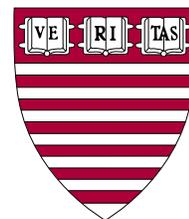


THE REPORTER'S PRIVILEGE, THEN AND NOW

by
Stephen Bates

Research Paper R-23
April 2000

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In passing back and forth between his scientific friends and his literary friends, C.P. Snow once observed, he detected “a gulf of mutual incomprehension.” The two groups had “almost ceased to communicate at all,” producing “a curious distorted image of each other.” To Snow, they represented nothing short of two distinct cultures.¹

The same might be said of journalists and officials in the American criminal justice system—investigators, judges, and, especially, prosecutors—when it comes to whether reporters should be called before grand juries. The journalist maintains that testifying would undermine his constitutional function of keeping the public informed. In this view, subpoenaing a journalist threatens to transform the independent press into an investigative arm of the government; it silences potential confidential sources, which reduces the flow of information to the citizenry; and it thereby violates the First Amendment. Many journalists, Howard Simons and Joseph Califano once wrote, “believe the First Amendment places them in a constitutionally elite class.”²

From the government’s perspective, safeguarding the autonomy of the press often seems less important than helping the grand jury assemble pertinent evidence. By virtue of their work, journalists come into possession of such evidence more than most people. In this view, testifying is simply one of those obligations that society imposes on its citizens. *All* of its citizens, including journalists.

The mutual incomprehension sometimes stifles reason and perspective. In a 1981 speech, *New York Times* executive editor A.M. Rosenthal declared that, by enforcing subpoenas against journalists, the courts were telling the press “what to publish, when to publish, how to operate, what to think.” When four *Fresno Bee* journalists refused to name their sources in 1976, a judge upbraided them for an “act of fanaticism.”³

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I have some sympathy with both sides. As a law student, I used a separation-of-powers analysis to argue for enhancing the institutional press’s legal protection. Just as Congress cannot trespass on the domain of the executive, I argued, so too the government should not trespass on the domain of that quasi-fourth branch, the press. If the state can use the press for its own ends—including by forcing journalists to testify—then the essential independence of the press is compromised. (I applied the same analysis to another institutional beneficiary of the First Amendment, the church.) My article, published in the magazine *Freedom at Issue*, called for a bold new constitutional jurisprudence; as with many such calls, it was universally ignored.⁴

Working for the Whitewater Independent Counsel a decade later, I dealt with the law as it is rather than as I think it ought to be. A major witness, Susan McDougal, refused to testify before the grand jury, but she talked volubly to the press. Her published or broadcast remarks were no substitute for testimony under oath, but, in the face of her intransigence, they were all we had, and we wanted all we could get. So we subpoenaed ABC for the full video, including outtakes, of McDougal’s interview with Diane Sawyer on *PrimeTime Live*. ABC filed a motion to quash the subpoena, and I worked on the response.

While the ABC case is no landmark—the network lost before a federal district judge and chose not to appeal—it does make for an illuminating case study. To begin with, it shows the odd evolution of the law in this sphere. After the Supreme Court ruled that journalists have no First Amendment privilege, several federal appeals courts proceeded to hold that such a privilege *does* exist. ABC, not surprisingly, stressed the appellate rulings and said little about the Supreme Court decision. The litigation also suggests how media attorneys sometimes deal with defeat in this realm—by turning over the requested materials without an appeal, thereby minimizing the potency of an adverse precedent—and how such strategic thinking may look like cowardice to others in the press.

In this paper, I try to explore how prosecutors and journalists see the issue of press subpoenas.

I look first at how the issue has been framed and fought over the years. Next I track the ABC subpoena, the litigation over it, and the subsequent commentary. I conclude with brief observations about, among other things, the intrusiveness of subpoenas, the theoretical and practical obstacles to recognizing a journalist's privilege, the social costs of what some have called the "ritual jailing" of reporters, and the virtues—for press and government alike—of self-restraint.

Honor and Professionalism

Journalists began claiming a right to silence over 150 years ago, initially against Congress and later against the courts. The first recorded case occurred in 1848, when the *New York Herald's* John Nugent refused to reveal who had given him a copy of a secret draft treaty with Mexico. He was jailed for contempt of Congress, and a federal judge ruled that the courts had no power to intervene. The *Herald* doubled his salary while in captivity, and Nugent filed articles bearing the dateline "Custody of the Sergeant-at-Arms." "When the Senate awoke to the futility of the situation," writes historian Donald Ritchie, "it released Nugent on the face-saving grounds of protecting his health."⁵

It is no accident that the issue first arose in the 19th century, the dawn of the nation's age of professionalization—a time when, as sociologist Nathan Hatch observes, American undertakers tried to distance themselves from cabinetmakers and liverymen by adopting the title *mortician*, a word chosen to echo *physician*. By saying (as they did by century's end) that they needed a testimonial exemption akin to the attorney-client privilege, journalists were equating their work, and its social value, with that of attorneys. The journalists were neither the first nor the last to stake such a claim. "Every newly established professional group seeks the privileges of existing ones," writes Sissela Bok. "Established ones, on the other hand, work to exclude those whom they take to be encroaching on their territory."⁶

Along with guarding their own turf, lawyers had a second reason to pooh-pooh a journalist's privilege. Whereas most rules of evidence are geared toward finding the truth, testimonial privileges, in the words of the *Harvard Law Review*, "subordinate the goal of truth seeking to other societal interests." As a result, the law tends to look on privileges, especially novel ones, with disfavor. An 1810 treatise on American evidence law recognized the attorney-client and spousal communication privileges, but dismissed as

wholly unsupported two upstart privileges, doctor-patient and clergy-penitent. The courts later validated those privileges, and journalists hoped for similar success over time.⁷

John Nugent's explanation for his silence, if he gave one, is not recorded. By the early 20th century, journalists were contending that disclosure would cause myriad harms. Breaking his pledge of confidentiality, a reporter said in a 1911 case, would cause him to suffer "the forfeiture of an estate, to wit, it would cause him to lose his means of earning a livelihood." In a 1914 case, a Hawaii journalist posited a chilling effect: "[I]f we break confidence with the source of news we would lose all of our sources and would have no newspaper." The courts were unmoved. "Hereafter," a Pennsylvania judge told a reporter in 1930, "you must overlook your profession when you are called upon to answer testimony, like a good citizen."⁸

Some legislatures intervened. The earliest shield law was adopted by Maryland in 1896, a decade after a *Baltimore Sun* police reporter had been jailed for refusing to name his sources. In his influential evidence treatise, John Henry Wigmore called the Maryland law "as detestable in substance as it is in form," but shield laws eventually spread. Seven states passed them in the 1930s, and three more in the 1940s. Congress first considered federal shield legislation in 1929, but the bills never passed.⁹

Enter the First Amendment

Most of the early privilege cases involved matters of public policy—secret draft treaties, allegations of official corruption, police brutality, and the like. Not so *Garland v. Torre*, the first case to consider a well-honed First Amendment argument, and the first to reach a federal appeals court. At issue here was Judy Garland's body image.

