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Notes

The Rights of Sources—The Critical Element in the Clash over Reporter’s Privilege

*New York Times* reporter Myron Farber’s five-month legal battle¹ to protect his confidential sources focused public attention on a delicate legal question: how should a court accommodate the interest of a reporter² in upholding his pledge of confidentiality and the countervailing interest of the government or a private party³ in compelling disc-

2. Conflicts over nondisclosure of sources or materials most frequently involve reporters, but may also involve editors, photographers, announcers, or others engaged in media operations. *See*, e.g., *In re Lewis*, 377 F. Supp. 297 (C.D. Cal.), *aff’d*, 501 F.2d 418 (9th Cir. 1974), *cert. denied*, 420 U.S. 913, *contempt upheld*, 517 F.2d 236 (9th Cir. 1975) (radio station manager ordered to produce tape); People v. Dupree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. 1976) (picture editor and photographer ordered to appear and produce photographs); *cf.* S.36, 93d Cong., 1st Sess. § 2 (1973), *reprinted in Hearings on Newsmen’s Privilege Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 409-10 (1973) (proposed national shield law would protect any reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in gathering or presenting news) [hearings hereinafter cited as 1973 Hearings]. In this Note the word “reporter” is used to refer to all news-media personnel.
3. The demand for testimony may be made by a litigant in a civil suit; by the government, in a criminal case or on behalf of an agency or legislative body; or by a criminal defendant. In each case, the government—through the judiciary—is the party that challenges a reporter’s resistance to a subpoena. In civil cases in which litigants attempt to compel testimony, the subpoena is issued by authority of the court, e.g., *Fed. R. Civ. P. 45*, and a recipient who fails to obey may be deemed in contempt of the issuing court, e.g., *id.*, § 1972 (f). When the reporter’s testimony is sought by the prosecutor in a criminal case, or for a legislative or administrative body, the government confronts directly the reporter resisting disclosure.

Criminal defendants have a constitutional right to compulsory process for the attendance of witnesses, U.S. Const. amend. VI, but a witness may assert any valid legal exemption for withholding his actual testimony, Kastigar v. United States, 406 U.S. 441, 444 (1972) (power to compel testimony not absolute; numerous exemptions exist). In such a case, the witness may be charged with contempt, and it is the government that challenges the witness’s refusal to testify. Thus in the case of Myron Farber, *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978), although the testimony was sought by criminal defendant Dr. Mario Jascalevich, it was the government that ordered Farber to testify and the government that prosecuted Farber when he refused to comply. Criminal defendants, despite their constitutional right to compulsory process, may be less successful in actually compelling testimony than prosecutors. *See* Murasky, *The Journalist’s Privilege: Branzburg and Its Aftermath*, 52 Tex. L. Rev. 829, 898 (1974) (courts have forced criminal defendants to overcome higher burden than prosecutors to compel disclosure).
closure? The Supreme Court has confronted the issue of reporter's privilege only once, in *Branzburg v. Hayes.* In *Branzburg* the Court denied the reporters' claims that the Constitution excused them from testifying before a grand jury, and declared that the interest of the grand jury in considering all information relating to possible wrongdoing prevailed over the interests of the reporters. The Court in *Branzburg* disregarded, however, the interests of a third party—confidential sources.

Although the interests of sources have been noted by commentators and were even argued to the Court in *Branzburg,* these interests have been considered analogous to those of the reporter. A source's interests,


6. 408 U.S. at 690-91. *Branzburg* has been discussed extensively by commentators. For analysis of the case generally, see Murasky, *supra* note 3; *The Supreme Court, 1971 Term,* 86 Harv. L. Rev. 50, 137-48 (1972).


9. See, e.g., Murasky, supra note 3, at 843-51 (First Amendment interests of public, source, and press); Newsman's Privilege, supra note 7, at 1223-35 (newsman asserts interest in newsgathering and in protecting source).

Commentators who have singled out the source's interest, see note 7 supra, apparently argue that if the interests of the source and the interests of the press are cumulated the resulting interest in nondisclosure will be worthy of greater consideration. One commentator, however, does not make even this timid assertion. See Murasky, supra note 3, at 849 (fortunately, argument for permitting reporters to protect sources does not rest on recognizing source's First Amendment rights). V. Blasi, supra note 7, provides by far the most detailed analysis of the First Amendment interests of the source, yet he too simply combines the source's interest with those of the press and of the public, *id.* at 106-46. The only commentator to recognize the distinctive nature of the source's interest appears to be the author of a pre-*Branzburg* casenote. See 84 Harv. L. Rev. 1536, 1538-39 (1971) (source's interest distinguished from public's interest). The difficulty with each of these analyses, however, is that although the cumulative effect of the reporter's interest and the source's interest may be greater than either alone, it is not clear to what extent the combined interest is significantly different from the reporter's interest that the Court refused
however, are qualitatively different and far more compelling than those of a reporter. When a source’s interests are properly recognized, the *Branzburg* mode of analysis— a mode employed regularly by the Court in recent First Amendment cases—becomes inappropriate. This Note will demonstrate that proper consideration of the interests of sources compels courts to use a different analytic approach and grant sources greater protection than was provided in *Branzburg* or *In re Farber*.10

