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Constitutional Law -- Evidence -- No Testimonial Privilege For Newsmen

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the cognovit provision, the debtor would have a choice between reasonable alternatives, and, if he waived his rights, he would receive an identifiable value for his waiver.

CONCLUSION

Cognovit procedures are not unconstitutional *per se* because the due process rights to notice and hearing prior to judgment may be validly waived. If a strict standard of waiver is applied and if a presumption against waiver is maintained, the heavy burden on creditors to establish a valid waiver may well destroy the commercial utility of cognovit notes in small consumer transactions. If the burden is placed on the creditor to demonstrate a valid waiver in a hearing to reopen judgment, a confession of judgment would be of less use to the creditor than ordinary judgment procedures, in which he can rely on default judgments to keep his legal expenses down. The cognovit creditor would be forced to gamble that the facts of the particular case could establish the validity of the waiver in order to be certain of a valid judgment. This would be an equitable burden on the creditor. Cognovit procedures are undeniably legitimate and useful commercial devices in arm's length dealings between corporate parties. In disparate bargaining situations there is a great potential for unfairness and exploitation. If a heavy burded is placed on creditors to demonstrate the efficacy of the debtor's waiver, commercial expediency will determine that creditors only employ cognovit provisions in appropriate circumstances. A creditor simply could not afford to execute a confessed judgment not validly obtained if the debtor, armed with strict standards of waiver, can so easily reopen the judgment.

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Constitutional Law—Evidence—No Testimonial Privilege For Newsmen

From the time the issue of a newsman's first amendment right to withhold information was first raised,[1] attorneys and newsmen eagerly awaited a ruling on the question by the United States Supreme Court.

[1]Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958). All previous attempts were based on common law claims. *See, e.g.*, People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

Numerous articles were written prescribing and predicting what the Court should or would decide;[2] but that decision was long in coming as the Supreme Court has denied certiorari in case after case.[3] Finally, in 1971, certiorari was granted in three cases: *Branzburg v. Pound*,[4] *In re Pappas*,[5] and *Caldwell v. United States*.[6] In a five-to-four decision[7] the Court held that the first amendment does not grant to newsmen a testimonial privilege that other citizens do not enjoy. The purpose of this note is to analyze this decision, to compare it with the prior development of the law, and to evaluate the significance of the holding.

The fact situations in the three cases reviewed by the Court were similar in that they all involved challenges by newsmen to subpoenas requiring their appearances before grand juries. Staff reporter Branzburg was subpoenaed to testify as to his knowledge of drug law violations.[8] The subpoena was based on a news story under Branzburg's byline describing his observations of two persons synthesizing hashish from marijuana.[9] The subpoenas involving television newsman Pappas and black reporter Caldwell arose from grand jury investigations of the Black Panther Party. Both Branzburg and Pappas appeared before the grand juries but refused to answer certain questions that they believed called for information given to them in confidence. Branzburg refused to identify the two hashish makers on the ground that his promise not to reveal their identities was a condition to his gaining the information.[10] Pappas refused to answer questions about what took place inside Black Panther headquarters during a particular civil disorder because he had

[2]*See, e.g.*, Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971) (hereinafter cited as Blasi); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

[3]*E.g.*, Buchanan v. Oregon, 392 U.S. 905, *denying cert. to* State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968); Murphy v. Colorado, 365 U.S. 843 (1961); Torre v. Garland, 358 U.S. 910, *denying cert. to* 259 F.2d 545 (2d Cir. 1958).

[4]461 S.W.2d 345 (Ky. 1971), *cert. granted sub nom.* Branzburg v. Hayes, 402 U.S. 942 (1971).

[5]___ Mass. ___, 266 N.E.2d 297 (1971), *cert. granted*, 402 U.S. 942 (1971).

[6]434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971).

[7]Branzburg v. Hayes, 92 S. Ct. 2646 (1972) (reporting the disposition of all three cases). Justice White wrote the opinion for the Court, in which Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined. Justice Douglas dissented in a separate opinion, and Justice Stewart filed a dissenting opinion in which Justices Brennan and Marshall joined.