Garland had agreed to do a series of CBS specials in 1957, but network executives could not get her to agree on a date and format for the first one. In the *New York Herald Tribune*, columnist Marie Torre quoted an unnamed CBS executive as saying that "something is bothering [Garland] . . . I don't know, but I wouldn't be surprised if it's because she thinks she's terribly fat." Garland—who, according to biographers, at the time was indeed overweight and was overmedicating herself with diet pills—sued CBS for \$1.4 million, alleging libel and breach of contract.¹⁰

Today, a court would likely dismiss the libel portion of a suit like Garland's. In 1957, though,

the Supreme Court had yet to raise the bar for libel suits brought by public figures, so the suit proceeded. Questioned by Garland's attorneys, Torre testified that the quotation in her article was accurate but refused to identify the source. If she did so, she said, "nobody in the business will talk to me again."¹¹

Herald Tribune lawyers argued that the First Amendment creates a reporter-source privilege. For a novel argument, it won respectful attention in the appeals court. "[W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news," wrote Judge (later Justice) Potter Stewart, serving as a visiting judge in the Second Circuit (he was based on the Sixth Circuit). He added later: "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society." That freedom, however, "is not an absolute," for "basic too are courts of justice, armed with the power to discover truth." The obligation to testify "impinges sometimes, if not always, upon the First Amendment freedoms of the witness," who at a minimum loses "[t]he freedom to choose whether to speak or be silent." Garland, Judge Stewart wrote, was not seeking "wholesale disclosure of a newspaper's confidential sources." Because "the question . . . went to the heart of the plaintiff's claim," he wrote, "the Constitution conferred no right to refuse an answer." Marie Torre would have to identify her source.¹²

Rather than complying, Torre went to jail for 10 days. Her incarceration was heavily covered, producing reams of fan mail and, she later wrote, "more visitors . . . than I really cared to see." From her cell, she sent a letter to the former *Herald Tribune* publisher who had backed her refusal to testify. "Thanks," she wrote, "for giving me the biggest opportunity of my career."¹³

Adversarial Press, Adversarial Government

From John Nugent in 1848 to Marie Torre in 1958, subpoenas represented a sporadic annoyance rather than a continuing menace to the press. Not a word about the issue appeared in the 1950 edition of the treatise *Legal Control of the Press: Concerning Those Potential or Actual Controls that Affect the Press, Particularly Libel, Privacy, Contempt, Copyright, Regulation of Advertising, and Postal Laws*.¹⁴

Journalists might try to avoid getting ensnared in legislative battles, like Nugent, or in civil litigation, like Torre. But, through the mid-1960s, many of them viewed law enforcement in a different light. They provided information to police, prosecutors, and grand juries, often informally and without a subpoena. Police reporters of this era were at least "half cop," writes David Shaw of the *Los Angeles Times*; "their interests and their instincts lay with the police." In the late 1960s, though, attitudes started to change. "The new-breed reporter was generally younger, more skeptical, often more liberal, and he asked questions and wrote stories that sometimes made law enforcement look bad. . . ." writes Shaw. Moreover, he notes, the new reporters were "often looking and thinking and talking more like the demonstrators than like the police." Especially in large cities, press and law enforcement no longer saw themselves as teammates.¹⁵

At the same time, journalists possessed far more information of interest to law enforcement than ever before. The nation suffered its most violent riots in decades, riots covered by television. That film became potentially valuable evidence in prosecutions. In addition, whereas criminal suspects traditionally avoid the press, many of the new, self-styled revolutionary groups hungrily sought coverage. Reporters, according to attorney Marcus Cohn, often developed close "relationships with the social activists of our time." As a result, the press sometimes possessed better information than the police did.¹⁶

Take Earl Caldwell of the *New York Times*. In his view, the Black Panther movement grew out of the "thousands of black folks who were fed up, who were so filled with rage that they . . . were about to explode." He began covering the Panthers in late 1968, and soon began spending hours at their national headquarters in Berkeley. "Often I would not leave until 3 or 4 in the morning. The party trusted me so much that I did not have to ask for permission to bring along a tape recorder." He kept tapes of his conversations as well as files with notes on personalities, off-the-record revelations, and his reactions to events. When Eldridge Cleaver asked how his reporting was serving the cause, Caldwell writes, "I wrestled with the question."¹⁷

The FBI had a somewhat different take on the Panthers. J. Edgar Hoover deemed them a major threat to the nation's security, and the bureau's COINTELPRO program sought to infiltrate, harass, and disrupt the Panthers and other New

Left organizations. After writing in the *Times* about a cache of weapons in Panther headquarters, Caldwell was questioned by FBI agents, but “they left me alone when I assured them that all the information was available in the newspaper.” Another of his articles quoted a Black Panther official as urging “the very direct overthrow of the government by way of force and violence.” Agents tried to question him again, but he refused to talk. Finally prosecutors served a grand jury subpoena demanding his tapes, notebooks, and other materials about the Panthers.¹⁸

Caldwell was not alone. That same week in 1970, prosecutors subpoenaed tapes and outtakes of the Black Panthers from CBS, as well as notes and photos related to the Weathermen from *Time*, *Life*, and *Newsweek*. In the Chicago Seven trial of 1969, prosecutors sought—from those three magazines, the three TV networks, and Chicago’s four newspapers—all notes, outtakes, drafts, and anything else referring to the disorder at the Democratic convention. During the first 20 months of the Nixon administration, CBS and NBC were served with more than 120 subpoenas, nearly half of them issued by attorneys for the government. *Columbia Journalism Review* warned of a “subpoena epidemic” that was seeking to reduce the press to “a de facto arm of the Attorney General’s office.” Subpoenas to journalists, unmentioned in 1950’s *Legal Control of the Press*, dominated the 1974 American Civil Liberties Union book *The Rights of Reporters*.¹⁹

Most media organizations complied, sometimes redacting confidential source names from internal files. But, according to James Aronson’s *Deadline for the Media* (1972), there was a good deal of grumbling. Picketing CBS, journalists distributed a leaflet accusing network management of turning reporters into “police agents.” At the *Wall Street Journal*, most members of the editorial staff signed a petition urging management not to surrender files to prosecutors. Caldwell retained his own attorney rather than relying solely on *Times* attorneys, who, he feared, might barter away his rights.²⁰

Strategic Subpoenas?

