

A REVISIONIST VIEW OF JOURNALIST'S
PRIVILEGE: JUSTICE POWELL, *BRANZBURG* AND
THE "PROPER BALANCE"♦

WILLIAM E. LEE*

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* Professor, Grady College of Journalism & Mass Communication, University of Georgia. The author expresses appreciation to Justice Powell's clerks Larry Hammond, Robert Comfort and John Buckley who offered invaluable insights. John Jacob, Archivist of the Lewis F. Powell, Jr. Archives, housed at the School of Law at Washington & Lee University, also provided key assistance. Jeff Flannery, Head of the Reference and Reader Services Section in the Manuscript Division of the Library of Congress, was an extraordinary guide to the papers of Justices Blackmun, Brennan, Douglas, Marshall, and White. Professor Del Dickson, an expert on deciphering the handwriting of many Justices, also gave excellent help.

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I. INTRODUCTION

New York Times reporter James Risen described in detail a secret CIA operation to disrupt Iran's nuclear program in his 2006 book *State of War*.¹ According to the Obama Administration, Risen received this information from Jeffrey Sterling, a former CIA officer, who was charged with violating the Espionage Act. To prove its case against Sterling, the government argued it was necessary to compel Risen to identify Sterling as a source of the classified information.² In the ensuing battle over Risen's refusal to identify his confidential sources, Risen was unable to rely upon a statutory privilege as there is no federal shield law. Thus, Risen's attorneys based their privilege claims on the First Amendment. This required creativity, however, to overcome *Branzburg v. Hayes*, in which the Court, per Justice White, rejected a First Amendment-based journalist's privilege.³ Risen's attorneys argued that a concurring opinion in *Branzburg* by Justice Lewis F. Powell, Jr. supported judicial recognition of a journalist's privilege.⁴

This reading of Powell's concurring opinion was rejected by a 2-1 vote by the Fourth Circuit in 2013.⁵ When the Supreme Court denied certiorari in 2014,⁶ the stage was set for one of the most important confrontations between the government and the press since the jailing of Judith Miller in 2005.⁷ Yet on the eve of Sterling's January 2015 trial, Attorney General Holder made a stunning announcement: despite having won the legal authority to question Risen about his sources, the

¹ JAMES A. RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

² For the context of the Sterling prosecution, see William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27, 27-29 (2012).

³ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁴ *Id.* at 709-10 (Powell, J., concurring).

⁵ *United States v. Sterling*, 724 F.3d 482, 496 (4th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 3843 (U.S. June 2, 2014). For Judge Gregory's contrasting views on the meaning of Powell's concurring opinion, see *Sterling*, 724 F.3d at 522-25 (Gregory, J., dissenting in part). See *infra* text accompanying notes 25-26.

⁶ *Risen v. United States*, 2014 U.S. LEXIS 3843 (U.S. June 2, 2014).

⁷ See William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 638-39 (2006) (discussing the circumstances leading to the jailing and release of Judith Miller).

government would not do so.⁸ Holder, who faced intense backlash from the press in 2013 for Department of Justice subpoenas for journalists' emails and telephone records,⁹ recognized an old-school rule of American political life: it is not wise to pick fights with people who buy ink by the barrel. Holder was acting on a premise that Justices White and Powell shared—the press has extralegal means of protecting its interests.

As the Risen episode reveals, much rides on the meaning of Justice Powell's concurring opinion in *Branzburg*. Powell joined White's opinion for the Court holding that "reporters, like other citizens," must appear before grand juries and answer relevant questions asked in good faith.¹⁰ Powell added a three-paragraph concurring opinion to "emphasize what seems to me to be the limited nature of the Court's holding."¹¹ Where a journalist claimed that the questions were not relevant to a legitimate need of law enforcement, Powell believed a court considering a motion to quash or a protective order should strike a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."¹² The ink had barely dried on *Branzburg* when courts began using Powell's concurring opinion to emphasize the 5-4 decision's "limited reach."¹³

To Justice Stewart, who dissented in *Branzburg*, the vote was perhaps "four and a half to four and a half."¹⁴ Stewart advocated a

⁸ Matt Apuzzo, *Reporter Wins a 7-Year Fight Not to Testify*, N.Y. TIMES, Jan. 13, 2015, at A1. In a pretrial hearing, Risen made clear that regardless of any threat of sanctions, he would not identify his confidential sources. Matt Apuzzo, *Seven Years In, Reporter Says Little to Court*, N.Y. TIMES, Jan. 6, 2015, at A1. Despite the absence of Risen's testimony, Sterling was convicted of leaking classified information to Risen. Matt Apuzzo, *C.I.A. Officer Guilty in Leak Tied to Reporter*, N.Y. TIMES, Jan. 27, 2015, at A1.

⁹ See, e.g., Evan Perez & Brent Kendall, *Holder Defends AP Phone-Records Seizure*, WALL ST. J. (May 14, 2013), <http://www.wsj.com/articles/SB10001424127887324216004578483292722253924> (describing "sharp pushback" by the press against DOJ actions); Letter from Gary B. Pruitt, President and CEO, Associated Press, to Attorney Gen. Eric Holder (May 13, 2013), <http://www.usatoday.com/story/news/2013/05/13/doj-seizes-ap-phone-records/2156819/> (describing the DOJ's actions as serious interferences with the AP's constitutional rights). As a result, Holder revised the DOJ's guidelines on press subpoenas. See U.S. DEP'T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES (July 12, 2013) (revising 28 C.F.R. § 50.10); Memorandum from Eric Holder, U.S. Attorney Gen., to the Emps. of the Dep't of Justice, Updated Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member of the News Media (Jan. 14, 2015), <http://www.justice.gov/file/317831/download> (additional changes to DOJ policy). See generally Kimberly Chow, *Revising the Attorney General's Guidelines*, 39 NEWS MEDIA & THE L. 1 (Winter 2015), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2015/revising-attorney-generals->

¹⁰ *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

¹¹ *Id.* at 710 (Powell, J., concurring).

¹² *Id.*

¹³ See, e.g., *Burse v. United States*, 466 F.2d 1059, 1091 n.2 (9th Cir. 1972).

¹⁴ Potter Stewart, "Or of the Press", 50 HASTINGS L.J. 705, 709 (1975).

balancing test to define a qualified First Amendment-based privilege; in Stewart's view, Powell straddled the views of White's majority and Stewart's dissent. Others, however, counted the vote differently. James Goodale, general counsel of *The New York Times*, figured out that the "way around" White's opposition to a privilege was to read Powell's concurring opinion as supporting a First Amendment-based privilege. Goodale believed Powell's position, along with the four dissenting Justices, meant there were five votes in favor of recognition of a privilege in some form.¹⁵ Consequently, heavy reliance on Powell's concurring opinion became boilerplate in media briefs filed in the post-*Branzburg* fight for lower court recognition of a First Amendment-based journalist's privilege.¹⁶

Goodale's strategy was highly successful. Many lower courts have read Powell's concurring opinion as the basis for a First Amendment-based journalist's privilege.¹⁷ These courts treat White's opinion as a plurality¹⁸ and regard Powell's balancing test as controlling because he cast the "deciding" vote.¹⁹ As Professor Smolla wrote, Powell's concurring opinion "in effect superseded the majority opinion and

¹⁵ JAMES C. GOODALE, *FIGHTING FOR THE PRESS* 183 (2013) [hereinafter GOODALE, *FIGHTING FOR THE PRESS*] (stating that the keys "to the continued resistance by the press to subpoenas lay in Powell's opinion."). See also James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 716 (1975) [hereinafter Goodale, *Qualified Privilege for Newsmen*] (stating that Powell did adopt a qualified privilege for newsmen). See generally Stephen Bates, *Overruling a Higher Court: The Goodale Gambit and Branzburg v. Hayes*, 14 NEXUS 17 (2009).

¹⁶ See, e.g., Brief of Appellants Judith Miller, Matthew Cooper and Time Inc. at 23–27, *In re Grand Jury Subpoenas*, 438 F.3d 1141 (D.C. Cir. 2006) (No. 04-3138) (arguing that lower court failed to give appropriate weight to Justice Powell's opinion).

¹⁷ See, e.g., *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980) (Powell's balancing test should determine reporter's privilege); *Gilbert v. Allied Chem. Corp.*, 411 F.Supp. 505, 509 (E.D. Va. 1976) ("Justice Powell's concurring opinion . . . may be joined with Mr. Justice Stewart's dissenting opinion . . . to provide a majority of five justices" who are in favor of a qualified First Amendment privilege.).

¹⁸ See, e.g., *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (finding a qualified privilege is based on a "careful reading of the plurality and concurring opinions in *Branzburg*"). Other courts, while finding a First Amendment-based privilege to be inapplicable in the case before them, nonetheless identify *Branzburg* as a plurality. See *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992) (referring to *Branzburg* plurality); *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 990 n.2 (3d Cir. 1985) (Garth, J., concurring).

¹⁹ *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *Riley v. Chester*, 612 F.2d 708, 716 (3d Cir. 1979); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974); *United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972) (Leventhal, J., concurring) (*Branzburg* is controlled by the concurring opinion of Justice Powell as the fifth Justice of the majority.). Another view is that Powell's concurrence controls as the "minimum common denominator of all the views expressed." *Gilbert v. Allied Chem. Corp.*, 411 F.Supp. 505, 510 (E.D. Va. 1976). See generally *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). One commentator argues that "the fifth-vote concurrence rule . . . is nothing more than the *Marks* rule in a unique situation . . ." Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 696 (2009).

became the prevailing law of the land."²⁰

Smolla wrote before appellate courts rediscovered *Branzburg's* hostility to elevating "the journalistic class above the rest."²¹ The opening salvo came in 2003 when Judge Richard Posner, writing for the Seventh Circuit, surveyed the post-*Branzburg* cases protecting journalists and concluded that "[t]he approaches that these decisions take to the issue of privilege can certainly be questioned."²² In the Judith Miller case, the District of Columbia Circuit bluntly stated that Powell "joined the majority by its terms, rejecting none of Justice White's reasoning . . ."²³ White's opinion, according to the District of Columbia Circuit, is not a plurality opinion "of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court."²⁴ Addressing James Risen's assertion of a journalist's privilege, the Fourth Circuit rejected the claim that Powell tacitly endorsed Stewart's balancing test; to do so would substitute Stewart's dissenting opinion for the majority opinion.²⁵

As Judge Gregory noted in his dissenting opinion in the Risen case, Justice Powell's concurring opinion and the subsequent appellate history have made the lessons of *Branzburg* "about as clear as mud."²⁶ The wildly different readings of Justice Powell's concurring opinion are due to what Justice Stewart called its "enigmatic" quality.²⁷ The opinion was affected by end-of-term turmoil.²⁸ During the brief period in which Powell wrote his concurring opinion, he was besieged by Justices wanting to discuss abortion²⁹ and was also preoccupied with the death

²⁰ Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1116 (2002).

²¹ *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 972 (D.C. Cir. 2005).

²² *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).

²³ *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C. Cir. 2006).

²⁴ *Id.*

²⁵ *United States v. Sterling*, 724 F.3d 482, 496 (4th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 3843 (U.S. June 2, 2014). *See also In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987).

²⁶ *Sterling*, 724 F.3d at 523 (Gregory, J., dissenting in part).

²⁷ *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting). For additional descriptions, *see* FLOYD ABRAMS, *SPEAKING FREELY* 6 (2005) ("murky"); Goodale, *Qualified Privilege for Newsmen*, *supra* note 15, at 709 ("singularly opaque"); Geoffrey Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 44 (2005) ("puzzling").

²⁸ For a discussion about end of term turmoil in general, *see* JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 290 (2012) ("The last few weeks of a Supreme Court term are always tense and confusing. Only the most controversial cases remain. Drafts of opinions fly between chambers.").

²⁹ At the end of the October 1971 Term, the Court was considering whether to hear reargument in the abortion cases. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 332–39 (1994). Larry Hammond, who clerked for Justice Powell during the October 1971 Term, stated that at the end of the Term, Justice Powell was "inundated with people on the Court wanting to talk with him" about his views on abortion. Telephone Interview with Larry Hammond (Jan. 2, 2013) (on file with author) [hereinafter *Hammond Interview*]. Hammond later commented that the time pressure on Powell at the end of the 1971 Term cannot be overstated. E-mail from Larry

penalty issues presented in *Furman v. Georgia*,³⁰ two issues he regarded as much more significant than those presented in *Branzburg*. While Powell and his clerk Larry Hammond worked on *Furman* daily during Powell's first Term on the Court, producing four lengthy drafts,³¹ the *Branzburg* concurrence was written six days before the opinion was announced and the most significant modification was the addition of a footnote in response to Justice Stewart's dissenting opinion. Powell simply did not have time in late June 1972 to produce a polished opinion that fully engaged the issues.

Justice Powell considered withdrawing his *Branzburg* concurrence when it was criticized within the Court as being "superficial" and "confusing."³² Years later when his *Branzburg* concurring opinion became so influential, Powell expressed surprise; he had not realized that "people would think that he really held the fulcrum."³³ When given the opportunity to respond to sweeping readings of his *Branzburg* concurrence in *Zurcher v. Stanford Daily*,³⁴ a 1978 case regarded by the Justices as a sequel to *Branzburg*, Powell rejected those readings.

Other commentators have noted Justice Powell's frequent use of concurring opinions to restrict the meaning of majority opinions.³⁵ Powell's penchant for balancing, a key theme of his tenure on the Court, has also been critiqued.³⁶ The purpose of this Article is not to revisit those issues. Rather, my purpose is to review the papers of Justice Powell, housed at Washington & Lee University, as well as the papers of other Justices housed at the Library of Congress, to illuminate one of the most important, yet confusing concurring opinions in the Court's

Hammond to the author (Apr. 13, 2015) (on file with author).

³⁰ *Furman v. Georgia*, 408 U.S. 665 (1972).

³¹ Powell's fourth draft was circulated on June 26, 1972, three days before *Furman* was announced. Lewis F. Powell, Jr., *Furman v. Georgia Dissenting Opinion*, 4th Draft (June 26, 1972), *Furman v. Georgia File*, Part 14, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law [hereinafter *Powell Archives*]. Hammond recalls the intensity of Powell's attention to *Furman*, due in part to Powell's belief, until late in the Term, that he would carry the Court. *Hammond Interview*, *supra* note 29. *See also* JEFFRIES, *supra* note 29 at 411 ("The opinion Powell produced over the next several months was perhaps less polished and elegant than Harlan's best efforts, but it lacked nothing in force or clarity.").

³² *Hammond Interview*, *supra* note 29. Hammond does not recall which justice criticized Powell's draft concurring opinion, but the criticism was "something like it was silly, and he needed to stop fooling around, he needed to be on one side or the other, he was wasting everybody's time and energy, and it was confusing." *Id.*

³³ Hammond often visited Justice Powell during the 1980s and recounted that Powell "didn't really anticipate that he was undercutting White as much as subsequent history has suggested." *Hammond Interview*, *supra* note 29.

³⁴ *Zurcher v. Stanford Daily*, 436 U.S. 547, 568–70 (1978) (Powell, J., concurring).

³⁵ *See, e.g.*, Pelham-Webb, *supra* note 19; Samuel Estreicher & Tristan Pelham-Webb, *The Wisdom of Soft Judicial Power: Mr. Justice Powell, Concurring*, 25 CONST. COMMENT. 229 (2008).

³⁶ *See, e.g.*, Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

First Amendment cases.³⁷ In addition, extensive interviews with Powell's clerks during the *Branzburg* and *Zurcher* Terms provide insight into the development of Justice Powell's views.³⁸

Justice Powell's papers, which include his handwritten notes and commentary, as well as memoranda and draft opinions, clearly show that he was opposed to a constitutional privilege for journalists. Legislatures were to be the primary source of a journalist's privilege and only in extreme cases of harassment would courts balance the interests of law enforcement against those of journalists. Significantly, the interest balancing Powell envisioned had no substantive weighting or preference for First Amendment values. Consequently, Powell's "proper balance" falls far short of offering the significant protection often recognized by post-*Branzburg* courts. Moreover, his discomfort with treating journalists differently under the First Amendment undercuts any special judicial solicitude for journalists. While Powell's opinion offered a softer rhetorical tone and style than White's opinion, lower courts that have read Powell's concurring opinion broadly have misread that opinion.

A narrow reading of Justice Powell's concurring opinion would significantly impact the federal law of journalist's privilege.³⁹ If federal courts did not offer protection to journalists, pressure on Congress to enact a shield law would markedly increase. Indeed, the collapse of Congressional interest in a federal shield law in the period immediately after *Branzburg* was partly due to the perception that a crisis had been averted by judicial limiting of White's *Branzburg* opinion on a case-by-

³⁷ Two other authors have explored Justice Powell's *Branzburg* papers. See Sean W. Kelly, *Black and White and Read All Over: Press Protection After Branzburg*, 57 DUKE L.J. 199 (2007); Michele B. Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege*, 13 COMM. L. & POL'Y 379 (2008). Neither Kimball nor Kelly examined *Gravel v. United States*, 408 U.S. 606 (1972) and *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), two cases that shed important light on the *Branzburg* concurring opinion. Consequently, my reading of Powell's papers is distinct from their conclusions.

