In the

Supreme Court of the United States

PAUL BRANZBURG,

Petitioner,

vs.

JOHN P. HAYES, Judge, etc., et al.,

Respondents.

No. 70-85

Washington, D. C.
February 23, 1972

Pages 1 thru 70

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PAUL M. BRANZBURG, Petitioner,	:	
v.	:	No. 70-85
JOHN P. HAYES, Judge, etc., et al., Respondents	:	

Washington, D. C.,

Wednesday, February 23, 1972.

The above-entitled matter came on for argument at 10:20 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDGAR A. ZINGMAN, ESQ., 300 Marion E. Taylor Building, Louisville, Kentucky 40202; for the Petitioner.

EDWIN A. SCHROERING, JR., ESQ., Commonwealth's Attorney, Jefferson County Courthouse Annex, Louisville, Kentucky 40202; for Respondent Hayes.

WILLIAM BRADFORD REYNOLDS, ESQ., Assistant to the Solicitor General, Department of Justice; for the United States as amicus curiae.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 70-85, Branzburg against Hayes.

Mr. Zingman, you may proceed whenever you're ready.

ORAL ARGUMENT OF EDGAR A. ZINGMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ZINGMAN: Mr. Chief Justice, and may it please the Court:

We appear here in behalf of the petitioner, Paul Branzburg, a professional journalist employed by the Courier-Journal, a daily newspaper published in Louisville, Kentucky. The petitioner seeks reversal on First and Fourteenth Amendment grounds of two cases decided by the Court of Appeals of Kentucky.

In the first of these, involving the respondent Hayes, a Judge in the Trial Court in Jefferson County, Kentucky, following upon publication in the Courier-Journal of an article authored by the petitioner which described the manufacture of hashish by two individuals in Louisville, Kentucky, and which in the body of the article contained a statement that a promise had been given by the petitioner that the identity of the two individuals would be maintained confidential, would not be disclosed.

The petitioner was subpoenaed before a grand jury sitting in Jefferson County, Kentucky, and was asked by that

grand jury two questions relating to the identity of the persons that he had described in the newspaper article. One of the questions asked him, specifically:

"On November 12, or 13, 1969, who was the person or persons you observed in the possession of marijuana about which you wrote an article in The Courier-Journal on November 15, 1969?"

The second question was:

"On November 12, or 13, 1969, who was the person or persons you observed compounding marijuana, producing the same to a compound known as hashish?"

This appears in our Appendix at page 6.

The petitioner refused to answer these questions and was brought before the predecessor in office of the respondent Hayes, a Trial Judge by the name of Pound, and upon the questions being read to the judge, the petitioner was directed to answer the questions.

At that time we appeared in behalf of the petitioner and asserted First and Fourteenth Amendment grounds under the concept of freedom of the press for the petitioner's refusal to answer the questions.

We also asserted the provisions of a Kentucky shield statute, KRS, Kentucky Revised Statutes, 421.100, which is phrased in language that protects a newsman from revealing the source of any information published by him.

The trial court rejected the contentions made on behalf of the petitioner and various motions for writs of prohibition and for stays were made in the Kentucky Court of Appeals. The Kentucky Court of Appeals granted a temporary stay prohibiting the respondent's predecessor in office from proceeding with contempt action against the petitioner until such time as the Kentucky Court of Appeals had occasion to pass on the merits of the case.

The case was subsequently briefed and argued to the Kentucky Court of Appeals on the First and Fourteenth Amendment grounds, in addition to the provisions of the Kentucky shield statute.

In November of 1970, the Kentucky Court of Appeals delivered an opinion, in which the Kentucky Court of Appeals held that the Kentucky shield statute did not protect the petitioner; it held that the shield statute was restricted solely to informants' information and protected the identity of informants, but where the reporter or newsman observed at first-hand individuals engaged in a particular activity, which might constitute a crime, or any activity, he was not privileged to protect the individual, the identity of the individuals themselves.

A position which, it seems to us, would put a premium on second-hand reporting and second-hand sources; somewhat incongruous.

Shortly after the Kentucky Court of Appeals opinion was delivered, a petition for reconsideration was filed in the Kentucky Court of Appeals, calling to that Court's attention the fact that they had made no comment upon our First and Fourteenth Amendment arguments, and citing to the Kentucky Court of Appeals the decision of the Ninth Circuit Court of Appeals in Caldwell v. United States, the appeal of which was argued before this Court yesterday.

While that was pending before the Kentucky Court of Appeals, another article authored by the petitioner appeared in the Courier-Journal, and this article dealt with the use and sale of marijuana in the State Capitol buildings in Frankfort, Kentucky, and the environs of the Capitol buildings in Frankfort.

Immediately following the publication of this article, the petitioner was subpoenased to appear before a grand jury in Franklin County, Kentucky, and the subpoena stated, quote, "to testify in the matter of violation of statutes concerning the use and sale of drugs".

A motion to quash this subpoena was made on First and Fourteenth Amendment grounds, and the trial court, the respondent Meigs, entered an order which in effect overruled the contentions we made, and directing the petitioner to appear before the Franklin County Grand Jury.

At that time we contended not only that the testimony

with relation to the article was privileged under the First and Fourteenth Amendments, but we contended that the mere appearance of the petitioner under this subpoena was protected against under the First and Fourteenth Amendments.

The trial court having overruled us on this position, we appealed for relief to the Kentucky Court of Appeals, which had our petition for reconsideration in the first case still pending before it.

The Kentucky Court of Appeals refused us the relief which we had requested, entered a modified opinion in the first case, upon our petition for reconsideration which, in essence, modified the first opinion by adding a footnote contending that we had abandoned our First and Fourteenth Amendment claims in the argument in the Kentucky Court of Appeals; a position, which, I might say, I think was a distortion of the record and which has not been urged in this Court in the briefs.

Q Mr. Zingman.

MR. ZINGMAN: Yes, sir.

Q Judge Meigs did do more for your client than Judge Pound had, did he not?

MR. ZINGMAN: Yes, sir. Judge Meigs entered a four-paragraph protective order which, in the first three paragraphs, it is modeled very much like the order Judge Zirpoli entered in the Caldwell case, but then he took it all back in the

fourth paragraph, because he said, notwithstanding anything in the first three paragraphs, petitioner shall not be protected from disclosing anything concerning any crime he has observed.

And of course the whole news article was about the possession and sale of marijuana, which is a misdemeanor under Kentucky law.

Q So it's your position, then, that Judge Meigs' order was for practical purposes, the same thing as Judge Pound's?

MR. ZINGMAN: Yes, sir.

Q The news article -- there was only one, was there?

MR. ZINGMAN: There were two articles.

Q Well, one appears on pages 3 to 5 of the Appendix.

MR. ZINGMAN: Yes, sir. And the other appears on pages 30 to 42 of the Appendix.

Q And the first one was published in the Louisville Courier-Journal.

MR. ZINGMAN: Both were published in the --

Q Both of them?

MR. ZINGMAN: Both were published in the Louisville Courier-Journal.

Q Yes, but one had a dateline, Frankfort; that

was the one beginning on page 30.

MR. ZINGMAN: Yes, sir.

Q And the first one had a dateline -- seemed to be Louisville?

MR. ZINGMAN: Louisville.

Q Is that right?

MR. ZINGMAN: Yes, sir.

Q It doesn't have a dateline, but it's a local story in the local paper.

MR. ZINGMAN: Yes, sir. The Courier-Journal is a daily of general circulation throughout the State.

Q Throughout the State, right.

MR. ZINGMAN: Following upon Judge Meigs' action, as I stated, the Court of Appeals entered its opinion, modified opinion in the Hayes case, and denied us the relief we asked in the Meigs case. It subsequently followed this with an opinion in the Meigs case, which is at present unreported, but is set out in the Appendix at page 54. And in substance, in that opinion, they rejected our First and Fourteenth Amendment arguments. They took the position that a newsman occupies no position different from any other citizen in the community, and they specifically rejected the holding of the Court of Appeals for the Ninth Circuit in the Caldwell decision.

We asked for stays and engaged in various procedural moves to hold up action pending application for certiorari to

this Court. This was denied, and, upon application, Mr. Justice Stewart granted a temporary injunction staying any further compulsion of contempt proceedings against the petitioner, pending application for certiorari; and on May 3, 1971, certiorari was granted, and we are here.

