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The Supreme Court Stops the Presses

Lawrence R. Velvel*

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society . . . . [T]he Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.

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On June 29, 1972, three cases involving grand jury subpoenas issued to news- men were decided together by the Supreme Court. In *Branzburg v. Hayes*, the newsman had written stories about the synthesizing and use of illegal drugs. He refused to tell the grand jury the names of the informants or other people involved in the writing of the articles. The reporter also refused to divulge any information given to him in confidence. In *In re Pappas*, the newsman had been allowed inside a Black Panthers headquarters during an outburst of civil disorder. Pappas also refused to tell the grand jury what he had seen and heard in the headquarters or the identities of the persons he had met there. Finally, the newsman in *United States v. Caldwell* had spent considerable time covering the activities of the Panthers. He too refused to appear before the grand jury to disclose the private information he had obtained.

The reporters claimed that the first amendment guarantee of a free press protected them from being required to appear or testify before a grand jury unless three conditions were met: the government had to show that (1) there was probable cause to believe that the newsman had information about a specific probable crime; (2) the requested information could not be obtained by alternate means; and (3) there was a compelling and overriding governmental interest in obtaining the information.

By a 5 to 4 vote, the Supreme Court rejected the newsmen's argument. It was entirely rejected by Justice White, who wrote the majority opinion, and by three Nixon judges—Burger, Blackmun, and Rehnquist. In a brief concurring opinion, Lewis Powell—the fourth Nixon justice—voted against the newsmen but seemed to leave the door open to a different result in some future case. Justice Douglas dissented, maintaining that reporters are completely exempt from mandatory grand jury appearance or testimony. Douglas' dissent was based largely on his absolutist conception of first amendment rights. Justices Brennan, Stewart, and Marshall found the newsmen's three requirements to be the appropriate standard.

**The Basic Policy Choices**

The newsmen-subpoena cases presented a clash between fundamental policies underlying the use of grand juries and fundamental policies underlying the first amendment. The majority came down hard on the side of the former considerations. It is evident from Justice White's opinion that the majority's choice was dictated by a tremendous stress on the need to combat crime and to use the grand jury in this effort. The function of the grand

jury, the Court asserted, is to determine whether there is probable cause to believe that a crime has been committed and who committed it. This is a crucial task, for

[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process.2

The state was said to have a compelling interest in extirpating the drug traffic, forestalling assassination attempts, and preventing violent disorders, which were the subjects under investigation by the grand juries in the three cases. For the grand jury to fulfill its role as "an important instrument of effective law enforcement," it must have broad investigative powers, which are not limited by forecasts as to the probable result of an investigation.3 Citizens generally are not immune from grand jury subpoenas, and the majority could see no reason for the situation to be different for newsmen.

So strong was the majority's stress on combatting crime that White's opinion went so far as to seriously distort some of the arguments made for the other side. The majority stated that it
cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.4

But, of course, no one was arguing that it is better to write about crime than to do something about it. What was being argued was that the protection of confidential sources will enable the press to discover and bring out more information about crime and chicanery and will thereby better enable the government "to do something about it." The point was that the government should act by using methods other than issuing subpoenas to newsmen.

Another distortion was that Justice White appeared to analogize the newsmen's position to the claim that the first amendment confers a license to violate otherwise valid laws. But, as White himself admitted, no one claimed the first amendment confers a license for crime. The sole question was whether a newsman can be forced to reveal the source of his information as to what the crime is and who the criminal is. No one objected to the government using other methods to detect and prosecute the criminal.

Finally, the majority opinion noted that historically the grand jury has had two functions: ferreting out crime and protecting the citizen against

2. Id. at 690.
3. Id. at 701.
4. Id. at 692.
unfounded prosecutions.\(^5\) But in its zeal to promote the former function, the majority opinion ignored the widespread belief that today the latter function has largely atrophied. Today it is widely thought that, instead of protecting citizens, grand juries serve mainly as tools for prosecutors.\(^6\) One consequence is, of course, that vindictive or politically motivated prosecutors can use the grand jury as a tool of harassment. The capacity for misuse of the grand jury was not lost on a number of the dissenting Justices, who argued against extending the grand jury's power by compelling the appearance and testimony of newsmen.