³⁸ The workload in Justice Powell's chambers was divided among the clerks so that one clerk was responsible for a particular case. Thus, Larry Hammond was responsible for *Branzburg*, and Robert D. Comfort was responsible for *Zurcher*. Both consented to interviews for this Article. Phil Fox was responsible for *Gravel*, but declined an interview on the grounds that his discussions with Justice Powell were confidential. E-mail from Phil Fox to author (Sept. 11, 2014) (on file with author). The following technique was used for these interviews: the author sent the interviewees a list of questions, with references to specific pages in documents contained in the *Powell Archives*. As these documents are online, the interviewees were able to review the documents prior to the interview. During the interview, the author and the interviewees consulted documents relevant to the questions.

³⁹ A majority of states have shield laws or rules of evidence providing protection similar to shield laws. See generally KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 517–25 (9th ed. 2014). There is no federal shield law and the protection available to journalists in federal courts varies from circuit to circuit. Compare *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) (refusing to recognize First Amendment-based privilege), with *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) (recognizing First Amendment-based privilege).

case basis.⁴⁰

A. *In the Shadow of the Pentagon Papers*

It was a long shot. When the Court granted certiorari on May 3, 1971 to four cases presenting the question of whether journalists had a First Amendment right to refuse to testify before grand juries, media lawyers predicted only four Justices—Black, Douglas, Brennan, and Marshall—would be sympathetic to their claims.⁴¹ To gain the fifth vote, a group of media lawyers believed their amicus brief should be written by a conservative scholar, “one who might appeal to one or more of the justices who came less easily to broad views of First Amendment protection.”⁴² They hired Yale law professor Alexander Bickel who crafted an argument for a qualified privilege to pick up the fifth vote. Bickel’s argument was distinct from those news organizations advocating an absolute privilege.⁴³

On June 14, Bickel presented a draft of his brief to the media lawyers; on that same day, the Attorney General asked *The New York Times* to cease publishing the Pentagon Papers. Bickel was then retained to represent the *Times* in its historic fight against the government.⁴⁴ As in the journalist’s privilege cases, Bickel predicted that Justices Black, Douglas, Brennan and Marshall would support the *Times*’ right to publish; to pick up the fifth vote Bickel claimed the *Times* should avoid any “sign of First Amendment absolutism.”⁴⁵

Bickel’s arguments in the *Pentagon Papers* case were successful; by a vote of 6-3, the Court ruled the government had not overcome the heavy presumption against prior restraints.⁴⁶ In addition to the votes of

⁴⁰ Lee, *supra* note 7, at 662. For a discussion of the factors inhibiting recent efforts to enact a federal shield law, see Lee, *supra* note 2.

⁴¹ ABRAMS, *supra* note 27, at 3.

⁴² *Id.*

⁴³ GOODALE, FIGHTING FOR THE PRESS, *supra* note 15, at 182. For a discussion of the various positions advocated by media groups, see Eric Easton, *A House Divided: Earl Caldwell, The New York Times, and the Quest for a Testimonial Privilege*, 2009 UTAH L. REV. 1293, 1324–26 (2009).

⁴⁴ Bickel’s work on journalist’s privilege would pay off in the *Pentagon Papers* case. The government asked the *Times* to produce a copy of the documents in its possession. The *Times* fought this because its copy had Daniel Ellsberg’s handwritten notations and would identify him as the *Times*’ source. When confronted with the government’s request, “we knew exactly what we would say. After all, Floyd [Abrams], Alex [Bickel] and I had started off the week by working on our ‘Caldwell brief’ to the Supreme Court. We would make the very same argument again before [Judge] Gurfein.” GOODALE, FIGHTING FOR THE PRESS, *supra* note 15, at 94.

⁴⁵ ABRAMS, *supra* note 27, at 17. See also GOODALE, FIGHTING FOR THE PRESS, *supra* note 15, at 156 (stating that the position the *Times* presented to the Court was not an absolute one). The position the *Times* advocated in the *Pentagon Papers* case prompted criticism from Black who said of Bickel, “[t]oo bad the *New York Times* couldn’t find someone who believes in the First Amendment.” BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 145 (1979). For Douglas’ criticism of the *Times*’ position in *Branzburg*, see *infra* note 124.

⁴⁶ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

Justices Black, Douglas, Brennan, and Marshall, the *Times* had picked up the votes of Justices White and Stewart. Not surprisingly, Black wrote one of the most powerful statements in favor of press freedom to be found in the *United States Reports*.⁴⁷

The euphoria experienced by the press in the immediate aftermath of the *Pentagon Papers* decision was short lived as Justice Black left the Court on September 17, 1971, followed by Justice Harlan six days later. Black's replacement, Lewis F. Powell, Jr., a corporate lawyer, had little exposure to constitutional issues during his career⁴⁸ and was harshly criticized during the confirmation hearings for his essay criticizing the "radical left" and defending the use of wiretaps without a court order.⁴⁹ The criticism of Powell, however, paled in comparison to that directed at William Rehnquist,⁵⁰ who was nominated to replace Justice Harlan. Rehnquist offered little prospect of being sympathetic to the First Amendment.⁵¹ The loss of Black and Harlan, the "intellectual leaders" of the Court, was met with pessimism by Court watchers. Professor Philip Kurland, for example, wrote, "No matter who the replacements, the Supreme Court is likely to be a sadly debilitated institution for some time to come."⁵²

Once Justice Powell was confirmed, he met with his law clerks⁵³

⁴⁷ In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.

Id. at 717. For the inspiration for some of Black's prose, see WOODWARD & ARMSTRONG, *supra* note 45, at 147-48.

⁴⁸ For a discussion of Powell's professional career, see JEFFRIES, *supra* note 29, at 44-221.

⁴⁹ See *Nominations of William H. Rehnquist of Arizona, and Lewis F. Powell, Jr. of Virginia, to be Associate Justices of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 92d Cong., 1st Sess. at 213-17 (1971) (reprinting Powell's essay) [hereinafter *Confirmation Hearings*]. For criticism of the essay, see *id.* at 457-59 (testimony of Catherine G. Roraback); *id.* at 464-69 (testimony of Paul O'Dwyer). Other criticism against Powell focused on matters such as his service on the Richmond school board, the Virginia State Board of Education, and membership in racially segregated clubs. See, e.g., *id.* at 380-86 (testimony of John Conyers, Jr.).

⁵⁰ The following statement by the AFL-CIO opposing Rehnquist's nomination captures the tone of the criticism:

Mr. Rehnquist's public record demonstrates him to be a rightwing zealot whose sole distinctions in public life are that he was the only major person of stature who opposed the Arizona civil rights bill in 1964 and that he has been one of the prime theoreticians of and apologists for this administration's root and branch assault on the constitutional system of checks and balances.

Id. at 400.

⁵¹ See, e.g., *id.* at 420 (noting Rehnquist's comment that restoration of the Warren Court would result in "further expansion of the constitutional rights of criminal defendants, of pornographers, and of demonstrators.").

⁵² Philip B. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 320 (1971). Justice Douglas was later quoted as saying Powell was a "dismal choice." WOODWARD & ARMSTRONG, *supra* note 45, at 391.

⁵³ The law clerks hired by Justice Black for the October 1971 Term were invited by Chief Justice Burger to stay until Black's successor was named so clerks would be in place should the

and said they should disregard anything they had heard about positions he had previously taken on constitutional issues. Larry Hammond, who clerked for Powell in both the October 1971 and October 1972 Terms, recalls Powell stating, "I want you to assume that I am essentially a blank slate on anything having to do with the Constitution or criminal law. I want to go back to first principles; I want to understand what the various provisions of the constitution are about . . . how each amendment came into existence."⁵⁴ The impression Powell created with this conversation was that he was "extremely open minded" as to constitutional issues. In particular, Powell wanted to be known for having high regard for the First Amendment, but he did not see the First Amendment in absolute terms.⁵⁵

The *Pentagon Papers* case affected Justice Powell deeply. "The decision of the *New York Times* and the *Washington Post* to publish those papers was theirs to make; the idea that they could be interfered with or enjoined bothered him a lot," Hammond recalled.⁵⁶ Powell told Hammond that if he had been on the Court during the *Pentagon Papers* case, he would have voted to dissolve the injunction. "He would not have done it on the same basis that Hugo Black did, but he would have come out in the same place."⁵⁷ The *Pentagon Papers* case was in Justice Powell's mind throughout the *Branzburg* case⁵⁸ in part because *Gravel v. United States*,⁵⁹ decided on the same day as *Branzburg*, presented questions about a grand jury inquiry into the leaking of the documents. Yet while acknowledging the freedom of the press to publish the documents, Powell came "very quickly" to the view that there should not be a constitutional journalist's privilege.⁶⁰ Nor did he believe that a legislative privilege foreclosed inquiry into how Senator Gravel obtained the classified study. Powell was opposed to policies that would encourage the theft of documents, an important theme in his

successor wish to use them. Powell agreed to retain Larry Hammond and Pete Parnell as clerks. *Hammond Interview, supra note 29.*

⁵⁴ *Hammond Interview, supra note 29.* Powell added, "on issues having to do with commercial law, antitrust and tax, you can leave those things to me." *Id.* Jeffries writes that in areas other than business and corporate law,

Powell knew little. He had to study the briefs to identify the arguments, then go back and read the precedents. His clerks helped, but as they were well versed in contemporary constitutional doctrine, they spoke a kind of shorthand that Powell only partly understood. References familiar to a recent law school graduate often meant nothing to him. Ideas current in the classroom he found entirely new. He had to learn every issue from the ground up.

JEFFRIES, *supra note 29*, at 334.

⁵⁵ *Hammond Interview, supra note 29.*

⁵⁶ *Id.* See also *Confirmation Hearings, supra note 49*, at 220 (Powell states that he does "not approve of any censorship.").

⁵⁷ *Hammond Interview, supra note 29.*

⁵⁸ *Id.*

⁵⁹ *Gravel v. United States*, 408 U.S. 606 (1972).

⁶⁰ *Hammond Interview, supra note 29.*

consideration of both *Branzburg* and *Gravel*. Hence, while the press had the freedom to publish leaked documents, the recipients of those documents could be required to testify as to their source. Stated differently, the *Pentagon Papers* case presented core First Amendment concerns, while *Branzburg* presented peripheral constitutional concerns.⁶¹

Justice Powell initially modeled his judicial style after Justice Harlan. "I believe in the importance of judicial restraint," he told the Senate Judiciary Committee.⁶² As Powell's biographer Professor Jeffries wrote:

In a reflexive, nontheoretical way, Powell thought of himself as a disciple of restraint. He placed himself in the tradition of John Harlan, a Justice known for craftsmanship, clarity, lawyerly reasoning, and a modest conception of the judicial role. . . . In short, Harlan sought to build on the traditions of societal consensus rather than trying to uproot them. Powell saw himself following in Harlan's footsteps as a careful, restrained, lawyerly judge.⁶³

Justice Powell's admiration of Justice Harlan also influenced Powell's commitment to balancing. But where Harlan used zero-sum balancing,⁶⁴ Powell primarily relied upon representative balancing,

⁶¹ *Gravel* involved the Speech and Debate Clause, not the First Amendment. During oral argument, the Solicitor General emphasized that there was no First Amendment issue because "the presses have rolled" and the government was entitled to evidence as to whether crimes had been committed in connection with the publication of the classified study. Transcript of Oral Argument at 21, *Gravel v. United States*, 408 U.S. 606 (1972) (No. 71-1017). Powell's notes of the oral argument do not show any disagreement with the Solicitor General's framing of the issues. Lewis F. Powell, Jr., Notes on Oral Argument, *Gravel v. United States* (Apr. 19, 1972) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Notes on Oral Argument*]. On a separate sheet of paper titled "Gravel Notes," he wrote "(No 1st Amend. Issue—no prior restraint—*Beacon* has published.)" Lewis F. Powell, Jr., *Gravel Notes* (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Gravel Notes*]. Nonetheless, the theory advanced for the privilege in *Gravel* is the same as in *Branzburg*. See *infra* text accompanying note 233.

⁶² *Confirmation Hearings*, *supra* note 49, at 219.

⁶³ JEFFRIES, *supra* note 29, at 349. See also *id.* at 263 (noting the close friendship between Justices Powell and Stewart and they both had the same judicial hero, John Harlan). On the similarity between Powell's first term opinions and those of Harlan, see Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972). As Jeffries notes, over time Powell's loosened his commitment to judicial restraint. JEFFRIES, *supra* note 29, at 425.

⁶⁴ Kahn, *supra* note 36, at 26 describes zero-sum balancing in the following terms:

The zero-sum balance is the model typically associated with the assertion that constitutional rights are "not absolute." The process of recognizing an exception to a general constitutional norm is described as a process of balancing: The Court must determine whether competing interests "outweigh" the norm. The controversy is framed such that the choice is exclusive: either the norm or the exception is recognized, but not both.

Kahn, *supra* note 36, at 26.

which seeks to accommodate each competing interest.⁶⁵ This approach, sharply criticized by Justices Brennan and Marshall in *Herbert v. Lando*,⁶⁶ a 1979 case in which Powell urged lower courts to consider competing interests when supervising discovery in libel suits,⁶⁷ provides no guidance to lower courts, offers uncertain protection to speakers, and is duplicative of existing federal rules.⁶⁸

As will be shown, the interest balancing advocated by Justice Powell in *Branzburg* was to take place within the established framework of judicial consideration of motions to quash and protective orders. A First Amendment-based journalist's privilege, with presumptions in favor of the press, upended established procedures and presumptions, and was outside of Powell's profound commitment to existing legal frameworks.

II. REPORTER'S PRIVILEGE

A. *The Cases*

Branzburg presented the Court with four disparate lower court rulings involving grand jury subpoenas of journalists who promised confidentiality to sources. The most expansive ruling was *Caldwell v. United States*; the least protective ruling was *In re Pappas*. In between *Caldwell* and *Pappas* were the two *Branzburg* rulings, one of which offered very limited protection under a protective order that Justice Powell regarded as a "rational position."⁶⁹

1. *Caldwell*

The Ninth Circuit developed "[a] new interpretation of the First Amendment"⁷⁰ in *Caldwell v. United States*, in which the appellate court ruled that Paul Caldwell, a *New York Times* reporter specializing in coverage of the Black Panthers, could refuse to appear before a grand jury unless the government demonstrated a compelling need for Caldwell's presence.⁷¹ A protective order limiting the questions asked

⁶⁵ "Representative balancing is marked procedurally by the consideration of a wide range of interests with a stake in a particular decision. Substantively, it aims to give voice to each interest by setting forth a rule that accommodates all of them." *Id.* at 5.

⁶⁶ *Herbert v. Lando*, 441 U.S. 153 (1979).

⁶⁷ *Id.* at 178–80 (Powell, J., concurring).

⁶⁸ See *infra* note 321.

⁶⁹ Lewis F. Powell, Jr., Tentative Impressions, *United States v. Caldwell* (No. 70-57), *In re Paul Pappas* (No. 70-94), *Branzburg v. Hayes & Meigs* (No. 70-85) (Feb. 23, 1972) (on file with Powell Archives, Washington and Lee University School of Law) [hereinafter *Tentative Impressions*].

⁷⁰ *Branzburg v. Meigs*, 503 S.W.2d 748, 750 (Ky. 1971). The Kentucky Court added that *Caldwell* "represents a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." *Id.* at 751.

⁷¹ *Caldwell v. United States*, 434 F.2d 1081, 1089 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

of Caldwell had been issued by the district court; this was not at issue on appeal.⁷² Rather, the Ninth Circuit's focus was the burden imposed upon the government before a reporter could be ordered to appear before a grand jury.

Caldwell's position was based on his belief that even entering the grand jury room would imperil his sensitive relations with the Black Panthers.⁷³ Caldwell's decision to appeal to the Ninth Circuit was not supported by *The New York Times*;⁷⁴ the company's general counsel, James Goodale, feared that having won a qualified privilege at the district court, Caldwell's appeal raised the prospect of an adverse appellate ruling.⁷⁵ Goodale parted ways with Caldwell because he regarded Caldwell's refusal to even appear as "far out."⁷⁶ Thus, the *Times* filed amicus briefs at both the Ninth Circuit and the Supreme Court. Caldwell regarded this support from the *Times* as lukewarm.⁷⁷

2. *In re Pappas*

The least protective ruling was *In re Pappas*, in which the Supreme Judicial Court of Massachusetts rejected the privilege claims of a television reporter who had gained entrance to Black Panther headquarters in New Bedford, Massachusetts.⁷⁸ Pappas appeared before a grand jury and refused to testify about what he had observed inside the Black Panther headquarters. The Massachusetts Court found that

⁷² Even if the government could show the necessity of Caldwell's presence, a qualified First Amendment privilege justified limiting the questions Caldwell was required to answer. *Id.* at 1086. The protective order is described in Application of Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970), *vacated sub nom.* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

⁷³ *Branzburg*, 408 U.S. at 678.

⁷⁴ The *Times* was granted standing to intervene in the district court because it had "an interest in the work product of Mr. Caldwell and the knowledge he has acquired in the course of his employment as a full time reporter for it." *Application of Caldwell*, 311 F. Supp. at 359–60. Goodale later learned that Caldwell had destroyed his notes. He recounts,

I was shocked. Here the *Times* had made a major issue over protecting reporters' notes, namely Caldwell's notes, and he didn't have any. When we intervened in the case on behalf of Caldwell to protect him, we did it on the basis that we owned his notes. But there were no notes. Unwittingly, we had lied to the court. We were wise not to intervene in the Appeals Court in San Francisco on the basis of owning his notes. That would have been a lie, too.

GOODALE, FIGHTING FOR THE PRESS, *supra* note 15, at 25.