[8]Branzburg v. Pound, 461 S.W.2d 345, 346 (Ky. 1970).

[9]*Id.* at 345.

[10]*Id.* at 346.

agreed as a condition of entry not to disclose anything he saw or heard there.[11] Caldwell was the only reporter of the three who refused to appear at all before the grand jury. He justified his refusal on the ground that his working relationship with the Black Panther Party would be destroyed should he be forced to appear in secret before the grand jury,[12] for his informants, unable to attend the proceeding or to gain access to a report of it, would be unlikely to accept his word that their confidence had not been breached.

All three reporters argued that freedom of the press necessarily includes the right to gather news; that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed; and that if the reporter is forced to reveal confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information.[13] In short, refusal to recognize a testimonial privilege for newsmen results in suppression of the free flow of information to the public protected by the first amendment.

The Massachusetts Supreme Court in *Pappas* denied the existence of a newsman's privilege on the grounds that "[t]he principle that the public 'has a right to every man's evidence' "[14] had been preferred in their jurisdiction,that any effect of grand jury subpoenas on free dissemination of news was "indirect, theoretical, and uncertain,"[15] and that to hold otherwise would be to disregard the interests of the federal government and the states in the enforcement of the criminal law.[16] The Kentucky Court of Appeals in *Branzburg v. Pound* recognized a newsman's privilege against disclosing a source of information but not against disclosing the information itself.[17] In *Caldwell*, however, the Ninth Circuit, considering Caldwell's appeal from a contempt order issued by the District Court as a result of his refusal to appear before a federal grand jury, granted a qualified newsman's privilege covering sources and information on a " 'clear showing [by the government] of a compelling and overriding national interest that cannot be served by any alternative means.' "[18] The court's viewpoint is well stated:

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[11] *In re* Pappas, ___ Mass. ___, ___, 266 N.E.2d 297, 298 (1971).

[12] Caldwell v. United States, 434 F.2d 1081, 1084 (9th Cir. 1970).

[13] Branzburg v. Hayes, 92 S. Ct. 2646, 2655 (1972).

[14] ___ Mass. at ___, 266 N.E.2d at 299, *quoting* 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. 1961).

[15] ___ Mass. at ___, 266 N.E.2d at 302.

[16] *Id.*

[17] 461 S.W.2d at 347.

[18] 434 F.2d at 1086, *quoting* Application of Caldwell, 311 F. Supp. 358, 360 (N.D. Cal. 1970).

> The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes. To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function.[19]

The relief sought by petitioners Branzburg and Pappas and respondent Caldwell in the Supreme Court was the recognition of a qualified newsman's privilege similar to that granted by the Ninth Circuit:

> [T]he reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.[20]

A survey of past Supreme Court decisions involving infringement of first amendment rights discloses that petitioners in *Branzburg v. Hayes* had ample reason to hope for a favorable decision, for the Court has constructed a labyrinth of protective devices around the sensitive areas of freedom of speech, press, and association.[21] The decisions most

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[19]434 F.2d at 1086.

[20]92 S. Ct. at 2655.

[21]In 1919 Justice Holmes first enunciated the "clear and present danger" test, Schenck v. United States, 249 U.S. 47, 52 (1919), which was refined in subsequent cases to include only advocacy of destructive action, not ideas, Yates v. United States, 354 U.S. 298, 318 (1957), and only such advocacy as was likely to incite or produce such action. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

The overbreadth doctrine involves the striking down of statutes having the possibility of unnecessarily deterring the free exercise of first amendment rights. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966); Winters v. New York, 333 U.S. 507 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940).