Most of these subpoenas originated with federal grand juries, and the administration that took office in 1969 was singularly inhospitable to the press. Indeed, many commentators depict the subpoenas as part of a comprehensive anti-press strategy. The use of grand jury subpoenas, journalist Joseph C. Spear writes in *Presidents and the Press: The Nixon Legacy* (1984), was

“the tactic that most threatened to destroy freedom of the press,” for “[a] reporter’s sources are the one treasure he cannot live without.” To former *New York Times* reporter Aronson, some of the subpoenas were geared toward “silencing the growing number of black reporters in the general press.”²¹

Congress soon added to the subpoena epidemic. In 1971, the House of Representatives demanded outtakes from the controversial CBS documentary *The Selling of the Pentagon*. CBS president Frank Stanton refused, saying that “the official effort to compel evidence about our editing processes has an unconstitutionally chilling effect.” The responsible subcommittee voted to cite CBS for contempt of Congress, but the House, by a vote of 226 to 181, sent the matter back to the subcommittee.²²

“My God, is this Nazi Germany? Is this Communist Russia?” said Sander Vanocur when some fellow journalists talked of destroying files lest they be subpoenaed. In Congress, Rep. Glenn M. Anderson declared that journalists imprisoned for refusing to testify are in essence “jailed for seeking the truth.” William R. Burleigh, managing editor of Indiana’s *Evansville Press*, said in a speech, reprinted in the *Congressional Record*: “Prosecutors, grand juries and legislatures seek to make newsmen unwitting handmaidens of the official state apparatus. . . . In essence, when you strip away the artifice, they are saying they don’t trust freedom; liberty is not the wisest course. . . . It is not overstating the question to ask whether we as a free people can endure.”²³

Addressing the American Bar Association, Attorney General John Mitchell acknowledged that this “bitter dispute . . . has already produced seeds of suspicion and bad faith.” While “current law clearly supports” the subpoenas, he said, “there are some situations where the public interest is better served by negotiations.” Pledging “good faith and common sense,” he outlined detailed guidelines to discourage federal prosecutors from subpoenaing the press.²⁴

Administration critics were skeptical. The language in the guidelines, Marcus Cohn wrote, “allow[s] for tremendous latitude of non-appealable interpretations,” and much would depend on who holds office as Attorney General. Others darkly quoted Mitchell’s statement in another context: “Watch what we do, not what we say.” Some journalists sought federal legislation to restrict subpoenas. One bill would have barred subpoenas in nearly all circumstances unless the government was investigating a threat of foreign aggression, a determination that could be made

only by a federal district court. Some bills addressed only federal inquiries; others would have restricted state proceedings as well. The administration maintained that no law was needed, given the Justice Department guidelines.²⁵

As in the past, many reporters maintained that no statute was needed because the First Amendment already conferred a privilege, one that no legislature could diminish or revoke. In Caldwell's case, the federal district judge agreed. The court exempted him from having to testify about confidential communications unless the government demonstrated a "compelling and overriding national interest . . . which cannot be served by any alternative means." Caldwell appealed anyway, arguing that the First Amendment gave him a right to refuse to set foot in the grand jury room entirely, lest his sources be left wondering just how much he had revealed in that secret proceeding. Remarkably, he won: the U.S. Court of Appeals for the Ninth Circuit ruled that he could not be forced to appear before the grand jury, even to testify about nonconfidential matters, unless the government demonstrated a compelling need. This time the prosecutors appealed, and the Supreme Court agreed to hear the case.²⁶

The Court merged Caldwell's appeal with two others, both dealing with subpoenas issued by state grand juries. Paul Pappas, a TV reporter in New Bedford, Massachusetts, had pledged not to reveal anything he saw or heard inside a Black Panthers headquarters unless police raided the building; the police never came, and Pappas refused to testify. Paul Branzburg of the Louisville *Courier-Journal* refused to identify drug dealers and users featured in articles he had written.²⁷

The Supreme Court Weighs In

In an opinion written by Justice Byron White and issued on June 29, 1972, the Supreme Court, by a five-four vote, rejected the privilege claims of all three journalists.

The grand jury, the Court said, is "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation." Grand jurors are entitled to "every man's evidence" absent a privilege based on the common law, a statute, or the Constitution. The courts had not recognized a common law privilege for journalists, and Congress had not passed

statutory protection (though some states had done so)—which left only the Constitution as the possible foundation.²⁸

"Until now," the Court said, "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."²⁹

What of the possible chilling effect? The Court said that "[e]stimates of the inhibiting effect of such subpoenas . . . are widely divergent and to a great extent speculative." (As First Amendment scholar Melville Nimmer observes, the Court seemed to demand empirical proof of a chill in *Branzburg*, but, in *United States v. Nixon* two years later, the Justices simply cited "human experience" for the proposition that the threat of disclosure would chill communication in the White House.) The Court also observed that "the press has flourished" for nearly two centuries with no privilege. And even if there were some chilling effect, the public interest in pursuing and prosecuting crimes outweighs the public interest in the particular news coverage. "[I]t is obvious," the Court said, somewhat snippily, "that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."³⁰

Having concluded that the First Amendment spawned no privilege, the Court closed its analysis by suggesting, through a flurry of double negatives, that the Constitution might still protect journalists against a malicious prosecutor: "[N]ews gathering is not without its First Amendment protections, and grand jury investigations, if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."³¹

The opinion in *Branzburg* represented the views of five justices, two of whom—William H. Rehnquist and Lewis F. Powell, Jr.—had been on the Court for only a few months. Justice Powell decided to sign on to the White opinion "[a]fter

much hesitation," according to one account. His vote created the majority bloc, but he also filed an unorthodox concurring opinion. Whereas a concurring opinion ordinarily adds nuance or filigree to the Court's reasoning, Justice Powell appeared to contradict the majority opinion that he had joined.³²

Wrote Justice Powell, "As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy." So far, so good—that is just what the majority had said.³³

Justice Powell, however, then ventured well beyond the Court's ruling: "Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." In a footnote, he spoke of "the balancing that will be appropriate under the court's decision." There would be no "constitutional preconditions," no preliminary burden of proof (as Caldwell had sought) that prosecutors would have to meet before a journalist could be forced to appear in the grand jury; rather, the judge would "balance the competing interests on their merits in the particular case" in response to a motion to quash. He concluded: "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."³⁴

To recap: The majority rejected the claim of a reporter's testimonial privilege; Justice Powell seemingly recognized it. The majority rejected the call for a case-by-case, conditional balancing of interests; Justice Powell mandated it. The majority indicated that a journalist could quash a subpoena only by showing that it was issued in bad faith; Justice Powell extended the zone to good-faith subpoenas seeking "remote and tenuous" information. The majority said that prosecutors must treat journalists like other citizens;

Justice Powell suggested that, in response to a motion to quash, prosecutors may need to demonstrate that the information sought is relevant or necessary, a showing not required for ordinary witnesses. Yet Justice Powell joined the majority opinion. Indeed, his vote *made* it the majority opinion.