With the indulgence of the Court, I would first like to state the issue and the proposition we urge, and then to develop our arguments in support of that proposition.

In the sense that these cases seek relief for a newsman from compulsory testimony under certain circumstances, they are cases of first impression in this Court. They are here, as was the Caldwell case yesterday, and the Pappas case which follows us, because of a distressingly increasing practice of the entire criminal administration apparatus, grand juries, prosecutors, investigators, to attempt to make the news media into an appendage of that apparatus by compelling newsmen to give testimony relating to their confidential sources and information.

Doctrinally, however, these are not cases of first impression. We are asking here only for that historical protection against governmental interference, with exercise of First Amendment rights, which this Court has always provided.

While the factual setting may be novel, these cases seek nothing more than the application here of this Court's salutary and oft-repeated requirement that there is imposed

upon the government the burden of demonstrating a compelling and overriding need, and the lack of alternatives less destructive of First Amendment rights before government interference with the exercise of First Amendment rights will be countenanced.

The rule that we urge upon the Court is that the freedom of the press guaranteed by the First and Fourteenth Amendments encompasses not only publication but all meaningful pre-conditions to publication, not the least of which is the ability to gather or obtain information.

To insure these rights, we believe that it is necessary for this Court to declare that the First Amendment protects the newsman from being compelled to enter a closed proceeding and from being compelled to disclose confidential information obtained by him as a newsman, unless there has been a prior demonstration by the government, in an open hearing, of a compelling and overriding need for the disclosure.

Now, while we do not believe that the test of a compelling and overriding need can be or should be precisely defined, we suggest that as a minimum the following considerations should be waived, but none alone should be treated as controlling.

Q Mr. Zingman, let me interrupt you there. In passing, how would you define a newsman? Now, Mr. Branzburg here is a genuine one, all right; I take it there's no question

about this.

But it was suggested in the argument yesterday that beyond that one can get into a twilight zone.

MR. ZINGMAN: Yes, Mr. Justice Blackmun.

Firstly, let me comment that the definition of a newsman, as such, while we will offer one, should not be a problem, as the Court will recall in the whole line of litigation, starting with Sullivan v. The New York Times, we had to, and the Court had to deal with the definition of the public official, and we moved from public official in Sullivan with the footnote that the Court does not here define how far this reaches in the government structure to public person, to a person of prominence, and so forth.

And this of course is what the courts are peculiarly and aptly fitted to do, and we submit that the same thing with the newsman.

But, as a starting point, we would define a newsman as any person who, on a continuous basis, is engaged in the process of gathering information and preparing such information for dissemination to the public.

That's a very simplistic definition, but we think it would be a good starting place within the traditional approach of this Court.

Q Of course we're talking about the First Amendment. The First Amendment protects free speech as well as it does

a free press, does it not?

MR. ZINGMAN: Yes, sir.

Q And I suppose your argument, based as it is upon the First Amendment, could not logically be confined to newsmen, however defined. I suppose every one of us has the -- is protected in his right to free speech and the right to speak also includes the right to keep silent. And I suppose, logically carried to its conclusion, your argument would be that anybody would be protected if he just said, "I don't want to talk".

MR. ZINGMAN: Well, I wouldn't know --

Q Why is it confined to newsmen? We all have the right of free speech, do we not?

MR. ZINGMAN: Yes, Mr. Justice Stewart. I would not agree that logically carries to its conclusion every one under the exercise of the grant of free speech would have the right to refuse to testify.

Q Why?

MR. ZINGMAN: Well, specifically, we're talking about the press, which is also mentioned in the First Amendment.

Q Well, they're both there, are equally protected.

MR. ZINGMAN: Yes, sir.

Q Free press and free speech.

MR. ZINGMAN: And the records in these cases demonstrate that, at least we believe and we would urge upon the

Court, that the compulsion of testimony by a newsman would have an inhibiting effect upon the ability of the press to fulfill its function.

Now, we know of no such record with respect to compelling individuals to come before a grand jury and testify generally in support of free speech.

Q Well, if you're right, it would be a direct impingement upon a person's right of free speech, because the right of free speech includes the right to keep silent, does it not?

MR. ZINGMAN: The right of free speech --

Q It's not inhibiting, it's just a direct violation of it, if you're right in your basic argument.

MR. ZINGMAN: No, sir. I don't think the right of free speech has ever been interpreted by this Court as including the right to keep silent when called before a grand jury.

Q No, it never has, nor has this Court ever interpreted the right of free press to include the right of a newspaperman to defy a subpoena of a grand jury. So we are -- these both would be new decisions.

MR. ZINGMAN: That is correct. And our position is that the record here amply demonstrates that it's a necessary concomitant of the First Amendment free press right to protect the newsman, that the loss in not compelling testimony is so

little in the balancing process that we urge that the right be protected. If I follow your hypothesis, if at some future time a like demonstration is made that grand jury testimony by individuals has a chilling effect upon the exercise of free speech in our --

Q Well, it certainly does, particularly if it's anything told to an individual in confidence, it would have a chilling effect on anybody who wanted to confide in a friend or an associate, wouldn't it?

MR. ZINGMAN: Well, I don't know whether it would or not. All I can assert --

Q Well, it's very clear that it would, isn't it? I mean if your argument is right, or even if your affidavit is right.

MR. ZINGMAN: No, because I don't believe that in the context of speech there is the assurance that when confidences are given that they will not be disclosed as part of the compulsory process of a grand jury; but what we're urging here is that it is necessary to the functioning of the press, and it has been a part of the process of the press, that such confidences be given and those confidences are the condition upon which information is available to the public.

I don't see the same demonstration in the speech area.

Q The First Amendment protects them both.

MR. ZINGMAN: Yes, it does.

And the Court has made a different balancing consideration in different applications of the First Amendment.

Q Well, let's suppose this reporter had been accompanied by a member of the State Legislature, who was simply interested in informing himself in connection with, perhaps, revision of the State criminal code. He was also accompanied by an interested parent; and he was also accompanied by the head of the Criminal Law Revision Commission. And they both saw the same thing. And you would say the reporter would be privileged, and none of the others would?

MR. ZINGMAN: We would make that distinction, Mr. Justice White, but, of course, in that case it would be meaningless anyway because the information could be obtained from others, which would end the quest. But ordinarily --

Q Well, I'm saying --

MR. ZINGMAN: -- we make the distinction. Because we're talking about freedom of the press and the necessity to provide the information for the public. It's not the newsman that we emphasize. The newsman is the mechanism. But we are emphasizing the necessity for seeing to it that the flow of information to the public is maintained.

Q Well, the interested parent and the head of the Criminal Law Revision Commission says, We just can't get the information to allow us to conduct our business; run our families and to run this committee, if we can't -- aren't

allowed to respect confidences.

MR. ZINGMAN: My response to that would have to be that the framers of the Constitution didn't put an amendment in for them and there is a First Amendment dealing with the press.

Q Well, but they are covered, as Mr. Justice Stewart says, by the free speech provision.

MR. ZINGMAN: Well, insofar as the exercise of free speech is concerned, I merely would be repeating myself in the remarks I made in response to Mr. Justice Stewart.

Q Yes.

MR. ZINGMAN: We draw a distinction there on the demonstrations in the record and on the objectives that we are urging.

Q And I might ask you also: Do you say that the newsman's claim of privilege must automatically be respected once he claims it? Is there any investigation or any proof required as to whether he received the information in confidence, or must his assertion just be accepted?

MR. ZINGMAN: Our formulation would call for the kind of investigation in an open hearing that is made by courts today when the Fifth Amendment privilege is asserted. That is, if, prima facie, the trial court determines that the plea is being made in sincerity and good faith, that it is to be honored.

Q What do you think in this case, just as a

practical matter, a reporter goes and sees what he says and reports it; as a practical matter, why would the people that he saw running this hashish laboratory permit him to publish the fact that there was this laboratory operating, but say, Please don't publish our names?

MR. ZINGMAN: Well, this, Mr. Justice White, I think goes to the heart of what we're talking about and why this is so important. There are dissident elements in the society today which, for the first time historically, the news media are really dealing with. Traditionally the news media, historically, have reported what is going on in the general community, the orthodox community. But, more and more, through investigative reporting, they are dealing with the unorthodox, the rebellious, the youth, the drug culture, the hippies, the dissidents.