The balancing test is a device used to evaluate the necessity of governmental encroachment upon individual rights and has been applied to legislative investigating committees. *E.g.*, DeGregory v. Attorney Gen., 383 U.S. 825 (1966); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Uphaus v. Wyman, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957). It has also been applied to bar admissions. *E.g.*, *In re* Stolar, 401 U.S. 23 (1971); Baird v. State Bar, 401 U.S. 1 (1971). *See generally* NAACP v. Button, 371 U.S. 415 (1963); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State, 308 U.S. 147 (1939).

pertinent to determining the extent of a newsman's privilege to refuse to testify before a grand jury are the cases concerning the investigative powers of federal and state legislative committees. The Supreme Court has restricted those powers in several cases to avoid unnecessary infringement of first amendment rights.[22]

One of the first cases to require such restriction was *Watkins v. United States*.[23] The petitioner in that case was summoned to testify before a subcommittee of the House of Representatives Committee on Un-American Activities. He testified freely as to his own activities but refused to answer questions as to his knowledge of membership by other persons in the Communist Party. He was convicted of a violation of 2 U.S.C. § 192, which makes it a misdemeanor for any person summoned as a witness by either House of Congress to refuse to answer any question "pertinent to the question under inquiry." After granting a writ of certiorari, the United States Supreme Court reversed. Recognizing that the power of Congress to investigate is necessary and broad,[24] the Court nevertheless proceeded to place limitations on it to assure protection of first amendment rights of association. In the words of Chief Justice Warren, "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged."[25] The Court placed on such congressional investigations the requirement that the inquiry be justified by a specific legislative need,[26] and that the jurisdiction of the investigating committee be spelled out with sufficient particularity to insure that compulsory process is used only in furtherance of that legislative purpose.[27] The Court endorsed use of a balancing test to determine the validity of a stated legislative purpose:

Finally, the Court has afforded specific safeguards to the press by extending protection to distribution, Talley v. California, 362 U.S. 60 (1960), and receipt of information, Lamont v. Postmaster Gen., 381 U.S. 301 (1965). The need for self-censorship from fear of libel suits has been reduced by the imposition of a heavier burden of proof upon public officials, public figures, and private individuals involved in matters of legitimate public interest. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[22]Cases cited note 21 *supra*.

[23]354 U.S. 178 (1957).

[24]*Id.* at 187.

[25]*Id.* at 188.

[26]*Id.* at 205.

[27]*Id.* at 201.

> It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. . . . The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected.[28]

This balancing test was repeated in various forms in subsequent cases[29] until it became phrased in terms of an "overriding and compelling state interest."[30] One of the most recent cases to apply this test was *DeGregory v. Attorney General*.[31] The appellant in that case refused to answer questions put to him by the Attorney General[32] concerning his connection with the Communist Party ten years earlier. The Supreme Court reversed his contempt conviction because there was no showing of "overriding and compelling state interest" for lack of a "nexus"[33] between the witness and the subject under investigation.

Believing a grand jury investigation to be analogous to a legislative committee investigation, petitioners in *Branzburg* asked for protection of their constitutional rights similar to that granted witnesses before legislative committees: that a nexus be shown between the reporter and the crime under investigation and that the need be sufficiently compelling to override the invasion of first amendment interests occasioned by the disclosure.[34] The Ninth Circuit had accepted the analogy, but the Supreme Court did not.

Four major factors influenced the Court to distinguish between grand jury and legislative committee investigations. Perhaps the most consequential was the lack of empirical proof that forced disclosures of

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[28]*Id.* at 198.

[29]"Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Barenblatt v. United States, 360 U.S. 109, 126 (1959). "[W]e have for decision the federal question of whether the public interests overbalance these conflicting private ones." Uphaus v. Wyman, 360 U.S. 72, 78 (1959).

[30]Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963).

[31]383 U.S. 825 (1966).

[32]The Attorney General is authorized under N.H. REV. STAT. ANN. § 588:8-a (Supp. 1971) to investigate any of the violations provided in § 588:2 of that chapter. Such violations cover a wide range of "subversive" activities, including "any act intended to overthrow, destroy or alter . . . the constitutional form of the United States, or of the state of New Hampshire. . . ." *Id.* § 588:2 (1955).

