in those states are on shaky ground once their employment is terminated.

### *What is Protected?*

In those states with statutes limiting protection only to the source of information,<sup>74</sup> there is some question in determining whether "source" refers only to the identify of an informant, or if it can be construed to include other sources of confidential information. For example, should a tape left with a radio station be considered the "source" of the newsmen's article or merely the information itself? If a newsmen relies on a secret document for his story, is the document the "source" of the information, and therefore, protected?

*In re Taylor*,<sup>75</sup> construing the Pennsylvania "source protection only" statute, held the prohibition against compulsory source disclosure covers documents as well as personal informants. In arriving at that

---

protection, they are all worded in terms of present employment. None of the statutes anticipate the possibility of a newsmen claiming a statutory privilege regarding information he obtained while employed after terminating his employment. ARK. STAT. ANN. § 43-917 (1964); KY. REV. STAT. ANN. § 421.100 (1970); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975); MD. CTS. & JUD. PRO. CODE ANN. § 9-112 (1974); NEB. REV. STAT. §§ 20-144 to -146 (1974); NEV. REV. STAT. § 49.275 (1973); N.J. STAT. ANN. § 2A:84A-21 (1976); OKLA. STAT. tit. 12, § 385.1 (Supp. 1975); PA. STAT. ANN. tit. 28, § 330 (Supp. 1975-76); TENN. CODE ANN. §§ 24-113 to -115 (Supp. 1975).

73. ALASKA STAT. §§ 09.25.150-220 (1973); CAL. EVID. CODE § 1070 (West Supp. 1975); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1975-76); IND. ANN. STAT. § 34-3-5-1 (Burns Supp. 1975); LA. REV. STAT. §§ 45:1451-54 (Supp. 1975); MINN. STAT. ANN. §§ 595.021-.025 (Supp. 1975-76); MONT. REV. CODES ANN. § 93-701-4 (Supp. 1974); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975-76); N.D. CENT. CODE § 31-01-06.2 (Supp. 1975); ORE. REV. STAT. §§ 44.510-.540 (1973); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -3 (Supp. 1975).

74. See note 57 *supra*.

75. 412 Pa. 32, 193 A.2d 181 (1965).

determination, the court ruled that the section protecting newsmen from disclosing sources of information must be liberally construed in favor of the news media. Maryland courts have reached the opposite result in construing a similar shield statute. *State v. Sheridan*,<sup>76</sup> criticizing the *Taylor* decision, limited the meaning of source to the identity of the individual informant. *Lightman v. State*<sup>77</sup> upheld this distinction and ruled that the Maryland privilege statute requires a strict interpretation.<sup>78</sup>

A second problem concerns whether, in order for the privilege to apply, the information must be given with the understanding that it is confidential. Again, the answer differs from state to state. In *WBAI-FM v. Proskin*,<sup>79</sup> a New York court forced a radio station to turn over a letter concerning a bomb threat. The letter was found in a telephone booth after an anonymous telephone tip. The court ruled that the news source was not privileged since there was no confidential communication.

*Lightman* reached an opposite conclusion under the Maryland statute, finding that any source of information provided a newsman should be privileged, whether given in confidence or not. "[W]hile the Legislature may have enacted the statute with the primary purpose in mind of protecting the identity of newsmen's confidential sources, we think the statutory privilege broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not."<sup>80</sup>

States that have considered the problem seem to agree that a newsman is not privileged to refuse to divulge information about events he observes personally. *In re Dan*<sup>81</sup> involved a New York newsman who was subpoenaed to give testimony pertaining to crimes he observed while covering the Attica prison riot. Dan refused to answer, claiming such information was privileged under the New York shield law. The

---

76. 248 Md. 320, 236 A.3d 18 (1967).

77. See note 26 *supra* and accompanying text for a discussion of this case.

78. Most states would probably follow the Maryland trend, giving their statutes a strict interpretation. For a different approach see *State v. Briley*, 53 N.J. 498, 251 A.2d 442 (1969). In deciding how to interpret the New Jersey privilege statute, the court held that privileges should be construed and applied in sensible accommodation to the aim of a "just result." This suggests that some states may be willing to adopt a policy of flexibility in interpreting privilege statutes. Such a stance is highly desirable in view of the inability of most states legislatures to provide for all possible contingencies in their statutes.