Now, these people do want to get their positions across to the community at large, and it is important for the community at large to understand their position. There is great controversy in this country today about the question of legalization of marijuana. It's important for the public,in determining that question, to understand the attitude of those who use it.

Q Shouldn't the public have a right to know the sources of that information?

MR. ZINGMAN: Well, I think the important thing is for

the public to have the right to know, and if having the right to know the sources will destroy the ability to obtain the information, then it leads us no place.

Q Isn't the public going to make its evaluation of the information depending on the credibility of the source and the possible self-interest of the source?

MR. ZINGMAN: Well, that's part of it, and I suppose, in that quantum, the public will also weigh the fact that these people wanted to remain unidentified.

But, obviously, if you're going to print news about what is presently an illegal activity, you are not going to get information voluntarily from those who are participating in such activity if it's going to immediately lead to their arrest and prosecution.

Now, it's a question of cutting off the information at the very start.

Q Let me ask you a hypothetical question, to pursue the point that both Justice Stewart and Justice White have embarked on. Suppose in a particular community, not only the law enforcement authorities were apathetic but also the press was apathetic, and some public-spirited citizens decided to conduct their own investigation, and they went around and did just what your investigative reporter did, and then used the time-honored method of writing a letter to the Editor to do. again, just what your investigative reporter did. Is he pro-

tected?

MR. ZINGMAN: Not under the definition which I offered Mr. Justice Blackmun, I believe, of what a newsman is, because --

Q Justice Stewart suggested that it's a difficult distinction to make.

MR. ZINGMAN: It is a difficult distinction, but one, I think, that has to be made.

Q If the reporter is protected and the citizen who writes the letter to the Editor is not?

MR. ZINGMAN: In the application, with the definition that we make, that would be the case. But, again, Mr. Chief Justice, I must emphasize that we are not talking about reporters qua reporters as against other individuals. We are talking about the flow of information protected by the First Amendment for the benefit of the general public.

Q Well, doesn't that standard precisely fit my hypothetical public-spirited citizen who is trying to get the flow of information that neither the law enforcement authorities nor the local press is delivering to the public?

MR. ZINGMAN: As an abstract proposition it would. I might agree in a particular case. But here the First Amendment talks about the press. It doesn't --

Q This man is using the press, isn't he? Vicariously?

MR. ZINGMAN: Yes, sir; but we have to arrive at a definition, and for definitional purposes we have defined the press as one who on a continuous basis does this; not a volunteer.

Q Well, historically, in this country and in other countries, particularly our own, beginning 200 years ago, wasn't the Letter to the Editor a great means of -- used by essayists, pamphleteers who communicated to the public in much the way the columnists do today. Were they any less -- Madison or Jefferson or any of these men any less exercising the freedom of the press, because they did not get paid for writing their Letters to the Editor?

MR. ZINGMAN: Well, I would concede that the pamphleteer and such may, under the forumula we make, be included in a particular case. There may have to be some weighing and balancing. But, as a starting point, we believe that in the tradition of this Court, going one step at a time, that you start with a definition of the press along the lines that I have suggested, and then we move with experience from there.

Q Under your definition, you would not automatically include all the authors of the Federalist Papers, would you?

MR. ZINGMAN: Well, I'm not familiar with to what extent they would fit, but I would suppose not. I would

suppose not.

Q Mr. Zingman.

MR. ZINGMAN: Yes, sir.

Q Following up on this same line of questioning, with which you have already been barraged, take the class of people who speak more or less formally as an occupation, of whom I would think perhaps of college professors, lecturers. Now, Justice Stewart suggested that, and I think he's quite right, that the freedom of speech is every bit as much protected as freedom of the press. And here you have a class of people that are more or less regularly exercising the freedom of speech and not casually exercising it.

Wouldn't your concept of the privilege at least have to extend to this type of person?

MR. ZINGMAN: We are not prepared to urge that upon the Court, because, again, while that may be a freedom of speech problem, it is not a freedom of the press problem. We're talking specifically about press. There are many elements in the community that are engaged in the acquisition of knowledge and the dissemination of knowledge, but they're not constitutionally protected and constitutionally dealt with; so we don't reach that problem.

Q What about the research right of books on criminology?

MR. ZINGMAN: Well, Mr. Justice Marshall, I think

that's the same answer I have just given Mr. Justice Rehnquist, that that does not, in our judgment, fit in this constitutional framework.

Q It's not the press?

MR. ZINGMAN: Yes.

Q The author of a book isn't covered?

MR. ZINGMAN: Not in that sense, no.

Q Well, in this case, your man witnessed a crime; correct?

MR. ZINGMAN: Yes, sir.

Q Suppose that instead of making hashish they were making a bomb to blow up the Capitol in Frankfort, would the privilege still apply?

MR. ZINGMAN: Well, at the --

Q I just wanted to know how far you'd go with this crime.

MR. ZINGMAN: At the time the questioning by the Justices of the Court started, I was at the point of stating to the Court the standards that we would apply. And the third standard that I have to offer, if I may, will respond to your question.

We have said that there must be a test of compelling and overwhelming need demonstrated by the government for the information. And I was starting to say that while we did not believe it could be or should be precisely defined, that, as a

minimum, the following three considerations, none alone of which we would consider be controlling, should be applied:

First, that there is probable cause that the newsman has specific information relative to a specific permissible inquiry.

Second, that there are no alternative means less destructive of First Amendment rights by which to obtain the information.

And third, and this is in answer to your question, Mr. Justice Marshall, that the newsman's appearance and testimony is necessary to prevent direct, immediate, and irreparable prospective damage to national security, human life, or liberty.

And, in terms of the third consideration, we would say a Court could waive and compel the testimony.

Q Well, suppose they were making a bomb to blow up John Doakes, an ordinary citizen. That wouldn't be covered, would it?

MR. ZINGMAN: Yes, it would, in terms of my third criteria.

Q Well, I thought you said that would be something of national importance.

MR. ZINGMAN: National security --

Q What's national importance about killing Joe Doakes?

MR. ZINGMAN: National security, human life, or liberty.

Q Well, then -- or liberty?

MR. ZINGMAN: Yes, sir. Human life or liberty. So, in the case you posit, which is, in substance, I would suppose, the Knops case, in which --

Q My whole problem is, crimes are crime; are they not?

MR. ZINGMAN: Well, I think --

Q You're going to draw a line among crimes.

MR. ZINGMAN: I think there are distinctions, and this Court has recognized that there -- that distinctions can be drawn as between crimes. Mr. Justice Jackson, speaking for this Court in the Brandon case in 1958, dealing with the Fourth Amendment, pointed out that while the Court would not countenance a widespread net and search of all vehicles leaving a community in the case of some misdemeanor, if there was a kidnapping and such a dragnet was necessary to save the life of a child, such a search would be countenanced under the Fourth Amendment.

So distinctions among crimes is not such a novel idea for this Court.

Q Have you got another one?

MR. ZINGMAN: Not at the moment, sir.

Q I didn't think so.

Q Do you think the Court has ever adopted Mr. Justice Jackson's view of that bifurcation of the amendment?

MR. ZINGMAN: I've known of no specific application, but I suggest that it is not an unreasonable argument at all.

Q Under your test, Mr. Zingman, supposing that the reporter had witnessed a murder, but there was no reason to believe that the man was in the business of murdering people, that it was a one-time offense. Could the grand jury subpoena him to testify?

MR. ZINGMAN: Subpoena the reporter?

Q Yes.

MR. ZINGMAN: In -- under our balancing test that would be possible, yes.

Q But I thought it was danger to national security, liberty -- you would regard the prosecution of an already completed offense as a way of, in effect, averting that sort of danger?

MR. ZINGMAN: I would say that would come in under the balancing act, and it might be permissible for a court, using the standards we have applied, if he felt that the definition of prospective damage to human life was there.

Q Well, Mr. Zingman, I didn't understand you to make the argument that your balancing test comes into play unless or until we're dealing with confidential information.

MR. ZINGMAN: That is correct.

Q True?

MR. ZINGMAN: That is correct.

Q And my brother Rehnquist's question, as I understood it, if a reporter is an eyewitness to a murder he's like anybody else that's an eyewitness to a murder.

But we're only talking here about something that's acquired by a journalist in a confidential capacity, are we not?

MR. ZINGMAN: I thank you, Mr. Justice Stewart. I misunderstood Mr. Justice Rehnquist's question.

Q Well, maybe I did also. Maybe I did also.

Q Yes. It was implicit in my question, certainly.