The effort to find middle ground was typical of Justice Powell. Legal scholars have written of his "instinct for moderation and compromise" and his need to "find the center, to strike the balance between competing interests." For years, in fact, he defined the center of the Supreme Court, casting the critical vote in over three-quarters of cases decided, like *Branzburg*, by a five-four vote.³⁵

Branzburg's Aftermath

Whatever ambiguities Justice Powell's opinion introduced, the Court's holding was clear: the three journalists were obliged to testify. Yet none of them ever did. Michigan refused to extradite Branzburg, so Kentucky held him in contempt of court in absentia. Pappas and Caldwell were not called back to their grand juries. Caldwell, in fact, announced that he had destroyed his files: "I ripped up the notebooks. I erased the tapes and shredded almost every document that I had that dealt with the Panthers."³⁶

Although these three reporters did not have to face the dilemma of going to jail or breaching confidences, many others did. In eight months following *Branzburg*, some 35 reporters were cited for contempt and a dozen were jailed for refusing to comply with subpoenas. Journalists and their organizations sought relief wherever they could. At the time of the *Branzburg* ruling, 17 states had shield laws. Today, 31 states plus the District of Columbia have them.³⁷

While some journalists maintained that the judiciary had misconstrued the First Amendment—" [t]here is a privilege whether the Supreme Court says so or not," declared Ben Bradlee—many reporters and their lawyers insisted that *Branzburg*, the case that was supposed to settle the hoary controversy over a journalist's privilege, actually resolved nothing. The privilege issue "was largely left in the air" by *Branzburg*, media lawyer James Goodale wrote in 1979. In 1981, First Amendment attorney Floyd Abrams termed *Branzburg* "none-too-scrutable." (To this line of argument, *National Review* publisher William Rusher responded: "The limits on a reporter's right to conceal his sources 'remain unresolved' only in the sense

that certain spokesmen for the media decline to take the U.S. Supreme Court's 'No' for an answer.") Going further, many journalists and their attorneys maintained that *Branzburg* actually created a reporter's privilege. One lawyer said in 1975 that he viewed *Branzburg* as a 5-4 victory for the press, with Justice Powell plus the four dissenters agreeing on a qualified privilege—precisely what Justice White's majority opinion had rejected. In the view of media lawyer Goodale, *Branzburg* "effectively required litigants to go to court every time they sought information from reporters."³⁸

One might dismiss such sentiments as wishful thinking—except that a number of lower courts came to agree, especially in civil cases but sometimes in criminal ones as well. "Despite his emphatic language," Charles Alan Wright and Kenneth Graham observe in their treatise, "the courts decided that Justice White had not intended to reject the constitutional claim except on the facts involved in *Branzburg*. . . . So complete was the denigration of White's opinion that five years after it was written, a federal court could say that the existence of the First Amendment 'privilege is no longer in doubt.'" To these scholars, the lower courts' response to *Branzburg* has been "most remarkable."³⁹

While their approaches vary, many such courts apply the privilege through a three-part test, quashing the subpoena unless the information is (in one formulation) clearly relevant, essential to resolution of the issue, and cannot be obtained from any nonmedia source. The journalists in *Branzburg* urged a similar test on the Supreme Court, but they lost. While some courts and commentators attribute this test to the concurring opinion, Justice Powell actually rejected such "heavy burdens of proof," which would leave "the essential societal interest in the detection and prosecution of crime . . . heavily subordinated." The three-part test appears only in Justice Stewart's dissent (he had applied a similar analysis 14 years earlier in *Garland v. Torre*).⁴⁰

While many lower courts have refashioned *Branzburg*—sometimes calling Justice White's opinion for the Court a mere plurality opinion, though it was signed by five justices—the Supreme Court has stood firm. In a unanimously decided 1990 case concerning a regulatory subpoena to a university, the Court said that *Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special show-

ing that the reporter's testimony was necessary." A year later, the Court cited *Branzburg* for the proposition that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source." In other realms too, including police searches and pretrial discovery in libel cases, the Court has declined to fashion special rules for the press. But, while it has not backed off its *Branzburg* holding, the Supreme Court has not rushed to correct the lower courts, either: in the 28 years since *Branzburg*, the Court has declined to hear any other cases involving the reporter's privilege, including cases in which lower courts have recognized a privilege.⁴¹

This, then, was the setting in the mid-1990s. Some appeals courts had reconceived *Branzburg*, but the Supreme Court had not intervened. Most states had adopted shield laws. Congress had not done so, but Justice Department guidelines had reduced the number and the scope of federal grand jury subpoenas. While subpoenas still numbered in the thousands each year—the Reporters Committee counted 2,725 in 1997—most originated with civil litigants or criminal defendants. Fewer than 25 that year came from federal prosecutors.⁴²

Subpoenaing ABC

Kenneth W. Starr was initially appointed Independent Counsel to investigate federal crimes related to "James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." Susan McDougal, the former wife of James McDougal, appeared to be a central witness in this investigation. She had been an officer of Madison Guaranty; a partner, with her then-husband and the Clintons, in Whitewater; and a defaulting \$300,000 borrower at Capital Management. On May 28, 1996, a jury found her guilty of four felony counts related to her Capital Management loan. She was sentenced to two years in prison.⁴³

Seeking to hear her account, the Little Rock grand jury subpoenaed McDougal to testify. A court gave her testimonial immunity so that nothing she said could be used against her except in a perjury prosecution. Brought before

the grand jury on September 4, 1996, she refused to answer questions. She was held in civil contempt and committed to jail “for no more than eighteen months, until such time as she agrees to testify, her testimony is no longer necessary, or the term of the grand jury . . . has expired.”⁴⁴

When an important witness is unavailable for one reason or another, prosecutors question people with whom the witness may have talked about matters under investigation. Before issuing such a subpoena, prosecutors need not prove that a particular conversation occurred or that its topics included matters under investigation. The courts require substantial proof as a prerequisite to some actions—probable cause for a search warrant, proof beyond a reasonable doubt for a conviction—but grand jury subpoenas can be issued without any threshold showing. In *United States v. R Enterprises* (1991), the Supreme Court noted that “the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.” As the Court explained, “[a] grand jury subpoena is . . . much different from a subpoena issued in the context of a prospective criminal trial.” In a trial, a particular defendant has been charged with a particular offense. The grand jury, by contrast, is seeking to determine whether a crime has been committed, and, if so, by whom. The grand jury investigation, the Court said in *Branzburg*, “is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.”⁴⁵

Lacking a testimonial privilege, the recipient of a subpoena can ask the court to modify or quash it by arguing that “compliance would be unreasonable or oppressive.” In the grand jury context, these prove to be high hurdles. To quash a grand jury subpoena as unreasonable, the Court said in *R Enterprises*, the movant must demonstrate that “there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” Just as defendants are innocent until proven guilty, subpoenas are valid until proven faulty.⁴⁶