⁷⁵ Caldwell recalls Goodale saying, "If you keep pushing this, you're going to get a bad law written." Easton, *supra* note 43, at 1299. Anthony Amsterdam, Caldwell's attorney, claimed that one of the reasons for appealing the appearance issue "was an apprehension that the government might possibly penetrate the privilege . . . in some unknown respect, forcing testimony, albeit of an extremely limited nature, from Caldwell." Goodale, *Qualified Privilege for Newsmen*, *supra* note 15, at 719 n.47 (citing personal correspondence from Amsterdam).

⁷⁶ GOODALE, FIGHTING FOR THE PRESS, *supra* note 15, at 25. *See* note 74, *supra* (noting that Goodale later learned that Caldwell had destroyed his notes, despite being subject to a subpoena). Caldwell's fear of being found out "helped explain the incredible position he took in the case." *Id.*

⁷⁷ Easton, *supra* note 43, at 1326 n.262.

⁷⁸ *In re Pappas*, 266 N.E.2d 297, 299 (Mass. 1971)

testimonial privileges were “exceptional” and journalists, like every citizen, were required to answer relevant and reasonable grand jury inquiries.⁷⁹ The Court believed the *Caldwell* ruling “largely disregards important interests . . . in enforcement of the criminal law” and any effect of compelled testimony on the dissemination of news was “indirect, theoretical, and uncertain”⁸⁰ It did comment that judges supervising grand juries had the duty to “prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation”⁸¹

3. *Branzburg I and II*

Between *Caldwell* and *Pappas* are two rulings involving Paul Branzburg, a reporter for the Louisville *Courier-Journal* who wrote articles describing illegal drug manufacturing and use in Kentucky. The first case (*Branzburg I*) involved Branzburg’s refusal to answer certain questions while appearing before a grand jury.⁸² The Kentucky Court of Appeals interpreted the state’s shield law as protecting the identity of sources of information, but Branzburg was required to testify about events he had personally observed, including the identities of those he had observed.⁸³ In a second case (*Branzburg II*) Branzburg sought to quash a grand jury subpoena on the grounds that forcing him to even appear before a grand jury would harm his effectiveness as a reporter.⁸⁴ Although this motion was denied, a protective order was issued shielding Branzburg from disclosure of confidential sources, but requiring that he divulge information based on his observations.⁸⁵ The Kentucky Court of Appeals affirmed, finding that Branzburg had not offered substantial evidence to prove that appearing before a grand jury would cause harm.⁸⁶

B. *No Constitutional Right*

According to Larry Hammond, Justice Powell very quickly arrived

⁷⁹ *Id.*

⁸⁰ *Id.* at 302.

⁸¹ *Id.* at 303. In affirming the Massachusetts Court, the U.S. Supreme Court stated that Pappas’ appearance was subject to the supervision of the presiding judge as to the propriety of the inquiry. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972).

⁸² *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. 1970).

⁸³ *Id.* Branzburg conceded in this case that the “general weight of authority” was that there was no First Amendment-based privilege. *Id.* at 346.

⁸⁴ *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

⁸⁵ *Branzburg v. Hayes*, 408 U.S. at 670.

⁸⁶ *Branzburg v. Meigs*, 503 S.W.2d 748, 750–51 (Ky. 1971). Although *Branzburg I* and *Branzburg II* present separate, but related issues, the arguments at the Supreme Court by Branzburg’s lawyers collapsed the issues. *See, e.g.*, Brief for Petitioner at 9, *Branzburg v. Hayes*, 408 U.S. 665 (1972) (No. 70-85) (arguing that the First Amendment provides newsmen a privilege against “compulsory appearances in closed proceedings and against compulsory disclosure of confidential information”).

at the position that there was no First Amendment-based journalist's privilege.⁸⁷ While Powell wrestled with other aspects of the cases, documents created by Hammond and Powell in preparation for the oral arguments consistently show Powell's certainty that these cases did not involve constitutional rights.

Hammond prepared a bench memo that treated *Garland v. Torre*⁸⁸ as "point[ing] in the proper direction analytically" in accommodating newsgathering and law enforcement.⁸⁹ *Garland*, written by Potter Stewart shortly before he joined the Court, found that due to the "paramount public interest in the fair administration of justice[.]" a journalist had no First Amendment right to refuse to identify the source of an allegedly libelous statement that "went to the heart of the plaintiff's claim."⁹⁰ Hammond summarized *Garland*: "Having found (or presumed) a First Amendment interest, the task for the court was to strike an appropriate balance which would permit the minimal interference with protected rights while serving other valid interests."⁹¹ In the margin next to this passage, Justice Powell wrote, "But not a Const. Right[.]"⁹²

Justice Powell also recorded his thoughts on a sheet labeled "Objections to Establishing a Const. Rule[.]"⁹³ Among the problems Powell noted are the "[definition] of newsmen," the *Caldwell* type "pre-hearing would result in a law suit every time" and the "Fair Trial/Free Press Issue" in which "Potter emphasized that fair trial is means of asserting all rights[.]"⁹⁴ Powell added that "[l]awyer's privilege [is] not of Const. dimension, States may create by statute[.]"⁹⁵ Powell concluded his comments with the following: "If we start down road of Const. Privilege—we open Pandora's Box[.]"⁹⁶

The problems posed by a constitutional privilege also appear in Justice Powell's notes of the oral arguments occurring on February 22

⁸⁷ *Hammond Interview*, *supra* note 29.

⁸⁸ *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

⁸⁹ Larry Hammond, Bench Memo, *U.S. v. Caldwell* (Feb. 20, 1972) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Caldwell Bench Memo*].

⁹⁰ *Garland*, 259 F.2d at 549–50. Stewart wrote, "What must be determined is whether the interest to be served by compelling the testimony of the witness . . . justifies some impairment" of press freedom. *Id.* at 548.

⁹¹ *Caldwell* Bench Memo, *supra* note 89. Thus, Hammond suggested a court should consider factors such as whether the information sought could be obtained from some "non-newsman source." *Id.* at 20.

⁹² *Id.*

⁹³ Lewis F. Powell, Jr., Objections to Establishing a Const. Rule, *U.S. v. Caldwell* (on file with the Powell Archives, Washington and Lee Law Library). Although this sheet is undated, it appears in Powell's *Caldwell* file between a preliminary note dictated by Justice Powell on February 16, 1972 and Hammond's February 20, 1972 bench memo.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

and 23, 1972.⁹⁷ In his notes concerning the *Caldwell* oral argument, Powell found a colloquy between Anthony Amsterdam, Caldwell's counsel, and Justice Marshall to be of significance. Powell's notes state: "(Marshall, J.—asked good Q—whether any other class of citizens has the privilege claimed by the press?)"⁹⁸ Similarly, William Bradford Reynolds of the Solicitor General's office emphasized during the *Branzburg* oral argument that the privilege could be claimed by "anybody" exercising First Amendment rights, not just journalists.⁹⁹ In the margin beside his notes on Reynolds' arguments, Powell wrote: "Difficult point to deal with[.]"¹⁰⁰

C. Tentative Impressions

On the afternoon of February 23, after hearing oral arguments in the cases, Justice Powell dictated a memo entitled "Tentative Impressions."¹⁰¹ He emphasized that these were his initial impressions and that his views were "subject to change and to the discussion at the

⁹⁷ Lewis F. Powell, Jr., Notes on *Branzburg v. Hayes* Oral Argument, *Branzburg v. Hayes* (Feb. 23, 1972) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Branzburg Oral Argument Notes*]. During the *Caldwell* and *Pappas* arguments, Justice Powell asked no questions. Powell asked several questions during the *Branzburg* argument, the most important is discussed in note 110 *infra*.

⁹⁸ Lewis F. Powell, Jr., Notes on *U.S. v. Caldwell* Oral Argument (Feb. 22, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Notes on Caldwell Oral Argument*]. For the exchange between Justice Marshall and Caldwell's attorney, see Transcript of Oral Argument at 11–12, *U.S. v. Caldwell* (Feb. 22, 1972) (on file with the Powell Archives, Washington and Lee Law Library). Powell's notes of the *Caldwell* oral argument also refer to the following remarks of Solicitor General Griswold: "If there is a privilege, how far does it extend? Can't be limited to resp. [responsible] press. It would go to underground press—books, magazines, etc. Privilege would soon be extended to professors." *Notes on Caldwell Oral Argument, supra*.

⁹⁹ Transcript of Oral Argument at 701, *Branzburg v. Hayes*, 408 U.S. 665 (1972) (No. 70-85), reprinted in 74 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 701 (Philip B. Kurland & Gerhard Casper, eds., 1975) [hereinafter *Transcript of Branzburg Oral Argument*].

¹⁰⁰ *Branzburg Oral Argument Notes, supra* note 97. Similarly, in Powell's notes on the *Pappas* oral argument, he indicated concern with the argument for a privilege. Powell wrote: "Reporter is entitled to a hearing in every case he claims privilege prior to being required to go before G/J-- + no other member of society could have this privilege." In the margin, Powell wrote, "This is substance of Prettyman's answer to question by Marshall (If I write, I should see transcript of argument)." Lewis F. Powell, Jr., Notes on *In Re Pappas* Oral Argument (Feb. 22, 1972), (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Pappas Oral Argument Notes*].

¹⁰¹ Lewis F. Powell, Jr., Tentative Impressions, *U.S. v. Caldwell* (Feb. 23, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Tentative Impressions*]. As Powell's biographer wrote, Powell did not have

that implicit faith in the validity of his own first reactions that cuts off second thoughts. Powell's letters, memos, and conversations were filled with disclaimers of certitude. His views were "tentative"; his reactions "preliminary" or "provisional," pending further research. He constantly told his clerks that his judgment awaited theirs, that he wanted to know their minds before making up his own.

JEFFRIES, *supra* note 29, at 404.

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Conference."¹⁰² His certainty that there was no constitutional privilege is evident in this memo; his views as to the "proper balance," however, were beginning to form.

Powell outlined how he intended to vote in each case. He intended to reverse *Caldwell* "as it went too far in establishing a constitutional right not even to testify at all."¹⁰³ He initially said of *Branzburg*, "I would affirm the holding, although I would not accept all of the reasoning of the court."¹⁰⁴ He amended this with a handwritten note that reads, "I would affirm because I concluded no const. privilege exists."¹⁰⁵ Regarding *Pappas*, he made the following observation:

It seems to me that the Massachusetts court may have been right in holding that there is no privilege as a matter of constitutional right, either absolute or qualified. But the Court did not give due weight to the importance of balancing First Amendment interests against the other interests involved. I would be inclined to reverse *Pappas* for reconsideration in light of the principles and guidelines established in this Court's opinion.¹⁰⁶

As to "controlling principles," Powell was tentatively inclined to share the view expressed by Potter Stewart in *Garland v. Torre* that there is no constitutional privilege, but that courts should balance First Amendment interests against the interest in the administration of justice.¹⁰⁷ He also expressed interest in the protective order issued in *Branzburg II*, which shielded the identity of the reporter's confidential sources, but required the reporter to answer questions about criminal acts he witnessed. Some "elaboration and refinement" of this approach might make sense, Powell wrote. Finally, he found that some of the safeguards urged by attorneys for the media, such as "imposing a heavy burden on the state to show a 'compelling and overriding interest,' and to guarantee a public hearing *prior* to the newsman being required to answer any question, go much too far."¹⁰⁸

To Justice Powell the term privilege meant something quite distinct from the meaning offered by lawyers for the journalists in these cases. For example, Edgar Zingman, Branzburg's attorney, argued that a First Amendment-based qualified privilege had both procedural and substantive components; before a journalist was required to appear before a grand jury "an inquiry must be made in an open hearing to

¹⁰² *Tentative Impressions* at 1, *supra* note 101.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 3–4. See *supra* text accompanying notes 88–91.

¹⁰⁸ *Tentative Impressions*, *supra* note 101, at 4.

determine whether the necessary compelling need has been shown to justify infringement of the constitutional rights involved.”¹⁰⁹ Powell’s notes of the *Branzburg* oral argument state that he did not accept Zingman’s position.¹¹⁰ As will be shown, Powell disagreed with special procedures and the interest balancing Powell advocated offered far less protection than the journalists sought.

D. *The February 25 Conference*

At the Court’s February 25, 1972 Conference, the Justices voted 5-4 in each case to reject the arguments for a First Amendment-based privilege.¹¹¹ According to Justice Brennan’s notes, Powell stated, “[it w]ould be unwise to give press any constitutional privilege and we’re writing on a clean slate so don’t have to give constitutional status to newsmen. I’d leave it to legislatures to create one, or perhaps let courts create something like lawyers’ privilege[.]”¹¹² Justice Blackmun’s

¹⁰⁹ Brief for Petitioner at 38, *Branzburg v. Hayes*, 408 U.S. 665 (1972) (No. 70-85).

¹¹⁰ In the *Branzburg* oral argument, Justice Powell asked several questions; the most important colloquy was when Powell asked the attorney for Kentucky if he agreed with Judge Meigs’ protective order. *Transcript of Branzburg Oral Argument*, *supra* note 99, at 697–98. Powell came back to this portion of his notes of the *Branzburg* oral argument with a different writing instrument and wrote the following in the margin: “Note to myself: A rational position might be based on J. Meigs order—according qualified privilege—but not accepting Zingman’s submission (which is similar to Bickel) See AG’s guidelines.” *Branzburg Oral Argument Notes*, *supra* note 97. The reference to the Attorney General’s guidelines in Powell’s note is to a policy adopted by the Attorney General governing the circumstances under which subpoenas may be issued to journalists. As the Solicitor General wrote, these guidelines were designed to minimize interference with the newsgathering activities of the press. “This, however, is different from according the news media a privilege under the Constitution to be free of the duty imposed on all citizens to give testimony relating to a crime.” Brief for the United States as Amicus Curiae at 14, *Branzburg v. Hayes*, 408 U.S. 665 (1972) (No. 70-85).

¹¹¹ Justice Powell recorded the following votes in *Caldwell*: Chief Justice Burger, Justices Blackmun, Powell and Rehnquist voted to reverse. Justices Douglas, Marshall and Brennan voted to affirm. Justice White’s vote to reverse was listed as tentative as was Justice Stewart’s vote to affirm. Docket Sheet, *U.S. v. Caldwell* (Feb. 25, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Caldwell Docket Sheet*]. On the *Branzburg* cases, Justice Powell noted Chief Justice Burger along with Justices White, Blackmun, Powell and Rehnquist voted to affirm. Justices Douglas, Brennan, Stewart, and Marshall voted to reverse. Docket Sheet, *Branzburg v. Hayes* (Feb. 25, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Branzburg Docket Sheet*]. Voting to affirm in *Pappas* were Chief Justice Burger, Justices White, Blackmun, Powell and Rehnquist. Voting to reverse were Justices Douglas, Brennan and Marshall. Justice Stewart’s vote to reverse was described as “still tentative.” Docket Sheet, *In the Matter of Pappas* (Feb. 25, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Pappas Docket Sheet*]. Justice Brennan’s docket sheets for these cases show the same line-up, but do not list the votes of White and Stewart as tentative. *See, e.g.*, Docket Sheet, *United States v. Caldwell* (Feb. 25, 1972), Box I: 253, Folder 5, William J. Brennan Papers, Manuscript Division, Library of Congress [hereinafter *Brennan Papers*].

¹¹² Brennan Papers, *supra* note 111. Powell’s reference to lawyer’s privilege here is understandable as it was the privilege most familiar to him as a former corporate lawyer. Lawyer’s privilege, however, is the worst model for a journalist’s privilege as the former is recognized as “the most complex of all evidentiary privileges.” PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE* § 7.01 (3d ed.1995). *See United States v. United Shoe*

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Conference notes attribute the following comment to Powell: "Once we give const. dimension to status of newsmen, we open many doors. Legis can create a priv."¹¹³ Finally, Justice Douglas' notes show that Powell regarded any privilege as sharply circumscribed: "If there is a choice of Bill of Rights—a fair trial comes first—he gives no basis to press for protecting these confidences—no segment of society should be privileged against a fair trial[.]"¹¹⁴

Although Justice Powell stated in his "Tentative Impressions" memo that he was inclined to reverse *Pappas*, at the conference he voted to affirm *Pappas*.¹¹⁵ On the front of his docket sheet, Justice Powell wrote the following: "I don't like Mass. opinion or result, but as I have concluded there is no Constitutional privilege, I have no choice but to affirm."¹¹⁶

On the *Caldwell* docket sheet, Powell wrote two notes explaining his vote and intentions. He explained his vote in the following manner:

My vote turned on my conclusion—after hearing arguments of counsel + re-reading principal briefs—that we should not establish a constitutional privilege. If we did this, the problems that would flow from it would be difficult to foresee: e.g. applying a privilege of const. dimensions to grand juries [sic], petit juries, congressional committees, etc. And who are "newsmen"—how to define?¹¹⁷

As to his intentions, Powell wrote: "I will make clear in an opinion—unless the Court's opinion is clear—that there is a privilege analogous to an evidentiary one, which courts should recognize + apply on case by case to protect confidential information."¹¹⁸

On the *Branzburg* docket sheet, Powell wrote, "I don't agree with much of Ky. opinion but if there is no 1st Amend. Privilege, this is merely a state case."¹¹⁹ In his notes summarizing the comments of the Justices, he wrote of his own views: "*Affirm* as I do not think there is a

Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950) (Judge Wyzanski's description of lawyer's privilege, outlining the factors and sub-factors necessary before a privilege applies to lawyer-client communication). Journalists and their sources need simplicity and clarity when they enter into confidential relationships. See Lee, *supra* note 7, at 664–70.