MR. ZINGMAN: I deal solely with confidentiality. Yes, sir.

Q You would -- I take it you would assert the privilege both with respect to the name of the source, and also with respect to --

MR. ZINGMAN: Information.

Q -- information.

MR. ZINGMAN: Yes, sir.

Q Now, let's assume a reporter gets items A to Z, and he is, he promises not to disclose L to Z, but he may disclose A to L, and he does. Concededly, however, L to Z are very newsworthy items, if he were free to publish them. And yet -- and he says, I must have this privilege in order that

I can publish A to L; that I must be privileged to withhold this other very newsworthy information. So your argument is you must, you must permit him to suppress certain newsworthy items in order to disclose some other; is that it?

MR. ZINGMAN: Our argument is that the judgment must be left to the newsman as to what he will publish or not publish.

Q And he may suppress newsworthy information in order to publish some of it?

MR. ZINGMAN: He might withhold, as a matter of news judgment, some information that he has acquired, as a basis for publishing of it; yes, sir, in response to your question.

Q And also he's got the judgment as to when to publish?

MR. ZINGMAN: Yes, sir.

Q I mean, even if he says, Well, I'm going to -- these items L to Z I'm going to publish some time but not now.

MR. ZINGMAN: He could exercise that judgment.

Let me, if I may, indicate something to the Court. In the main, the questions that have been posed to me have dealt with problems of definition of problems of singling out the newsman, problems of the various kinds of crimes and such that might or might not be disclosed to the public.

If I may, let me suggest a paradox that we're dealing with here.

In our cases, for example, the petitioner's cases, if this Court was to affirm the holdings below, the net effect would be to require the petitioner to go into the grand juries in Kentucky and disclose the identity of two individuals in one case, and three, four, five, six individuals in another case, who then might be successfully prosecuted for the misdemeanors involved.

But the end product would be that that's the end of it. From that point on, this Court, having announced that there is no protection, no further information will be forthcoming to reporters on a confidential basis; no reporters will be available to aid the prosecution by giving testimony before grand juries or any place else, because they're not going to have the information. Elements in the community that might have provided information, including government officials at all levels, will no longer provide such information to reporters.

Q Mr. Zingman, in the Pound case, the Kentucky Court of Appeals suggested that what your client witnessed was a felony rather than a misdemeanor. Do you disagree with that?

MR. ZINGMAN: I don't disagree with that; it may have elements of felony in it.

The sources of information will be withheld. Reporters who have information on a confidential basis would exercise prior restraint in the form of self-censorship, by not printing that information for fear that they will be called

before grand juries. And the end result is that the Court's ruling here, upholding the decision below, will complete the circle and completely dry up information, and accomplish nothing other than the prosecution of the few individuals involved in these cases.

On the other hand, --

Q Aren't you saying at that point -- perhaps I don't follow you -- that this is precisely the situation that has prevailed until recently,when your newsmen were able to get into some of these circles and uncover news that heretofore was unavailable?

MR. ZINGMAN: Well, I'm saying that up to now they have been able to get that information, but once this Court declares that there is no First Amendment right to protect that, they're not going to get the information. That's what I'd say.

Q Well, a little while ago I thought you said that up to now they hadn't been able to get this information?

MR. ZINGMAN: Oh, no, sir.

Q And that why --

MR. ZINGMAN: This case demonstrates that they had been able to.

Q That it's only recently that newsmen have been able to get into these inner circles.

MR. ZINGMAN: No, sir.

Q So, I suggest that your parade of horribles

merely takes us back to where we'd been twenty years ago.

MR. ZINGMAN: I don't believe it takes us back, because, as a practical matter, the very fact that this issue has not gotten here before, I think is demonstration of the fact that prosecutors have not pressed newsmen up until recent years, that accommodations have been worked out to protect confidential sources and such; but in recent years, what I said was, there has been a distressingly increasing spate of activity by prosecutors and such to compel information from newsmen, and the Attorney General's recent guidelines are indicative of the changed situation, and the recognition of the fact that there has been this developing situation.

I am about at the end of my time, so I would just say, in closing, that what we are talking about is a First Amendment situation. We think that the failure to insure to newsmen a First Amendment right here would result in self-censorship, prior restraint, the drying up of sources of information, would result in a total loss to the general public of the kinds and scope and extent of information which the First Amendment was designed to achieve.

I think the records demonstrate very clearly the chilling effect upon the newsman's ability to operate, that these subpoenas and compelling testimony induces.

The inevitable conclusion that we believe is the case is that the newsman is entitled under the First Amendment

to refuse to disclose confidential material and to appear in a closed proceeding under compulsion, unless there has been a prior demonstration in an open hearing by the government of a compelling and overriding need for compulsory disclosure. And we have suggested three criteria to be applied in determining whether or not there is such a compelling and overriding need, none of which we suggest is to be controlling, but we strongly urge upon the Court that in the historic line of cases which have preserved and enhanced First Amendment rights in the process of bringing about that robust and wide-open debate which this Court has noted, in preserving an untrammeled press, that the cost of -- that the necessity for declaring these First Amendment rights is immediate and urgent and that it comes at very slight cost to the prosecutorial apparatus,to the criminal administration apparatus, whereas the reverse, as was noted yesterday by Mr. Amsterdam in his argument, every newsman interviewed in the particular survey has said that it would be a disaster for the newsman to operate in the face of a declaration by this Court that confidential sources could not be protected.

Thank you.

Q Mr. Zingman, before you conclude, is the open hearing which you mentioned essential to your submission, or would in camera proceedings be acceptable?

MR. ZINGMAN: Mr. Justice Powell, I don't think in

camera proceedings would be acceptable, because the thing is that the moment the newsman goes behind the closed door, that the suspicions of the kind that were referred to in the Caldwell case yesterday are generated.

And so we think it necessitates an open hearing.

Q And before whom should that hearing be?

MR. ZINGMAN: The trial judge.

Q Of course, one ofthe traditional values of the grand jury, we've always thought, and certainly this Court has repeatedly said, is that it is not and should not be controlled by judges or by prosecutors or by anybody else. Sometimes it's a corrupt judge that the grand jury is investigating; isn't that correct?

MR. ZINGMAN: I agree with that --

Q The very freedom of a grand jury of citizens to act and investigate without any limitations imposed upon it by officials has been thought to be one of its values. Isn't that correct?

MR. ZINGMAN: I agree with that, but the traditional practice, for example, as the record shows in this case, the petitioner was called before the trial judge; the two questions were read to the trial judge; and the petitioner was directed by the trial judge to answer those questions.

Q Well, because the trial judge said, I'm not going to interfere with the traditional freedom of a grand jury.

Correct?

MR. ZINGMAN: Well, if he said that by saying that I don't agree with you that it's a First or Fourteenth Amendment privilege.

I would -- this is not the time nor place, Mr. Justice Stewart; but I would say there is a great deal of myth prevalent in the --

Q There may be, but lawyers and judges have been saying this to each other for a good many centuries.

MR. ZINGMAN: Yes, sir. And --

[Laughter.]

-- in my twenty-some-odd years of experience in the courts in Kentucky, without in any way casting any aspersions on my friend Mr. Schroering here, the myth does not fit the operations of grand juries in Kentucky.

Q Could I ask you just one more question? Do you claim the same privilege for trials as compared with grand juries?

MR. ZINGMAN: We make some distinction with reference to trials. But, in essence, the way we formulated the situation, the same balancing test would be in that case.

Q So you say the same privilege would be available to the newsman when he's subpoenaed at an actual trial as he would have when he's subpoenaed by the grand jury?

MR. ZINGMAN: Yes, sir.

Q He needn't even appear?

MR. ZINGMAN: Oh, I think -- I said he would not have to appear in a closed proceeding; he has to appear in the open proceeding. There's no need --

Q But only to claim his privilege?

MR. ZINGMAN: He would then assert his privilege not to respond to questions relating to confidential information. But certainly would have to appear.

It's the vice of the closed proceeding that we object to.

MR. CHIEF JUSTICE BURGER: Mr. Zingman, we've helped you consume your time, so we -- and it is used up; but we'll allow you a full five minutes for rebuttal.

MR. ZINGMAN: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: We will adjust the other time accordingly.

MR. ZINGMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Schroering.