While the majority strongly emphasized the need to combat crime, the dissenting Justices opted for the values protected by the first amendment. Their basic argument was simple.\(^7\) A full and free flow of information to the public is vital to enlightened decision-making in a democracy. To enhance that flow, newsmen must have informants from whom to obtain information and who feel free to write about and discuss the issues. These considerations are impaired if the government has a broad power to call newsmen before grand juries and to question them about their sources or about the things they have seen or heard in confidence. Many sources are unwilling to give information to newsmen, or to permit newsmen to observe them, unless they can be assured that confidentiality will be maintained. In short, if newsmen can be hauled before grand juries, these sources will dry up. Moreover, if newsmen can be forced to testify, they will feel compelled to engage in self-censorship in order to avoid publishing matters which could lead to a mandatory appearance before a grand jury. The sum total of the effect of these cases is that the press, which should be rooting out and exposing the existence of crime or governmental misdeeds and which should be engaged in the competent coverage of events and movements, may instead be reduced to publishing press releases and hand-outs that reveal only the information which their authors wish to see revealed.

The different values chosen by the majority and the dissent—stressing the need to combat crime versus the need for an enlightened citizenry—reflect a strong disagreement over fundamental philosophy and priorities. Although it cannot be proven with scientific precision, it seems that these differences in basic value systems conditioned and determined each side's response to the subsidiary questions presented. Reading the majority opinion, one could al--


7. See generally 408 U.S. at 711-12.
most believe that the Nixon Justices and Byron White had never heard of the way in which the Pentagon Papers came to life, or the way in which Nixon's strategy over the latest India-Pakistan conflict was discovered, or the manner in which the tremendous cost overruns on the C-5A cargo plane were uncovered. Apart from a brief comment that stealing documents was not a privileged activity, the majority opinion appears oblivious to the fact that, in recent history, information about important governmental matters often depends on confidential sources. Nor is adequate cognizance given to the crucial role of confidentiality in enabling the acquisition of information on dissident political groups. Recent decisions, such as the Gravel case and last year's Washington Post case, indicate that, far from protecting the methods of securing information on governmental misconduct, a number of the majority judges have a very low regard for the release of such information. They prefer instead to concentrate on crime in the streets.

The dissenting Justices, on the other hand, are much impressed by the lessons of recent political history. The dissenters pay heed to the necessity for information about governmental actions and to the possibility that such information will be curtailed by the Court's opinion. Their world view is less concerned with crime in the streets than with a viable governmental and political system.

I. As stated above, each side's choice of basic values appeared to dictate its reaction to subsidiary questions. A major subsidiary question was the extent to which newsmen actually rely on confidential sources and the extent to which such sources might dry up if reporters can be hauled before grand juries. The evidence available to the Court on the use of confidential sources consisted of affidavits filed by a number of newsmen and surveys made by lawyers. These materials indicated that the use of confidential sources can be and often is quite important in presenting the news. Of course, not every newspaper or television station makes heavy use of information obtained in confidence. However, the overall impression one gets is that these sources play a significant role in gathering and analyzing news.

It is true that the drying up of these sources is not empirically certain. The results of one survey indicate that only a relatively small percentage of newsmen feel that the threat of being subpoenaed had adversely affected their ability to obtain news, and many other newsmen felt their fears about sources drying up had proven unjustified. Yet, as Justice Stewart indicated, even if the percentage of sources which dry up is small, their absolute number may be large and the flow of information to the public will be substan-

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ially impaired. Furthermore, it is apparent that, when sources demand confidentiality, it is reasonable to assume that a large number of them will be reluctant or unwilling to give information unless they are given the necessary assurances. Indeed, in two of the cases before the Court, explicit promises of confidentiality were required before the reporters were permitted to observe the people and events about which the grand jury wished to inquire; in the third case, there clearly were understandings that certain matters would not be revealed to the newsmen unless they were kept in confidence.

Given their reliance on the values of the first amendment, the dissenters were quite willing to accept the evidence in the affidavits and surveys that confidentiality plays a significant role in gathering news, and to arrive at the conclusion that many sources would dry up if newsmen could be subpoenaed. Moreover, the latter conclusion was fortified by practical considerations. As Justice Stewart said,

An officeholder may fear his superior; a member of the bureaucracy, his associates, a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to reveal that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.\(^\text{10}\)

In short, informants' jobs and reputations may be threatened if their names are revealed. And if a reporter had to reveal the name of an informant who told him about organized crime or violent crimes, the informant might lose his life as well. These considerations underscore the belief that subpoenaing newsmen will effectively deter a substantial number of potential informants.