¹¹³ Harry A. Blackmun, Conference Notes (Feb. 25, 1972), U.S. v. Caldwell Case File, Box 138, Folder 8, Harry A. Blackmun Papers, Manuscript Division, Library of Congress [hereinafter *Blackmun Papers*].

¹¹⁴ William O. Douglas, Conference Notes (Feb. 25, 1972), U.S. v. Caldwell Case File, Box II: 1547, William O. Douglas Papers, Manuscript Division, Library of Congress [hereinafter *Douglas Papers*].

¹¹⁵ *Pappas Docket Sheet*, *supra* note 111.

¹¹⁶ *Id.* Based on his "Tentative Impressions" memo, Powell believed the lower court did not "properly" balance the competing interests.

¹¹⁷ *Caldwell Docket Sheet*, *supra* note 111.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

const. privilege[.]”¹²⁰

By late February 1972 Powell’s certainty that these cases did not involve constitutional rights was evident. Further, he believed that state legislatures would play a critical role in developing privilege law. Finally, his belief that courts should balance competing interests was nascent; a more complete sense of this balancing process would be developed in June largely in response to Justice Stewart’s dissenting opinion.¹²¹

E. Notes on Justice White’s Draft Opinion

Justice White circulated a draft majority opinion to the Conference on May 29.¹²² Justice Douglas circulated a draft of a dissenting opinion on May 30,¹²³ arguing for an absolute privilege unless a reporter was implicated in a crime.¹²⁴ Justice Stewart announced on May 31 he would write a dissenting opinion.¹²⁵

Justice Powell reviewed White’s draft opinion on June 5 and 6, writing on the first page, “[a]m strongly inclined to join, subject to discussing with L.H. [Larry Hammond.]”¹²⁶ Significantly, nothing in Powell’s margin notes on the draft or on a separate sheet of handwritten comments indicates disagreement with White’s opinion. Instead, Powell emphasized the strengths of White’s opinion. For example, Powell observed that White’s draft contained a “[s]trong statement as to no 1st Amend. protection vs. violating laws—e.g. stealing documents or

¹²⁰ *Branzburg* Docket Sheet, *supra* note 111.

¹²¹ See *infra* note 159.

¹²² Justices Blackmun and Rehnquist respectively joined White’s opinion on the 30th and 31. Letter from Justice Blackmun to Justice White (May 30, 1972), Box I: 212, Folder 8, Byron R. White Papers, Manuscript Division, Library of Congress [hereinafter *White Papers*]; Letter from Justice Rehnquist to Justice White (May 31, 1972), Box I: 212, Folder 8, *White Papers*. Chief Justice Burger joined on June 9. Letter from Chief Justice Burger to Justice White (June 9, 1972), Box I: 212, Folder 11, *White Papers*. As will be discussed below, Burger circulated a draft of a concurring opinion on June 26, but decided to pull it shortly before the case was announced. See *infra* note 161.

¹²³ The draft circulated to the conference on May 30 was Douglas’ fourth draft. The uncirculated early drafts are in box II: 1547 of the Douglas Papers. The fourth, fifth, sixth, and seventh drafts, circulated from May 30 to June 12, 1972, are also in Box II: 1547.

¹²⁴ *Branzburg v. Hayes*, 408 U.S. 665, 712 (Douglas, J., dissenting). Douglas was especially critical of *The New York Times* for its position that “First Amendment rights are to be balanced against other needs or conveniences of government.” *Id.* at 713 (footnote omitted). The balancing test advocated by the *Times* was adopted by Justice Stewart. See *id.* at 745–46 (Stewart, J., dissenting).

¹²⁵ Letter from Justice Stewart to Justice White (May 31, 1972), Box I: 212, Folder 8, White Papers.

¹²⁶ Justice Powell’s comments on Justice Byron White’s Draft Opinion of *Branzburg v. Hayes* (May 29, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Powell’s Comments on White’s Draft Opinion*]. Woodward & Armstrong report that “[a]fter much hesitation” Powell finally joined White’s opinion. WOODWARD & ARMSTRONG, *supra* note 45, at 223. Nothing in Powell’s papers indicates that he was hesitant to join White’s opinion.

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private wiretapping—or receiving stolen prop[.]”¹²⁷ He also observed that the opinion contained a “[s]trong statement as to purpose of fair + effective law enforcement” and that a “[r]equirement to show that crime has been committed would hamper G/J—as purpose is to determine whether a crime has been committed[.]”¹²⁸

One of Justice Powell’s most interesting margin notes appears on the page where White wrote that the First Amendment should not be construed to:

protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen’s justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates.¹²⁹

In the margin, Powell wrote “cheers!”¹³⁰

Reiterating a theme stated on the *Caldwell* docket sheet and at several points in his notes concerning the oral arguments, Justice Powell wrote on the back of the last page of White’s draft, with page references to White’s draft, “[a]dministration of a newsman’s privilege would present courts with great difficulty—37 (How does one define “newsmen”—all writers, commentators, etc??—a day, or career?) Leave to Legislation rather than a Const. rule—39[.]”¹³¹

On June 19, Justice Stewart circulated his dissenting opinion. Thus, when Powell prepared a separate opinion on June 23, the views of both White and Stewart had been presented to the Conference. To put Powell’s separate opinion in perspective, it is useful to briefly summarize the contrasting views of White and Stewart.¹³² Stewart described newsgathering as “a corollary of the right to publish;”¹³³ White, however, believed the core First Amendment activity of publishing was not burdened by the requirement that reporters testify before grand juries.¹³⁴ Stewart believed the press deserved special constitutional protection to fulfill the societal interest in the free flow of

¹²⁷ *Powell’s Comments on White’s Draft Opinion*, *supra* note 126.

¹²⁸ *Id.*

¹²⁹ White’s Draft Opinion of *Branzburg v. Hayes* at 32 (May 29, 1972) (on file with the Powell Archives, Washington and Lee Law Library).

¹³⁰ *Powell’s Comments on White’s Draft Opinion*, *supra* note 126, at 32. He reiterated his “cheers!” comment again on the back of the last page of the draft when he wrote, “[b]etrayers of confidences + thieves of information—32 (cheers!).” *Id.*

¹³¹ *Id.*

¹³² A more detailed explication of their differences is found in Lee, *supra* note 7, at 644–51.

¹³³ *Branzburg v. Hayes*, 408 U.S. 665, 727 (Stewart, J., dissenting).

¹³⁴ *Id.* at 681 (stating that these cases do not present a restriction on what the press may publish).

information.¹³⁵ White believed the grand jury had a special role to play and that compliance with subpoenas was critical to “fair and effective law enforcement.”¹³⁶

Most significantly, White was opposed to defining a constitutional privilege via ad hoc balancing, which he believed would not offer much protection to journalists and would “embroil” courts in difficult policy determinations.¹³⁷ Stewart admitted his three-part balancing test, developed by Alexander Bickel, would require courts to make “some delicate judgments” but this was a function of courts.¹³⁸

Justice Powell agreed completely with White that there was no First Amendment-based journalist’s privilege; however, Powell wrote separately to emphasize that constitutional interests should be considered by courts addressing a motion to quash. To Powell, this interest balancing was distinct from Stewart’s rights-based approach.

F. *The Draft Concurring Opinion*

1. The Heading

The heading published in the *United States Reports* is “MR. JUSTICE POWELL, concurring.”¹³⁹ Before settling on this heading, though, Justice Powell tried other headings. On the typed draft, dictated on June 23, 1972, the heading is “MR. JUSTICE POWELL, concurring,”¹⁴⁰ after which Powell handwrote “in the opinion of the Court and the judgments.”¹⁴¹ The phrase “and the judgments” was subsequently crossed out. Hence, the draft circulated to the Justices on June 24th was labeled “MR. JUSTICE POWELL, concurring, in the opinion of the Court.”¹⁴²

Are these changes of any significance? Earlier in the October 1971 Term, Henry Putzel, Jr., Reporter of Decisions, circulated a memo stating, “[i]n the past there has been occasional line-up confusion where a Justice whose opinion is labeled “concurring” does not join in the majority opinion. In such a case, his opinion should logically be labeled not just “concurring,” but “concurring in the result” or “concurring in

¹³⁵ *Id.* at 725 (Stewart, J., dissenting).

¹³⁶ *Id.* at 686–88.

¹³⁷ *Id.* at 702–06.

¹³⁸ *Id.* at 745–46 (Stewart, J., dissenting).

¹³⁹ *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

¹⁴⁰ The uncorrected version is not in Justice Powell’s papers, but he shared a copy featuring this heading with Justice White. Lewis F. Powell, Jr., Draft Concurring Opinion, *Branzburg v. Hayes* (June 23, 1972), Box I: 212, Folder 12, *White Papers*.

¹⁴¹ Lewis F. Powell, Jr., Draft concurring opinion, *Branzburg v. Hayes* (June 23, 1972) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter *Powell Draft Concurring Opinion*].

¹⁴² Lewis F. Powell, Draft concurring opinion, *Branzburg v. Hayes* (June 23, 1972), Box I: 212, Folder 12, *White Papers*.

the judgment.”¹⁴³ Larry Hammond recalls that Frank Lorson of the Clerk’s Office offered suggestions to Justice Powell as to the correct nomenclature, and Powell, “in his very courtly, thoughtful way,” accepted guidance.¹⁴⁴ Hammond believes Powell paid close attention to the views of Lorson and Putzel as to the correct labeling of his opinion.¹⁴⁵

Some argue that the use of phrases such as concurring or concurring in part is inconsistent among the Justices and therefore should not have prominence over the text.¹⁴⁶ Others note the problem of mislabeled opinions.¹⁴⁷ Consequently, scholars who have studied concurring opinions focus on the text of the opinion to determine whether it expresses agreement with the majority’s result but not with its reasoning or agrees with the majority’s result and its reasoning.¹⁴⁸ While the substantive meaning of a concurring opinion comes from an assessment of its text, Justice Powell’s decision as to the labeling of his opinion is one indicator of his intent.

2. The Typed Draft

A typed version of Justice Powell’s draft was circulated to the Conference on June 24. In this draft, as in the published opinion, Powell wrote that he added this “brief statement to emphasize what seems to me to be the limited nature of the Court’s holding.”¹⁴⁹ Powell’s first paragraph stated the Court was not holding that newsmen “are without

¹⁴³ Memorandum from Henry Putzel, Jr., Reporter of Decisions, to the Justices’ Secretaries and Law Clerks Re: Advance headnoting procedures (Nov. 23, 1971), Box I: 204, Folder 4, *White Papers*.

¹⁴⁴ *Hammond Interview*, *supra* note 29. Hammond initially thought Michael Rodak offered suggestions to Justice Powell, but the death of Frank Lorson caused him to recall that it was Lorson who offered suggestions. E-mail from Larry Hammond to the author (Jan. 18, 2013) (on file with author).

¹⁴⁵ *Id.*

¹⁴⁶ See, e.g., Sonja R. West, *Essay: Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1958 (2006).

¹⁴⁷ See, e.g., Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1607–10 (1992).

¹⁴⁸ Igor Kirman, Note, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 (1995) (distinguishing a “concurrence in judgment” which disagrees with the majority’s reasoning from a “simple concurrence” which agrees with the majority’s reasoning). Other scholars offer different categories. Ray categorizes concurrences as emphatic, doctrinal, limiting, and expansive. Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780–81 (1990). Similarly, Witkin identified four purposes of concurring opinions: to expand a holding or supplement its reasoning; to limit or qualify a holding; to offer a different theory in support of the holding; or to uphold a precedent or produce a majority opinion. B. E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* 217–24 (1977). Perhaps the most trenchant comment on concurring opinions comes from Judge Gewin who said there were three types of concurring opinions: the excusable, the justifiable, and the reprehensible. Walter P. Gewin, *Opinions—Dissents, Special Concurrences, Policy, Techniques*, 63 F.R.D. 594, 595 (1973).

¹⁴⁹ *Powell Draft Concurring Opinion*, *supra* note 141.

constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested by the dissenting opinion, that state and federal authorities are free to ‘annex’ the news media as ‘an investigative arm of government.’¹⁵⁰ As Hammond recalls, Powell was concerned about the press being used as a “lazy prosecutor’s tool,” where information sought from a journalist was “indistinguishable from anybody else’s,” such as where a reporter is subpoenaed to testify about an event, such as a demonstration, that was viewed by many people.¹⁵¹ But Powell “would not buy” the idea that asking a journalist questions would cause sources to dry up.¹⁵²

The second paragraph referred to the concluding portion of Justice White’s opinion, which emphasized that harassment of journalists will not be tolerated.¹⁵³ Powell elaborated, writing that where a newsman believes a grand jury investigation is not conducted in good faith, “he is not without remedy.”¹⁵⁴ If a newsman was called upon to give information not relevant to the investigation, or believes 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 protection order may be entered.”¹⁵⁵ A court considering such a motion should “stri[k]e a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”¹⁵⁶ Powell’s emphasis here was different in tone, rather than substance, from White’s opinion.

In the concluding paragraph, Justice Powell wrote: “In short, the Court merely holds that a newsman has no testimonial privilege as a matter of right under the Constitution. We do not hold that the protection of the courts is unavailable to newsmen under circumstances

¹⁵⁰ *Id.*

¹⁵¹ *Hammond Interview, supra* note 29.

¹⁵² *Id.*

¹⁵³ *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (stating that grand juries are subject to judicial control to prevent harassment of the press).

¹⁵⁴ *Id.* at 710 (Powell, J., concurring).

¹⁵⁵ *Powell Draft Concurring Opinion, supra* note 141, at 2. Some commentators claim Powell’s reference to relevance is similar to the first prong of Stewart’s test which required the government show the journalist has information relevant to a specific probable violation of the law. *See, e.g., Goodale, Qualified Privilege for Newsmen, supra* note 15, at 715. Whereas Stewart put the burden of proving relevance on the government, Powell couched this in terms of the “tried and traditional” method where the burden is upon the movant. *See infra* text accompanying note 174. Regardless of what Powell said about relevance, a motion to quash may raise that issue; a fundamental requirement of a valid subpoena duces tecum is the requirement that materials sought must be relevant to the investigation. *See infra* note 170. This requirement exists regardless of any claim of privilege. Moreover, Justice White was well aware of the requirement of relevance. *See, e.g., Branzburg*, 408 U.S. at 690–91 (journalists must respond to relevant questions). *See also Gravel v. United States*, 408 U.S. 606, 628 (1972) (grand jury may ask Senator’s aide questions relevant to its investigation).

¹⁵⁶ *Powell Draft Concurring Opinion, supra* note 141, at 2.

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where legitimate First Amendment interests require protection.”¹⁵⁷ The published version of the concluding paragraph changes the emphasis slightly by deleting the reference to the lack of a constitutional right. It reads as follows: “In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.”¹⁵⁸

3. The Typeset Version

Prompted by Justice Stewart’s dissenting opinion, which Justice Powell believed went too far,¹⁵⁹ Powell added a footnote to a typeset draft that was circulated to the Conference.¹⁶⁰

From the outset of the case, Powell rejected the idea that the press was special, a sentiment also expressed by Chief Justice Burger in a concurring opinion that was withdrawn at the last minute.¹⁶¹ Hammond recalls that Powell

couldn’t find a way to distinguish newsmen from anyone else. So, when you put that in the context of a grand jury subpoena, he had a really hard time going with the idea that there was something so quintessentially important about newspaper people that he should enshrine their rights in a way different from the rights of others.¹⁶²

Powell claimed in the footnote that special protection for the press would defeat the “essential societal interest” in law enforcement.¹⁶³

Justice Powell, however, believed that there were limits to a grand

¹⁵⁷ *Id.* at 2–3.

¹⁵⁸ *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

¹⁵⁹ Hammond recalls that Powell felt the footnote was a necessary response to Stewart’s dissenting opinion. *Hammond Interview*, *supra* note 29.

¹⁶⁰ Lewis F. Powell, Jr., Draft Concurring Opinion, *Branzburg v. Hayes* (June 24, 1972) (on file with the Powell Archives, Washington and Lee University School of Law). The draft is stamped June 24 in the file copy in Powell’s papers. However, a circulation list maintained in Justice White’s chambers states the draft was circulated on June 26. Circulation List, *Branzburg v. Hayes*, Case Files: Oct. Term 1971, Box I: 203, Folder 5, *White Papers*.

¹⁶¹ Chief Justice Burger circulated a draft concurring opinion on June 26. Burger criticized the idea that “there is some constitutional right to gather news in a particular manner—in this case a constitutional right to refuse a grand jury subpoena or to refuse to give testimony before a grand jury.” Warren E. Burger, Draft Concurring Opinion at 1, *Branzburg v. Hayes* (June 26, 1972), Box I: 212, Folder 13, *White Papers*. He also disputed the claim that compelled testimony would dry up news sources. “If there were any genuine, or even plausible, basis for the sweeping claims made here for reporters, one might well ask how a free press has flourished in America as no where else in the world for nearly 200 years, without the protection now asserted to be indispensable.” *Id.* at 2. A page proof of the syllabus and the line-up of the Justices dated one day before the case was announced shows Burger writing a concurring opinion. Letter from Henry Putzel, Jr., Reporter of Decisions, to Justice Byron White, (June 28, 1972), Box I: 212, Folder 13, *White Papers*. Burger’s decision to withdraw the concurring opinion came later on the 28th or very early on the 29th.