While McDougal would not talk to Independent Counsel attorneys or the grand jurors, she talked freely to the news media. She submitted to interviews with the *New Yorker*, *Larry King Live*, *Today*, and the ABC program *PrimeTime Live*, among others. Though her media interviews were not sworn under penalty of perjury, and they were no substitute for grand

jury testimony, they still could constitute important evidence. So the Office of the Independent Counsel served a subpoena on ABC, seeking the entire videotape and transcript of McDougal’s *PrimeTime Live* interview with Diane Sawyer.⁴⁷

ABC turned over the broadcast portions of the interview, as well as additional portions that it had given the *Washington Post* three days before *PrimeTime Live* aired, evidently to promote the program. But the network refused to surrender the outtakes. The unaired material was, ABC asserted in a motion to quash the subpoena, “protected by the journalist’s qualified privilege, a privilege arising under the First Amendment.”⁴⁸

ABC and an amicus stressed the rulings of lower courts, mentioning *Branzburg* only in passing. According to the network, “the vast majority of courts have construed *Branzburg*, and particularly Justice Powell’s concurrence, as recognizing—rather than rejecting—a qualified First Amendment privilege for journalists . . . and have established a demanding three-part test for overcoming that privilege.” Both briefs cited one decision of the U.S. Court of Appeals for the Eighth Circuit (whose rulings bind the Little Rock federal courts), *Cervantes v. Time, Inc.* (1972), which recognized a testimonial privilege in a libel case.⁴⁹

ABC also tried to distinguish *Branzburg* on two grounds, both dubious. First, the network said that the Supreme Court’s rejection of a testimonial privilege applies only where a reporter witnesses a crime firsthand. In truth, there is no intimation in the Court’s opinion that Paul Pappas witnessed any crime at Black Panthers headquarters, though the other two reporters before the Court, Paul Branzburg and Earl Caldwell, evidently did in their reporting. And, while the justices wrote that “we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source,” they also held that the needs of the grand jury take precedence even where the sources are “not themselves implicated in crime.” Indeed, the Court rejected the reporter’s contention that, before enforcing a subpoena against a reporter, prosecutors must demonstrate that a crime had been committed. Second, ABC maintained that *Branzburg* rejected only an absolute privilege, not the conditional privilege that ABC was invoking. Actually, the Court in *Branzburg* took note that “the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances,” and later reiter-

ated that “[t]he privilege claimed here is conditional, not absolute.”⁵⁰

Under the test that ABC posited, the Independent Counsel would have to demonstrate “that the matter is highly relevant, that the information is not reasonably available from other sources, and that the party issuing the subpoena has an overriding need for the information.” ABC predicted that the Independent Counsel could not satisfy this test. Throwing in every conceivable argument, ABC also invoked the Arkansas constitution, the state shield laws of Arkansas and New York State, and the Justice Department guidelines governing subpoenas to journalists.⁵¹

Motion Denied, Ruling Denounced

In an opinion issued November 6, 1996, Judge Susan Webber Wright denied ABC’s motion to quash. *Branzburg*, she held, rejected the notion of a reporter’s privilege. “Contrary to ABC’s assertion, Justice Powell’s concurring opinion cannot be characterized as ‘decisive’ (in the sense that it is controlling) and as mandating some sort of ‘case-by-case’ weighing process to determine any harm to First Amendment interests.” Rather, she said, quoting a Ninth Circuit case, “‘The balancing of interests suggested by Justice Powell is in the limited circumstances he mentioned, where there is, in effect, an abuse of the grand jury function,’ and ‘[i]f Justice Powell’s concurrence is read more broadly, it would be inconsistent with Justice White’s [majority] opinion with which he concurred.’” ABC did not claim that the *PrimeTime Live* subpoena was issued in bad faith or for purposes of harassment. As for *Cervantes v. Time*, the Eighth Circuit case cited by ABC and the amicus, it was a civil case, and the court there had expressly distinguished *Branzburg* as a grand jury case. (Serving society as a whole, grand juries may have a greater need for evidence, and therefore more tightly constrained testimonial privileges, than civil trials, which principally serve the individual litigants.)⁵²

Judge Wright went on to hold that, even if the three-part test did apply, the Independent Counsel had satisfied it. Two of the prongs, relevance and need, “must be considered in the context of grand jury proceedings.” McDougal alluded to matters under investigation during the broadcast *PrimeTime Live*, and “there is a reasonable possibility that the non-broadcast portion of the interview may contain additional statements on these matters,” so the need crite-

tion was satisfied. Judge Wright further held that the Independent Counsel had no reasonable alternative for getting this evidence.⁵³

Finally, Judge Wright held that the state constitution and statutes were inapplicable; that the Justice Department regulation, requiring the Attorney General’s authorization for subpoenas to the news media, did not govern Independent Counsels; and that in any event the Department regulation did not confer any rights on outside parties such as ABC.⁵⁴

The network surrendered the materials without seeking appellate review of Judge Wright’s ruling (and the outtakes proved useful enough that portions were shown during McDougal’s trial for criminal contempt in 1999). According to press reports, the ABC ruling prompted at least one other media organization, the *New Yorker*, to comply with a subpoena without filing a motion to quash. The magazine turned over tapes and notes of reporter James B. Stewart’s interviews with Susan McDougal. “Given the failure of ABC’s subpoena challenge,” the *New York Times* reported, “[Stewart] and his lawyers felt a motion to quash would have been futile.”⁵⁵

While the *Times* article and other commentary faulted Independent Counsels for issuing media subpoenas, commentators were equally harsh with regard to the news organizations that had complied with them. In *American Journalism Review*, Florence George Graves called the responsible media executives “willing executioners”—the title of a book about German citizens who aided the Nazis—and declared that Judge Wright’s “interpretations of the law would emasculate journalist’s First Amendment rights.” In *Columbia Journalism Review*, former NBC News president Michael Gartner pointed out that the press “traditionally fought the occasional government subpoena with vigor and outrage” and appealed losses as far as possible through the courts. Now, though, “many in the press—those subpoenaed and those on the sidelines—seem pliant and compliant.”⁵⁶

The commentators’ alarm stemmed partly from a questionable interpretation of the ABC ruling. Both Graves and Gartner asserted that Judge Wright had ruled the Justice Department’s regulations for press subpoenas inapplicable to Independent Counsels. The opinion actually addresses only the procedural regulation, the one requiring the Attorney General’s authorization; it says nothing about the substantive DOJ guidelines that, for instance, bar prosecutors from using media subpoenas in pursuit of peripheral

or speculative information. Most likely, Congress intended for an Independent Counsel, acting as a mini-Attorney General over a sharply circumscribed domain, to apply the factors set forth in the guidelines before issuing a media subpoena, but not to seek the Attorney General's blessing. Graves quoted Senator Carl Levin to this effect—"the independent counsel is supposed to abide by the same guidelines as every other federal prosecutor up to the point of seeking approval by the attorney general"—without noting that Judge Wright had said nothing to the contrary.⁵⁷

"Many lawyers have wondered aloud why ABC did not appeal Wright's decision," wrote Graves. "Her finding that the Justice Department guidelines do not apply to Starr seems especially vulnerable to a legal challenge." Graves went on to quote two media lawyers who speculated that network penny-pinching was the reason (as well as an ABC representative who noted that an appeal might generate an adverse precedent). Gartner likewise lamented that "public relations, affiliate relations, and financial results outweigh the fight for freedom and the worth of principle in some journalistic organizations."⁵⁸

ABC, however, did not truckle. The network had nothing to lose in the *PrimeTime Live* case by appealing; the defeat before Judge Wright—her denial of the motion to quash—could not get any worse. But network attorneys no doubt also considered what precedent would be established for future litigation.