[33]383 U.S. at 829-30, *quoting* Uphaus v. Wyman, 360 U.S. 72, 79 (1959).

[34]92 S. Ct. at 2655.

sources can obstruct the free flow of information to the public.[35] While conceding that newsgathering should and does qualify for first amendment protection,[36] the Court refused to make the requisite factual assumptions necessary to imply from the right to gather news a right to protect informational sources.[37] The Court was simply unconvinced that use of the subpoena power would deter potential sources from divulging information:[38] "[W]e remain unclear [*sic*] how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury."[39] Consequently, the potential loss of news sources caused by even an unbridled use of the subpoena power by the grand jury was characterized by the Court as an "incidental burdening of the press"[40] that may be upheld as a necessary adjunct to the enforcement of valid laws.[41] The Court seemed to demand a higher burden of proof of infringement of freedom of the press than it has demanded in other first amendment cases. As Justice Stewart said in his dissenting opinion:

> [W]e have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental

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[35]*Id.* at 2662-63.

[38]*Id.* at 2656.

[37]The right to gather news implies the right to protect news sources when four factual assumptions are accepted: 1) newsmen require informants to gather news; 2) confidentiality is essential to establishment of relationships with many informers; 3) use of an unbridled subpoena power will deter potential sources from divulging information; 4) use of an unbridled subpoena power will deter reporters from gathering or publishing information which might lead to a demand for complete compulsory disclosure. Note, 80 YALE L.J., *supra* note 2, at 329.

[38]In spite of numerous briefs filed by the news media as amici curiae in Caldwell v. United States, 434 F.2d 1081, 1083 (9th Cir. 1970), and an empirical study, Blasi, *supra* note 2, at 246-47 (the average newsman relies on "regular" confidential sources in 22% of his stories and on first-time confidential sources in 12.2% of his stories, and the news coverage of 8% of the 887 newsmen questionedhad been adversely affected in the last eighteen months by the possibilityof subpoena), the Court said, "[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen." 92 S. Ct. at 2662.

[39]92 S. Ct. at 2662.

[40]*Id.* at 2657.

[41]The Court cites numerous cases to illustrate: Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (a newsman has no right of special access to information not available to the public generally); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (a newsman has no privilege to invade the rights and liberties of others); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (a newspaper may be subjected to nondiscriminatory forms of general taxation).

> action, who would actually be dissuaded from engaging in First Amendment activity.[42]

This strict proof requirement is a definite departure from the rule applied in legislative investigation cases, where the Court has been willing to speculate on the damage causd by unnecessary and overly broad questioning:

> Abuses of the investigatory process may *imperceptibly* lead to abridgment of protected freedoms. . . . Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and *immeasurable* effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time.[43]

The Court's characterization of the burden on newsgathering that results when reporters must disclose confidential information as an "incidental" one was instrumental in its consideration of the second factor: the public interest in law enforcement. As in other first amendment cases, the Court employed a balancing test to determine whether the public interest involved was so "overriding and compelling" as to condone infringement of a first amendment right.[44] Normally the scales in such a test are weighted in favor of a right guaranteed by the Constitution, but a predetermination that the infringement of that right is only "incidental" shifts the weight. The imbalance is blatant in the Court's reading of the scales: "[W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[45]

The imbalance is augmented by the Court's consideration of the third factor: the nature of the grand jury. Though a grand jury investigation, like a legislative committee investigation, is a form of governmental action, the Court refused to limit the grand jury's investigatory powers as strictly as those of investigting committees. One reason was

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[42]92 S. Ct. at 2676.

[43]Watkins v. United States, 354 U.S. 178, 197-98 (1957) (emphasis added).

[44]Cases cited note 21 *supra*.