¹⁶² *Hammond Interview*, *supra* note 29.

¹⁶³ *Powell Draft Concurring Opinion*, *supra* note 160.

jury's investigative powers, and in the footnote he differentiated the balancing called for by Stewart from the balancing Powell believed was appropriate under the majority's approach. Whereas Stewart's approach placed a heavy burden on the government—thus making the questioning of journalists a rarity—Powell assigned no predetermined weight to the interests. In effect, the reasonable balance Powell sought lacked a preference for free expression. Courts were to be sensitive to First Amendment interests, yet also protect the “essential” interest in the detection and prosecution of crime.

a. The Appearance Issue

Neither Justice Powell nor his clerks had any experience with grand juries, and in the footnote Powell miscast the process of challenging a subpoena.¹⁶⁴ As noted earlier, Powell did not like what he termed the *Caldwell*-type pre-hearing,¹⁶⁵ and in the footnote he elaborated on the “tried and traditional way” of resolving challenges to subpoenas.¹⁶⁶ Unlike Caldwell, who asserted a privilege “not even to appear” unless the government had made a threshold showing, Powell said, “[t]he newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him.”¹⁶⁷ This statement is misleading because it is both right and wrong. It is wrong in its description of grand jury procedures concerning a motion to quash a subpoena *duces tecum* and a motion seeking a protective order; it is correct in its description of motions to quash a subpoena *ad testificandum*.

The most common remedy in grand jury litigation is a protective

¹⁶⁴ *Hammond Interview*, *supra* note 29. Hammond stated that he assumed in 1972 that “if you were subpoenaed, you would actually have to show up.” Yet, as he has learned through the representation of clients subpoenaed by grand juries, motions to quash and applications for protective orders are filed “long before the grand jury appearance itself.” *Id.* He adds that protective orders must be sought in a way that respects the court's authority: he states that if you were to say “I'm not going to appear under any circumstances,” you would not get a protective order in most jurisdictions. *Id.* But, “the image that you have to go into a grand jury room and assert a privilege and ask for the court's help is not entirely true.” *Id.*

¹⁶⁵ See *Tentative Impressions*, *supra* note 101.

¹⁶⁶ There was little case law dealing with press challenges to subpoenas. See *Branzburg v. Hayes*, 408 U.S. 665, 685–86 (1972). So Powell's reference to the “traditional way” of resolving disputes is enigmatic. It could refer to the body of law holding that the First Amendment was outweighed by the obligation to testify. See *Tentative Impressions*, *supra* note 101, at 686. Or, it could more broadly refer to the doctrine surrounding motions to quash and protective orders. Either meaning, however, is not supportive of a First Amendment-based journalist's privilege.

¹⁶⁷ *Powell Draft Concurring Opinion*, *supra* note 160. Stewart was not claiming that a reporter could ignore a subpoena or that a subpoena could be issued only after the government met the three-part test. “Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.” *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

order delineating the scope of permissible questioning.¹⁶⁸ This order, issued by the court supervising the grand jury, is tailored to meet specific concerns of the witness in advance of the witness' appearance.¹⁶⁹ Grand jury practice also allows challenges to a subpoena duces tecum before an appearance; substantive First Amendment issues are ripe for determination in a pre-appearance motion to quash this type of subpoena.¹⁷⁰ In contrast, since a motion to quash a subpoena ad testificandum "seeks to discharge the obligation to appear at all, the courts hold that the issues raised may not be ripe for determination until the grand jury seeks specific evidence at the appearance stage."¹⁷¹ Thus, courts often hold that the witness must first appear before the grand jury and assert a constitutional privilege in response to questioning.¹⁷² A motion to quash a subpoena duces tecum has more likelihood of success than a motion to quash a subpoena ad testificandum.¹⁷³

To be certain, Stewart was not saying that journalists could disregard subpoenas, but once a reporter challenged a subpoena, a heavy burden fell upon the government.¹⁷⁴ Powell believed this burden upset the "tried and traditional" method of addressing motions to quash. That method presumes the grand jury was acting legitimately and places the burden on the movant.¹⁷⁵

¹⁶⁸ THE GRAND JURY PROJECT OF THE NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES at § 3:9 (4th ed. 2013) [hereinafter REPRESENTATION OF WITNESSES].

¹⁶⁹ *Id.* A protective order may also be issued once a witness appears and the line of questioning is apparent. For an example of judicial supervision of grand jury questioning to protect the First Amendment, see *Burse v. United States*, 466 F.2d 1059, 1087–88 (9th Cir. 1972) (examining questions presented to two journalists for *The Black Panther* newspaper and concluding that the foundation for some was adequate, but the foundation for others was insufficient).

¹⁷⁰ REPRESENTATION OF WITNESSES, *supra* note 168, at § 2:58. Apart from any claims of privilege, questions of reasonableness may also be challenged at this stage. *Id.* A subpoena duces tecum must call for items relevant to the investigation, must be reasonable in its scope and not be oppressive, must adequately describe the items demanded, and must allow the witness reasonable time to assemble the items. *Id.* at § 1:11. "If these requirements are not met, the subpoena may be challenged in a motion to quash prior to the time set for compliance." *Id.* For an example of an unreasonable subpoena being quashed in the absence of a privilege, see *In re Grand Jury Subpoena*, 504 F. Supp. 2d 1085 (E.D. Wash. 2007).

¹⁷¹ REPRESENTATION OF WITNESSES, *supra* note 168, at § 2:34.

¹⁷² *Id.* As the District of Columbia Court of Appeals wrote, "[a] newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith for the purpose of harassment, he can call on the courts for protection." *In re Possible Violations of 18 U.S.C. 371, 641, 1503, 564 F.2d 567, 571* (D.C. Cir. 1977).

¹⁷³ REPRESENTATION OF WITNESSES, *supra* note 168, at § 7:1.

¹⁷⁴ Before this burden was triggered, a reporter would have to move to have the subpoena quashed, "asserting the basis on which he considered the particular relationship a confidential one." *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

¹⁷⁵ See, e.g., *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (a grand jury subpoena is presumed to be reasonable and the burden of showing unreasonableness must be on the recipient). Where the materials sought are presumptively privileged, the party seeking those materials can be required to show relevancy, admissibility, and specificity. *United States v. Nixon*, 418 U.S. 683, 700 (1974). For application of these factors in a journalist's privilege case, see *United States v.*

4. A Preliminary Assessment

Unlike Justice Stewart's dissenting opinion which applied a three-part test to Caldwell's circumstances,¹⁷⁶ Justice Powell's concurring opinion speaks in generalities: "when called upon to protect a newsman from improper or prejudicial questioning," a court would be free to "balance the competing interests on their merits in the particular case."¹⁷⁷ As previously noted, Powell assigned no weights to the competing interests. Without a preference for freedom of the press, compliance with a subpoena would be the norm and only in exceptional circumstances could non-compliance be ordered by a court. This is the opposite of Stewart's approach.

Powell's open-ended inquiry resembles the task of courts addressing motions to quash under Rule 17(c) of the Federal Rules of Criminal Procedure. That Rule allows a court to quash or modify a subpoena duces tecum if compliance would be "unreasonable or oppressive."¹⁷⁸ Under this Rule a court may balance the burden of compliance against the governmental interest in obtaining the documents.¹⁷⁹ Even where there is no constitutional privilege, constitutional claims may "color the analysis of burdensomeness under Fed. R. Crim. P. 17(c)."¹⁸⁰

Justice Powell's position in *Branzburg* is properly termed one of reasonableness, where questions such as relevancy are addressed in an ad hoc manner with no predetermined preference for First Amendment interests.¹⁸¹ Apart from providing no guidance to journalists who need clarity when negotiating confidentiality agreements with sources,¹⁸² Powell's position offers no guidance to judges. They were free to assign some undefined value to First Amendment interests, provided they did not unreasonably interfere with the countervailing interest in law enforcement.¹⁸³ And Powell's concurring opinion ignores the conundrum of defining journalists. If *anyone* can call on a court to quash a subpoena due to its unreasonableness, it would be inane to describe this as a privilege belonging to journalists. At most, Powell

LaRouche Campaign, 841 F.2d 1176, 1179–80 (1st Cir. 1988).

¹⁷⁶ *Branzburg*, 408 U.S. at 746–52 (Stewart, J., dissenting).

¹⁷⁷ *Id.* at 710 (Powell, J., concurring).

¹⁷⁸ FED. R. CRIM. P. 17(c).

¹⁷⁹ For different approaches to this balance, compare Justice O'Connor's opinion for the Court in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991), with Justice Stevens' separate opinion in that case. O'Connor found the subpoena at issue was reasonable because the information sought was relevant to the grand jury's inquiry. *Id.* at 302–03. Stevens, however, believed the emphasis on relevance ignored the burden of compliance. *Id.* at 303–06 (Stevens, J., concurring).

¹⁸⁰ *In re Grand Jury Subpoena*, 829 F.2d 1291, 1296 (4th Cir. 1987).

¹⁸¹ *Branzburg*, 408 U.S. at 665.

¹⁸² See Lee, *supra* note 7, at 666 (noting that to be effective, a privilege must be understandable to a reporter and source at the time they are entering into a confidential relationship).

¹⁸³ *Branzburg*, 408 U.S. at 665 (Stewart, J., dissenting).

was encouraging courts to be sensitive to First Amendment interests, but this sensitivity pales in comparison to the presumptions embedded in Justice Stewart's dissenting opinion.¹⁸⁴

An insight into Justice Powell's *Branzburg* concurring opinion is found in his files on *United States v. Calandra*, a case in which Powell wrote the majority opinion holding that a grand jury witness may not refuse to answer questions based on evidence obtained from an unlawful search.¹⁸⁵ The *Calandra* opinion repeatedly quotes Justice White's *Branzburg* opinion to explain the historic function and importance of grand juries and the duty of citizens to testify.¹⁸⁶ Powell's *Calandra* opinion also notes that a "grand jury's subpoena power is not unlimited."¹⁸⁷ Footnote four accompanying this statement refers to judicial supervision of grand jury proceedings and gives Rule 17(c) as an example.¹⁸⁸

In a memo to his law clerk John Buckley, Powell wrote that he wanted to discuss several points, including the following: "I still wonder whether we should refer to my concurring opinion in *Branzburg*—possibly adding it to note 4 on page 5? I see no inconsistency in our heavy reliance on *Branzburg* in this case, and what I said in my concurrence in that case. What do you think?"¹⁸⁹ Buckley later wrote, "No" in the margin beside this point; thus, the reference to the *Branzburg* concurring opinion did not appear in *Calandra*.

Buckley recalls there were two primary reasons for not including references to the *Branzburg* concurring opinion in *Calandra*.¹⁹⁰ First, given the sources cited in footnote four, such as Rule 17(c) of the Federal Rules of Criminal Procedure,¹⁹¹ a citation to Powell's

¹⁸⁴ *Id.*

¹⁸⁵ *United States v. Calandra*, 414 U.S. 338 (1974).

¹⁸⁶ *See, e.g., id.* at 345 (quoting *Branzburg* for the proposition that "citizens generally are not constitutionally immune from grand jury subpoenas"). The "strong" use of *Branzburg* was at Powell's suggestion and he wondered if "we may be chilling Justice Stewart (although basically he is willing to follow precedents in most areas)." Lewis F. Powell, Jr., Memorandum to John Buckley at 1, *United States v. Calandra* (Nov. 10, 1973) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *November 10 Powell Memo to Buckley*].

¹⁸⁷ *Calandra*, 414 U.S. at 346.

¹⁸⁸ *Id.* at n.4.

¹⁸⁹ Lewis F. Powell, Jr., Memorandum to John Buckley, *United States v. Calandra* (Nov. 19, 1973) (on file with the Powell Archives, Washington and Lee University School of Law). In another memo to Buckley, Powell suggested adding a reference to his *Branzburg* concurring opinion in a portion of the opinion stating that in certain instances a grand jury witness may be "excused from telling all that he knows." *November 10 Powell Memo to Buckley, supra* note 186. This suggestion was rejected as there are no citations to Powell's *Branzburg* concurrence in any of the *Calandra* drafts in the Powell Archives.

¹⁹⁰ Telephone Interview with John Buckley (Feb. 13, 2015). Prior to the interview, Buckley studied Powell's November 19 Memorandum. Although his recollection of these matters is somewhat limited, he believes the points discussed in the text reflect his interactions with Justice Powell. *Id.*

¹⁹¹ *Calandra*, 414 U.S. at 346 n.4 (citing FED. R. CRIM. P. 17(c)).

concurring opinion would have been redundant. Second, the citation of the *Branzburg* concurring opinion in the *Calandra* majority opinion might have led some to believe that the Court was adopting the concurring opinion in place of White's opinion. Powell did not want to appear to be undercutting White's *Branzburg* opinion, so the *Calandra* opinion does not cite his *Branzburg* concurrence.

It is important to reiterate that Justice Powell did not have time in late June 1972 to polish or expand his *Branzburg* concurring opinion.¹⁹² Significantly, as Powell was working on *Branzburg*, he was also working on the fourth draft of his lengthy opinion in *Furman*, a case he considered to be far more important than *Branzburg*.¹⁹³ The end of term pressure on Powell in June 1972 is also revealed in *Gravel*, the legislative privilege case.

III. LEGISLATIVE PRIVILEGE

Gravel v. United States, decided on the same day as *Branzburg* and with the same 5–4 lineup, allowed a United States Senator's aide to be questioned about the source of a leak of the Pentagon Papers.¹⁹⁴ *Gravel* provides added insight into Justice Powell's view of privileges; although the case involved a legislative rather than a First Amendment-based privilege, the theory advanced by the petitioner resembled the claims of the journalists in *Branzburg*.¹⁹⁵

While the Supreme Court was considering the *Pentagon Papers* case in June 1971, Daniel Ellsberg leaked a copy of the classified study to Senator Mike Gravel.¹⁹⁶ Gravel, a vehement critic of U.S. involvement in Vietnam, placed the documents in the record of a Senate subcommittee meeting on June 29, one day before the Court issued its *Pentagon Papers* ruling.¹⁹⁷ Gravel also gave a copy of the papers to the Beacon Press, which republished the documents in book form in October 1971.¹⁹⁸

¹⁹² Hammond believes the time pressures on Powell in late June 1972 cannot be overstated. See *Hammond Interview*, *supra* note 29.

¹⁹³ JEFFRIES, *supra* note 29, at 412 (stating that during Powell's first term he "completely committed" himself to only two issues: capital punishment and school desegregation).

¹⁹⁴ *Gravel v. United States*, 408 U.S. 606 (1972).

¹⁹⁵ See *infra* note 233 and accompanying text.

¹⁹⁶ The intermediary was Ben Bagdikian of *The Washington Post*. For a discussion of the interactions among Ellsberg, Bagdikian, and Gravel, see *How the Pentagon Papers Came to Be Published by the Beacon Press: A Remarkable Story Told by Whistleblower Daniel Ellsberg, Dem Presidential Candidate Mike Gravel and Unitarian Leader Robert West*, DEMOCRACYNOW.COM (July 2, 2007), http://democracynow.org/2007/7/2/how_the_pentagon_papers_came_to.

¹⁹⁷ See generally ALLISON TRZOP, BEACON PRESS AND THE PENTAGON PAPERS (2007).

¹⁹⁸ See *id.* In the introduction to the book, Gravel wrote that every American is entitled to examine the [Pentagon Papers] study in full and to digest for himself the lessons it contains. The people must know the full story of their government's actions over the past twenty years, to ensure that never again will this

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The Court's *Pentagon Papers* decision left open the possibility of post-publication penalties,¹⁹⁹ including unauthorized possession of classified information.²⁰⁰ Drawing upon this aspect of the opinion, President Nixon called Gobin Stair, director of the Beacon Press, and warned him of the consequences of publishing.²⁰¹ In an equally heavy-handed manner, the Nixon administration also convened a grand jury to investigate Gravel's conduct, including his sources for the papers, on the grounds that the leak and republication were possible violations of federal law.²⁰²

A subpoena was issued to Gravel's assistant, Leonard Rodberg; Gravel and Rodberg filed motions to quash, claiming that testimony by Rodberg would violate Gravel's privilege under the Speech or Debate Clause.²⁰³ A district court denied the motions to quash but entered a protective order proscribing questions about the actions of Gravel and Rodberg at the subcommittee meeting or in preparation for the meeting.²⁰⁴ The Court of Appeals for the First Circuit modified the protective order, proscribing questions of the senator and his aide as to sources of information.²⁰⁵ Third parties, however, could be questioned as to their conduct regarding the Pentagon Papers, including their dealings with Gravel and Rodberg.²⁰⁶ Although the First Circuit ruled that the republication was not covered by the Speech or Debate Clause, it found that a common law privilege prevented questioning of the Senator and his aide.²⁰⁷

The Justices split 5–4 on the issue of whether the grand jury could inquire as to Gravel's source.²⁰⁸ Justice White, joined by Chief Justice

great nation be led into waging a war through ignorance and deception.

MIKE GRAVEL, *THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM* x (Beacon Press 1971).

¹⁹⁹ *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 736–37 (1971) (White, J., concurring) (warning of the consequences of publication and stating he would have no difficulty in sustaining convictions under the criminal statutes “on facts that would not justify” a prior restraint).

²⁰⁰ *Id.* at 737–40 (discussing statutes prohibiting unauthorized possession).

²⁰¹ TRZOP, *supra* note 198, at 22.