I. *Branzburg’s* Analysis of the Competing Interests

Justice White, writing for the Court in *Branzburg*, weighed two conflicting interests—the grand jury interest in receiving testimony11 and the press interest in protecting its confidential sources.12 The grand jury interest, the Court determined, should prevail.13

The right of the government or a private party to compel witnesses to appear and testify is well established14 because the adversary system requires that each party to a dispute be able to present all the facts that support its position.15 When reporters refuse to reveal their sources, it was suggested in *Branzburg*, the government may be denied important information.16

to protect in *Branzburg*. Because the source’s interest is qualitatively different from that of the reporter, however, and deserving of a higher degree of protection, this Note argues the source’s interest and the reporter’s interest together will be deserving of far greater protection than the reporter’s interest alone.

11. 408 U.S. at 686-88.
12. *Id.* at 679-82.
13. *Id.* at 690-91.
14. In England, the Statute of Elizabeth in 1562-63 imposed a penalty on any person who failed to appear after a proper summons. 5 Eliz. 1, c.9, § 12 (any person failing to appear shall forfeit £ 10 and pay further recompense for any harm). Early cases upholding the government’s right to compel testimony include Countess of Shrewsbury’s Trial, 2 How. St. Tr. 769, 80 Eng. Rep. 381 (1612) (all subjects owe King their knowledge); Dobson v. Crew, Cro. Eliz. 705, 78 Eng. Rep. 940 (1599) (person is compelled by law to testify).
15. The right of government to compel testimony was recognized—and resisted—in colonial America. Benjamin Franklin recounts in his autobiography an occasion when, as a youth, he was called before the local officials to disclose the author of an anonymous article in the newspaper to which he was apprenticed; Franklin writes that he refused to reveal the author’s identity. B. FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 33-34 (L. Lemisch ed. 1961).
16. In the United States, the First Judiciary Act established a statutory basis for the government’s right to compel testimony. Ch. 20, § 30, 1 Stat. 73, 88-90 (1789) (any person may be compelled to appear and testify). The first reported American case over a reporter’s refusal to disclose his sources appears to be *Ex Parte* Nugent, 18 F. Cas. 471 (C.C.D.C. 1848), involving *New York Herald* reporter John Nugent. For a history of the right of government to compel testimony, see Blair v. United States, 250 U.S. 273, 279-81 (1919); 8 J. WIGMORE, EVIDENCE §§ 2100-92 (J. McNaughton rev. ed. 1961).
17. *See* United States v. Nixon, 418 U.S. 683, 709 (1974) (“The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.”)
16. 408 U.S. at 701-02 (grand jury investigation not completed until every clue examined; no reason to excuse reporter who may help grand jury).

The duty to testify has never been absolute, and some privileges such as those between
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The reporters, however, asserted that First Amendment protection of the press includes the right to gather news and that as part of that right the press can refuse to disclose its sources. Some sources will not provide information unless guaranteed anonymity, and the reporters contended that the press's interest in protecting sources outweighed the need for disclosure. Branzburg, despite its holding against the reporters, strengthened journalists' claims for a constitutional privilege by explicitly stating for the first time that newsgathering is protected by the First Amendment. Newsgathering "qualifies" for protection, attorneys and clients and between spouses have been readily recognized. 8 J. Wigmore, supra note 14, § 2197. The Fifth Amendment provides a privilege to all individuals against self-incrimination in criminal cases. U.S. CONST. amend. V. However, the Supreme Court has endorsed the general rule that all persons must testify and that all exemptions are exceptional. United States v. Bryan, 339 U.S. 323, 331 (1950).


The constitutional claim was first asserted in Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958). The claim was rejected in Garland, however, because the information concealed by the reporter was essential to adjudicate the plaintiff's action for libel. Id. at 549-50.

18. The district court in Application of Caldwell, 311 F. Supp. 358 (N.D. Cal.), aff'd sub nom. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), rev'd, 408 U.S. 665 (1972), one of the cases consolidated in Branzburg, found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news," id. at 361 (emphasis added). During lengthy testimony before a congressional subcommittee considering legislation on reporter's privilege, repeated statements were offered on the importance of confidential sources. See, e.g., 1973 Hearings, supra note 2, at 76 (statement of Jack Landau and Fred Graham) ( affidavits from more than 100 reporters allege that attempts to force disclosure of confidential sources have inhibited press freedom); id. at 553 (statement of Citizen's Right to News Committee) ( much newsgathering depends on sources who will not, for various reasons, provide information if their identities are revealed). Justice Stewart, dissenting in Branzburg, cited numerous statements supporting his view that disclosure could inhibit sources. See 408 U.S. at 730 n.8, 732 n.14, 736 n.20 (Stewart, J., dissenting).

