

Confidentiality and shield laws branzburg v hayes research paper example

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Confidentiality and Shield Laws: Branzburg v. Hayes

Paul Branzburg was a news reporter who published stories about drug abuse in Kentucky (Calvert, C & Pember, 2011). The court asked him in 1971 to testify about sources that were obviously breaking the law by handling and trafficking in illegal substances but he declined citing source confidentiality (Calvert, C & Pember). Paul Pappas was a news reporter in Massachusetts who was asked to testify before a grand jury concerning sources within the Black Panthers (Calvert, C & Pember). The third journalist involved was Earl Caldwell who was also asked to testify about the Black Panthers before a Grand Jury (Calvert, C & Pember).

The court decisions concerning the three journalists are collectively known as the Branzburg ruling (Calvert, C & Pember). The journalists all cited the First Amendment in their refusal to testify (Calvert, C & Pember).

I. What did the Court Decide in Branzburg v. Hayes regarding a journalist's right to withhold confidential sources?

The court ruled that the First Amendment did not provide reporters privilege for reporters who are required to give testimony to a grand jury (Calvert, C & Pember). Justice Byron White noted that the court was not ruling on the prerogative or journalists to use confidential sources, but rather on the duty of journalists to cooperate with grand jury subpoenas, writing that it would be incorrect to award to reporters' a constitutional immunity that was not available to ordinary citizen. He concluded that reporters are 'no better' than average citizens (Hanzburg v. Hayes)

The dissenters who lost 4-5, were of the opinion that the First Amendment did indeed offer the press privilege (*Branzburg v. Hayes*) and that reporters should have the freedom to shield their confidential sources' identities. One of the dissenters felt that reporters should enjoy 'absolute and unqualified' privilege but the other three felt that reporters' should enjoy qualified privilege.

Since there has been no Supreme Court ruling on the subject since *Branzburg v. Hayes* in 1972, this case remains the primary reference when it comes to journalists' rights to shield their confidential sources.

II. How have Lower Courts Interpreted the *Branzburg v. Hayes* Decision Based on Whether the Cases Involved Civil, Criminal or Grand Jury Proceedings?

With regards to criminal charges, the *Branzburg v. Hayes* Supreme Court decision has been used to hold journalists criminally liable. In 1998, a freelance journalist appearing before a Maryland U. S. District Court failed to avoid charges of transporting and receiving pornography (Calvert & Pember, 2011). The court did not accept his defense that he was gathering news, instead arguing that according to a precedent set by *Branzburg v. Hayes*, the First Amendment does not free reporters and their sources to commit crimes. The journalist in question was known as Lawrence Matthews (Calvert & Pember) Such hearings are rare since reporters are hardly ever charged with criminal offences in the US.

In the years 2005 and 2006, Federal appeal courts have upheld *Branzburg v. Hayes* (Calvert & Pember). They ruled against Judith Miller, a New York Times reporter as well as Joshua Wolf, a video blogger who refused to obey subpoenas from grand juries (Calvert & Pember). The law has been upheld mostly as it pertains to reporters' duty to testify in a Grand Jury setting, write Calvert & Pember.

The rulings have therefore, treated the *Branzburg* ruling as a narrow ruling.

With regards to civil proceedings, the *Branzburg* ruling has been interpreted as actually recognizing a reporter's right to refuse to testify. This in fact happened only one year after the famous *Branzburg* case. A District Court in Washington D. C. upheld the right of reporters from different newspapers not to have to submit their research materials they obtained as they covered the Watergate Break-in (Calvert & Pember).

According to Calvert & Pember, the court typically considers these three questions before considering making a reporter testify:

" 1. Has the person seeking the information from the reporter—normally the plaintiff— shown that this information is of certain relevance in the case? It must be related to the matter before the court.

2. Does this information go to the heart of the issue before the court? That is, is it critical to the outcome of the case?

3. Can the person who wants the information show the court that there is no other source for this information?" (Page 381)

When it comes to criminal cases, courts typically balance journalists' right to privilege with the Sixth Amendment right that the defendant enjoys to have testimony given on their behalf (Calvert & Pember). This means that journalists enjoy more privilege when it comes to civil cases than they do with criminal cases.