79. 42 App. Div. 2d 5, 344 N.Y.S.2d 393 (1973).

80. 15 Md. App. at —, 294 A.2d at 156 (footnote omitted).

81. 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975).

court held that while Dan was privileged to refuse to divulge the identity of any source, he could not withhold evidence of crimes which he had witnessed.

[T]his Court finds no proof offered that the testimony sought of this witness involves a confidential communication or confidential sources protected by this statute. None of the information was given to him by a person requesting that his name not be disclosed. The testimony before the Grand Jury is about evidence he observed, not events related by an informer or others under a cloak of confidentiality.<sup>82</sup>

A Maryland court came to the same conclusion in *Lightman*, holding a newsman could properly be compelled to disclose both the identity of persons seen by him in the perpetration of a crime and the address of the shop where the crime occurred.<sup>83</sup> In light of these holdings, a newsman would be well advised not to rely on any statutory privilege to try to conceal evidence of any crime committed in his presence. Presumably, for example, a reporter interviewing an underground fugitive could be forced to give details concerning the meeting to an investigatory body.

#### IV. THE OKLAHOMA SHIELD LAW

Oklahoma's shield statute provides a newsman with a qualified testimonial privilege to withhold the source of any published or unpublished information as well as the content of unpublished information obtained in his newsgathering capacity.<sup>84</sup> The privilege is conditional because the statute permits the court to divest the claimant of his protection on a finding that the party seeking the information has established by clear and convincing evidence the relevancy of the information sought and an inability to obtain the information by alternate means.

The Oklahoma law expressly limits its applicability to state pro-

---

82. *Id.* at —, 363 N.Y.S.2d at 496.

83. See note 26 *supra* for the facts of the case.

84. OKLA. STAT. tit. 12, § 385.1 (Supp. 1975) provides:

No newsman shall be required to disclose in a state proceeding either:

1. The source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or

2. Any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public;

unless the court finds that the party seeking the information or identity has established by clear and convincing evidence that such information or identity is relevant to a significant issue in the action and cannot be obtained by alternate means.



ceedings,<sup>85</sup> including hearings before any judicial, legislative, executive or administrative body. The testimonial privilege is also expressly denied to a newsman who is being sued for defamation and who attempts to defend on the basis that the defamatory material originated with a third party whom he is protected from disclosing under the statute.

There are three strong points in the Oklahoma law. First, the statute does not require that the information be given in confidence for a newsman to qualify for protection. As a result, the privilege is much broader than in those states requiring a cloak of confidentiality,<sup>86</sup> extending to any information coming into a reporter's possession.

A second feature of the statute is its extension of protection to both the source of the information and any unpublished information in the possession of the newsman. Several states have used their "source protection only" statutes to divest the newsman of any substantive privilege by requiring him to divulge all unpublished information given to him by his source. In many instances, this information could only be known by certain individuals and upon its disclosure the informant could be identified.

The third attribute of the Oklahoma statute is the expansiveness of its definitions.<sup>87</sup> The law expressly protects not only any written communications between a reporter and his source, but also any notes, photographs, tapes or "other data of whatever source."<sup>88</sup> By clearly detailing the material that is protected, the legislature has substantially reduced the possibility of judicial limitations of the privilege's scope.

The statute also broadly defines "newsman" as "any . . . individual regularly engaged in . . . preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service."<sup>89</sup> It is difficult to see how this language could be read to exempt employees of school newspapers and

---

85. Nebraska is the only state whose statute purports to extend the privilege to federal as well as state proceedings. Whether a federal court would be bound by such a statute is uncertain. It is settled that in cases arising in federal courts under diversity jurisdiction, state law is controlling. *See* *Cervantes v. Time, Inc.*, 464 F.2d 986, 989 (8th Cir. 1972). Where the action arises under federal question jurisdiction, courts have reached opposite results as to whether state law must be followed. *See* *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972) (holding state law not determinative). *But see* *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960) (holding state substantive law must be followed).

86. *See* text accompanying notes 79 & 80 *supra*.

87. The definitions found in OKLA. STAT. tit. 12, § 385.2 (Supp. 1975) are patterned closely after those in N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975).