Perhaps the most persuasive evidence of the importance of confidentiality for sources is the fact that reporters have sometimes cancelled stories because of fears that they could not protect a source's identity. Five specific examples of such cancellations are presented in 1973 Hearings, supra note 2, at 755; any such cancellation severely restricts the flow of information to the public that the First Amendment is designed to protect. See Associated Press v. United States, 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

19. 408 U.S. at 681. Reporters generally do not argue for an absolute privilege. In Branzburg, for instance, each of the reporters argued for a qualified privilege, id. at 680, 702, although the tests suggested differed slightly, see Brief for Petitioner Branzburg, supra note 8, at 44 (testimony privileged unless necessary to prevent direct, immediate threat of irreparable damage to national security, human life or liberty); Brief for Respondent Caldwell at 82-84, Branzburg v. Hayes, 408 U.S. 665 (1972) (testimony privileged absent showing of compelling state interest); Brief for Petitioner Pappas at 46, Branzburg v. Hayes, 408 U.S. 665 (1972) (testimony privileged absent showing of reasonable belief that crime committed, newsman has relevant information, and state was unsuccessful in obtaining information elsewhere).

20. 408 U.S. at 681 ("Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom..."
the Court said, because without some protection "freedom of the press could be eviscerated."\footnote{21}

In weighing the competing interests, the Court in 

\textit{Branzburg} employed a mode of analysis that it has used subsequently in several First Amendment cases.\footnote{22} First, the Court determined that the burden imposed on the press by grand jury subpoenas was only an indirect restraint—not a direct restraint—because the press claim for protection was based on its instrumental interest in newsgathering and not on any restriction of pure expression.\footnote{23} This instrumental interest, derived from the need to facilitate pure expression, merited less protection than expression itself. The cases before it, the Court said, "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."\footnote{24} Second, the Court minimized even this indirect restraint by determining that the inhibiting effect of grand jury subpoenas on the press was "uncertain"\footnote{25} and "speculative."\footnote{26} This conclusion was crucial because an indirect restraint on First Amendment activity encounters constitutional objections only when its chilling effect is certain or substantial.\footnote{27}

\textbf{Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 888 (1971).}

\footnote{21}{408 U.S. at 681.}
\footnote{22}{See note 27 infra.}
\footnote{23}{408 U.S. at 691 (case involves "no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire").}
\footnote{24}{Id. at 681.}
\footnote{25}{Id. at 690.}
\footnote{26}{Id. at 694.}
\footnote{27}{See, e.g., Laird v. Tatum, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."); cf. Zurcher v. Stanford Daily, 436 U.S. 547, 566-67 (1978) ("whatever incremental effect there may be on press activity by police search of newspaper office too slight to invalidate issuance of warrant); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (when chilling effect "at best a prediction," statute cannot be invalidated as overbroad).}

\textbf{See generally Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 888 (1971).}

\footnote{21}{408 U.S. at 681.}
\footnote{22}{See note 27 infra.}
\footnote{23}{408 U.S. at 691 (case involves "no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire").}
\footnote{24}{Id. at 681.}
\footnote{25}{Id. at 690.}
\footnote{26}{Id. at 694.}

The Court's analysis in 

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By characterizing the burden on the press in this way—as indirect and only "speculative"—the Court could engage in a balancing of interests, because "the First Amendment does not invalidate every incidental burdening of the press." Thus the sole question, according to Justice White, was whether an otherwise valid rule of general application—that citizens must respond to grand jury subpoenas—could be applied to reporters. Weighing the press's "speculative" interest in nondisclosure against the grand jury's need for testimony, the Court held that the interest of the grand jury was paramount.

Although the right of sources to engage anonymously in First Amendment activities was argued in Branzburg, the right was analyzed incorrectly. The journalists simply suggested that the source's interest was much like that of the reporter and thus added more weight to the interest in nondisclosure. The Court, moreover, did not carefully analyze the source's interest; Justice White simply noted that the privilege claimed was for the reporter, not the source, and that an informer has no constitutional protection if the judiciary decides that

29. Id.
30. Although Justice White did not use the word "balancing," he noted that laws serving substantial public interests may be enforced against the press because the First Amendment does not bar incidental burdens. Id. at 682 (emphasis added). Justice Powell, whose vote was necessary for a majority, stressed in his concurring opinion that reporters' claims for a privilege should be balanced on a case-by-case basis against the obligation of all citizens to testify about criminal conduct. Id. at 710; cf. Saxbe v. Washington Post Co., 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) (Branzburg decision hinged on assessment of competing interests). Lower courts generally have interpreted Branzburg to require a balancing of interests on a case-by-case basis. See, e.g., Baker v. F&F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (civil litigant in class action denied disclosure of reporter's sources); Zelenka v. State, 83 Wis. 2d 601, 617-19, 266 N.W.2d 279, 286-87 (1978) (criminal defendant not entitled to disclosure of reporter's sources). But see, e.g., Caldero v. Tribune Publishing Co., 98 Idaho 288, 294, 562 P.2d 791, 797, cert. denied, 434 U.S. 930 (1977) (no reporter's privilege founded on First Amendment exists in absolute or qualified version); Dow Jones & Co. v. Superior Court, 364 Mass. 317, 320, 303 N.E.2d 847, 849 (1973) (First Amendment provides no privilege, qualified or absolute).
31. See note 8 supra.
32. Petitioner Branzburg, for example, asserted that "[t]he state action in the instant cases destroys the effective exercise of First Amendment rights." Brief for Petitioner Branzburg, supra note 8, at 14. He then detailed the asserted burdens of disclosure on newsgathering, reportorial independence, and the rights of sources. The argument based on source's rights is the last and shortest of the three. Id. at 14-27.
33. This failure might be explained by the fact that the grand juries in Branzburg sought testimony from the reporters about alleged criminal activity that they had witnessed personally and thus the Court was not confronted with a case in which a reporter was called upon to testify about information received exclusively from sources. Cf. In re Farber, 78 N.J. 259, 394 A.2d 330, cert. denied, 99 S. Ct. 598 (1978) (reporter began investigation 10 years after incidents occurred, therefore dependent on sources).
his identity should be revealed.\textsuperscript{35} The interests of the source should not be dismissed so casually. If the \textit{Branzburg} Court had considered the true nature of sources' interests, and the effect that disclosure would have upon these interests, the test in \textit{Branzburg} would have been drawn much differently.