[45]92 S. Ct. at 2661.

the historical role of the grand jury[46] as a protective device for citizens against unfounded criminal prosecutions.[47] Because of its dual function, the grand jury's investigative powers have always been necessarily broad, and its authority to subpoena witnesses, essential.[48] The Court had previously determined in *Watkins* that a legislative committee's power of inquiry is also broad, but had held that it is "not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."[49] The Court refused to recognize any such limitation upon the grand jury's power of investigation; consequently, it found no abuse by the grand jury of its proper function in the case before them: no "expos[ing] for the sake of exposure" as in *Watkins*[50] and no "probing at will and without relation to existing need" as in *DeGregory*.[51] By defining the grand jury as "an instrument of justice"[52] and its purpose as "[f]air and effective law enforcement aimed at providing security for the person and property of the individual,"[53] the Court concluded that "ensuring effective grand jury proceedings"[54] is an interest compelling enough to justify an indirect burden on first amendment rights. The Court deemed the common law principle that "the public . . . has a right to every man's evidence"[55] essential to effective grand jury proceedings. This duty to testify was recognized earlier in connection with legislative committee proceedings, but was subordinated to first amendment freedoms.[56] Obviously, the Court accords to the grand jury a status superior to that of legislative committees. The basis for this hierarchy seems to be that grand jury proceedings are "constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious

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[46]*Id.* at 2659.

[47]Wood v. Georgia, 370 U.S. 375, 390 (1962). *See also* Note, *The Grand Jury As An Investigatory Body*, 74 HARV. L. REV. 590 (1961).

[48]92 S. Ct. at 2660.

[49]354 U.S. at 187.

[50]*Id.* at 200.

[51]383 U.S. at 829.

[52]92 S. Ct. at 2659, *quoting* Costello v. United States, 350 U.S. 359, 362 (1956).

[53]92 S. Ct. at 2659.

[54]*Id.* at 2661.

[55]8 J. WIGMORE, *supra* note 14, § 2192.

[56]"It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas . . . . This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice." Watkins v. United States, 354 U.S. 178, 187-88 (1957).

crimes"[57] and that "the adoption of the grand jury 'in our Constitution as the sole method of preferring charges in serious criminal cases shows the high place it held as an instrument of justice.' "[58]

The fourth factor that in the Court's opinion militates against the granting of a newsman's testimonial privilege is that such a system would be unaccountable to the public.[59] The individual newsman would have the privilege of deciding when and how much to divulge. The Court distinguishes the police-informant privilege[60] on this basis; that is, the public, through its law enforcement officers, may decide whether or not to assert a privilege against disclosing the identity of its informers.[61] The privilege belongs to the law enforcer who represents the public, rather than to a newsman who does not represent the public. But this reasoning is fallacious. Does not the newsman represent the public in his quest to keep them informed?

The police-informant privilege is justified on the ground that it encourages the flow of information to law enforcement agencies.[62] Agreements to conceal information concerning the commission of crimes have never been viewed favorably in the law,[63] and the Court is reluctant to offer any protective device to newsmen or their sources that would shield them from an obligation to report any knowledge of criminal activities to law enforcement agencies.[64] The Court does not acknowledge a paradox in their position which the Ninth Circuit noted in *Caldwell*:[65] that newsmen will be unlikely to possess information relevant to the commission of crimes if informants cease taking them into their confidence. Consequently, journalists will be unable to serve any public function either as news gatherers or as prosecution witnesses. Encouragement of the flow of information to law enforcement agencies as well as to the public would seem therefore a sufficient justification for a newsman-informant privilege.

The Court asserts that police-informers are actually unprotected[66]

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[57]92 S. Ct. at 2659.

[58]*Id.*, *quoting* Costello v. United States, 350 U.S. 359, 362 (1956).

[59]92 S. Ct. at 2664.

[60]8 J. WIGMORE, *supra* note 14, § 2374(f).

[61]92 S. Ct. at 2664.

[62]*Id.*

[63]Misprison of a felony was a common law crime. 4 W. BLACKSTONE, COMMENTARIES *121. Congress has also recognized such a crime. 18 U.S.C. § 4 (1970).

[64]92 S. Ct. at 2664.

[65]434 F.2d at 1086 n.5.