Even if the subpoenaable reporter assured the informant that he would not reveal anything to the grand jury, this would not provide much comfort to the source. For it is just too possible that the reporter might be broken down before the grand jury: the possibility of a long jail sentence for contempt, the hostility of the prosecutor, the possible hostility or apathy of the grand jurors, the badgering lawyer's questions, and the lack of rights before the grand jury, could eventually destroy the reporter's resolve or ability to remain silent. Thus, sources can place small faith in the good intentions of a newsmen, particularly when the informant's job, reputation, or even freedom or life are at stake.

Indeed, if newsmen can be subpoenaed, a source would have to fear adverse consequences even if he is neither guilty of criminal conduct nor in

\(^{10}\) 408 U.S. at 729-30.
possession of information relating to criminal conduct by others. For grand juries are permitted to undertake virtual fishing expeditions, and can thus be used by vindictive Executive authorities to discover all kinds of information which is not necessarily related to crime, but might prove useful in dealing with opponents. Grand jury investigations are not limited to specific criminal acts, and standards of materiality and relevance are very low. As the majority itself said,

It 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. . . .

The grand jury, said Justice Stewart, is effectively "immune from judicial supervision." It can be convened by a prosecutor "on virtually any pretext," and "with no serious law enforcement purpose," except to discover the confidential sources.

The possibility of a vindictive misuse of the grand jury will give pause even to a potential source who is innocent of crime or knowledge of crime, and only wishes to blow the whistle on bad policies. And one might add that the possibilities of misuse of the grand jury do not stop with attempts to discover the informant. As many newsmen see it, they are often called before the grand jury when the government already has the information they could give and their testimony is thus not needed. The reasons they are called in these circumstances can be the fact that they are articulate, that it will save the government some expense, that the government does not want to blow the cover on its own informers or eavesdropping, or that the government wants to discredit the newsmen with their sources, thereby reducing news coverage given dissident groups and causes. Certainly the desire to curtail the news coverage given to dissident political groups is a misuse of the grand jury, and it is highly questionable whether the saving of expense or a desire not to blow the cover on government sources is an adequate basis for making a newsmen reveal his sources.

There were thus many reasons for thinking that the right to subpoena newsmen could have a seriously adverse effect on the flow of information to the public. It cannot be said that the empirical evidence and common sense argumentation to this effect were utterly conclusive, but utter conclusiveness is rarely available in constitutional law, and here the evidence and argumentation were at least quite strong. They were strong enough so that Jus-

11. Id. at 688, citing Blair v. United States, 250 U.S. 273, 282 (1919).
13. 408 U.S. at 744-45 n.34.
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Practice Stewart had a right to complain about the Court's unwillingness to accept them: "We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies."\textsuperscript{14} He continued, in a footnote:

Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.\textsuperscript{15}

The majority did give a number of reasons for refusing to accept the idea that the flow of information may be harmed. Where the informant is himself the criminal, of course, the decision was essentially a straight matter of law and order. The Court did indicate its disbelief that a large percentage of all confidential sources were themselves criminals, but basically it stressed the policy that crime must be punished, and if subpoenaing reporters will help the state to catch informants who are themselves the criminals, then the reporters should be subpoenaed.

The opinion was more detailed in discussing the situation where the informant is not himself the criminal, but has given information about crimes committed by others. Here the majority's basic point was that the evidence failed to show that subpoenas would cause a "significant constriction of the flow of news to the public."\textsuperscript{16} Estimates of the inhibiting effect, said the Court, are widely divergent and are only speculative opinions. The informants cannot be canvassed and surveys of reporters "must be viewed in the light of the professional self interest of the interviewees."\textsuperscript{17} Even if it is permissible to subpoena newsmen, a reporter may not in fact be called before the grand jury, or the prosecution may not insist on his testifying if he objects. If a reporter is forced to testify, his testimony is secret and law enforcement officers are experienced in protecting informants. Indeed, there is little to indicate that informants would feel they are in a worse position if they had to risk placing their trust in public officials as well as reporters. History indicates that the press can flourish even though newsmen are subject to subpoenas. Minority and dissident confidential sources will not dry

\textsuperscript{14} Id. at 736.
\textsuperscript{15} Id. at 736 n.19.
\textsuperscript{16} Id. at 693.
\textsuperscript{17} Id. at 694.
up, because they need the press for exposure of their views. And finally, even

accepting the fact . . . that an underdetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.\(^{18}\)