II. A Source's Right to Confidentiality

A. The Right to Anonymous Speech and Association

Reporters' sources are protected by two related First Amendment rights—a right to anonymous speech and a right to engage in confidential association. The right to speak anonymously was recognized in \textit{Talley v. California},\textsuperscript{36} where the Court struck down a Los Angeles city ordinance that made it a misdemeanor to distribute any handbill that did not have the author's name printed on it.\textsuperscript{37} The city defended the ordinance as an attempt to ensure that individuals engaged in fraud, false advertising, or libel could be identified.\textsuperscript{38}

The Supreme Court, however, said that the identification requirement tended to restrict the freedom to distribute information and

\textsuperscript{35} Id. at 698. Although the Court did not address itself to the interests of the source, it did express two concerns that might make it reluctant to protect such interests. First, the Court said that the crime of misprision, 18 U.S.C. § 4 (1976), which requires each citizen to raise a "hue and cry" over wrongdoing, might require disclosure of confidential sources, 408 U.S. at 696-97. The fear of condoning misprision, however, should not bar permitting a reporter to protect his source. Misprision requires both knowledge of a crime and some affirmative act of concealment or participation. \textit{Id.} at 696 n.36. These requirements are not met by the actions of the confidential source. By revealing information to a reporter, the source does not conceal the alleged wrongdoing, but in fact makes disclosure, and prosecution, more likely.

Second, the Court expressed reluctance to foster "a private system of informers." \textit{Id.} at 697. The Court distinguished police informers from press informers by noting that the decision to unmask the former is in public hands and can be compelled by the judiciary. \textit{Id.} at 698. The recently enacted Civil Service Reform Act of 1978, Pub. L. No. 95-454, 47 U.S.L.W. 45 (Nov. 28, 1978), eliminates the importance of this distinction, however, because the Act places authority to keep the identity of government whistleblowers confidential in the hands of a Special Counsel, not the judiciary, \textit{Id.} § 1206(b)(1)(B). The Special Counsel is a new position created by the Act. Although the Special Counsel is a public official, he is free from any control by a court. Thus the informers that the press might utilize are not significantly different from the "private system of informers" now protected under the Civil Service Reform Act.

\textsuperscript{36} 362 U.S. 60 (1960).

\textsuperscript{37} Id. at 60-61. The ordinance in \textit{Talley} prohibited any anonymous handbill distributed in any place under any circumstances, and thus was void on overbreadth grounds. \textit{Id.} at 63-65. Although the Court did not rule on the validity of a more limited ordinance, \textit{id.} at 64, it did say that anonymity has been used "for the most constructive purposes," \textit{Id.} at 65, thus indicating that the Court's protection of confidential communication probably would extend at least to political expression and discussions of public matters.

\textsuperscript{38} \textit{Id.} at 64.
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thereby freedom of expression.\textsuperscript{39} Because fear of identification and reprisal could lead to self-censorship, such an ordinance was a direct restraint on expression and chilled citizens' First Amendment activity.\textsuperscript{40}

When the source is functioning as a "whistleblower," alerting the public to possible wrongdoing, the source's claim for protection in disseminating information is particularly strong. \textit{Talley} noted that anonymous speech has played an important role in the nation's political history,\textsuperscript{41} and First Amendment protection is traditionally great when speech is directed at the operation of government.\textsuperscript{42}

In a series of decisions during the late 1950s and early 1960s the Court recognized that the Constitution protects citizens' right to join in confidential associations.\textsuperscript{43} Thus the Court has rebuffed attempts to force groups to disclose their membership,\textsuperscript{44} or to force individuals to identify the groups to which they belong.\textsuperscript{45} It has recognized that the right to assemble to advance ideas is fundamental to democratic government.\textsuperscript{46} Therefore, the Court has protected individuals from compelled disclosure of group membership that could subject them to harassment and reprisals.\textsuperscript{47}