²⁰² *Id.*

²⁰³ U.S. CONST. art. I, § 6, cl. 1. Rodberg also claimed a First Amendment privilege to protect his confidential sources. *United States v. Doe*, 332 F. Supp. 930 (D. Mass. 1971), *aff'd*, 455 F.2d 753 (1st Cir. 1972), *vacated and remanded sub nom. Gravel v. United States*, 408 U.S. 606 (1972). This was rejected by the district court. *Doe*, 332 F. Supp. at 932.

²⁰⁴ *Id.* at 930.

²⁰⁵ *Doe*, 455 F.2d at 753.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ While the Court held that both Rodberg and Gravel had protection under the Speech or Debate Clause to engage in protected legislative acts, both the senator and his aide had to answer grand jury questions unrelated to legislative acts. *See Gravel*, 408 U.S. at 618 (stating that the Speech or Debate Clause “applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself”). Although the questioning of Senator Gravel was discussed extensively by the Justices in their consideration of

Burger and Justices Blackmun, Powell, and Rehnquist, held that Gravel's actions leading to republication of the papers were not within the coverage of the Speech or Debate Clause.²⁰⁹ The Court disagreed with the First Circuit as to the common-law privilege, stating that "we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct . . . or to frustrate the grand jury's inquiry" into whether publication of the classified documents was illegal.²¹⁰ The grand jury could ask Rodberg questions "relevant to tracing the source of obviously highly classified documents . . . as long as no legislative act is implicated by the questions."²¹¹

A. *Theft of Documents*

Throughout consideration of *Gravel*, Justice Powell was troubled by policies that would encourage the theft or leaking of documents.²¹² In an analysis of the First Circuit's opinion prepared before the Conference discussion of *Gravel*, Powell questioned the appellate court's ruling that a Senator could not be asked questions about the acquisition of information:

this case, technically the subpoena was directed at Rodberg. In fact, the Department of Justice claimed it had no intention of questioning Gravel. *Doe*, 455 F.2d at 756. Solicitor General Griswold emphasized during oral argument that "Senator Gravel is not being questioned by anybody in any place." Transcript of Oral Argument at 6, *Gravel*, 408 U.S. 606 (No. 71-1017). Justice White's opinion, though, stated that no privilege shielded Rodberg "any more than any other witness" from questions about the source of the documents. *Gravel*, 408 U.S. at 628. Members of the Court recognized that the ruling allowed the questioning of Gravel. *See, e.g., id.* at 629 (Stewart, J., dissenting in part) (the Court holds that the Speech or Debate Clause "does not protect a Congressman from being forced to testify before a grand jury").

²⁰⁹ *Gravel*, 408 U.S. at 625 (republication was in no way essential to the deliberations of the Senate). Justice Douglas dissented because Gravel's efforts to publish the Pentagon Papers were covered by the Speech or Debate Clause. *Id.* at 635 (Douglas, J., dissenting). Further, the Beacon Press had a First Amendment right to republish the papers and its actions were not the subject of a legitimate grand jury inquiry. *Id.* at 642-48. Justice Brennan, joined by Justices Douglas and Marshall, claimed republication was covered by the Speech or Debate Clause and Gravel and his aides had an absolute privilege to refuse to answer questions about how the Papers were acquired and the actions of sources. *Id.* at 648-64 (Brennan, J., dissenting).

²¹⁰ *Id.* at 627.

²¹¹ *Id.* at 628. Justice Stewart dissented in part from the Court's treatment of questions about sources of information. *Id.* at 633 (Stewart, J., dissenting in part). Justice Brennan, joined by Justices Douglas and Marshall, also dissented on this issue. *See supra* text accompanying note 209.

²¹² Lewis F. Powell, Jr., Analysis of Opinion of First Circuit (Judge Bailey Aldrich) in *Gravel v. United States* at 2-3 (May 4, 1972) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter Powell, *Analysis of Opinion of First Circuit*]. On a separate sheet of paper prepared for the May 4 Conference, Powell wrote the following about criminal conduct: "[c]ause affords no immunity from crim. prosecution. Gravel could be asked if he burglarized a safe (but not whether he used stolen papers in speech[.])" Lewis F. Powell, Jr., My Confidential Notes on *Gravel v. United States* at 1 (May 4, 1972) (on file with the Powell Archives, Washington and Lee University School of Law).

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I am not sure this is the correct view. We might draw a line . . . between questions about a criminal act and questions as to the use of the fruits of the Act in a speech or otherwise in the legislative process. For example, if there was reason to believe that a Senator had burglarized an office and stolen top secret papers, I think he could be asked whether he committed this crime. He could not be asked what he did with the stolen documents, whether he used them in a speech or otherwise in the legislative process.²¹³

An absolute bar to questions about sources of documents, Powell wrote, would really open "a can of worms!"²¹⁴

In his notes of the Conference discussion of *Gravel*, Justice Powell wrote that Justice White believed it was appropriate to question the Senator and his aide "as to whether a crime has been committed—*e.g.*, do you know whether papers were stolen? Who stole them? When + where? Clause would not prevent this line of questions."²¹⁵ Further, White stated that "stealing papers would not be a legislative act—nor would receiving stolen goods be a legislative act."²¹⁶ In the margin beside these comments, Powell wrote that he "agree[d] with Byron."²¹⁷

Justice Powell's handwritten notes on the third draft of Justice White's opinion summarized White's belief that the legislative process must "depend on lawful sources of information—not on illegal conduct."²¹⁸ Powell added, "Suppose the information came from bugging the Secretary of State's office, and the Senator's aid knowingly obtained the fruits of the illegal bugging."²¹⁹ On a draft of Justice Brennan's dissenting opinion, which argued for an absolute privilege, Powell wrote that Brennan "would afford complete immunity from inquiry into 3rd Party Crime, thus encouraging the theft of documents which may be vital to conduct of diplomatic + military affairs."²²⁰ He

²¹³ *Id.* On a separate sheet of paper prepared for the May 4 Conference, Powell wrote the following about criminal conduct: "[c]lause affords no immunity from crim. prosecution. Gravel could be asked if he burglarized a safe (but not whether he used stolen papers in speech[.])" Lewis F. Powell, Jr., My Confidential Notes on *Gravel v. United States* at 1 (May 4, 1972) (on file with the Powell Archives, Washington and Lee University School of Law).

²¹⁴ Powell, *Analysis of Opinion of First Circuit*, *supra* note 213, at 5. In the memo, Powell also described the First Circuit as going "off the deep end as to a common law legislative privilege." *Id.* at 7.

²¹⁵ Lewis F. Powell, *Gravel Case, Personal + Confidential Notes* at 3 (May 4, 1972) (on file with the Powell Archives, Washington and Lee University School of Law).

²¹⁶ *Id.*

²¹⁷ *Id.* at 4.

²¹⁸ Justice Powell's comments on Justice White's Third Draft of *Gravel v. United States* (June 22, 1972) (unpublished draft opinion) (on file with Powell Archives, Washington and Lee University School of Law). Earlier drafts were circulated on June 2 and 12, 1972. Powell joined White's opinion on June 18. *See infra* note 227.

²¹⁹ *Id.*

²²⁰ Justice Powell's comments on Draft of Justice Brennan's dissenting opinion in *Gravel v. United States* at 1 (June 20, 1972) (unpublished draft opinion) (on file with the Powell Archives,

reiterated this theme on a page where Brennan wrote that sources' "willingness to reveal" information to Congress depended upon confidentiality.²²¹ After the phrase "willingness to" Powell inserted "steal!"²²²

Nonetheless, Justice Powell was concerned that Justice White's draft created the possibility of a Senator (or his aide) "being harassed as to his sources on the pretext" that a third party had committed a crime.²²³ Powell was in complete accord with White that privilege "should not prevent a bona fide investigation of a third party crime, provided no legislative act is implicated."²²⁴ But to ensure that investigations were not a pretext, on June 18 Powell sent White a substitution providing that there must be probable cause to believe a third party crime has been committed before a member of Congress or an aide may be interrogated.²²⁵ Powell also suggested, "it might also be desirable to require a showing that the testimony is reasonably necessary to a proper investigation of the crime."²²⁶

Powell did not regard these suggestions to be a condition of joining White's opinion. In the same letter suggesting these changes, he informed White that he was joining the opinion.²²⁷ White did not incorporate these suggestions.

B. *The Informing Function*

According to a history of *Gravel* prepared in Justice Brennan's chambers,²²⁸ Justices Brennan and Stewart visited White a few days

Washington and Lee University School of Law) [hereinafter Powell, *Comments on Draft Dissent*].

²²¹ *Id.* at 19.

²²² *Id.* Similarly, where Justice Brennan wrote he would "exclude from grand jury inquiry any knowledge that that the Senator or his aides" might have concerning how the source obtained the Pentagon Papers, Powell wrote in the margin, "Gosh!" *Id.*

²²³ Letter from Justice Powell to Justice White at 1 (June 18, 1972) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Letter from Powell to White*]. In two memos, Powell's clerk Hamilton P. Fox III suggested that Powell seek to have White's opinion modified. Hamilton P. Fox III, Memo to Justice Powell on *Gravel v. United States* (June 12, 1972) (on file with the Powell Archives, Washington and Lee University School of Law); Hamilton P. Fox III, Memo to Justice Powell on *Gravel v. United States* (June 15, 1972) (on file with the Powell Archives, Washington and Lee University School of Law). As previously stated, Fox refused to be interviewed for this Article. See E-mail from Phil Fox to author, *supra* note 38.

²²⁴ Letter from Powell to White, *supra* note 223, at 1.

²²⁵ Powell's substitution stated "(4) except where there is probable cause to believe a third party crime has been committed, [no questions may be asked] concerning any act, in itself not criminal, performed by the Senator or by his aides in the course of their employment in preparation for the sub-committee hearing." *Id.* at 2. White's version only required relevance.

²²⁶ *Id.* at 1.

²²⁷ Powell told White, "Your opinion, on a difficult and delicate subject, is an excellent one and I am happy to join you—as I am doing in a separate note to the Conference." *Id.*

²²⁸ The Library of Congress describes these case histories in the following terms: "[t]hese annual reviews of the Court's work by Brennan and his clerks provide personal perspectives on the

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after his *Gravel* draft was circulated and urged him to delete the references to sources. "White steadfastly refused, sticking to his view that the Clause could not shield criminal conduct, even by a Senator, from grand jury inquiry."²²⁹ Brennan decided to write a dissenting opinion focusing on the "informing function" of legislators²³⁰ and claiming that "those who divulge information to Congressmen in confidence must be assured that the confidence will not be broken through grand jury investigation."²³¹

Justice Brennan's draft dissenting opinion regarded Gravel's arrangement with Beacon Press as covered by the Speech and Debate Clause. Consequently, Gravel's receipt of the Pentagon Papers, including the identity of his source, could not be the subject of a grand jury inquiry. Neither could the grand jury ask the Senator or his aides how the source acquired the Papers.²³² In terms essentially identical to the arguments of journalists in *Branzburg*, Brennan claimed that to adequately inform the public, members of Congress needed to be able to promise confidentiality to sources. He wrote that the willingness of sources

to reveal that information and spark Congressional inquiry may well depend on assurances from their contact in Congress that their identity and means of obtaining the evidence will be held in strictest confidence. To permit the grand jury to frustrate that expectation through an inquiry of the Congressman and his aides can only dampen the flow of information to the Congress and thus to the American people.²³³

Justice Powell did not like the "informing function" as a means of defining the scope of the Speech and Debate Clause.²³⁴ "If so, any

deliberations and decisions in prominent cases before the Court. The narratives describe in detail the discussions in conference, the evolution of opinions as they were circulated among the chambers, the role of clerks in the deliberative process, and how the Court conducted its business in general." *William J. Brennan Papers: A Finding Aid to the Collection in the Library of Congress* at 5, Manuscript Division, Library of Congress (2001). The discussion of *Gravel* is found in Opinions of William J. Brennan, Jr. (October Term, 1971), Case Histories File, Box II: 6, Folder 15, *Brennan Papers*. For a critical assessment of the case histories, see SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 465–66 (2010) (noting that these accounts cannot be relied on as a definitive historical record).

²²⁹ Opinions of William J. Brennan, Jr., *supra* note 228, at XCVII–XCVIII.

²³⁰ Brennan argued that communication between Congress and the electorate "is essential to the continued vitality of our democratic institutions." *Gravel v. United States*, 408 U.S. at 606, 652 (1972) (Brennan, J., dissenting).

²³¹ Opinions of William J. Brennan, Jr., *supra* note 228, at XCIX.

²³² William Brennan, Draft dissenting opinion in *Gravel v. United States* at 19 (June 19, 1972) (unpublished draft opinion) (on file with the Powell Archives, Washington and Lee University School of Law).

²³³ *Id.* at 19–20.

²³⁴ Powell, *Analysis of Opinion of First Circuit*, *supra* note 213.

speech made anywhere by a Senator would be protected; any communication—such as the weekly newsletter—would be so protected. It seems clear to me that this type of speech and conduct is not within either the language or the intent—as derived from its history of the Clause.”²³⁵ And, the absolute privilege to protect sources would encourage the theft of documents.²³⁶ After reviewing Brennan’s draft, Powell wrote on the first page, “I’m still with White.”²³⁷

C. *Second Thoughts?*

According to the history of the case prepared in Justice Brennan’s chambers, Justice Stewart’s clerks heard that Justice Powell, even after joining White’s opinion, remained troubled about White’s treatment of Gravel’s sources.²³⁸ Stewart’s clerks suggested that Justice Brennan depart from his absolutist position and permit grand jury inquiry in limited circumstances, “where, for example, there was reason to believe a crime had been committed in obtaining congressional information, and there was clearly no other way to investigate it except through the Congressman and his aides.”²³⁹ This resembled the position Stewart had taken in *Branzburg*.²⁴⁰ Stewart’s clerks believed that if Brennan adopted this qualified position, Stewart, Marshall, and Douglas would go along and Powell “very well might” join as well.²⁴¹ Brennan “adamantly refused. Even if it meant swinging the Court his way, he was not willing to open the door even an inch to Executive investigation of protected legislative acts.”²⁴² Consequently, Stewart wrote a dissenting opinion suggesting a balancing approach to the source issue: “[w]hy should we not, given the tension between two competing interests, each of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases?”²⁴³

It turned out that the information about Powell was “not very good” as he did not alter his decision to join White’s opinion.²⁴⁴ Thus, Stewart’s position was isolated and Brennan was joined by Douglas and Marshall. However, after the final decisions of the October 1971 Term had been announced on June 29 and Powell was leaving for the summer, Powell told Brennan that “if he had more time to study the

²³⁵ *Id.* at 4.

²³⁶ Powell, *Comments on Draft Dissent*, *supra* note 220, at 1, 19.

²³⁷ *Id.* at 1.

²³⁸ Opinions of William J. Brennan, *supra* note 228, at C.

²³⁹ *Id.*

²⁴⁰ See *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

²⁴¹ Opinions of William J. Brennan, *supra* note 228, at C.

²⁴² *Id.*

²⁴³ *Gravel v. United States*, 408 U.S. 606, 632 (1972) (Stewart, J., dissenting in part).

²⁴⁴ Opinions of William J. Brennan, *supra* note 228, at C1.

case, he would probably have joined the Brennan dissent, but as it was he was simply too pressed to give the case the extended attention it deserved."²⁴⁵

Justice Powell was certainly pressed for time in June 1972, but there is nothing in his papers to show he was amenable to Brennan's views. His papers show his opposition to an absolute privilege and the underlying "informing function." His concerns about the questioning of Senator Gravel and his aide allowed by White's opinion were so tepid that he did not insist on a strengthening of the protective order as a condition to his vote.²⁴⁶ Given Powell's predisposition against absolutes,²⁴⁷ Stewart's qualified protection likely would have been more attractive than Brennan's absolute privilege. Certainly the separation of powers issues in *Gravel* do not explain Powell's comment to Brennan as Powell later joined the Court's opinion in *United States v. Nixon*, rejecting an absolute executive privilege.²⁴⁸ Perhaps his comment to Brennan was a sign of Powell's humility, his willingness to reconsider matters, and his sheer exhaustion at the end of his first Term on the Court.²⁴⁹

D. Implications for Branzburg

Setting aside Justice Powell's comment to Justice Brennan as an outlier,²⁵⁰ several themes emerge in Powell's *Gravel* papers that temper efforts to read his *Branzburg* concurrence expansively. First, Powell was critical of the First Circuit's common law privilege, not because the lower court was creating an extra-Constitutional privilege, but because of the absolute protection provided by that privilege. To Powell, the First Circuit went "off the deep end."²⁵¹ Second, Powell disliked the "informing function" as a means of defining the scope of the Speech or Debate Clause privilege because it was boundless.²⁵² The journalists in *Branzburg* relied on essentially the same theory, packaged as the "free flow of information,"²⁵³ and there is no indication that Powell found this

²⁴⁵ *Id.* Powell's clerks said that if pressed for time, "Powell will automatically vote conservative, but if he has time to think through a problem and consult his colleagues, his votes are surprisingly liberal." *Id.*

²⁴⁶ *Id.*

²⁴⁷ Jeffries writes that Powell "instinctively recoiled from extreme positions, particularly those nonnegotiable ideological commitments that left no room for compromise or debate." JEFFRIES, *supra* note 29, at 409.

²⁴⁸ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁴⁹ One of Powell's clerks described Powell at the end of the 1971 Term as "wearied and drained, more so than I have ever seen him." J. HARVIE WILKINSON, III, *SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW* 85 (1974).