This, of course, is the key to the Court's view. What the majority argued, in effect, was that subpoenas should be allowed in order to catch criminals even if it was wrong to claim that the flow of news will not be seriously impaired. The majority's arguments that the information flow will not be constricted is not convincing. Admittedly, estimates of the inhibiting effects of subpoenas are divergent and speculative. But, on the other hand, the facts and arguments mentioned above make it somewhat difficult to believe that the threat of subpoenas will not result in a significant amount of deterrence. One can attempt to discount surveys of reporters by saying that professional self interest enters into the answers to the surveys, but reporters are the ones with the most intimate knowledge of the importance of confidential sources. Just who else should be surveyed? Perhaps a reporter will not be called before a grand jury, or made to testify if he objects. But how can an informant know this in advance? It is true that the grand jury proceedings are secret from the public, but they are not secret from prosecutors. A prosecutor can use them to discover the identities of persons who have told reporters about criminal activities or questionable policies of the prosecutor's political or governmental allies. Once their names are discovered, the informants can be harassed or lose their jobs or end up in a concrete barrel at the bottom of a river. When potential informants have information on the derelictions of a government in power, or the political machine behind it, or criminals with whom it is allied, it is a deliberate blinking of reality to think that these sources will not feel worse off if they must risk "placing their trust" in prosecutors as well as reporters. What history teaches is open to question—many would say the press has often been entirely too timid, and one could plausibly take the position that more exposés would have come to light had there been an assured constitutional rule which guaranteed confidentiality. Finally, it is true that many minority or dissident groups rely on press coverage to get their message across. But it is also true that others are quite

\(^{18}\) Id. at 695.
wary of the press and that in the *Caldwell* case there was specific evidence that a relationship of trust and confidence—bottomed on the reporter's discretion and on confidentiality—was required before the Panthers would permit serious in-depth coverage of themselves and their views.

In sum, a good deal is left to be desired by the majority's reasons for believing that news will not be constricted. And the unpersuasiveness of the majority's reasoning adds fuel to the belief that, at bottom, those Justices did not really care whether the flow of news would be lessened. Their overriding concern was the use of grand juries to catch criminals.

II. A second subsidiary question discussed at various places by the majority is whether it is wise to fashion a single, uniform constitutional rule binding both the federal and state governments. The Court, of course, did not want to do this. It felt a uniform rule would simply protect private networks of informers unaccountable to the public. The fact that the government has such a system of confidential informers did not move the majority. The Nixon judges and Justice White argued that, while it is proper for the government to maintain and protect a system of informers to combat crime, this does not mean the press should be able to have relationships with informants. Rather than create a rule protecting press informants across the country, the majority simply wanted to leave it to Congress and the state legislatures to decide whether newsmen's sources should be safeguarded.

Like so many of its other arguments, this is not persuasive. Every year the Supreme Court lays down many national rules on issues of immense public importance, issues ranging from voting rights to criminal rights. This being the case, to refuse to create a uniform constitutional rule here rings hollow. Nor is it convincing to say that it is acceptable for the government to have a system of paid informers to ferret out crime, but to deny that same prerogative to the press. Finally, newsmen's sources are unlikely to receive widespread protection from legislatures. While the problem of protecting newsmen's sources is an old one, only seventeen state legislatures have enacted statutes which protect confidential informants. This leaves 33 states where they are not protected; and given the anti-press feeling being whipped up in the country, the politicians' distaste for exposés which can hurt them, and the generally poor reform record of state legislatures, one can be justifiably dubious that many of these legislatures will rush into the breach to protect confidential sources. At the federal level, a bill to protect sources has been introduced in Congress, but this bill may not pass. If it does pass, President Nixon will doubtlessly want to veto it, since his administration fought so hard in court against the newsman's privilege.

19. Id. at 689 nn.27-28.
The Matter of Precedent

The newsman-subpoena cases were matters of first impression in the Supreme Court. Never before had the high Court ruled on whether the first amendment protects the confidentiality of newsmen's sources. Thus there were no direct Supreme Court precedents for or against the decision. But there were a raft of other first amendment cases which established principles that could be applied in this context.