\begin{itemize}
  \item \textsuperscript{39} \textit{Id.}
  \item \textsuperscript{40} \textit{Id.} at 64-65 (ordinance may deter peaceful discussions of public matters of importance).
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} \textit{See, e.g.}, \textit{Mills v. Alabama}, 384 U.S. 214, 218 (1966) (major purpose of First Amendment is free discussion of governmental affairs); \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 260, 279-80 (1964) (First Amendment protects defamation of public officials absent "actual malice").
  \item \textsuperscript{43} The statute constitutes an affirmative statement of public policy that anonymity should be extended when necessary to encourage disclosure of possible wrongdoing.
  \item \textsuperscript{44} \textit{E.g.}, \textit{Bates v. City of Little Rock}, 361 U.S. 516 (1960); \textit{NAACP v. Alabama}, 357 U.S. 449 (1958).\textsuperscript{45} The Court recognized in each case that members were exercising First Amendment rights through participation in the group. \textit{E.g.}, \textit{Bates v. City of Little Rock}, 361 U.S. 516, 522-23 (1960); \textit{NAACP v. Alabama}, 357 U.S. 449, 462-63 (1958). The Court has not always upheld a right to confidential association, but the cases compelling disclosure generally involved allegations of membership in the Communist Party. \textit{See, e.g.}, \textit{Konigsberg v. State Bar}, 366 U.S. 36 (1961); \textit{Barenblatt v. United States}, 360 U.S. 109 (1959). In these cases the Court has placed great weight on the fact that Congress specifically authorized inquiries into the Communist Party and that the Party represented a direct threat to national security. \textit{See, e.g.}, 366 U.S. at 52 (Communist Party membership not unrelated to danger of illegal activity); 360 U.S. at 128 (close nexus between Communist Party and violent overthrow of government).
  \item \textsuperscript{45} \textit{E.g.}, \textit{Bates v. City of Little Rock}, 361 U.S. 516, 523 (1960); \textit{NAACP v. Alabama}, 357 U.S. 449, 466 (1958).
  \item \textsuperscript{47} \textit{E.g.}, \textit{id.} at 523-24.
\end{itemize}
B. The Source’s Rights Under Branzburg

The Court’s recognition of a right to engage anonymously in First Amendment activity applies directly to a reporter’s confidential sources and undermines the legitimacy of the approach employed in Branzburg. The source’s interests are pure First Amendment interests, not simply instrumental interests, and cannot be balanced away as was the First Amendment interest in newsgathering in Branzburg.

Grand jury subpoenas are a direct restraint on sources’ expression and substantially chill that protected activity. A source who communicates his message to the public through a reporter is engaged in pure First Amendment expression. In Branzburg the Court minimized the press’s interest by deciding that only the instrumental interest in newsgathering was affected, and thus any burden was only an indirect restraint on First Amendment activity. What the Court failed to consider was the source’s pure First Amendment interest, which merits a higher degree of protection than does newsgathering.

The Supreme Court has made it clear that such a pure First Amendment interest will be protected from a direct restraint or a restraint that will have a substantial chilling effect. Talley and the association cases recognize that forcing anonymous speakers to reveal their identities imposes a direct restraint on their First Amendment activity. The Court’s special concern with preventing such direct restraints is evidenced by the nearly absolute protection given the press against government attempts to determine either what cannot be communicated (prior restraints) or what must be communicated (mandatory access). Compelling reporters to reveal their confidential sources

48. There are at least two reasons why a source might prefer to disseminate his message through a willing reporter—a lack of other means to disseminate the information and a preference for the broader platform of an established news outlet. See note 54 infra. That a reporter makes the communication more effective in no way alters the basic nature of the communication or the degree of First Amendment protection that it merits.
49. E.g., Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (“[T]he First Amendment needs breathing space [and] statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”); Laird v. Tatum, 408 U.S. 1, 11 (1972) (constitutional violations may arise even from chilling effect of regulations).
50. 362 U.S. at 69.
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restrains a source's expression in both ways: the source cannot disseminate the information unless he disseminates his identity as well. 54

Even if compelling disclosure of a reporter's source is not characterized as a direct restraint on the source's expression, disclosure will result in a chilling effect on the source. This chilling effect will be neither insubstantial nor speculative in the way the Court in Branzburg viewed the impact of disclosure on newsgathering. That such disclosure can chill expression was settled by Talley, 55 in which the Court invalidated an identification ordinance because it would lead to self-censorship. 56

The cases upholding a right to confidential association squarely addressed the chilling effect of disclosure on association. 57 Sources of the press engage in protected confidential association in two ways. First, the source's contact with a reporter merits protection. When anonymity is necessary in order for the contact to occur, 58 and when the association results in the dissemination of ideas or information, the source-reporter relationship comes directly within the ambit of the cases recognizing a right to confidential association. 59 Second, the source may himself be

54. A source who does not wish to be identified through a subpoena to a reporter can, of course, forego mass-media communication for self-publication of the kind protected in Talley v. California, 362 U.S. 60 (1960). But this alternative forces the source to trade effective communication for anonymity. See D. Lange, R. Baker & S. Ball, Mass Media and Violence 68 (1969) ("Today, unless the individual has access to formal channels of communication, it is almost impossible for him to have an impact.") Anonymous pamphleteering, although certainly protected by the First Amendment, is in no way an adequate substitute for dissemination of a message through a willing news outlet. One commentator suggests that if the source wishes to remain anonymous but still communicate through mass media, he may either purchase advertising space or be guaranteed a right to print a "letter-to-the-editor." Constitutional Protection, supra note 7, at 128. The former, however, conditions First Amendment activity on the availability of money, while the latter is a direct intrusion on the functions of the editor. Cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating state right-of-reply statute as violative of First Amendment); Columbia Broadcasting Sys., Inc. v. Democratic Natl' Comm., 412 U.S. 94 (1973) (broadcasters not required to accept paid editorial advertisements). Neither alternative, therefore, is adequate.