ORAL ARGUMENT OF EDWIN A. SCHROERING, JR., ESQ.,
ON BEHALF OF THE RESPONDENT HAYES

MR. SCHROERING: Mr. Chief Justice, may it please the Court:

Mr. Zingman has, I believe, generally stated the facts in the case and the procedure by which these facts have come to the Supreme Court of the United States.

I do believe, however, that some amplification is needed in certain areas, and will attempt to do that before I get into a discussion of the issues which I believe have been raised here.

The article involved --

Q Is your only brief this little, three, four-page brief?

MR. SCHROERING: That's correct, Mr. Justice Douglas.

Q You think that -- you say that there's nothing in the Constitution, apart from the privilege of self-incrimination, that protects a witness?

MR. SCHROERING: Yes.

Q Suppose a man is on the stand, before a legislative committee, and they ask him if he believes in Jesus Christ, or God, or what his religion is; do you think that is subject to examination by the government group?

MR. SCHROERING: That, of course, would be a protection under the First Amendment, that is, freedom of religion. I could see how an argument could be made to this Court along those lines.

Q Well, to take it a little apart from religion; do you believe in socialism?

MR. SCHROERING: You mean as a general principle?

Q Yes. I mean, does everything -- does it mean everything goes in these --

MR. SCHROERING: No.

Q That the State can compel everybody to do anything.

MR. SCHROERING: No.

Q What did you tell your priest; what did you tell your pastor; what did you tell your wife; what did you tell your doctor? All those things can be squeezed out of a man?

MR. SCHROERING: A very interesting argument, Mr. Justice Douglas, could be made to this Court on the protection of the First -- by the First Amendment on a --

Q I know, but I'm just amazed at this little three-page --

MR. SCHROERING: -- religious --

Q You treat it as almost a frivolous question.

MR. SCHROERING: I did not mean, by writing a short brief, Mr. Justice Douglas, to give the impression that I was writing or thinking that this was a frivolous matter. Indeed, I might apologize to the Court by saying that, as chief prosecutor in my community, indeed, I have many, many cases, and I believe that sometimes brevity in bringing forth your argument is as forceful, perhaps, as an exhausted survey of the cases in any particular field or area.

I would call the attention of the Court to the cases that have been cited in connection with some of the questions that the Court has asked.

I did want --

Q You don't cite any cases in your brief?

MR. SCHROERING: Riley vs. Lee is cited. That is a case decided by the Court of Appeals of Kentucky --

Q Oh, I see it now, yes.

MR. SCHROERING: -- which holds that the press has no more rights under the Constitution than a citizen. And this is one of the questions which I believe has been directed to counsel in this case. I think that it's an extremely important part of this presentation.

I would like to continue with the presentation of my argument and call the attention of the Court to KRS 421.100. Now, this particular statute states, in pertinent part, that:

"No person shall be compelled to disclose in any legal proceedings or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee therefore, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engage or employed, or with which he is connected."

As you can see by this, Kentucky has adopted, by statute, a protection for newsmen.

Q But the same State of Kentucky, through its judiciary, said that statute just doesn't apply.

MR. SCHROERING: The case decided in Branzburg vs. Hayes, Mr. Justice Marshall, held that the protection does apply except in the instance of where the newsman is an actual witness to the crime. And in that case the court felt that there was a distinction in his position that the grand jury has the obligation --

Q Well, what do we have before us, that statute or the judgement in this case? We have the judgment in this case interpreting its own statute. And it says that --

MR. SCHROERING: That's correct.

Q -- it doesn't apply.

MR. SCHROERING: That's correct.

Q So how is it in this case?

MR. SCHROERING: We raised this question in our brief as to just how this case arrived at the Supreme Court, which was a matter of some concern to us in our brief, because the judge held in the court below that the petitioner had exhausted -- excuse me -- that the petitioner had abandoned his argument on the First Amendment.

But we are here now --

Q But in the last -- I thought the last decision in your court ruled specifically on the First and Fourteenth Amendment. Just said it didn't apply.

MR. SCHROERING: That's correct.

Q And that's the one that's here.

MR. SCHROERING: No, there are two cases here, Mr. Justice Marshall.

Q Well, that one is here.

MR. SCHROERING: The case of -- there are two cases involved. The first case was precipitated in 1969; the second case was a year later, in a community some 50 miles away from the first, where the first case arose. And in the second case you're absolutely correct. The question was taken up, and that's the case involving Branzburg vs. Meigs. That question was before the Court of Appeals, and the Court of Appeals specifically rejected the Caldwell decision, the decision of the Ninth Circuit.

Q Mr. Schroering, even in the Pound case, certainly the petitioner here, in their application to the Kentucky Court of Appeals raised the constitutional question, did they not? As I read the Appendix at page 10.

MR. SCHROERING: Yes, they mentioned that before Judge Pound, as I recall. But then, later on, in argument before the court, and if you will note in the Court of Appeals decision involving Meigs, it's specifically referred to and they refer to the portion of the Appendix where they claim, where the court claims that they abandoned this particular argument.

Q So it's a contention of abandonment on oral argument, although the claim was made in the written application?

MR. SCHROERING: That's correct.

The one part of the argument made here, which I would like to refer to at the present time, has to do with an apparent view on the part of the petitioner that somehow the grand jury is an alter-ego of the police. Somehow, that the grand jury is not acting on its own, but is in the business of acquiring information; acquiring information for the benefit of prosecution.

This is not the case, certainly in Kentucky. Contrary to an inference that has been made by counsel, the grand juries in Kentucky are not operated any differently from grand juries throughout the country. We have 12 a year, and there are 12 people chosen, through our system of jury selection. These people are interested in the enforcement of the laws of the State of Kentucky. They are also interested in the protection of the innocent as well.

And if the grand jury believes that there is insufficient evidence to show probable cause that an offense has been committed, or that this person committed it, certainly -- certainly that indictment is going to be dismissed. And this is a far cry from saying that one of the greatest dangers we have is that the press will be an arm of the grand jury.

Q You mean of the --

MR. SCHROERING: Excuse me; of the prosecution. I'm very sorry.

Q The grand jury often investigates the police, does it not?

MR. SCHROERING: Often it does, and that --

Q Particularly in certain counties in Kentucky, in my experience.

[Laughter.]

MR. SCHROERING: That's correct.

And I've had the pleasure of investigating the police department myself, in my capacity as servant to the grand jury. So that's very true.

Q Is there a grand jury empaneled every, you say every month in each county in Kentucky? Or did I misunderstand you?

MR. SCHROERING: No. No. During the terms in the smaller judicial districts; but every month in courts of continuous session, as we have.

Q How many counties in Kentucky?

MR. SCHROERING: 120.

Q Does the prosecutor or the police in Kentucky use newspapermen as agents or runners or investigators?

MR. SCHROERING: No, Mr. Justice Douglas, we do not use, the prosecution does not use the news media for this

purpose. Indeed, we had an unusual situation where the grand jury had some of its sessions in the building of a local newspaper during a recent incident. But this does not have any application here.

And I'm not saying this by any way inferring that the petitioners would use the grand jury in any such a manner that they were not supposed to.

But the -- as I see it, the newsman has no more privilege under the law than the average citizen. There is, of course, a chilling effect upon any use of the law, if the grand jury goes out and subpoenas someone and asks them a question, and citizens observe that person going before the grand jury, certainly there's some effect that might develop from this.

But isn't this something that we have to accept as a part of our obligation as citizens?

I would call the attention to the Court of the procedure which has been suggested by counsel in his discussion of how you would have this open hearing to determine whether a newsman would be subpoenaed, in which they refer to the same type of procedure that we would use in determining Fifth Amendment privileges.

The Fifth Amendment applies to everyone. The Fifth Amendment does not merely apply to a newman or any group of newsmen.

Also would like to call the attention to the Court of the reasons why the informants gave their information to the newsman, and it's in the brief: he wanted to bug the narcotics agents involved in the community.

This appears to be a reason not quite as important as some of the reasons that have developed in other privileges under the law that we've noticed. Certainly bugging the narcotics agents, his purpose in giving the information, is not the type of a privilege, or should not go to consider the type of privilege that's being requested here.

The petitioner has suggested these different tests to be made.

I would take the position that this would fetter the grand jury process, to the point that it would have a substantial effect upon the operation of the grand jury.

The grand jury certainly has deep roots in constitutional law. They have a constitutional duty to investigate, just as the press has the freedom, as any other citizen. When these two meet under these circumstances, certainly doesn't the grand jury, that acts for all of the people, doesn't their constitutional duty carry heavier weight in this connection than the corresponding privilege which is advanced here by counsel?