In support of its decision, the majority cited cases which permitted "incidental burdening of the press." These cases ruled that news organizations could be subjected to national labor acts or the antitrust laws or nondiscriminatory taxation. Yet the support these decisions offer is questionable. First, they did not place restraints on gathering or publishing news, which is the heart of the first amendment function of the press. Rather, they were concerned with business practices or the monetary side of the press; often the laws involved, as in labor or antitrust matters, were not confined to the press but extended across the economy. The newsman-subpoena cases, on the other hand, stuck at the news gathering function of the press, which can be far more dangerous to the first amendment. Of course, it is possible to imagine laws which strike so hard at the commercial or profit side of the press that the press' ability to carry out its first amendment functions would be severely harmed. But the Court has been careful to avoid this.

Another group of precedents used by the majority held that the press can be punished for publishing libels or can be punished for publications which constitute contempt of court. These cases, said the majority, prove that the press is "not free with impunity to publish everything and anything it desires." But it is doubtful that the Court's use of the libel and contempt cases is appropriate. While these cases do imply that there are times when the press can be punished for what it has written, the majority of the libel and contempt cases have made such punishment very difficult to impose. The Court created and enforced rules which give great protection to the press. Thus, these cases hardly justify a decision which gives very little protection to the press, which is what the majority did in the newsman-subpoena cases. Moreover, to the extent that the libel cases indicate a newsmen can be punished for what he writes, they indicate this only in circumstances where the press has published something which violated someone's rights. In the subpoena cases, however, the press had not violated anybody's rights; the reporters were not being punished for such violations; and the whole is-

20. Id. at 682-83.
21. Id. at 683-84.
22. Id. at 683.
sue of protecting sources from the grand jury has nothing to do with whether a newsman can be punished if he does publish something which violates another person's rights.

The majority also claimed that past cases and general practice show the first amendment does not give the press any special access to information. The Court, for example, has in the past approved a State Department refusal to validate passports for travel to Cuba to gather information, and it has approved limitations on the reporting of trials. And the press, said the majority, is regularly excluded from grand jury proceedings, Court conferences, conferences of other official bodies, and of private bodies. Nor do newsmen have a right to witness the scenes of crime or disaster when the public generally is excluded.

The passport decision, however, was a bad one that has been severely criticized: it was, in effect, a sell-out to the kind of cold warriorism which demands that liberties be curtailed. In some of the other examples given by the Court, newsmen were excluded by the group they sought to observe or interview, whereas, in the subpoena cases, the informants are willing to talk and be observed. Further, one wonders why and how long newsmen can be excluded from areas of crime or disaster, since this perpetuates government secrecy. Moreover, if newsmen can be restricted from going to Cuba and can be kept out of areas of crime and disaster when the government wishes this, could they be kept out of other areas—like Viet Nam—if the government does not like their reporting?

All in all, the majority's arguments here are inadequate. This society already suffers from too much secrecy and lack of information. The Court has taken questionable precedents and used them as a basis for creating even more secrecy and lack of information.

The majority also maintained that, even though public officials use confidential informers in criminal matters, the identities of these informers must be revealed to a "defendant when it is critical to his case." Does this actually support the ultimate ruling? Only questionably. For the present decision permits the government to acquire information even when it is not critical to its ability to build a case, as shall be discussed later.

In total, the majority's use of precedent was not too impressive. More persuasive were the cases cited by the dissent. These can be put into two

23. Id. at 684.
27. 408 U.S. at 698.
categories. First are cases where the Supreme Court has protected the right of pamphleteers and southern members of the NAACP to have their names remain anonymous.28 This protection stemmed from the Court's recognition that, because of the possibility of retribution, anonymity can be essential to an individual's ability to exercise his first amendment rights. Those cases would apply in the subpoena situation. And it could not validly be argued that all the prior anonymity cases necessarily rested on a higher degree of evidence and proof as to reprisals than existed in the subpoena cases. It is true that, in the NAACP cases, revealing members' names would lead to reprisals in states like Alabama and Arkansas in the late 1950's and early 1960's. But the certainty of reprisals was not at all apparent in the pamphleteer case; yet the Court gave protection to anonymity. In the subpoena cases, there was of course much evidence and argument that forcing newsmen to reveal sources would curtail first amendment functions. The amount of evidence and argumentation should make the anonymity cases fully applicable.