55. 362 U.S. at 64 ("no doubt" that identification requirement tends to limit freedom of expression).

56. The sensitivity of a source and the gulf between his view of the press and of government are suggested by the court of appeals in Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), rev'd, 408 U.S. 665 (1972). The Black Panthers were willing to talk at length with reporter Caldwell, id. at 1084, yet the court found that his relationship with the Black Panthers would be jeopardized if he even appeared before a grand jury, id. at 1088-89.

57. See, e.g., NAACP v. Alabama, 357 U.S. 449, 462 (1958) (compelled disclosure may constitute effective restraint on association).

58. See note 18 supra.

59. The potential importance of the right to association was recognized by both Justice Douglas and Justice Stewart in their Branzburg dissents. Although neither Justice relied heavily on this interest, both noted that a reporter and source might have an interest in
a member of a group that merits associational protection. If disclosure of the source threatens disclosure of the group or of the group's activities, then forcing a reporter to identify his source violates the First Amendment rights of the source and his group.

Congress recently acknowledged the chilling effect of compelled disclosure on expression by guaranteeing government whistleblowers anonymity so that they might reveal possible wrongdoing without fear of reprisals. The chill imposed by disclosure on the source's expression is clearly direct and certain, in contrast to the speculative chill on news-gathering identified in Branzburg.

The effect of disclosure on sources is demonstrated by In re Farber. In that case, confidential sources had served as whistleblowers and disseminated information through the news stories of reporter Farber. Their activity was, therefore, protected by the First Amendment. Many of Farber's sources were known to the criminal defendant and could have been summoned directly to testify. Others, perhaps, were known only to Farber. To the extent that these sources would not disseminate information except under a pledge of confidentiality, compelling Farber to reveal his sources would directly restrain their First Amendment activity. In effect, the sources were ordered to reveal their identities as a condition for engaging in expression. Such a restraint substantially chills any future expression by these sources and by others who might similarly disseminate information only under a guarantee of confidentiality.

Thus, when the First Amendment interests of sources are properly considered, cases involving a claim of reporter's privilege present a very different calculus of interests than the Court perceived in Branzburg.

association that deserves protection. See Branzburg v. Hayes, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting) (reporter's privacy of association also at stake); id. at 726 n.2 (Stewart, J., dissenting) (associational right of reporter and source included under First Amendment).


61. See Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (plurality opinion) ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . . .") The majority opinion in Branzburg does not cite Sweezy.

62. See note 42 supra.


64. Id. at 279-80, 394 A.2d at 340-41 (listing some of Farber's sources).
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From the perspective of sources, the cases do, to paraphrase the Court, involve intrusions on speech and assembly, prior restraints, and restrictions on what the source may publish. The cases do, in effect, sanction an express or implied command that the source publish what he prefers to withhold. The existence of this direct restraint and substantial chill on the source's First Amendment activity renders the balancing approach implicit in Branzburg illegitimate. Instead, the Court must employ the "compelling state interest" approach it has adopted for cases involving direct intrusions on First Amendment interests; first the Court must determine whether the government has a compelling interest in the confidential information, and second, even if a compelling interest is demonstrated, the Court must determine whether there exists a less restrictive means for satisfying that interest.

III. Adjudicating Sources' Rights

In determining whether there is a compelling state interest that might warrant disclosure of a confidential source, the Court must examine both the party asserting the need for information and the facts of the particular situation. The need for disclosure may be as-

65. See p. 1206 supra.
67. See Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.")

In Branzburg, Justice White asserted that the cases before the Court met any requirement that the government show a compelling interest in the information. 408 U.S. at 700-01. His explanation, however, is unconvincing. Justice White stated that the government had a compelling interest in law enforcement. Id. This assertion ignores the fact that the government had shown no compelling need for the specific information the reporters possessed, as distinguished from information about the subject in general. In any event, Justice White ignored any need to explore less restrictive means for satisfying the government interest in forcing the reporters to disclose their sources.

Justice Stewart, dissenting in Branzburg, contended that courts should only compel a reporter to disclose his confidential sources when (1) the government had shown there was probable cause to believe the reporter had information relevant to a specific violation; (2) the government had shown there were no alternative sources for the information; and (3) there was a compelling state interest in receiving the information. Id. at 743. Justice Stewart based his justification for such a stringent test on the view that newsgathering was a direct First Amendment right. Id. at 727-28. It is not necessary to accord full First Amendment protection to newsgathering, however, in order to justify a compelling state interest analysis. The interests of the source compel this approach. Furthermore, Justice Stewart's proposed test fails to consider means of protecting the source even when no alternative sources are available. See pp. 1216-17 infra.
serted by any of several groups—a grand jury, a criminal prosecutor, a criminal defendant, a civil litigant, a legislative committee, or an administrative agency. The weight to be accorded a demand for information will vary depending on the nature of the party seeking access; the state interest in resolving alleged criminal activity, for instance, is thought to be greater than the interest of civil litigants in resolving a dispute. Moreover, the need for information will vary depending upon the circumstances of each case. When the information is duplicative or only tangential to a claim or inquiry, the need for disclosure will be much less than when the information is critical to resolve the conflict.