Grand Juries typically refuse to uphold reporters' first amendment privileges (Calvert & Pember).

III. Summarize the Approach Journalists should take Pertaining to Promising Confidentiality to Sources.

What advice should journalist give to sources who demand confidentiality?

When it comes to making promises to their sources, journalists should exercise some caution. It is clear that although journalists do enjoy some shield law privileges, the extent to which that privilege would apply within a given situation is highly subjective. Generally, journalists should make several considerations.

For one, the nature of the matter in question - whether civil or criminal has a great bearing. Sources involved in criminal activities are likely not to be protected by shield laws.

The treatment of *Branzburg v. Hayes* also differs from one geographical area to another, so that has to be put into consideration too. The variation occurs from one state to another and from one federal circuit to another.

The relative importance of the story to the public has an impact; as does the relevancy of the information to criminal or civil proceedings. If the information can only be gotten from that particular source, then there is a greater likelihood that the court will be keener on getting information from that source.

Reporters and their sources should be prepared to face the possibility of having to make a difficult choice should the worst come to the worst. In such situations, reporters either face jail time, or their sources release them from their obligation to maintain silence.

IV. What Protections do Shield Laws Provide, if any, in Addition to Federal Constitutional Protections Supporting Nondisclosure of News Sources?

Explain your Response.

Shield laws basically offer protection to reporters against forced disclosure of confidential information or confidential sources encountered in the process of newsgathering (Boutrous, 1999). Shield laws ideally protect journalists' sources and information even when the said information is about a criminal act and even when the confidential source may have broken the law in sharing the information with the said reporter (Boutrous).

Shield laws offer limited protection, particularly in the case of sources who are involved in criminal activities (Calvert, C & Pember). This is because the Branzburg ruling made direct and specific reference to criminal dealings. It is also difficult to tell whether a story would attract the kind of attention that would result in a hearing in the Supreme Court; this makes it very difficult to predict whether or not one can be forced to testify (Calvert, C & Pember). Outside a Grand Jury Setting however, journalists are pretty much safe from being forced to testify as far as Branzburg v. Hayes is applicable.

Some shield laws - at least half of the state shield laws in place do give reporters absolute privilege to conceal confidential sources. And for those that do not give absolute privilege, there are relatively high standards that have to be met (Boutros, 1998). The shield laws protect not just sources, but all information that is obtained during the process of gathering information for a news story.

Journalists are primarily concerned with protecting their confidential informants. They also need to keep their editorial process free from scrutiny (Boutros, 1998). Such scrutiny could result in self-censorship which would be the inevitable result of compulsory disclosure of sources or research material (Boutros, 1998). This should ideally not change, whether it is a civil or a criminal case.

Courts in the 6th Circuit Court of Appeals, that is Kentucky, Ohio, Michigan and Tennessee, have not granted reporters qualified First Amendment privilege (Calvert, C & Pember). They declined to do so in 1987. This means

that reporters can and have, been ordered by federal judges to reveal the identity of their confidential sources (Calvert, C & Pember).

The 7th Circuit Court of Appeals made a different decision concerning reporters' privilege, ruling that it was the duty of the courts to ensure that a subpoena directed to the media is reasonable - the same criterion used for all subpoenas (Calvert, C & Pember).

Now 37 states have shield laws. Shield laws are statutory provisions allowing reporters some freedom to refuse to reveal the identity of confidential sources (Calvert, C & Pember). As for courts of appeal, all apart from Wyoming do give some form of shield law, whether it is a constitutional or common law provision for testimonial privilege (Calvert, C & Pember).

The way the Branzburg rule has been applied has recognized the importance of safeguarding the processes by which reporters gather the news, and the privacy of their confidential sources. Thankfully, most of the states have recognized journalists' privilege although with varying degrees.

Federal prosecutors are growing more aggressive in seeking to subpoena reporters, which brings up an urgent need for courts to make clearer a federal common law that governs reporters' privilege.

References

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