Further, in many cases involving such crucial civil rights as free speech, voting rights, and racial equality, the Supreme Court has developed a number of doctrines designed to insure that these rights are not unjustifiably abridged.29 The state cannot impair rights unless it has a compelling interest. It cannot abridge them by means of laws which are vague, since such laws create uncertainty and discourage constitutionally protected activity. When the state's purpose could be achieved by a narrow law, it has not been allowed to use a broad, blunderbuss law which works more harm on constitutionally protected action than is wreaked by a narrow law. When legislative investigators who seek information have created a threat to first amendment freedoms, the Court has demanded that the investigators first prove a substantial relation between the information sought and a subject of compelling state interest. And, in employing these doctrines, the Court has not been content with merely assuming that a compelling state interest exists, or that a broad law was necessary to accomplish a state purpose, or that there is a substantial nexus between the information sought and a subject of compelling state interest. Rather it has given close and detailed scrutiny to these questions.

In his dissent, Justice Stewart sought to implement these doctrines by establishing three requirements which must be met before the government can successfully subpoena a reporter. The government would have to (1) show probable cause to believe that the newsman has information clearly relevant

28. Id. at 734.
29. Id. at 716-17 nn.5 & 6 (citing cases).
to a specific probable violation of law, (2) demonstrate that the information sought cannot be obtained by alternative means, and (3) demonstrate a compelling and overriding interest in the information. These requirements would insure against vague or overbroad investigations—fishing expeditions—where the prosecutor has no concrete reason to subpoena a newsman or ask him particular questions. They would insure that there is a substantial relationship between the information sought and a subject of compelling interest.

As opposed to Justice Stewart, the majority's opinion gave much less faithful treatment to the doctrines developed in other cases to protect crucial civil rights. The doctrine against actions which overbroadly impair first amendment rights was dismissed on the ground that there was no abuse of power in the subpoena cases: the government was not seeking to expose people just for the sake of exposure, nor was it seeking wholesale disclosure of names without a relationship to possible crime. Of course, even if it is true that there was no abuse of power in the three cases—and this can be disputed—calling reporters before a grand jury will still be a deterrent to first amendment activities, and there could be abuses in other cases where subpoenas will be upheld on the basis of the Court's decision here.

The notion that the government has to show a compelling state interest also received short shrift from the majority. Its most basic point was that there is a compelling state interest in having grand juries investigate crime in order to safeguard persons and property. The government can thus call the reporter without showing that it is probable a crime was committed and without showing that information is unavailable from other sources. Rather than have the government show this, the grand jury will decide on these questions. And as for showing a substantial relationship between the information sought and a subject of compelling state interest, it was enough for the majority that the state has an interest in stopping crime and that these reporters could likely supply information on crime.

Mediating Principles

It has been maintained throughout this article that the newsman-subpoena cases involved a conflict between values underlying the use of grand juries and those underlying the first amendment. The only judge who opted wholly for one side or the other was Justice Douglas. With his strong belief in the efficacy of the first amendment, Douglas could see no circumstances under which a newsman could be called before the grand jury to testify. The majority—the Nixon four plus White—opted heavily for using grand juries to fight crime with some small protection for first amendment rights.
It indicated that investigations that were not in good faith might not be protected, saying that "[o]fficial 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."  

Of course the majority's disclaimer as to bad faith harassment may not provide newsmen with much protection. It will give them no protection when the prosecutor is not acting in bad faith. And it may not even protect them when he is. For the majority said that newsmen can be called even when the prosecutor does not have probable cause to believe they know about a specific crime, that a grand jury investigation can be triggered by mere tips and rumors, and that the grand jury is a grant inquest whose investigations are not to be limited by questions of propriety or predictions of results. The latitude that this allows the prosecutor is so broad that it is easily subject to abuse.

It seems that the most serious attempt to develop a set of principles which mediate fairly between the needs of the first amendment and the need to fight crime was made by Justice Stewart. His three requirements, outlined above, gave much protection to the first amendment. These conditions would prevent fishing expeditions, vague investigations, disturbing of confidential relationships when the information could be had in other ways or when the government is not seeking to protect a vital concern. On the other hand, Stewart's requirements would permit a reporter to be subpoenaed when this is necessary for the full implementation of an important criminal investigation. The government, it is true, would have to show that the reporter probably knows something about the criminal acts involved, but it will usually be able to do this. After all, if it is acting in good faith, it probably has reason for thinking that the newsman has information.

This is not to say, however, that there are no problems with Stewart's analysis. For instance, he does not give absolute protection to the first amendment. Justice Douglas argued that:

Sooner or later any test which provides less than blanket protection to belief or associations will be twisted and relaxed so as to provide virtually no protection. . . . A compelling interest test may prove as pliable as did the clear and present danger test. Perceptions of the worth of state objectives will change with the composition of the Court and with the intensity of the politics of the times.  