Q Well, of course if it applies -- if there is no privilege in this case, there'd be no privilege in any trial,

I'd suppose. The petit jury has a great dignity under our system, too.

MR. SCHROERING: Only the Fifth Amendment would apply; that is our position, for constitutional reasons.

Now, there are privileges that are set out by statute and Wigmore discusses the privileges and the different types. And his feeling is that privileges should not be -- should not be advanced. He thinks that the more privileges you have the more difficult it is to administer the law.

And certainly I think that in this instance, the Kentucky statute --

Q Of course it depends upon what you think the purpose of the law may be. Have you ever been to a totalitarian country? Have you been to Russia?

MR. SCHROERING: I have not, Mr. Justice Douglas, been to Russia.

Q And seen the press, the kind of a press that you have under a regimented society?

MR. SCHROERING: I would never want to have such a situation occur in this country. And I agree wholeheartedly with the statute which has been passed by the Legislature of Kentucky granting to the press a privilege, a legislative Act, they have a privilege. But I also agree with the Court of Appeals, that when the reporter starts to transcend from a receiver of information to a witness to a serious crime, which,

I might say, was a felony at the time that the investigation began in 1969, but today, by change of statute, is now a misdemeanor.

Q Then you've made every reporter a runner for the government, in every case.

MR. SCHROERING: If we assume that that is a function of the grand jury, to be an arm of the government, --

Q But this doesn't stop at grand juries. These rules, with their exceptions, have a tendency to run the full limit of their logical extent.

MR. SCHROERING: No, I --

Q They apply to the petit jury; apply to administrative agencies; and would apply, I would think, to every aspect that passes to the government.

MR. SCHROERING: You mean that each of these agencies would thereby employ the press to do their job for them?

Q No, I mean they would -- if he can be required to testify in this, I don't see why he couldn't be required to testify at the SEC or Federal Trade or --

Q It wouldn't be employing them, because you don't pay them.

MR. SCHROERING: No.

Q But you might end up.

MR. SCHROERING: Well, I don't think that I would use the same analogy with arms of government who are out attempting

to obtain information. The grand jury has its roots different from that. It has additional obligations under the law, and set out in the Constitution, which makes it independent. And this is the reason why I suggested this. I feel that throughout argument on this, that the grand jury has been placed in a position before this Court, in the view of the petitioner, that it's somehow an arm of the Commonwealth. And I will not agree with this.

I think that the corresponding constitutional obligations of the grand jury, as far as the defendants are concerned, are just as important as for the prosecution. So how can we say that the grand jury is an arm, an alter-ego of the Commonwealth?

Q Well, if this judgment is affirmed, then every place in the country, once a story appears in the press which shows confidential information concerning a crime, wouldn't it automatically follow that the grand jury would subpoena that reporter?

MR. SCHROERING: Not necessarily.

Q Well, how -- but you say they're so great, how could they be doing their job if they didn't?

MR. SCHROERING: If the newspaper reporters observe a crime, the commission of a crime, they become a witness and they have a duty and a responsibility to testify in a court of law.

Q Well, then wouldn't it be true that once they publish a story they volunteer as a witness?

MR. SCHROERING: They are subject to being subpoenaed before the grand jury --

Q And wouldn't they be subpoenaed?

MR. SCHROERING: That's correct. Just like you would subpoena a husband in Kentucky, or a wife, in connection with a case, or you would subpoena someone else with some privilege. They would raise the privilege in the particular communication involved in the court of law, whether it be before the grand jury or whether it be before the petit jury.

They have a right --

Q Well, I think, if I understand this case correctly, he did raise the privilege, and it was denied.

MR. SCHROERING: It was denied --

Q So then I say further that if we affirm this case, every time a reporter publishes a story of this type he will be subpoenaed before the grand jury, will make his claim of privilege, and it will be denied. Am I right?

MR. SCHROERING: Only if there is an indication that he is also a witness to the crime, in Kentucky.

Q Well, I'm saying a case of this type.

Q I didn't think we were talking about a witness to a crime. This is a case, as I understand it, where, in confidence, this man is given information.

MR. SCHROERING: He was told --

Q He's not walking down the street and sees a bank being held up. That's not this case, is it?

MR. SCHROERING: No, but this case is one where --

Q We're talking about confidential information.

MR. SCHROERING: Confidential information, and also the reporter witnessed the compounding of hashish, the combining together of the elements of that drug, which is a felony in Kentucky.

And under the circumstances there is an overriding, certainly an overriding need that these individuals be brought to justice under our law.

Q I know, but being a member of the Communist Party has been a crime in the United States. Attending a meeting and witnessing, counting the heads in the room is witnessing who the members are.

I mean, this leaves a -- this goes a long distance.

MR. SCHROERING: The present law, as of the common law, does not grant a privilege, First Amendment privilege, to newsmen, any more than any other occupation, any specialized occupation.

So I cannot see how, that the situation can be worse than it is right now if the privilege is not extended to newsmen.

I think one of the most important arguments to make

to the Court is in connection with the constitutional rights of individuals as opposed to groups, sole groups, individual groups that may have certain interests. And in this connection the media has interests which they want to protect, and certainly the media is extremely important in our society today.

Q Mr. Schroering, --

MR. SCHROERING: But no law is supreme -- excuse me.

Q -- in that connection Mr. Zingman made a very appealing argument about the drying up of sources of information. What is your response to that?

MR. SCHROERING: I do not believe that the sources of information will be dried out. As a matter of fact, in this instance, within a few months after the action taken by Judge Pound, the same newspaper reporter went 50 miles away from our community and published an entirely new article on the same subject matter. And apparently had no difficulty in getting individuals in that community, within the range of that newspaper, to give him all sorts of information.

Now, I might say this, that if the reporter had appeared before the grand jury in May, instead of refusing to appear, in my opinion the court would have sustained his privilege under 421.100. I am not saying here that he does not have a privilege; but what I am saying is that when he turns from a reporter to a witness, when he becomes a witness

to a crime, at that point, at that point there's an overriding need that he perform his duty as a citizen: appear before the grand jury, which has the constitutional responsibility of going into these crimes, investigating these crimes, and testifying.

Q Mr. Schroering, the protective order entered by Judge Meigs, as I read it, recognizes a qualified privilege of newsmen. It's not clear to me from what you've said whether your position here this morning is that you agree with Judge Meigs that a qualified privilege exists, or is it your position that no privilege whatever exists?

MR. SCHROERING: Well, in Kentucky, it's the statutory privilege that exists. I would argue that there is no First Amendment privilege on the part of a newspaper reporter to refuse to answer questions in connection with offenses that he has witnessed.

Q Well, the first three paragraphs of Judge Meigs' order do not necessarily relate to crimes actually witnessed, they reflect a recognition of a qualified privilege with respect to information.

MR. SCHROERING: That's correct.

Q But do you agree with his order in that respect?

MR. SCHROERING: I believe that he probably modeled that order after Caldwell.

Q He no doubt did, but I want to know if you agree

with it or not?

MR. SCHROERING: I do not agree with the Caldwell decision.

Q Well, was his order not reflecting in part the statute of the Commonwealth of Kentucky?

MR. SCHROERING: Yes, but when he granted the privilege that he could consult with counsel in connection with it, this of course is not in our statute. There were other portions of it which led me to believe that what he did was, that he modeled the protective order from the same protective order that we find in Caldwell. And I think that when the case went to the Court of Appeals, they made their decision on whether or not Caldwell would be the proper law in the State of Kentucky.

Q The State didn't appeal from that portion of Judge Meigs' order that were adverse to it?

MR. SCHROERING: That's correct. The counsel that argued the Meigs case in the Court of Appeals did not, I don't believe, file a brief with this particular Court.

I argued the case for Judge Hayes, and did file a brief, short though it may have been.

Actually, the argument that the press makes, that they can't get information any more, and indicate that the problem in recent years, there's been an activity, an increased activity on the part of prosecutors in this connection; I do

not believe it is supported by the facts. Certainly there has been an effort made by grand juries in recent years to do their job.

But I do not conclude thereby that it is strictly because of the action of government or the action of grand juries. We've had a considerable amount of publicity, much, much more in connection with the operation or the commission of crimes in recent years. And this, of course, is not necessarily a bad thing.