88. OKLA. STAT. tit. 12, § 385.2 (Supp. 1975).

89. *Id.*

underground publications, two groups denied statutory protection in many states.<sup>90</sup>

While the Oklahoma law incorporates some aspects of a good shield law, it has some serious shortcomings as well, of which newsmen should be aware. First of all, the statute does not specify whether a newsman can waive his privilege involuntarily. It is conceded in all states with shield legislation that the privilege against compulsory disclosure is personal to the newsman alone. Therefore, should the reporter choose to voluntarily waive his right not to testify on confidential matters,<sup>91</sup> he may divulge the source of his information, regardless of the wishes of the informant.

A number of states, however, provide for an implied waiver; that is, if the newsman reveals any of his unpublished information or answers certain questions about his source (short of actually divulging his identity) he may be found to have implicitly waived his privilege.<sup>92</sup> The Oklahoma statute does not mention waiver, and apparently the Oklahoma legislature did not intend to leave a loophole in the law permitting an involuntary relinquishment of the privilege. Certainly this position is consistent with the purpose behind all shield legislation—protecting the public interest in the free flow of information. Nevertheless, courts in other states without express waiver provisions have forced reporters to testify after a finding of implicit waiver.<sup>93</sup> The Oklahoma statute should be amended to expressly recognize or reject involuntary waiver. Until such time, newsmen should approach the waiver issue with caution.<sup>94</sup>

---

90. Typically, protection is implicitly denied to such groups by imposing requirements of compensation for employees and general circulation for the publication. See IND. ANN. STAT. § 34-3-5-1 (Burns Supp. 1975). The statute protects "any person . . . employed by, a newspaper or other periodical issued at regular intervals and having a general circulation . . ." (Emphasis added.) See also N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975-76) defining "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 . . . has a paid circulation and has been entered at United States post-office as second-class matter."

91. Privilege statutes do not provide that a newsman is incompetent to testify at all; they merely permit him to refuse to answer certain questions about confidential sources. In regard to other matters, a newsman must give testimony as any other ordinary citizen.

92. See *Beecroft v. Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (Super. Ct. L. Div. 1964).

93. *Id.* See also Note, *State Newsmen's Privilege Statutes: A Critical Analysis*, 49 NOTRE DAME LAW. 150, 154 (1973).

94. A good waiver provision is set forth in DEL. CODE ANN. tit. 10, § 4325 (1974) (emphasis added):

If a reporter waives the privilege provided by this subchapter with respect to certain facts, he may be cross-examined on the testimony or other evidence he gives concerning those facts but not on other facts with respect

The Oklahoma statute can be criticized as well for its failure to define the "source" of information. This omission is particularly unfortunate, since it leaves open two critical questions regarding protection: (1) whether "source" refers only to an individual or whether it can be broadly defined to include tapes and other means through which information is obtained;<sup>95</sup> (2) whether the "source" protection in the statute includes the personal observations of the newsman.<sup>96</sup> Regardless of the Legislature's intent, these questions should be resolved in a statutory definition of "source."<sup>97</sup> Without such a definition, the courts are free to limit or expand statutory protection by implementing their own definitions.

Another weakness of the Oklahoma statute is its failure to expressly extend or deny protection to sources and confidential information given to a former newsman before his employment was terminated.<sup>98</sup> In an appropriate case, a court could possibly conclude that a former newsman is not covered by the statute which is drafted in terms of present employment. To alleviate this problem the statutory definition of newsman should be amended to include anyone who was a newsman at the time the information was received, though not at the time the privilege is claimed.

The most serious problem with the statute concerns the procedure for divesting a newsman of his privilege. In a state such as Oklahoma that affords only conditional shield protection, the most important aspect of the privilege statute should be the section detailing how that privilege can be lost; however, Oklahoma's law contains only a single sentence relating to divestment.<sup>99</sup>

The statute should provide some procedural guidelines by which the courts can decide if the party seeking disclosure has established its relevancy. The considerations should include "the importance of the issue on which the information is relevant, . . . the circumstances under which the reporter obtained the information, and the likely effect that disclosure of the information will have on the future flow of infor-

---

to which he claims the privilege. *A reporter does not waive or forfeit the privilege by disclosing all or any part of the information protected by the privilege to any other person.*