While Douglas' point concerning pliable tests is well taken, this cannot be escaped by invoking an absolutist test. For when the times or the judges
change, any absolute first amendment rule will be watered down or narrowed by the new Justices.

Another problem with Stewart's views from an absolutist standpoint is that, unless a newsman receives blanket protection against appearing or testifying before the grand jury, neither he nor his source will be able to ascertain in advance whether the newsman will be made to testify. This lack of certainty can discourage the source from imparting information and the newsman from writing what he knows. While there is force to this argument, there can be times when the need for a newsman's testimony is overwhelming. Imagine, for example, that after a series of bombings or attempted assassinations, the police reasonably believe that these acts will again be perpetrated by the same people in the near future, and that a newsman is the only available person with information on the culprits.

Since there can be situations where there is an overwhelming need to have a reporter testify, it may be worthwhile to take some risk that the absence of an absolute privilege will sometimes deter newsmen or their sources. The risk of deterrence, moreover, would be cut down under Stewart's preconditions if the latter were interpreted very strictly so as to deprive the newsmen of protection only in extraordinary situations.

There are other difficulties with Stewart's proposals. Under his requirements, courts will have to make judgments about the existence of probable cause to believe that a newsman has information about a crime, about whether government can obtain information elsewhere, and about whether the government's interest is compelling. This apparently upset the majority, but, it would appear, without good reason. Courts make judgments every day about probable cause, alternative avenues for the government, and compelling state interests. As Stewart said, "Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases." 32

Finally, under any view which permits newsmen to invoke first amendment protection, it will be necessary to determine whether such protection should be allowed to pamphleteers, scholars, pollsters, novelists and others who use confidential sources as an instrument for obtaining information for publication. The majority clearly did not wish to decide these questions. But again, every day courts make decisions as to what groups fall under the protection of legal principles, and there is no reason today that such judgments should not be made in this context. Moreover, just as the first amendment should protect newsmen's sources, it should also protect the sources of other

32. Id. at 746.
persons and groups whose goal is to obtain information with which to enrich the public dialogue.

In addition to those who joined in the Stewart opinion, Justice Powell felt it necessary to mediate between the values underlying the grand jury and those underlying the first amendment. Powell voted with the majority and joined in its opinion. Yet, in a brief concurring opinion, which Stewart called "enigmatic" and thought held some hope for the future, Powell illustrated that the majority opinion did not suit him entirely. The only situation where the majority indicated that it would protect a newsman's first amendment rights was where the prosecution was acting in bad faith. But Powell indicated that he would go further than this: he argued that a reporter should also be protected if the information sought from him bears 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 asserted that a proper balance could be struck on a case-by-case basis—a balance between freedom of the press and the citizen's obligation to give evidence about crime.

But, while Powell went further than the majority, he disagreed with Stewart's dissent. He took exception to the fact that, under Stewart's opinion, a reporter could only be required to appear in the grand jury room if the three conditions were met. He maintained that Stewart's conditions imposed an onerous burden on the state and that they defeated a fair balancing of the competing interests and harmed society's fight against crime.

Stewart is, to some extent, correct in characterizing Powell's decision as enigmatic. For his opinion is inexplicit as to the precise procedural situation in which he would protect first amendment rights. What Powell seems to be driving at is that a newsman must at least appear in the grand jury room. Since there is no point in requiring his presence unless he can be asked questions, Powell must implicitly be saying that questions can be posed. However, since Powell indicated that certain kinds of information need not be divulged, he must also be implying that, once asked questions, the newsman can object to giving the information.

Nevertheless, even if a newsman objects at this point, Powell's standards still do not confer adequate protection. While the newsman would be protected against prosecutorial bad faith, this is an extremely difficult charge to prove. While Powell would protect against remote questions, there are many irrelevant and coercive inquiries that the prosecutor can make which are not

33. Id. at 710.
remote from the subject of the investigation, but which are objectionable to the first amendment rights of the newsman. For all his talk of a proper balance, it appears that Justice Powell comes down fairly heavily on the side of fighting crime. Justice Stewart may well be making a mistake if he hopes that Justice Powell will provide the additional vote which the dissenters need to prevail in future subpoena cases.