I don't want the Court to get the impression that I am arguing that. But I am saying that the responsibility, the constitutional responsibility of this grand jury to investigate, not only for the benefit of the people but certainly for the benefit of a defendant who may or may not be charged, depending upon whether probable cause had been properly shown to that grand jury, is of overriding importance.

And, indeed, if we had a system whereby we had to apply in open court, in order to get a subpoena, if we had to go to the judge in open court to apply, there would be no question the grand jury would be fettered. Because the pledge of secrecy which we have in the grand jury is also a protection. And in an open hearing, what does this do to the pledge of secrecy?

Is the suggestion made that this should be done, perhaps because the media would want more publicity concerning

that reporter's testifying before the grand jury?

I don't know.

Q Mr. Schroering, is it the procedure in Kentucky that these grand jury subpoenas are issued by the grand jury, or aren't they actually issued by the prosecutor in the name of the grand jury?

MR. SCHROERING: They can be.

Q Well, aren't they, is my question.

MR. SCHROERING: Not uniformly. The grand jury has the right to choose its own legal adviser in Kentucky, and there are instances of where the grand jury has chosen --

Q Well, aren't they issued in the name of its legal adviser?

MR. SCHROERING: Its legal adviser. They serve the grand jury and give recommendations to that grand jury.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schroering.

MR. SCHROERING: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Reynolds.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,
FOR THE UNITED STATES AS AMICUS CURIAE

MR. REYNOLDS: Mr. Chief Justice, may it please the Court:

The United States is appearing as amicus in these cases, and the case that follows, In the Matter of Paul Pappas, and I therefore will address my remarks here to the three cases

which involve the broad argument with respect to the First Amendment, and whether there is in the First Amendment a privilege for news reporters to withhold from grand jury investigations information that they might have. And they might well overlap.

Q How would this case be decided under the guideline of the Attorney General? They were issued in 1970, I think.

MR. REYNOLDS: Well, I don't believe the Attorney General guidelines would apply to these cases. They're State --

Q I understand, but I say if they did apply, how would -- would there be immunity from -- would the privilege be honored?

MR. REYNOLDS: The Attorney General guidelines do not grant any immunity to a news reporter with respect to grand jury proceedings.

But they do set up a procedure whereby, before a reporter will be called before a grand jury, there will be some negotiation with the news media, prior to that time, and to ascertain and determine the need for the testimony of the reporter, and whether or not there are other sources from which information might be gleaned of the same nature.

Q Those guidelines are in your brief in the Caldwell case.

MR. REYNOLDS: They are, yes.

Q I was wondering, has there been any litigation under those guidelines?

MR. REYNOLDS: Not to my knowledge at the present time. I'm not aware of any case thus far.

Q So that if the guidelines did apply, if this was a federal situation, it would be a matter of negotiation between the Attorney General and the press?

MR. REYNOLDS: Essentially that's correct, Your Honor.

Q But the fact that there are guidelines, established by the Attorney General, I suppose suggests that we're dealing in a pretty sensitive area. Otherwise, why guidelines?

MR. REYNOLDS: Well, I believe that we are dealing in a sensitive area. I don't believe anybody disputes that. The question here is whether we are to create a new constitutional privilege in the First Amendment for a specific class of citizens; that is, news reporters. And I don't believe that the fact that the Attorney General has issued guidelines in what is an admittedly sensitive area, that it follows from that fact that we need to create a constitutional privilege of this nature.

Q He said the guidelines are based on a recognition, quote, "of limiting effects on the exercise of First Amendment rights", close quote.

MR. REYNOLDS: Your Honor, I think we all recognize

that when we're talking about newsgathering, that in the penumbra of First Amendment interests there is lurking somewhere an interest in newsgathering.

I don't think that there is much doubt, if the government were to cut off all access to a particularly impoverished area, for example, solely for the reason that they do not want the public to know what was going on there, that that would be permissible under the First Amendment.

But newsgathering is an exceedingly broad concept. And as this Court recognized in Zemmill v. Russ?, in many respects it connotes action more than expression.

I think plainly that one does not have any constitutional right to access to particular newsworthy stories or newsworthy items. I, for instance, don't think that, as a matter of constitutional law, a news reporter could gain access to a White House conference, or a conference in the Supreme Court, for example, because it might be a newsworthy story.

Moreover, and this has been pointed out in prior questions and answers before the Court, newsgathering as a First Amendment interest is not an interest that is only with the institutionalized press, of the news reporter.

I think that any citizen, any individual who is concerned with exchanging ideas or disseminating information to others, whether he be a news reporter, an author, a free-

lance writer, a professor, he has the same interest in the First Amendment and newsgathering. Nor, in my view, is it confined to the written word or publication or, as I think Mr. Justice Rehnquist pointed out, the lecturer or the public debater, or any individual citizen who wished to exchange ideas or information with friends or associates would have the same interest in gathering news.

I don't think it's an exclusive interest that we find in the free press language of the First Amendment; I think it's also inherent in free speech.

And it's our view that, as a matter of constitutional theory, if we're going to construct a privilege based on a First Amendment interest in newsgathering, that that privilege is going to have to pertain not just to news reporters but to anybody who says that an appearance before a grand jury is going to have a chilling effect on his confidential sources of information.

There is an additional difficulty that, in those circumstances there's an additional difficulty on how to determine or verify confidentiality. That's one of those factors that the court, by its nature, is going to be unable to scrutinize.

Our position is essentially that to allow this type of wholesale interference, and it would be wholesale interference with the grand jury, is contrary and undercuts the

specific protections that the framers of the Constitution intended by the Fifth Amendment.

The Fifth Amendment provides that a grand jury shall be the sole method for preferring charges in criminal cases, serious criminal cases. Our grand jury is modeled after the English grand jury as a body of laymen with very broad powers to investigate, in secret, alleged criminal acts not only for determining probable guilt but also for the purpose of protecting innocent people from false prosecutions.

From the early days of the republic and, indeed, in England, attendance upon and testimony before a grand jury has been a public duty which every citizen is bound to perform when summoned.

We don't think that the framers of the Constitution were unaware of this obligation. Nor do we think they were unaware of the fact, as has been pointed out already in prior discussion this morning, that anybody who is called before a grand jury is going to have some adverse effect on First Amendment interests, either speech or associational ties or press. But the area of this potential conflict is an exceedingly narrow one. It's an area that deals only with questions of criminal activity.

And in that narrow area, we think that the framers of the Constitution, in reconciling the broad public interest, in having a grand jury with these broad investigatorial powers,

and the First Amendment interest that might be indirectly affected by calling these people to appear before a grand jury, that they apparently determined that there should be no alteration of the requirement, the general requirement that people appear and give testimony before grand juries.

Now, they did write an exception into the Fifth Amendment; the exception against self-incrimination.

But there is no exception written into the First Amendment. We think that the very direct effect that is possible on First Amendment interests, that is interests in speech and association, which are, in our view, far more direct First Amendment interests than what we're talking about here, which is a more remote interest in newsgathering.

But the effect on those direct interests by appearing before a grand jury were, we think, not unforeseen by the framers, and they did not see fit to write a privilege into the First Amendment. We don't believe that this more remote interest, in terms of newsgathering, is one that would require that we now create a new privilege in the First Amendment.

Now, we've heard a lot this morning about the fact that the holding by this Court to the effect that there is no privilege in the First Amendment is going to dry up news sources.

The news media in this country has, of course, existed for almost 200 years without a constitutional privilege

of the sort being urged here. Confidential sources have long been used in the newsgathering process.

Q Do you recognize the fact that in many areas it's worked out in the prosecutor's office?

MR. REYNOLDS: In many areas --?

Q It's worked out in the prosecutor's office with the newspaper. Isn't that true?

MR. REYNOLDS: What is worked out?

Q As to what information will be divulged and what will not.

MR. REYNOLDS: I think that that --

Q It works -- is being done every day.

MR. REYNOLDS: I think that that is -- but I don't --

Q Aren't the Attorney General's guidelines a manifestation of that very thing?

MR. REYNOLDS: That is correct.

Q And I suppose, too, those guidelines have a further effect with 93 branch offices, as it were, 93 United States Attorneys around the country, that such an important and sensitive area as this ought to have a uniform treatment in the Federal system. I suppose that's the function of those guidelines, is it not?

MR. REYNOLDS: That's the function of those guidelines, that's correct, Mr. Chief Justice.