95. See text accompanying notes 74-78 *supra*.

96. See text accompanying notes 81-83 *supra*.

97. For a comprehensive definition of "source" see DEL. CODE ANN. tit. 10, § 4320 (5) (1974).

98. See notes 72 & 73 *supra* and accompanying text.

99. OKLA. STAT. tit. 12, § 385.1 (Supp. 1975).

mation to the public."<sup>100</sup> A court might also consider "the nature of the proceeding, the merits of the claim or defense, [and] the adequacy of the remedy otherwise available . . . ."<sup>101</sup>

The Oklahoma law should also provide for an immediate appeal from an order by a court divesting the journalist of his privilege. Under the current statute the body before whom the newsman is claiming the privilege has the power to revoke that privilege. A number of states require that the party seeking disclosure apply to the district court, which then decides whether or not to compel testimony.<sup>102</sup> At the very least, there should be a right to appeal to a court other than the one hearing the original action.

Finally, Oklahoma should consider the adoption of a new test for divestment. The privilege is currently conditioned on the absence of findings that the information sought is relevant to a significant issue in the action and that the information is not available by alternate means. This test requires a determination of what is "relevant" and what a "significant issue" involves. The statute endows the court making the determination with a great deal of discretion and the result could be a complete lack of uniform treatment as different courts reach different results. A better test could be fashioned after that suggested in Justice Stewart's dissenting opinion in *Branzburg*. Justice Stewart's three-pronged test requires

that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>103</sup>

## V. CONCLUSION

Many observers predicted that the furor engendered by the *Branzburg* decision would gradually subside with the passage of time. Fortunately, events over the last three years have indicated an opposite trend. The courts have continually chipped away at the sweeping scope of

---

100. DEL. CODE ANN. tit. 10, § 4323 (1974).

101. N.M. STAT. ANN. § 20-1-12.1 (1970).

102. *E.g.*, LA. REV. STAT. § 45:1453 (Supp. 1975), N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975).

103. 408 U.S. at 743 (Stewart, J., dissenting) (footnotes omitted).

*Branzburg* and more states are passing shield laws to ward off its far-reaching effects.

Today, various state shield statutes furnish the newsman with the best available protection.<sup>104</sup> There remains, however, a pressing need for uniform shield legislation. In the author's opinion, the answer lies in federal legislation, although none of the bills which were introduced in Congress has surfaced from committee.<sup>105</sup>

The federal government has eased the newsman's plight lately by seeking fewer subpoenas aimed at the reporter's confidential work product.<sup>106</sup> This is, perhaps, a step in the right direction. Former Senator

---

104. Though more and more states are enacting shield legislation protecting newsmen, Blasi points out that the lack of awareness of these statutes by newsmen is remarkable:

We asked the respondents, "Does the state in which you do most of your work have a 'shield law' which protects the confidentiality of source relationships in certain circumstances?" Of the 421 respondents in our survey who listed one of the shield law states as the state in which they do most of their work, only 149 (35.4%) were able to say with certainty that their state has a statutory privilege for newsmen; 211 (50.1%) said, "I'm not certain," and 61 (14.5%) were under the mistaken impression that their state has no shield law.

Blasi, *supra* note 10, at 275-76.

105. Five bills were introduced in the House of Representatives during the first session of the Ninety-sixth Congress: H.R. 6213, 96th Cong., 1st Sess. (1975); H.R. 3655, 96th Cong., 1st Sess. (1975); H.R. 562, 96th Cong., 1st Sess. (1975); H.R. 215, 96th Cong., 1st Sess. (1975); H.R. 172, 96th Cong., 1st Sess. (1975).

106. United States Department of Justice, Order No. 544-73 provides in part:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department:

(a) In determining whether to request issuance of a subpoena to the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

(c) In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

(1) There should be reasonable ground based on information obtained from nonmedia sources that a crime has occurred.

(2) There should be reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non essential or speculative information.

(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of pub-

Sam Ervin has written that "[E]ven with *Branzburg* on the books, the free flow of information might not be stifled if the parties concerned are willing to restrain themselves."<sup>107</sup> In the absence of an absolute constitutional or statutory privilege, restraint may well be the only protection afforded to newsmen.

*Ben Singletary*

---

lished information and to such surrounding circumstances as relate to the accuracy of the published information.

28 C.F.R. § 50.10 (1975).

107. Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 276 (1974).