*Justice Rehnquist’s Participation*

Without sufficient justification either in policy or precedent, the majority opinion decided against extending first amendment protection to newsmen’s sources. Wrong though it may have been, the majority opinion stands as the judgment of the Court. If one of the five majority judges had not participated, there would have been a tie in the Supreme Court and the decision in the court below would have continued in operation. In the *Caldwell* case, this would have benefitted the newsmen, who won below, but it would have been disadvantageous to the newsmen in the *Pappas* and *Branzburg* cases, where the reporters lost in the court below. As far as the Supreme Court was concerned, however, the question of a newsman’s privilege would have been left for resolution in a later case. How the Court would ultimately have decided the issue cannot be known, since there always exists the possibility that a change in thinking, politics, or judges will occur. But it certainly could not have ruled more strongly against newsmen than did the five-man majority of June 29, 1972.

All this is by way of introducing this author’s belief that the vote in the Supreme Court should have been a 4-4 tie instead of a 5-4 decision against the newsman. One of the majority, Justice William Rehnquist, should not have participated in the case.

It is a matter of common sense, backed up by canons of ethics and statutes, that a judge should not participate in a case where his nonjudicial activities or associations lead to serious doubt that he can be impartial. This is true when the activities and associations occurred a long time ago and it is even more true when they occurred in the recent past. Rehnquist’s recent activities and associations with the Department of Justice, which was the prosecuting agency and wrote the government’s brief in the *Caldwell* case, lead to great doubt that he could be impartial. For as a lawyer with the Department, he was closely connected with the government’s side of the problem.

When the Nixon administration began subpoenaing reporters several years ago, a controversy arose because of the fear that this would severely harm first amendment rights. Lawyers for the Department of Justice responded by writing a set of so-called Attorney General’s Guidelines which
detailed the circumstances under which reporters should and should not be subpoened. The Guidelines went through several drafts and revisions before being publicly promulgated. After being made public in August and September of 1970, they were later discussed at a conference on media problems. These Guidelines were quoted at some length in a footnote in the majority's opinion in the subpoena cases.

As head of the Office of Legal Counsel—as the man whom Nixon called his lawyer's lawyer—Rehnquist was in a high level position in the Department of Justice and had a hand in formulating many important policies. One of these policies was the Department’s policy on subpoenaing newsmen. Both the Office of Legal Counsel, and Rehnquist personally, participated in the drawing up of the Attorney General’s Guidelines. Later, at the conference on media problems, Rehnquist represented the Department's position.

In light of his work on drawing up the Department's position on subpoenaing reporters, and his representation of this position in public, Rehnquist should not have participated in any case where the Department was fighting for the right to subpoena newsmen. Thus, he should not have participated in the Caldwell case. Moreover, his recent association as a lawyer with one side of the controversy meant that Rehnquist also should have excused himself from participating in cases where it was not the Department, but state prosecuting authorities, which were fighting to subpoena reporters. He should have excused himself from state cases even if they were being decided apart from a federal case. And he certainly should have excused himself where, as actually occurred, they were decided in one opinion with a federal case involving the Department of Justice.

Since Rehnquist should not have participated in the newsmen-subpoena cases, it is interesting to note that his participation in other cases decided in late June has now been challenged by the losing parties—who, as with the newsmen cases, lost by a 5-4 vote, with Rehnquist contributing one of the majority votes. In the army surveillance case decided on June 26,84 and the case of Senator Gravel, decided on June 29,85 petitions for rehearing have been filed with the Court and Rehnquist has been asked to disqualify himself. Those who are familiar with the problem generally believe that the case for disqualification is even stronger in the surveillance and the Gravel matters than in the newsmen cases. But even so, there is little if any doubt that Rehnquist should have disqualified himself in the newsmen cases too.

34. 408 U.S. at 707 n.41. Laird v. Tatum, 408 U.S. 1 (1972).
35. Gravel v. United States, 408 U.S. 606 (1972). Subsequent to this writing, Justice Rehnquist refused to disqualify himself in the army surveillance and Gravel cases. See 93 S. Ct. 7 (1972).
Conclusion

In the final analysis, the decision in the newsman-subpoena cases represents a needless sacrifice of first amendment rights. After reviewing the reasons for and against the decision, one tends to agree with the comments made by Justices Stewart and Douglas quoted at the beginning of this article. The majority has shown itself insensitive to the critical role of an independent press. It has created a situation in which newsmen and their sources will have to be very cautious. It has given government another tool with which to harass dissenters or unfriendly commentators. It has increased the pervasiveness of government power and the government’s ability to stifle people and causes.