68. E.g., Branzburg v. Hayes, 408 U.S. 665 (1972) (grand juries seek information from three reporters).
69. E.g., In re McGowan, 305 A.2d 645, 648 (Del. 1975) (Attorney General may be authorized to subpoena reporter).
72. E.g., McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (right to subpoena witnesses before legislative committee is essential and appropriate auxiliary to legislative function).
74. V. BLASI, supra note 7, at 146-95 (analyzing weights to be accorded interest in disclosure asserted by various kinds of parties).
75. See Murasky, supra note 3, at 899. Even when the need for information is asserted in a criminal prosecution, however, the court might determine that the state interest is not sufficiently significant to warrant the resulting intrusion on the First Amendment interests of the source. Courts must decide which prosecutions are important enough to warrant the burden on First Amendment freedoms.
76. See note 78 infra.
78. E.g., Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958) (reporter's assertion of privilege denied because information sought central to plaintiff's claim).

The potential impact of properly recognizing a source's rights is demonstrated by Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977). Andrews, a reporter, received information from a source, named C, about purported official improprieties on the expressed condition that the source's identity be kept confidential. When Andrews moved to quash a grand jury subpoena, the court, citing Branzburg, ruled there was no privilege available. Id. at 415, 400 N.Y.S.2d at 446. The source, however, was disseminating information and providing a public service in exposing possible wrongdoing. The grand jury had available to it alternative sources of information. Id. at 421-24, 400 N.Y.S.2d at 449-51 (two sources not protected by court, thus available to grand jury; reporter asserts other sources also available). The direct intrusion on the interests of the source, therefore, was unwarranted. Andrews ultimately was permitted to protect C under a state shield law.

In a similar case, State v. Sandstrom, 581 P.2d 812 (Kan. 1978), cert. denied, 47 U.S.L.W. 3545 (U.S. Feb. 20, 1979), the reporter was ordered to serve 60 days in jail on criminal contempt charges after refusing to disclose his source, id. at 814. The reporter disclosed confidential information to a criminal prosecutor and to the defense counsel, but refused
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Even when a compelling state interest is shown, a court still must seek a less restrictive means for satisfying that interest before ordering disclosure of a source. In particular, a court should require a showing that there is a complete absence of alternative sources and that the source's evidence is essential to resolve the conflict. Unless the party seeking disclosure can make such a showing, a court should not force disclosure.

When it is held that the interests of the reporter and source are insufficient to prevent all disclosures by the reporter, consideration of the interests of the confidential source should still influence judicial decisions at a second stage: when testimony by the reporter is compelled, the inquiry should be sharply circumscribed to limit the degree of intrusion on the interests of the source. In particular, a court to reveal his source. The state supreme court acknowledged that there was a limited privilege available to reporters, but upheld the lower court's decision against the reporter. Id. at 814, 816. By failing to acknowledge and protect the source's interest, the court forced the reporter to bear the burden of maintaining the source's anonymity.

79. These criteria follow from the Court's prior use of a “compelling state interest” test. They are also implicit in the recently enacted Civil Service Reform Act's protection of government whistleblowers. See note 42 supra; Senate Comm. on Governmental Affairs, Conference Report for the Civil Service Reform Act of 1978, S. Rep. No. 1272, 95th Cong., 2d Sess. 137 (1978) (rule is nondisclosure and confidentiality may be breached only so major investigation not halted solely to avoid identifying source; if source is disclosed, Special Counsel must ensure source suffers no reprisal).

80. In some cases, a reporter might be willing to disclose a source although the source would prefer confidentiality. In such cases the reporter would simply offer the information upon request, respond to the subpoena, or publish the information as news. Should a source attempt to restrain disclosure, the effort would doubtless fail—and properly so—as an impermissible prior restraint. The source's interest, though significant, would not be great enough to overcome the strong presumption against prior restraints. See note 52 supra.

In the event the reporter desired to protect the source's identity but the source desired to come forward, the source could easily do so. Indeed, the source's willingness to appear has caused courts to deny reporters' claims of privilege under state shield laws. People v. Zagarino, 24 Crim. L. Rep. (BNA) 2269 (N.Y. Sup. Ct. Nov. 3, 1978); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977). When the source is willing to be exposed, the reporter suffers no injury in disclosing his identity. Thus courts will confront serious conflicts over protection of confidential sources only when both the reporter and the source oppose disclosure.