[66]92 S. Ct. at 2664.

since their identity cannot be concealed when critical to a defendant's case.[67] Under the qualified privilege requested by petitioners, would not a showing of compelling need accomplish the same result? The Court answered this contention by asserting that the qualified privilege sought by petitioners would not accomplish their own purpose of protecting their confidential news sources, for such informants would still face the prospect of being unmasked whenever a judge determined it was necessary.[68] This conclusion is logical, yet even a contingent privilege would improve the present situation according to Professor Blasi:

> What really matters, in the judgment of many newsmen, is the basic recognition in principle of a newsman's privilege; the precise wording is not so important. The [Ninth Circuit's] *Caldwell* decision, for example, has had a remarkable effect in "clearing the air," despite the fact that the court's holding was sharply qualified.[69]

Blasi concludes that "[n]othing, in the opinion of every reporter with whom I discussed the matter, would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit's *Caldwell* holding."[70]

Branzburg represents a significant step backwards for the Supreme Court. The case presented a challenge to the Court either to fit the issues into an existing legal framework or to devise new first amendment standards for resolving the dispute.[71] The Court did neither. Instead of using existing law or developing new standards, the Court looked to the past, basing its decision on common law theories[72] and historical reasoning.[73] Present-day overuse of the subpoena power against the press by governmental investigative bodies[74] demands a solution if the critical role of an independent press in our society is to be preserved. Justice Powell, in his concurring opinion, gives some hope of a more responsive decision in the future by stating that the balancing of this vital constitutional issue against the obligation of all citizens to give relevant testimony with respect to criminal conduct will be done on a case-by-case basis.[75] Perhaps if more empirical data is amassed, Justice Powell will

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[67]Roviaro v. United States, 353 U.S. 53 (1957).
[68]92 S. Ct. at 2667.
[69]Blasi, *supra* note 2, at 281.
[70]*Id.* at 283.
[71]*Id.* at 234.
[72]92 S. Ct. at 2663-64.
[73]*Id.* at 2659.
[74]Note, 58 CALIF. L. REV., *supra* note 2, at 1199-1202.
[75]92 S. Ct. at 2671.

cast a deciding vote in favor of the preservation of a free and independent press.

CHAN POYNER PIKE

Constitutional Law—Municipal Boundary Changes and the Fifteenth Amendment

The struggle of blacks in this country to obtain and preserve the franchise has been a difficult and continuing one. They have had to overcome many obstructions along the path to the voting booth. The fifteenth amendment[1] to the Constitution has served throughout this struggle as the legal standard by which alleged infringements of the right to vote have been judged. In *Holt v. City of Richmond*,[2] black residents of the city utilized the fifteenth amendment to challenge the city's annexation of a portion of a suburban county immediately prior to a city council election at which black voters were expected to elect a majority of the members. The Fourth Circuit held in *Holt* that the annexation was constitutional on its face and that possible illicit motivations of those individuals responsible for the annexation were, under the circumstances of the case, too remote from the fact of the annexation to taint its constitutional validity.[3]

The problem in *Holt* had its origins in 1962 when the City of Richmond initiated judicial proceedings to annex portions of two adjacent counties, Henrico and Chesterfield. The city first concentrated on the Henrico area, but upon receiving an unsatisfactory annexation award from the state annexation court,[4] the city diverted its attention to Chesterfield County. Before a judicial determination was rendered,[5] Richmond and Chesterfield County reached a compromise agreement specifying the new boundaries of Richmond, the price to be paid for the annexed area, and the county's agreement not to appeal the annexation

[1]U.S. CONST. amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[2]459 F.2d 1093 (4th Cir. 1972).

[3]*Id.* at 1094.

[4]*Id.* at 1095. The annexation court had decided that Richmond ought to pay Henrico County 55 million dollars for 16.16 square miles of land. Richmond thought this price too high.

[5]The formal trial had first begun in September of 1968, but a mistrial was declared in January of 1969 when one of the judges disqualified himself. *Id.*