And if no constitutional privilege is recognized,

there are the guidelines, and of course we'll continue, as Mr. Justice Marshall suggested, to have the same kind of negotiations.

Q Do you think that the First Amendment, as applied to the States, is to be read the same as when it's applied to the Federal Government?

MR. REYNOLDS: I do, Your Honor. I don't think there is a distinction along those lines.

As far as the drying up of the sources, this claim, we might point out, is being made by a certain segment of the media; by, in these cases, essentially the large metropolitan newspapers, by amicus briefs, the large major TV networks. And Professor Blasi's report, that had been referred to yesterday, talks also in terms of, as this study group is compiled, newspapers with a circulation of over 50,000.

Now, while conceivably it might be demonstrated that a reporter's privilege is desirable for that segment of the media, it may well not be desirable on balance to provide such protection for newspapers with a smaller circulation. There may be no problem with drying up of news sources or drying up of news stories when we're dealing with the smaller segment of the -- the smaller circulation.

What about newsletters, for example? College newspapers?

We think that if there is, if there is really a

difficulty with respect to drying up of sources, and we point out again that the news media have been able to exist for 200 years without any constitutional privilege and without a drying up of sources; but if there is a difficulty along those lines, we think that it's for the Legislature to determine on an informed judgment, looking at the different particular problems with respect to different media, and to meet that difficulty in that way.

We don't believe that there is -- that the right approach is a constitutional privilege that is to be confined to a particular class of citizenry, that is, news reporters as such.

There is also a difficulty as to what is a reporter, as has been pointed out, and who would be covered along those lines.

To our knowledge, this Court has never recognized in the First Amendment or in any other amendment in the Bill of Rights any special rights or privileges that apply to a special class of citizens. And we do not think that it would be appropriate to do so here.

Thank you.

MR. CHIEF JUSTICE BURGER: We'll allow you five minutes, counsel.

REBUTTAL ARGUMENT OF EDGAR A. ZINGMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ZINGMAN: Mr. Chief Justice -- thank you.

I would briefly point out that,Mr. Justice Rehnquist, you asked a question about the abandonment of the First and Fourteenth Amendment claims in the Kentucky Court of Appeals, and Mr. Schroering, I believe in error, stated that the contention was that in oral argument I had abandoned that claim. That's not what the record discloses.

The record discloses that the Court of Appeals claimed that in a memorandum,a supplemental memorandum, which I filed with them, I had abandoned that claim by a statement which I made that there is no question here concerning the First Amendment -- concerning the issue of privilege itself; we have a statute.

We dealt with this proposition in our reply brief on the application for writ of certiorari. That was taken out of context. It was in response to an argument based upon Professor Wigmore's writings on privileges.

But, in any event, even if there was a technical abandonment in the Meigs case, they specifically rejected the First and Fourteenth Amendment grounds, as this Court has noted, it would be a fruitless exercise to send us back and have the petitioner make his assertion and be held in contempt. And we'd be right here, because we know what the Kentucky Court

of Appeals would do.

Now, the Solicitor General has referred, in his argument, to the Attorney General's guidelines in response to a question from Mr. Justice Douglas.

I would point out that, first of all, as Mr. Justice Douglas recognized, and as I think the Court must recognize because the Solicitor General states it in his brief, this is a very delicate area recognized by the Federal Government; but then the Solicitor General, in his brief, says that the Attorney General's guidelines do not create any litigable rights.

So what we have is, in the Federal area, a statement of policy, but, at the same time, the Solicitor General tells us that if they decide not to follow it that's their judgment and no rights are conferred.

We're talking about First Amendment rights and, as Mr. Reynolds indicated, we are talking about the penumbra of rights, and we suggest that under the penumbra this right is necessary of declaration.

Now, in this entire argument this morning and to some extent yesterday there seemed to be some implicit assumption that compulsory testimony is an absolute, absent the Fifth Amendment privilege.

Well, that's just not the case. To begin with, we have, on the government's side, the asserted right of the

government, not provided any place in the Constitution, not to disclose the identity of informers in criminal proceedings. And that's been protected by judicial decisions.

We have --

Q But that's been considerably eroded, has it not?

MR. ZINGMAN: Well, and I think necessarily so. But it still is established, and it's a right that they urge.

Q But again we're not -- at least at the threshold, we're not talking about compulsory testimony. We haven't reached that. We're talking about compulsory attendance, are we not?

MR. ZINGMAN: We have the appearance issue at the threshold, but I --

Q That's the threshold issue?

MR. ZINGMAN: Yes, sir.

Q And that is generally required, is it not?

MR. ZINGMAN: Yes, sir.

Q Except, as I learned yesterday, of the President of the United States.

[Laughter.]

MR. ZINGMAN: Yes, sir.

I went to Yale, too; maybe they didn't teach us that!

[Laughter.]

Q Yes, we missed that!

MR. ZINGMAN: I would --

Q Compulsory attendance is required --

MR. ZINGMAN: Yes, sir.

Q -- and it's only after one attends and is interrogated that he generally asserts the privilege, whether it be that of an informer or a spouse or whatever.

MR. ZINGMAN: Yes, sir.

Q That's common ground, is it not?

MR. ZINGMAN: Yes, sir.

Than I would pass, finally, to this 200-year argument, which I alluded to in my argument earlier. And that is, we don't know what the situation might have been had the Court declared this First Amendment penumbra right that we urge somewhat earlier. We don't know to what extent the press has been denied information.

But we do know, in the record in the Caldwell case, in the Branzburg affidavit which is part of the record in our cases, the present effect of a denial of this privilege. We are already seeing situations. And the Caldwell judge himself, as I think has been noted in some of the supplemental briefs and proceedings following upon Caldwell, applying the same guidelines, has compelled the disclosure of testimony. So the guidelines themselves were too narrow to extend any significant protection.

Further, I would point out that we're dealing with a new breed of newsman today. With the advent of television, and the on-the-spot coverage that the television newscaster

provides, more and more our daily newspapers are going into in-depth reporting, investigative reporting. And this is an entirely different situation, and does deal with the sensitive groups where information is required.

I would just conclude and urge upon you that the penumbra area of the First Amendment requires the declaration here of the rights we urge.

Q If I can just put a hypothetical question to you, now on the Court's time, counsel --

MR. ZINGMAN: Yes, sir.

Q Suppose the prosecutor upon reading this story, or the foreman of the grand jury, if there was a grand jury then sitting, as I gather there is in the larger cities of Kentucky, concluded that this was one of two things: either the story was true, and his own, the local police department was not alert enough; or the story was a hoax and a fabrication and a fraud, and the pictures were fraudulent with actors and not real people, and that the powder was baking soda and not hashish. And so, as foreman of the grand jury -- and let's make it the foreman of the grand jury -- he said he wanted to find out which was true.

Now, would you think there is an important public interest to be served in finding out which of these two things is true; namely, is the police department falling down or is it in league with these people on the one hand; or is this just a

fabricated news story, completely made up out of whole cloth?

MR. ZINGMAN: My answer would have to be, Mr. Chief Justice, that I could not isolate that situation; and in the balancing act that I suggest ought to be fulfilled, the gain to the community in that one instance, as weighed against the situation that we posit that denial of the privilege would lead to the over-all effect of denying the entire community the flow of information,that I would sacrifice in this case the gain of that information about that specific situation.

I think if we don't do that, then we're cutting off the flow of information to serve this one immediate purpose.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen -- excuse me.

Q Let me ask you one more question, following up that response, if I may.

You're talking about the cutting off of an entire flow of information. Do you have any idea how many stories the Courier-Journal runs in a year, in which the reporter's account indicates that he witnessed the commission of a crime?

MR. ZINGMAN: Mr. Justice Rehnquist, I don't have the specific answer to that. But there is cited in our brief a survey by Guest and Stanzler, which appears at pages 16 and 18 of our brief, and my understanding is that the Courier-Journal was one of the newspapers that participated in the analysis. And I believe the analysis indicated a staggering

percentage, 40, 50 percent of stories in the newspapers surveyed were based upon confidential information.

Q But not necessarily witnessing a crime -- the commission of a crime?

MR. ZINGMAN: No, sir.

Q And that's what this case is about, isn't it, the witnessing of a crime?

MR. ZINGMAN: These cases are about the witnessing of a crime. That's the hard case.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:58 o'clock, a.m., the case was submitted.]