It may be difficult, of course, for the source to be represented in court or play a formal role in the proceedings. Representation should not be required, however, for the court to take cognizance of the source's interests. Most importantly, the reporter can assert the source's interests along with his own; they seek the same result although the magnitude of the interests may vary. The reporter is an appropriate representative of the source. See 82 Harv. L. Rev. 1384, 1389 (1969). To require the source to be represented separately would pose insuperable problems. In coming forward to protect his anonymity, the source would have to identify himself. If represented through counsel, the court would have to ascertain that the counsel actually spoke for the source. These difficulties are insignificant if the reporter is permitted to assert the source's rights along with his own. Similar considerations led the Court in NAACP v. Alabama, 357 U.S. 449 (1958), to permit the organization to assert the rights of its members to anonymity since “[t]o require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion,” id. at 459.
should (1) attempt in camera review of the reporter's information to determine whether exposure of the source's information is actually necessary, and (2) consider means of protecting the identity of the source even if the content of the source's information is revealed.

In some instances in camera review may be all that is required. Indeed, such review has sometimes been sufficient to resolve cases involving conflicts only over the interests of the reporter. If in camera review is not sufficient and the court deems that some disclosure is

81. Even though the government may make a prima facie showing of need sufficient to overcome the rights of the reporter and source, in camera review may disclose that the testimony should not be revealed publicly because either (1) its value to the government or other party seeking disclosure would actually be so small that the harm to the source and the reporter outweighs the benefits, or (2) the impairment of the interests of the reporter and source caused by disclosure would be greater than originally believed, thus tipping the balance.

There is, of course, a difficulty inherent in all in camera review: when the material is never disclosed, later courts do not have clear guidance as to why disclosure was not compelled or how the material then before the court compares with the information previously granted confidentiality. Cf. New York Times Co. v. United States, 403 U.S. 713, 732 (1971) (White, J., concurring) (decision withholding disclosure would provide little guidance). This concern, though valid, should not be permitted to deter courts from making use of in camera review. When a decision to grant anonymity rests on the fact that in camera review demonstrated that the information merely duplicates other information already in the record, or simply supports such information, there would be no need to disclose the confidential material to aid a future court.

82. The utility of in camera review for consideration of conflicting claims on confidential material has been recognized in the Freedom of Information Act, 5 U.S.C. § 552 (1976). The Act was amended in 1974, Pub. L. No. 93-502, § 1(b)(2)(B), 88 Stat. 1562 (1974) (amending 5 U.S.C. § 552(a) (1970)), to make clear that courts are permitted to engage in in camera review of classified documents when litigants seek material that the government contends is within one of the Act's exceptions. Although recognizing that in camera review might not always be required, the conference committee stated that in many situations it would be both necessary and appropriate. S. CONF. REP. No. 1200, 93d Cong., 2d Sess. 9, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6285, 6287-88. The report states that the government shall be given an opportunity to establish that the documents are exempt. Only if this effort fails would the court employ in camera review. Id. When a court is considering a reporter's confidential sources the court should follow a similar procedure by considering the interests of the source and the journalist to determine whether complete nondisclosure is appropriate before authorizing in camera review.

83. See, e.g., Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (1977), cert. denied, 436 U.S. 906 (1978) (trial court ordered to hold in camera proceeding to determine reliability of reporters' sources and accuracy of their information, and whether to require full disclosure of sources' identities). In camera review could be particularly useful for protecting confidential sources in cases such as Ammerman involving charges of libel—an extraordinarily thorny area for traditional analysis of reporter's privilege because it focuses on the actions of the reporter; it is often necessary to know about his sources in order to determine liability. A reporter might eliminate the possibility of "actual malice"—and hence liability in a libel action by a public figure—by presenting clear and convincing evidence that seemingly reliable information was received from an identifiable source. Identification of this source in camera could satisfy the court and still protect the source's confidentiality. Although revealing this information to a judge even in camera could be considered disclosure, it is certainly less disclosure—and less likely to result in repercussions for the source—than disclosure in open court.

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necessary, in camera procedures may still be used to consider means to protect the identity of the source even though the content of his information is disclosed. In particular, it may be possible for the reporter to provide the requested information but simply delete the name of the source. When this is sufficient to meet the needs of the court, the procedure could be a suitable compromise between the source's interests and the need for information. Disclosure of a source in open court would be appropriate only in that small number of cases when a compelling state interest had been shown and no less restrictive means of satisfying that interest could be devised.

Conclusion

In the area of reporter's privilege, courts have been forced to balance opposing—and weighty—claims of right. Both the interest in disclosure and the press's interest in protecting confidential sources are strong. Clashes over reporter's privilege, however, also involve a third interest that courts have failed to consider adequately: the interest of the source. The source's interest, rooted squarely in the First Amendment, is qualitatively different from that of the reporter and under the Court's own constitutional methodology deserves explicit consideration and a high degree of protection. Only by carefully considering the source's interest, an interest in pure First Amendment activity, can courts properly protect all the interests implicated in a case involving a claim of reporter's privilege.

85. In the case of material that is published, the contents will already be available to the court. Often, however, cases involving confidential sources involve material that either was omitted from the published story or was never developed into a story. In such cases the reporter may seek to protect both the identity of the source and the contents of the information.  

86. The government was ordered to follow this procedure in Department of Air Force v. Rose, 425 U.S. 352 (1976) (in camera procedures ordered to delete names, followed by disclosure, as compromise between individual rights and public's right to government information).