Judge Wright's rejection of the reporter's privilege could be dismissed as the product of one misguided district court judge. If, however, the ruling were affirmed by the relatively conservative Eighth Circuit, it would bind the federal courts in seven states, and it would influence courts elsewhere. In applying a journalist's privilege in the libel case *Cervantes v. Time* nearly 25 years earlier, the Eighth Circuit had indicated that the result would be different in a grand jury case. (After ABC had decided not to appeal, the Eighth Circuit cast doubt on the vitality of *Cervantes* altogether, saying that the question of a journalist's testimonial privilege "is an open one in this Circuit."⁵⁹)

In addition, the facts here did not make the most compelling argument for a privilege. ABC did not contend that the videotape contained off-the-record revelations, or that McDougal reasonably expected the network to protect her interests in the editing. So far as McDougal knew when she sat for the interview, ABC might

air the session in toto and unedited. When the source has no expectation of confidentiality, surrendering the information to prosecutors cannot exert much of a chilling effect.

Given the facts of the case, the strength of Judge Wright's opinion, and the composition of the Eighth Circuit, ABC may have concluded that an appeal would be too risky. SPJ observed in a 1997 report that "the media . . . have to tip-toe around the fragile law of the reporter's privilege and pick battles they can win." This was not one of them.⁶⁰

Conclusions

(1) Subpoenas are inherently, invariably, inescapably burdensome. They devour time and resources that recipients would rather devote to other matters. They entangle people in the criminal process, and render them vulnerable to it: withholding a subpoenaed document or lying under oath can lead to prosecution. Because grand jury rules of relevance are "extremely lax," writes Judge Richard Posner, subpoenas can lawfully require testimony "about activities that are at once intensely private and entirely marginal to the purpose of the inquiry." Even if the information sought is humdrum rather than intimate, subpoenas rob us, as then-Judge Stewart observed in *Garland v. Torre*, of the freedom to choose silence.⁶¹

Feeling put-upon, lots of people fight grand jury subpoenas. They complain about fishing expeditions, prosecutorial overreaching, the enormity of the task of gathering the requested material. Sometimes they contend that their occupational group must be insulated from such hindrances for the good of society. Just as journalists contend that their public service (like that of doctors and lawyers) warrants a testimonial privilege, so, at times, do accountants, psychics, veterinarians, massage therapists, and plenty of others. The journalists, unlike the others, can invoke the First Amendment, but the Supreme Court held in *Branzburg* that that does not alter the balance. By insisting that it is different, that it must have a privilege in order to perform its vital function, the press often sounds, to judges and prosecutors, just like everybody else.

(2) In several respects, the traditional, profession-based privileges are a poor fit for the press.

- The law has no trouble deciding who is an attorney or a doctor. Defining a journalist is

dicier. Courts and legislatures have had to decide whether the privilege extends to freelancers, magazine reporters, book authors, pamphleteers, Internet journalists, and scholars. In a 1998 case, the U.S. Court of Appeals for the Third Circuit ruled that a wrestling commentator on a 900-number telephone line did not qualify: though he gathered information, sometimes from confidential sources, and made it available to the public, the court deemed him “an entertainer, not a reporter.” That may be the proper distinction, but, by drawing it, the government takes a small step toward what the First Amendment plainly proscribes—licensing the press.⁶²

- Journalists sometimes want greater protection than privilege law affords other professionals. Some, like Earl Caldwell, want to avoid appearing in the grand jury at all. Some want to be able to keep their secrets from the courts even if they have disclosed the information outside the newsroom; journalists complained in 1991, for example, when a District of Columbia Superior Court judge forced the husband of a *Washington Post* reporter to name his wife’s confidential source. And journalists want a testimonial privilege but not the obligations that customarily accompany it. An attorney who discloses his client’s secrets can be sanctioned, disbarred, and sued for malpractice, but the American press has resisted making promises of confidentiality enforceable. In *Cohen v. Cowles Media* (1991), the press litigants and amici argued that courts must never punish a newspaper for printing truthful information (namely, the source’s identity), even if the newspaper had promised not to publish it; the Supreme Court rejected the argument and held that such an agreement can be enforced, notwithstanding the First Amendment.⁶³
- Similarly, traditional privileges are governed by elaborate ethical canons, statutes, and case law. The many newsroom and organizational ethics codes, by contrast, set forth broad generalities, which journalists construe and apply unilaterally and ad hoc. When, for example, is a journalist no longer bound by a pledge of confidentiality? Reporters have declared the obligation of confidentiality inapplicable once the source has provided inaccurate information (*New York Times* and a source on Russian money laundering, 2000), the source has publicly mischaracterized conversations with the reporter (Bob Woodward and Monica Lewinsky’s attorney Sydney

Hoffmann, 1999), the source has died (Woodward, speaking hypothetically about Deep Throat), the source has blamed others for his own leak (*Newsweek* and Oliver North, 1987), or the source has publicly addressed the same topic (*Boston Globe* and Jimmy Carter, 1982). The press, unlike medicine or the law, has no mechanism for resolving such questions; individual journalists make their own calls.⁶⁴

- Finally, the traditional privileges seek to encourage candor so that the listener can better aid the speaker. This is the case with doctors, lawyers, and clergy. The model also applies in part to a profession that, like journalism, gathers and publishes information. The American Anthropological Association’s “Principles of Professional Responsibility” provide: “In research, an anthropologist’s paramount responsibility is to those he studies. . . . The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honor their dignity and privacy. . . . The anticipated consequences of research should be communicated as fully as possible to the individuals and groups likely to be affected.” In dealing with their sources, journalists do not assume anything akin to the obligations of anthropologists. Perhaps Janet Malcolm got carried away when she called the typical reporter “a kind of confidence man, preying on people’s vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse,” but there is no question that many cooperative sources are astonished by how their revelations, and often how they themselves, appear in print. For the reporter, the source’s candor is a means to an end—getting the story—which, ultimately, may or may not benefit the source.⁶⁵