²⁵⁰ See STERN & WERMEIL, *supra* note 228, at 465–66 (questioning the reliability of the case histories produced in Justice Brennan's chambers).

²⁵¹ Powell, *Analysis of Opinion of First Circuit*, *supra* note 213, at 7.

²⁵² *Id.* at 4.

²⁵³ *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972) (journalists claim that disclosure of source

to be a useful concept. Third, Powell was opposed to defining the legislative privilege in a manner that encouraged theft of documents or leaking. Finally, Powell's commitment to a requirement that the government show the necessity of testimony was halfhearted. The themes important to him in *Gravel* readily transfer to the context of journalist's privilege. Stated differently, it would be contradictory for Powell to advocate an expansive journalist's privilege while simultaneously rejecting an expansive legislative privilege.

IV. *ZURCHER V. STANFORD DAILY*: "A SEQUEL TO *BRANZBURG*"²⁵⁴

The *Stanford Daily* newspaper obtained declaratory relief from a district court in response to a search of its offices.²⁵⁵ The district court ruled the First Amendment forbade the issuance of a warrant to search for materials in possession of one not suspected of a crime unless there was probable cause to believe that a subpoena would be impracticable.²⁵⁶ Further, the district court held that a search of a newspaper is permissible only in rare circumstances where there is a clear showing that "important materials will be destroyed" and "a restraining order would be futile."²⁵⁷ The district court rejected the government's claim that newsgathering is not protected by the First Amendment and quoted extensively from Justice Powell's *Branzburg* concurrence to emphasize the "limited nature" of the Court's *Branzburg* ruling.²⁵⁸

By a 5–3 vote, the Court reversed;²⁵⁹ Justice White wrote the majority opinion, joined by Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist, the same Justices that formed the *Branzburg* majority.²⁶⁰ Justice Stewart, joined by Justice Marshall, claimed, as he had in *Branzburg*, that the press was entitled to special First Amendment protection.²⁶¹ Justice Stevens' dissenting opinion

identity will deter confidential sources from disclosing information "all to the detriment of the free flow of information").

²⁵⁴ Harry A. Blackmun, *Stanford Daily Notes*, *Zurcher v. Stanford Daily* Case File, Box 267, Folder 3, *Blackmun Papers*. Robert Comfort, Powell's clerk during the October 1977 Term, agrees that the Justices regarded *Zurcher* as an "echo" of *Branzburg*. Telephone Interview with Robert Comfort, June 3, 2013 [hereinafter *Comfort Interview*].

²⁵⁵ *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 135 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977) *rev'd*, 436 U.S. 547 (1978).

²⁵⁶ *Id.*

²⁵⁷ *Id.* Searches were regarded as more harmful to the newsgathering of the press than subpoenas. *Id.* at 134. In his pre-argument notes, Justice Powell wrote that this was debatable. Lewis F. Powell, Jr., *Zurcher v. Stanford Daily* Misc. Pre-Argument Notes at 2 (Jan. 16, 1978) (on file with the Powell Archives, Washington and Lee University School of Law).

²⁵⁸ *Zurcher*, 353 F. Supp. at 133–34. The district court noted that Justice Powell's vote "was necessary to the Court's judgment." *Id.* at 133.

²⁵⁹ *Zurcher*, 436 U.S. 547. Justice Brennan did not participate. *See id.* at 568.

²⁶⁰ *See Branzburg*, 408 U.S. 665 (1972); *Zurcher*, 353 F. Supp. 124.

²⁶¹ *Zurcher*, 436 U.S. at 568.

addressed Fourth Amendment doctrine regarding third party searches.

Zurcher gave Justice Powell an opportunity to contemplate the meaning of his *Branzburg* concurring opinion. Because *Zurcher* was not subject to end-of-term pressures,²⁶² Powell and his clerk Robert Comfort were able to engage an extensive "back and forth" and produce a concurring opinion that "wasn't just dashed off."²⁶³ The concurring opinion was designed to rebuff Stewart's attempt to treat Powell's *Branzburg* concurring opinion as the basis for special protection for the press.²⁶⁴

Three themes are central to Justice Powell's *Zurcher* concurring opinion: 1) the importance of a neutral magistrate as a means of balancing First Amendment interests against the needs of law enforcement; 2) the difficulties created by special First Amendment status for the press, and 3) Stewart's use of Powell's *Branzburg* concurring opinion stretched that opinion far beyond Powell's intent.²⁶⁵

A. The Neutral Magistrate

In *United States v. United States District Court for the Eastern District of Michigan*,²⁶⁶ a 1972 opinion that surprised many,²⁶⁷ Justice Powell wrote that Presidential power to protect national security did not authorize warrantless electronic surveillance.²⁶⁸ Powell recognized that national security cases "often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime."²⁶⁹ Fourth Amendment protections "become the more necessary" when the targets of surveillance have unorthodox political beliefs.²⁷⁰

To Justice Powell, the "time-tested" means of protecting Fourth Amendment rights was "[p]rior review by a neutral and detached magistrate."²⁷¹ Rejecting the government's claim that national security cases involved complex and subtle factors beyond the competence of

²⁶² *Zurcher*, 436 U.S. at 547. The opinion was announced on May 31, 1978.

²⁶³ *Comfort Interview*, *supra* note 254. During this process, Comfort noted Justice Powell's humility, especially regarding his command of First Amendment issues. As an example, Comfort recalls trying to get Justice Powell to explain what he had meant by an ambiguous phrase from an earlier opinion, most likely *Branzburg*, and Powell responded, "I don't know. Why don't you tell me what you think I meant." *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *United States v. U.S. Dist. Court E. Dist. of Mich.*, S. Div., 407 U.S. 297 (1972).

²⁶⁷ Prior to his appointment, Powell wrote in favor of warrantless electronic surveillance. *See Confirmation Hearings*, *supra* note 49.

²⁶⁸ *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972).

²⁶⁹ *U.S. Dist. Court E. Dist. Mich.*, 407 U.S. at 313.

²⁷⁰ *Id.* at 314. Justice Powell regarded private dissent as important to our free society as open public discourse. Hence, unauthorized eavesdropping would deter "dissent and discussion of Government action in private conversation." *Id.*

²⁷¹ *Id.* at 318.

courts to evaluate, Powell believed prior judicial approval was necessary to protect “privacy of speech.”²⁷²

After the Court granted certiorari in *Zurcher*, Justice Powell suggested to Chief Justice Burger that it would be helpful to have the views of the Solicitor General.²⁷³ In response, the Solicitor General, “clearly playing” for Justice Powell,²⁷⁴ submitted a brief emphasizing the role of the magistrate. The brief stated,

We submit that the course selected by the Framers, embodied in the Warrant Clause of the Fourth Amendment, depends upon the discretion of executive officers and, more important, upon the detached judgment of a neutral magistrate to guarantee in the first instance that a warranted search is reasonable under all the circumstances, including the possible impact of the proposed search on values protected by the First Amendment.²⁷⁵

One day before the Court’s January 20, 1978 Conference, Justice Powell set out his tentative views in a memo. Powell could foresee abuse of warrants but agreed with the Solicitor General that “we should adhere to the provisions of the warrant clause which always have depended, initially, upon the discretion of law enforcement authorities in requesting a warrant and—more fundamentally—upon the detached judgment of a neutral magistrate.”²⁷⁶ When media searches are proposed, a magistrate should make a number of evaluations, such as whether a subpoena would be as effective as a warrant. Moreover the magistrate could restrict the manner and conditions of a warranted search to minimize the degree of intrusion. He concluded, “[i]t may be important to indicate that in the case of press searches the magistrate, because of First Amendment considerations, should be more attentive to the need for limiting the conditions of execution.”²⁷⁷

²⁷² *Id.* at 320.

²⁷³ Letter from Justice Powell to Chief Justice Burger, *Zurcher v. Stanford Daily* at 15 (Dec. 12, 1977) (on file with the Powell Archives, Washington and Lee University School of Law).

²⁷⁴ *Comfort Interview*, *supra* note 254.

²⁷⁵ Brief for United States as Amicus Curiae at 24, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (No. 76-1484), [hereinafter *Brief for United States as Amicus Curiae*] (on file with the Powell Archives, Washington and Lee University School of Law). The brief also stated that the reasonableness of searches “is most appropriately ensured not by a sweeping prophylactic modification of the traditional warrant procedures, but by the sensitivity of executive and judicial officers to the specific circumstances of each proposed search.” In the margin, Justice Powell wrote “Yes.” *Id.* at 20.

²⁷⁶ Lewis F. Powell, Jr., 76-1484 and 76-1600 *Stanford Daily Cases* at 3–4 (Jan. 19, 1978) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Jan. 19, 1978 Memorandum*].

²⁷⁷ *Id.* at 4. Also on January 19, Comfort gave Justice Powell a memo setting out a checklist of questions to be considered by a magistrate when confronted with a request for a warrant to search a “press” installation. For example, “[a]re there alternative enforcement techniques for discovering the same evidence?” Robert D. Comfort, Memorandum for Mr. Justice Powell at 5

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Justice Powell voted with the majority at the January 20 Conference, stating that the "[o]pinion should emphasize magistrate's duty."²⁷⁸ According to Justice Blackmun's notes, Powell stated that the Fourth Amendment's basic safeguard is a magistrate, and when the case involves the media, judges should take a harder look at need, alternatives, and restricting the search area.²⁷⁹ Powell also said that by altering the established procedure of obtaining warrants, the district court was reaching "for the wild blue yonder."²⁸⁰

Justice White's first draft of the *Zurcher* opinion stated:

[S]tate legislative or executive authorities may by statute, rule, or practice extend whatever protections they deem wise to safeguard the press, as well as others, from possibly overreaching searches, either by insisting on subpoenas as a general rule, by forbidding searches for particular kinds of materials, by providing opportunity to object in advance of the search, or otherwise.²⁸¹

Justice Powell objected to this language, believing that it was an open invitation for legislatures to alter search warrant procedure.²⁸² Comfort recalls that Powell had great trust in magistrates, that "you can expect the authorities to behave in a rational and upright way. So if that's your view of how the system is working, you don't need the state legislatures to be running around adding all kinds of additional requirements increasing the burden on authorities."²⁸³ In response to Powell's request, White softened the invitation to lawmakers, writing, "[o]f course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure."²⁸⁴ This new

(Jan. 19, 1978) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Comfort Memo*]. Comfort added that these questions fit "within the framework—or at least not too far outside of it—of current particularity and reasonableness requirements. It would embody the First Amendment concerns within the Fourth Amendment procedures created by the Framers." *Id.* at 6. Powell's notes of the January 20 Conference state that he used both Comfort's memo and his tentative views memo at the Conference. Lewis F. Powell, Jr., *Zurcher v. Stanford Daily Conference Notes* (Jan. 20, 1978) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Zurcher Conference Notes*].

²⁷⁸ *Zurcher Conference Notes*, *supra* note 277.

²⁷⁹ Harry A. Blackmun, *Zurcher v. Stanford Daily Conference Notes*, (Jan. 20, 1978), *Zurcher v. Stanford Daily Case File*, Box 267, Folder 3, *Blackmun Papers*.

²⁸⁰ *Id.*

²⁸¹ Byron R. White, *First Draft of Zurcher v. Stanford Daily Opinion* at 19 (Mar. 7, 1978) (on file with the Powell Archives, Washington and Lee University School of Law).

²⁸² See *Comfort Interview*, *supra* note 254; WOODWARD & ARMSTRONG, *supra* note 45, at 265.

²⁸³ *Comfort Interview*, *supra* note 254. Woodward and Armstrong wrote, "Powell believed that most people were well-intentioned, and the courts should capitalize on this good will. The courts had to rely on, rather than undermine, the best instincts of people. The courts should try only to regulate the extremes of behavior." WOODWARD & ARMSTRONG, *supra* note 45, at 265.

²⁸⁴ *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978). Congress responded to *Zurcher* in 1980

language was satisfactory to Powell.²⁸⁵ While the change is subtle, it is based on Powell's belief that the framework of the established system was sufficient.

B. *Special First Amendment Status for the Press*

The Solicitor General's brief argued that the "subpoena first" rule of the district court "would represent a judicial endorsement of two classes of First Amendment freedoms," counter to recent decisions such as *Branzburg*.²⁸⁶ Justice Powell agreed with the Solicitor General, noting in a memo, "[a]part from the absence of any justification for 'two classes of First Amendment freedoms' it would be difficult to define the boundaries of the classes. Even if expressed in terms of the 'media', the exception would encompass—at least arguably—everything from an underground 'newspaper' controlled by the Mafia to *The New York Times*."²⁸⁷

At the January 20 Conference, only Justice Stewart supported the position of the press.²⁸⁸ Justice White said the lower court decision was "plain wrong" and expressed no "sympathy for the press. They take care of themselves, [d]efeate prosecutors who displease press."²⁸⁹ In his first draft of *Zurcher*, White noted that the press was not easily intimidated and Powell asked White to make a minor stylistic change to this portion

with the Privacy Protection Act, 42 U.S.C. § 2000aa.

²⁸⁵ After sending Powell the new language, White wrote, "[i]s this still too much of an invitation to state lawmakers?" Memo From Justice White to Justice Powell at 1 (Mar. 10, 1978) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Memo from Justice White to Justice Powell*]. Powell wrote that the suggested change was "fine with [him]." Letter from Justice Powell to Justice White (Mar. 10, 1978) (on file with the Powell Archives, Washington and Lee University School of Law) [hereinafter *Letter from Justice Powell to Justice White*].

²⁸⁶ Brief for United States as Amicus Curiae, *supra* note 275, at 27.

²⁸⁷ Jan. 19, 1978 Memorandum, *supra* note 276, at 2. The problem of defining the press would continue to be a concern for Justice Powell. In *Saxbe v. Washington Post Company*, 417 U.S. 843 (1974), where the press sought to interview prisoners, Powell wrote a memo to his clerk John Jeffries commenting on the difficulty of defining "the 'media' or the 'press.'" Lewis F. Powell, Jr., Memorandum to John Jeffries at 5–6, No. 73-1265, *Saxbe v. Washington Post* (Apr. 11, 1974) (on file with the Powell Archives, Washington and Lee University School of Law). This problem was noted in his dissenting opinion. *Saxbe*, 417 U.S. at 873 (Powell, J., dissenting) ("the press" is a vague concept).

²⁸⁸ *Zurcher Conference Notes*, *supra* note 277.

²⁸⁹ *Id.* Chief Justice Burger also expressed the idea that there is no distinction between the press and others as to First Amendment rights. *Id.* Chief Justice Burger prepared a concurring opinion that stated:

I see no need to distinguish between newspaper offices, offices of doctors, lawyers and many others whose premises contain sensitive, confidential material. I would, of course, not give the "press" a lesser protection; I would protect all equally. See my concurring opinion in 76-1172 *First National Bank of Boston v. Bellotti* dated _____.

Letter from Chief Justice Burger to Justice White (Apr. 8, 1978) (on file with the Powell Archives, Washington and Lee University School of Law). Later, Chief Justice Burger decided to withdraw the concurring opinion. Warren E. Burger, Memo to the Conference (May 30, 1978) (on file with the Powell Archives, Washington and Lee University School of Law).

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of the opinion.²⁹⁰ White did so and explained to Powell that he had initially included a sentence stating: “[t]he prospect of a reporter, editor or publisher cowering before a prosecutor with a search warrant in his hand, if ever realistic, is not a recurring possibility.”²⁹¹ White added:

I was also going to footnote the poem which was in an early draft of *Branzburg* but which someone thought I should eliminate:

Two newsmen upset a D. A.
With a scandalous expose;
They lost on the First
And were jailed, unreversed,
But the press put the D. A. away.²⁹²

Powell wrote back, “I will still be with you if you include the poem about the ‘scandalous expose.’ It would be great!”²⁹³ White’s belief that the press had ways of defending its interests—apart from seeking judicial protection—was shared by Powell.

Justice Powell was also troubled by special status for the “press” because that term would encompass a wide variety of organizations with wildly different senses of social responsibility.²⁹⁴ During the oral argument, Powell asked Jerome Falk, Jr., counsel for the *Stanford*

²⁹⁰ In his first draft, after writing that the press is not easily intimidated, White added, “[i]t has a remarkable ability to take care of its interests and to protect itself against abuse at the hands of public officials, including the police and prosecutors.” *Zurcher* First Draft, *supra* note 281, at 18. The published version deletes that sentence and merely states “the press . . . is not easily intimidated—nor should it be.” *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978). Comfort recalls that Powell was “very attuned to . . . overemphasis. If you used a word, then used a synonym and he thought that was overemphasis, he would make you take out the synonym.” *Comfort Interview*, *supra* note 254. Powell’s request was stylistic and not based on disagreement with Justice White’s ideas about the press. Indeed, in *Branzburg*, Powell wrote, “[t]he solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort [to annex the press as an investigative arm of government], even if one seriously believed that the media . . . were not able to protect themselves.” *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring).

²⁹¹ *Memo from Justice White to Justice Powell*, *supra* note 285.

²⁹² *Id.* at 2. White attributed this to James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18, 48 n.148 (1969). The poem appears in White’s *Branzburg* draft circulated to the Conference on May 29, 1972. Byron R. White, *Branzburg v. Hayes* Second Draft at 40 n.41 (May 29, 1972), Box I: 212, Folder 8, *White Papers*. Justice Powell made no notations beside the poem in his copy of May 29 *Branzburg* draft. *Branzburg v. Hayes* Second Draft, Caldwell File Part 2 Sub-File, *Powell Archives*. The poem was deleted from White’s third *Branzburg* draft contained in Box I: 212, Folder 10, *White Papers*.