(3) Journalists want something that traditional, profession-based privileges do not confer: absolute discretion. They want to receive information, transmitted with or (as in McDougal’s case) without restrictions, and decide how and when it will get out—what will be broadcast, what will be handed to other media (as in ABC’s delivery of unaired portions of the transcript to the *Washington Post*), and what will remain secret. If prosecutors seek their information, journalists want unilateral authority to decide whether and to what extent to oblige. Many journalists say they will cooperate on proper occasions, but they want to make the call

themselves. It should be, writes Gartner (quoting a media attorney), “a matter of conscience, not a matter of compulsion.” Discussing a federal shield law, journalist Peter Bridge (who spent three weeks in jail for refusing to testify) urged Congress not to worry about legislating for extreme cases, because any reporter who witnessed a murder would testify voluntarily. The nation’s most distrustful profession thus asks to be trusted.⁶⁶

(4) While none of the profession-based privileges confers anything approaching total discretion, the law elsewhere does confer something close to what journalists are seeking: several areas of constitutional, checks-and-balances law give government officials vast discretion. Under the executive branch’s state secrets privilege and Congress’s speech or debate clause, the courts cannot inquire into certain internal workings of the two branches. The President (or agency head) or the Member of Congress has absolute discretion on whether to invoke the privilege, and, if he does so in the proper realm, the court generally can go no further, however great the need for evidence—just the sort of discretion that many journalists seek.⁶⁷

The courts have stressed that these privileges exist, not for the personal convenience of the government officials, but for the sake of the public. This too echoes the arguments of journalists. Marie Torre should be free to keep her secret, the *New York Herald Tribune* explained in 1957, “not because any newspaper should be above the law . . . but because the basic freedom of the press is the ultimate guaranty of all individual liberties.”⁶⁸

(5) Operating, in Douglass Cater’s famous phrase, as a fourth branch of government, the press might be more effective with an absolute, discretionary privilege, modeled on those created by the Constitution’s separation of powers and federalism. This was part of my argument in *Freedom at Issue*—an argument that now seems theoretically beguiling but utterly unrealistic. For better or worse, the courts are never going to grant *any* private entity absolute discretion on whether to provide evidence in court.

(6) If absolute discretion as a matter of law is unattainable, the press still manages to exercise a great deal of discretion in practice. Journalists possess one of the keys to autonomy under our system. They have, in Madison’s words, “the necessary constitutional means and personal motives to resist encroachments.” Specifically, as Michael Kinsley once wrote, journalists are “uniquely able to make their screams of pain heard.”⁶⁹

Through skillfully screaming about subpoenas (“it is not overstating the question to ask whether we as a free people can endure”), the press has won Justice Department guidelines, state shield laws, and the abiding reluctance—a chilling effect of sorts—of many prosecutors to pick a fight. “[M]ost prosecutors,” former Attorney General Dick Thornburgh said in 1998, “are very wary for a practical reason: you don’t want to get the media mad at you.” (Members of Congress are wary too. Rather than trying to force journalists to name confidential sources, they abandoned efforts to determine who had leaked Anita Hill’s allegations about Clarence Thomas.) Journalists and their sources can be quite confident that their dealings will remain secret, even with a weak or nonexistent privilege, if the press is almost never subpoenaed. At least in the context of Justice Department investigations, that is now the case.⁷⁰

The press’s power to publicize its hindrances has one additional effect. On those rare occasions when subpoena disputes are fought to the very end, the courts generally treat journalists far more leniently than they treat others held in contempt. Under the law, prosecutors can keep a silent witness in jail until the grand jury term expires. McDougal, for example, served 18 months while she refused to testify. A Reporters Committee study lists 17 journalists imprisoned between 1984 and 1998: none of them was jailed for more than a month, and nine were jailed for less than a day. “Indeed,” note Wright and Graham, “it has been suggested that the ritual jailing of reporters for short terms was a form of fiction in which journalists were granted a de facto privilege by sympathetic judges who were unwilling to diminish their own powers by the creation of a de jure privilege.”⁷¹

(7) This ritual jailing may help prosecutors, judges, and journalists feel they have vindicated their interests, but it carries a significant cost. The law suffers when court orders are flouted without shame. Or, indeed, with pride. The *New York Herald* doubled John Nugent’s salary during his imprisonment in 1848. “His popularity has been trebled by his manliness in this matter,” the *New York Times* said of a Baltimore reporter jailed in 1886. In 1929, William Randolph Hearst rewarded three of his reporters, fresh from 45 days in jail, with watches engraved “For Loyalty to Newspaper Ethics” and \$1,000 bonuses.⁷²

But, as one judge said at a 1975 roundtable, “[T]he whole system, no matter on which side

you are on the substantive issues, depends on court orders being followed until they're set aside by higher authority." When a citizen flouts the law for the best of reasons, others will find it that much easier to rationalize lawlessness for venal reasons.⁷³

Here I distinguish contempt of court from contempt of Congress. Both, to be sure, can end in jail, and journalists tend to see them as interchangeable. But, to the extent that there still is a line between politics and law, the two subpoenas fundamentally differ. Disobeying a congressional subpoena defies political power. Disobeying a court order enforcing a grand jury subpoena defies the rule of law.

The distinction becomes clear if we consider intransigence of the executive branch rather than the press. Congress, in the course of law-making and conducting oversight, regularly demands information, and the executive branch periodically refuses to provide it. In those instances, Congress can issue subpoenas, hold executive branch subordinates in contempt, or defund executive agencies. Sooner or later, one side acquiesces or they compromise. Far from undermining the constitutional order, this struggle between the political branches *is* the constitutional order.

For the executive to flout an edict of the judiciary, however, would be altogether different. In *United States v. Nixon*, the Supreme Court held that no one, not even the President, is above the law. President Nixon heeded the subpoena and surrendered White House tapes. The issue here was not the customary tug of war between the two political branches; it was the inviolability of the rule of law.

From the beginning, in fact, the Watergate Special Prosecutor pondered the consequences of such a confrontation. As he litigated a subpoena for White House tapes, according to his biography, Archibald Cox worried that he might be making a mistake: "What happened if he won the battle in the courts, but lost the war because the president simply refused to obey the federal courts? What happened if Cox gambled and lost, and ended up permanently damaging the institution of American law? 'Should one start down this road,' he asked himself, 'only to end up revealing the weakness, even the futility, of the law when it confronts power?'"⁷⁴

Marie Torre is not Richard Nixon, of course, but every public act of disobedience to the courts conveys a message. As one judge said in 1975: "I cannot tolerate a rule that the press is going to be the judge of its own cause any more

than the President can be the judge of his own privilege." Upholding public support for the rule of law may not be the principal concern of the prosecutor, the judge, or the journalist, but it ought to be among their concerns.⁷⁵

(8) Accordingly, prosecutors and judges ought to avoid these confrontations whenever possible. As Harvard Law Professor Zechariah Chafee, Jr., wrote in 1947, judicial authority to order reporters to disclose confidential sources "should be exercised with great caution." In Justice Department investigations today, caution generally prevails.⁷⁶