²⁹³ *Letter from Justice Powell to Justice White*, *supra* note 285.

²⁹⁴ Powell’s notes include questions a magistrate must consider to protect First Amendment interests. Among these were the weighing of the degree of responsibility of the target, “established newspaper vs. and underground sheet.” Lewis F. Powell, Jr., *Stanford Press* (Jan. 19, 1977) (on file with the Powell Archives, Washington and Lee University School of Law). The year written on this document is a mistake and should be 1978.

Daily, about that newspaper's stated policy of destroying photographs that might aid prosecutors. Powell asked if the *Stanford Daily* would destroy photos of the assassination of President Kennedy, prompting Falk to state, "[l]iterally read, the policy of the *Daily* requires me to give an affirmative answer."²⁹⁵ Powell quoted this colloquy in footnote one of his concurring opinion, adding, "[u]se of a subpoena, as proposed by the dissent, would be of no utility in face of a policy of destroying evidence."²⁹⁶ Further, Powell claimed this policy "illustrates the possible dangers of creating separate standards for the press alone."²⁹⁷

C. *Stretching the Branzburg Concurring Opinion*

The *Stanford Daily* attributed a broad sweep to Justice Powell's *Branzburg* concurrence and in a bench memo Comfort wrote to Powell, "[y]ou could avoid the sweep attributed to your *Branzburg* concurrence by Respondents. You did join in the Court's opinion in that case."²⁹⁸ In the margin Powell wrote "I did join Cts [sic] op[inion]."²⁹⁹ Comfort added, "you could, consistent with your vote in *Branzburg*, hold that the press is subject to the same forms of search as all other citizens."³⁰⁰ As Comfort recalls, Powell was looking for a way to limit his *Branzburg* concurrence because special Fourth Amendment procedures for the press would "undermine the appropriate issuance of search warrants."³⁰¹

Justice Stewart circulated drafts of a dissenting opinion in late April and mid-May³⁰² claiming the search of a newspaper was a violation of the First Amendment. The use of a subpoena, in contrast, would allow a newspaper to file a motion to quash and obtain an adversary hearing. As support for the principle of an adversary hearing,

²⁹⁵ Transcript of Oral Argument at 15, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (No. 76-1484).

²⁹⁶ *Zurcher*, 436 U.S. at 568 n.1 (Powell, J., concurring). Powell prepared this footnote. See Rider A, p.2 (*Zurcher*) (May 10, 1978) (on file with the Powell Archives, Washington and Lee University School of Law).

²⁹⁷ *Zurcher*, 436 U.S. at 568 n.1 (Powell, J., concurring).

²⁹⁸ See Robert Comfort, Bench Memo at 21 (Jan. 14, 1978) (on file with the Powell Archives, Washington and Lee University School of Law).

²⁹⁹ *Id.* Comfort also presented an alternative reading of Powell's *Branzburg* concurrence. Comfort wrote that Justice White's *Branzburg* opinion "seems to undercut any special claims of the press for special treatment in this area. Your . . . opinion in that case, however, seems to offer Respondents more support." *Id.* at 13. In the margin, Justice Powell wrote, "Yes." *Id.*

³⁰⁰ *Id.* at 22. Comfort interpreted Powell's *Branzburg* concurrence in the following manner:

Thus, you could view your position as one of subjecting the press, in a global sense, to the same duties as other citizens. You were simply more willing expressly to recognize the competing kinds of considerations that individual members of the press might advance once they were embarked upon performance of that duty.

Id.

³⁰¹ *Comfort Interview*, *supra* note 254.

³⁰² Circulation List, Consolidated Cases: *Zurcher v. Stanford Daily*, *Bergna v. Stanford Daily*, Box 1: 392, Folder 1, *White Papers*.

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Stewart quoted from Powell's *Branzburg* concurring opinion.³⁰³ As Comfort recalls, Stewart was trying to bring Powell around by pinning this new First Amendment doctrine on him.³⁰⁴ Stewart and Powell were very close and Powell frequently said he admired the way Stewart's "mind works."³⁰⁵ Nonetheless, Powell believed he needed to write a concurring opinion to show that he did not mean for his *Branzburg* opinion to be stretched as far as Stewart was taking it.³⁰⁶ Hence, the first draft of Powell's concurring opinion begins, "I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of the dissenting opinion."³⁰⁷ To Powell, there was no constitutional basis for exempting the press from searches.³⁰⁸

According to Comfort, Justice Powell believed it was necessary to directly address the meaning of the *Branzburg* concurring opinion.³⁰⁹ Thus footnote three, added after Stewart circulated his final draft, reads:

The concurring opinion in *Branzburg v. Hayes* . . . does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment. That opinion noted only that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. The concurrence expressed no doubt as to the applicability of the subpoena procedure to members of the press. Rather than advocating the creation of a special procedural exception for the press, it approved recognition of First Amendment concerns within the applicable procedure.³¹⁰

³⁰³ Potter Stewart, First Draft of dissenting opinion at 6, *Zurcher v. Stanford Daily* (Apr. 27, 1978) (on file with the Powell Archives, Washington and Lee University School of Law). Comfort wrote on the first page of Stewart's draft, "[t]his is another appealing opinion rhetorically, but it does not address the central issue: what warrant is there for creating a separate search [and] seizure proceeding for the press, i.e., of exempting the press from the Fourth Amendment? The First Amendment has never been held to impinge on the Fourth." *Id.* at 1.

³⁰⁴ *Comfort Interview*, *supra* note 254.

³⁰⁵ *Id.*

³⁰⁶ *Id.* When Powell joined White's opinion on March 10, he said he may write a short concurring opinion "including some of the thoughts [he] expressed in Conference, but as presently advised [he] probably will not write." *Letter from Justice Powell to Justice White*, *supra* note 285. Powell's decision to write a concurring opinion was prompted by the need to address Stewart, not to respond to White's majority opinion. *Comfort Interview*, *supra* note 254.

³⁰⁷ Robert D. Comfort, Draft of Justice Powell's concurring opinion *Zurcher v. Stanford Daily* at 1 (May 1, 1978) (on file with the Powell Archives, Washington and Lee University School of Law). The published version has very similar language. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 568 (1978). The first draft was circulated to the Conference on May 11, 1978. 1st Draft of Justice Powell's concurring opinion, May 11, 1978, Box I: 409, Folder 5, White Papers.

³⁰⁸ *Zurcher*, 436 U.S. at 570 (1978) (Powell, J., concurring).

³⁰⁹ *Comfort Interview*, *supra* note 254.

³¹⁰ *Zurcher*, 436 U.S. at 710 n.3 (1978) (Powell, J., concurring). The note was drafted by Comfort and Justice Powell made stylistic changes. Robert Comfort, Rider in *Zurcher* (May 18, 1978) (on file with the Powell Archives, Washington and Lee University School of Law). It was included in

In the search warrant context, the footnote explained that the *Branzburg* concurring opinion may “properly be read as supporting the view . . . that under the warrant requirement of the Fourth Amendment, the magistrate should consider the values of a free press as well as the societal interest in enforcing the criminal laws.”³¹¹ While there was no special procedure to be employed with search warrants aimed at the press, a magistrate “can and should take cognizance of the independent values protected by the First Amendment.”³¹² As with claims of journalist privilege, Powell offered no guidance to assist lower courts in reconciling the competing interests.

V. CONCLUSION

A. *The “Proper Balance”*

One year after *Zurcher*, the Court in *Herbert v. Lando* again rejected another press claim for special First Amendment status.³¹³ In *Herbert*, the Court, per Justice White, held that an evidentiary privilege for press defendants in libel suits would make it difficult for plaintiffs to prove the existence of knowledge of falsity or reckless disregard of the truth.³¹⁴

Although Justice Powell acknowledged privately that he did not want to “sound like a ‘stuck record’ in light of what [he had] said previously in *Branzburg* and *Zurcher*,”³¹⁵ he wrote a concurring opinion in *Herbert* to emphasize that a court supervising discovery in a libel suit has “a duty to consider First Amendment interests as well as the private interests of the plaintiff.”³¹⁶ In considering the relevance of discovery requests, a district court “must ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance.”³¹⁷

the second draft, circulated to the Conference on May 22. See Second Draft of Justice Powell’s concurring opinion, Box I: 451, Folder 3, *Brennan Papers*. A third draft, with minor stylistic changes, was circulated on May 24. Third Draft of Justice Powell’s concurring opinion, Box I: 451, Folder 3, *Brennan Papers*.

³¹¹ *Zurcher*, 436 U.S. at 570 n.3 (Powell, J., concurring).

³¹² *Id.* at 570.

³¹³ *Herbert v. Lando*, 441 U.S. 153 (1979).

³¹⁴ Justice White stated, “Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.” *Id.* at 175. Under the Federal Rules of Civil Procedure, however, courts must ensure that material sought in discovery is “relevant” and “judges should not hesitate to exercise appropriate control over the discovery process.” *Id.* at 177.

³¹⁵ Lewis F. Powell, Jr., Draft of Concurring Opinion at 7, *Herbert v. Lando* (No. 77-1105) (Mar. 7, 1979) (on file with the Powell Archives, Washington and Lee University School of Law). Powell’s comment is found in a note to his clerk Paul Stephan at the end of this draft.

³¹⁶ *Herbert*, 441 U.S. at 178 (Powell, J., concurring).

³¹⁷ *Id.* at 180. In a memo, Justice Powell commented that discovery questions will “require the

The "proper balance" Justice Powell advocated in *Branzburg*, *Zurcher*, and *Herbert* fell far short of the constitutional privilege advocated by journalists in each of those cases.³¹⁸ Although Powell's *Branzburg* papers contain statements that courts should recognize a non-constitutional journalist's privilege, Powell was using the term privilege in a rather idiosyncratic manner. Instead of approaching motions to quash or protective orders with a thumb on the scales in favor of journalists, Powell wanted lower courts to be sensitive to a range of interests, not just First Amendment interests. A "middle ground," even if it lacked doctrinal coherence, was his instinctive goal.³¹⁹

Justice Powell's "middle ground" or "proper balance" for journalist's privilege was defined by several factors. First, Powell was opposed to special procedures, so any judicial weighing of competing interests was to occur within an established procedural framework. Second, Powell was opposed to outcomes that encouraged the theft or leaking of documents, thus a "proper balance" would have to temper protection of journalists with the ability of government or private agencies to manage their delicate information. Third, Powell was opposed to extremes, whether it was a belief that the needs of law enforcement trumped all other interests or conversely treating press freedom as paramount. The exception was the *Garland*-type situation where a reporter had information critical to a trial.³²⁰ Powell's notes and

type of balancing [he] mentioned in *Branzburg*." Lewis F. Powell, Jr., No-77-1105 *Herbert v. Lando* Memorandum at 3 (Nov. 11, 1978) (on file with the Powell Archives, Washington and Lee University School of Law).

³¹⁸ Powell's opinion for the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) also reflects his concern for the proper balance. While cutting back on the protections of the press offered by a plurality in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), *Gertz* sought to provide a "more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Gertz*, 418 U.S. at 347-48. As Powell noted in a memorandum dictated after reading the briefs in *Gertz*,

I voted to grant cert in this case because I believe the Court has gone too far already in protecting the First Amendment rights of the media as against the individual rights (whether characterized as a right of privacy or the common law right not to be defamed) of individuals who may be permanently damaged or quite literally destroyed by the powerful news media.

Lewis F. Powell, Jr., No. 72-617, *Gertz v. Robert Welch, Inc.*, Summer Memorandum at 5 (July 6, 1973) (on file with the Powell Archives, Washington and Lee University School of Law). He wanted a decision that would "prevent the media from feeling inhibited to print legitimate news, and yet at the same time afford some reasonable protection to individual rights." *Id.*

³¹⁹ Powell's comment to one of his clerks while the Court was considering the issue of press access to prisoners captures his approach. His instinct, he wrote, is to "consider the possibility of some middle ground. From a doctrinal point of view, if middle ground were devised it may not be logical" nor would it please prison administrators or the press. Powell Memorandum to John Jeffries, *supra* note 287, at 6-7.

³²⁰ *Garland*, 259 F.2d at 545.

comments at the February 25, 1972 Conference reveal he believed a preference for a fair trial trumped the free press interest.

The “proper balance” was harshly criticized by Justices Brennan and Marshall because it provided little guidance to lower courts, offered marginal protection to the press, and was duplicative of existing federal rules.³²¹ Despite the shortcomings of the “proper balance,” Powell’s tone and language is more nuanced than that of White. Consequently, Powell’s *Branzburg* concurring opinion stands for shading the analysis of a Rule 17(c) motion in a manner that acknowledges the burden on First Amendment interests while also valuing competing interests.

To be sure, Justice Powell was opposed to special constitutional status for journalists. Yet he was also very sensitive to charges that the Court’s decisions were motivated by a dislike of the press.³²² He agreed with White that the press had powerful means of defending its interests outside of court but offered the press greater sympathy, at least rhetorically, than did White. The “proper balance” at its core was based on Powell’s intuitive sense of reasonableness.

B. Implications for a Federal Shield Law

The law of journalist’s privilege is a mess. At the time a reporter and source negotiate a confidential relationship, the parties can only guess how a state shield law might be applied or a federal court might respond to a First Amendment-based argument. As I have written elsewhere, “the varying privilege protections available in different jurisdictions as well as the unpredictable outcomes when judges engage in ad hoc balancing” create uncertainty for both sources and

³²¹ In *Herbert*, Justice Brennan wrote,

I have difficulty understanding exactly what First Amendment values my Brother Powell expects district courts to place in the balance. He may be suggesting that First Amendment values are impaired merely by requiring media defendants to respond to discovery requests like any other litigant. But even if district courts were to apply stricter standards of relevance in cases involving media defendants, the burden of pretrial discovery would be only marginally decreased”

Herbert, 441 U.S. at 195 n.14 (Brennan, J., dissenting in part). Marshall added that admonishing district courts to monitor discovery “adds little to the guidance already afforded by Rule 26 [of the Federal Rules of Civil Procedure] and cannot adequately mitigate the burdens on the press.” *Id.* at 205 n.4 (Marshall, J., dissenting). Scholars have also criticized Powell’s balancing. *See, e.g.,* Kahn, *supra* note 36, at 15–16 (stating that in Powell’s representative balancing “a stand on principle becomes an obstinate narrowness, a refusal to acknowledge competing interests.”)

³²² Powell appeared at an ABA panel in 1979 with Floyd Abrams, and as Powell reported to his colleagues, “I felt more like a target than a judge in view of some of the attacks made on the Court. . . . Abrams, whom I admire as an advocate, seemed to think we were deciding cases against the press because we don’t like it!” Lewis F. Powell, Jr., Judicial Administration Panel Program at ABA Meeting: Memorandum to the Conference (Sept. 10, 1979) Box 1406, Folder 13, *Blackmun Papers*. Press reaction to *Branzburg*, *Zurcher*, and *Herbert* was often extreme. *See, e.g.,* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 382–83 (1998) (recounting press commentary about Justice White’s opinions rejecting special status for the press).

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journalists.³²³ A solution to this uncertainty is a federal shield law creating a uniform statutory privilege applicable to both state and federal proceedings.³²⁴

Congress has little incentive to enact such a law as long as courts confer on journalists a First Amendment-based privilege built upon a misreading of Justice Powell's concurring opinion in *Branzburg*. Stated differently, Congressional interest in a shield law has generally been tied to a sense of crisis, such as when Judith Miller was imprisoned in 2005.³²⁵ Narrow judicial readings of Powell's concurring opinion, as shown by the recent Fourth Circuit decision involving James Risen, have the potential of fundamentally altering the law of journalist's privilege by pushing the issue back to the political branches.³²⁶

Legislative resolution of the complexities of journalist's privilege is preferable to ad hoc judicial decision making because journalist's privilege involves a range of policy considerations reaching beyond "the normal compass of a single case or controversy such as those with which the courts regularly deal."³²⁷ As this Article reveals, Justice Powell was troubled by judicial definition of the press, and this explains in part his opposition to a constitutionally based privilege. Defining the press is but one of a range of issues to be addressed in constructing a coherent journalist's privilege and courts are ill-suited, for example, to examine and adjust the interplay among statutes.

Attorney General Holder's decision not to pursue James Risen's testimony speaks to Powell's belief that the press has extrajudicial means to influence political actors and protect its interests. Stated differently, respect for the independence of the press by the executive branch, through policies and discretion of its officers, is a primary line of defense in protecting the press from inquiry into its sources and methods.³²⁸ A very modest judicial role, captured in Powell's "proper balance," mirrors his belief that the political branches should be the main architects of journalist's privilege.

³²³ Lee, *supra* note 7, at 664–65.

³²⁴ A federal shield law that involves ad hoc assessments such as the news value of a leak, however, would serve neither journalists nor sources well. Lee, *supra* note 2, at 32–33.

³²⁵ See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C. Cir. 2006).

³²⁶ See *United States v. Sterling*, 724 F.3d 482, 496 (4th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 3843 (U.S. June 2, 2014); *supra* note 25 and accompanying text.

³²⁷ *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005), *superseded by* 438 F.3d 1141 (D.C. Cir. 2006) (Sentelle, J., concurring).

³²⁸ See, e.g., William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1470–71 (2008) (discussing DOJ policy of not questioning reporters during leak investigations).