What of Independent Counsel investigations? Comparisons are difficult, partly because numbers are elusive. First Amendment attorney Floyd Abrams told *American Journalism Review* that he knew of "five or six" unpublicized subpoenas to news organizations issued by Independent Counsels between 1994 and 1998. The *New York Times* spoke of "at least" six federal subpoenas to media organizations between 1996 and 1998, "primarily" from the Whitewater Independent Counsel. At the Justice Department, according to *AJR*, the Attorney General considered 13 applications for media subpoenas in fiscal year 1996 and 25 in 1997 ("nearly all were approved"). If the Department is averaging one or two dozen press subpoenas per year, then two or three per year from Independent Counsels does not seem wildly disproportionate, given the intensive, no-stones-returned nature of their investigations.⁷⁷

If Independent Counsels are insufficiently cautious when issuing *particular* media subpoenas, as some have suggested, the reason may be the nature of the office. Independent Counsels focus intently on the few matters assigned to them, lacking the perspective afforded by a wide-ranging case load. In applying the Justice Department regulations to particular facts, a process that invariably entails some measure of subjectivity, they may reach different conclusions than the Attorney General would reach. The potential for disparity is endemic to the institution, and, given the demise of the Independent Counsel statute, it is an institution on the verge of extinction.

(9) The press ought to exercise self-restraint too. Some battles are worth fighting; some are not. An example from law enforcement, though not raising a privilege issue: After the rape, looting, and other criminality at Woodstock '99, the New York State police posted 14 newspaper photos on its website in hopes of locating witnesses. Claiming copyright infringement, the Associated

Press and Syracuse Online demanded immediate removal of the photos, and the police complied. "At issue," writes legal ethicist Stephen Gillers, "was nothing less than good citizenship, which requires recognition that a complex society cannot work unless we accept compromise between our narrow interests and the community's interests." Gillers adds that the press, by overinflating such trivial incursions, may numb the public to the dangers posed by true First Amendment violations.⁷⁸

When prosecutors want evidence from journalists, likewise, both sides ought to move beyond the comforting simplicity of absolutism. The point was made nicely by the late Alexander Bickel, the Yale constitutional scholar who represented the *New York Times* in the Pentagon Papers case. "The accommodation works well only when there is forbearance and continence on both sides," he wrote. "It threatens to break down when the adversaries turn into enemies, when they break diplomatic relations with each other, gird for and wage war. Such conditions threaten graver breakdowns yet, eroding the popular trust and confidence in both government and press on which effective exercise of the function of both depends."⁷⁹

(10) The privilege issue is but one facet of the modern-day press's adversarial stance. To many journalists, detachment is the key to legitimacy. Objectivity, mandating that they try to keep their views out of their writing, provides some detachment. Many also refrain from commonplace civic activities—signing petitions, running for office, contributing money to candidates, sometimes even voting—that, they worry, might make them appear too much a part of the system to be able to write about it fairly. Providing evidence to grand juries, in this view, is one more compromising entanglement to be avoided.

At the same time, the press retains a strong populist bent. Even as it looks down on government officials, it looks up to the public. Indeed, the press often portrays itself as representing the public and its interests better than government officials do. "The *Washington Post* is vitally

concerned with the national interest," according to the newspaper's ethics code, but "[t]he claim of national interest by a federal official does not automatically equate with the national interest"—the newspaper, like a shadow sovereign, makes its own calculus of what will most benefit the American people. "[H]owever flawed we may be," writes David Kidwell of the *Miami Herald* (who spent 15 days in jail after refusing to turn over notes), "newspapers are all that stand between the public and the awesome power of government."⁸⁰

Here, I think, is a key element of the conflict over media subpoenas. Prosecutors, like all government officials, view themselves as exercising constitutional authority to serve the public interest. The trouble is, journalists hold the same self-image. Each side believes that it faithfully represents the citizens, and each sees the other's claim, at least on this issue, as inferior. The prosecutor thinks he is doing the people's business by issuing a subpoena; the journalist thinks he is doing the people's business by refusing to comply. The two are locked in a struggle for democratic legitimacy.

Both combatants are professional snoops—curious, analytical, skeptical. Both pursue truth, and in doing so they examine documents, question witnesses (including confidential informants), evaluate credibility, and, at times, protect low-level wrongdoers who will implicate someone higher up. Both assemble their findings in the form of narratives, which they present to an audience; they strive mightily to retain the audience's trust. Both wield considerable power, and they aim to exercise it with impartiality and fairness. Both believe that their work serves society, a belief (however justified) that sometimes engenders self-righteousness, obstinacy, and hypersensitivity. The battle over subpoenas—"uninhibited, robust, and intractable," as Bickel described many First Amendment conflicts—demonstrates not only how much journalists and prosecutors differ, but also how much they are alike.⁸¹

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41. *Herbert v. Lando*, 441 U.S. 153 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). *Branzburg* is wrongly labeled a plurality opinion in *In re Selcraig*, 705 F.2d 789, 793 (5th Cir. 1983). "Rejected the notion": *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990). "First Amendment [does not]": *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).
42. Reporters Committee for Freedom of the Press, Agents of Discovery (1999), introduction, available online at www.rcfp.org/agents/intro.html. A Justice Department official told a reporter that the Attorney General received 25 applications for subpoenas to journalists in 1997; most were approved. Florence George Graves, "Starr Struck," *American Journalism Review*, April 1998, 25.
43. *In re Grand Jury Subpoena: American Broadcasting Companies*, 947 F. Supp. 1314, 1315–16 (E.D. Ark. 1996).
44. *Id.* at 1316 (footnote omitted).
45. *United States v. R Enterprises*, 498 U.S. 292, 297, 301 (1991); *Branzburg*, 408 U.S. at 701 (internal quotation marks and citation omitted).

46. Federal Rule of Criminal Procedure 17(c); *R Enterprises*, 498 U.S. at 301.
47. Grand jury matters ordinarily are litigated in secret. Here, however, the network's motion, the Independent Counsel's response, the network's reply brief, and an amicus brief all have been unsealed. *In re Grand Jury Subpoena: American Broadcasting Companies, Order* (E.D. Ark. October 11, 1996). The unsealing occurred because a court clerk inadvertently made one of ABC's pleadings available to reporters. Once the matter was no longer secret, the court unsealed some additional materials. Graves, "Starr Struck," 23.
48. *In re Grand Jury Subpoena*, 947 F. Supp. at 1317 n.3; *In re Grand Jury Subpoena*, ABC Motion to Quash, September 16, 1996, 1.
49. *In re Grand Jury Subpoena*, ABC Reply Brief, October 10, 1996, 3 (footnote omitted); *In re Grand Jury Subpoena*, Radio-Television News Directors Association Amicus Brief, September 30, 1996. The Eighth Circuit case is *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).
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51. ABC Motion, 1; ABC Reply Brief, 10–16; *In re Grand Jury Subpoena*, 947 F. Supp. at 1321.
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