

The Burger Court Opinion Writing Database

Branzburg v. Hayes

408 U.S. 665 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1972

Re: No. 70-85 - Branzburg v. Hayes
No. 70-94 - In the Matter of Paul Pappas
No. 70-57 - United States v. Caldwell

Dear Byron:

Please join me.

Regards,

WB

Mr. Justice White

cc: The Conference

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice White
Mr. Justice Stewart
Mr. Justice Harlan
Mr. Justice Clark
Mr. Justice Brandeis

From: [Redacted]
Circulated: JUL 23 1972

Recirculated: _____

No. 70-85 -- Branzburg v. Hayes
No. 70-94 -- In the Matter of Paul Pappas, Petitioner
No. 70-57 -- U.S. v. Caldwell

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the opinion of the Court and add a few words. An integral and what I consider mistaken step in the analysis of the three dissenters is the assumption 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 the grand jury. From the broad generalization that "news must not be unnecessarily cut off at its source," the dissenters takes a great leap and assert, without any foundation in history or other authority, that "the right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source." We are told, without more, that this "follows as a matter of simple logic." We are told also that "newsmen require informants," and hence concealment of the source is "essential to the creation and maintenance of a newsgathering relationship with informants." Surely the matter is not quite so simple, and this train of reasoning is answered in the Court's opinion: "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."

Ante at 18.

22
The Chief Justice
Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-57

5730/22
United States, Petitioner, } On Writ of Certiorari to the
v. { United States Court of Ap-
Earl Caldwell. } peals for the Ninth Circuit.

[April --, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Caldwell, a Black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

He was subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with its members. A hearing on a motion to quash was held. The District Court ruled that while Caldwell must appear before the grand jury, he need not reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." See 311 F. Supp. 358. Caldwell filed a notice of appeal and the Court of Appeals dismissed the appeal without opinion.

Shortly thereafter a new grand jury was impanelled and it issued a new subpoena for Caldwell to testify. On a motion to quash, the District Court issued an order substantially identical to its earlier one.

Caldwell refused to appear and was held in contempt. On appeal the Court of Appeals vacated the judgment of contempt. It said that the revealing of confidential sources of information jeopardized a First Amendment freedom, that Caldwell need not appear before the grand

6, 9

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-57

Circulated:

Recirculated

5-31

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Earl Caldwell. | peals for the Ninth Circuit.

[April —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Caldwell, a Black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

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3

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 31, 1972

Dear Byron:

Re: Nos. 70-85, 70-94 and 70-57
Branzburg v. Hayes

Would you please add at the
end of your opinion the following:

Mr. Justice Douglas would reverse
the judgments in Branzburg v. Hayes and
In the Matter of Pappas for the reasons
stated in his dissent in United States v.
Caldwell, post ____.

cc/
William O. Douglas

Mr. Justice White

cc: The Conference

6th DRAFT

3,13

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 70-57

Recirculated:

6-5

United States, Petitioner,
v.
Earl Caldwell. } On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit.

[April —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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3 / 13/72
13/15
To : The Chief Just.
Mr. Justice Bren.
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

SUPREME COURT OF THE UNITED STATES; J.

No. 70-57

Circulate: 6/12/72

United States, Petitioner, } On Writ of Certiorari to the
v. { United States Court of Ap-
Earl Caldwell. } peals for the Ninth Circuit.

[April —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Caldwell, a Black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

He was subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with its members. A hearing on a motion to quash was held. The District Court ruled that while Caldwell must appear before the grand jury, he need not reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." See 311 F. Supp. 358. Caldwell filed a notice of appeal and the Court of Appeals dismissed the appeal without opinion.

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Caldwell refused to appear and was held in contempt. On appeal the Court of Appeals vacated the judgment of contempt. It said that the revealing of confidential sources of information jeopardized a First Amendment freedom, that Caldwell need not appear before the grand

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20, 1972

RE: Nos. 70-85 - Branzburg v. Hayes
70-94 - In Matter of Pappas
70-57 - United States v. Caldwell

Dear Potter:

Please join me in your dissent in the
above.

Sincerely,
Bill

Mr. Justice Stewart
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 31, 1972

Nos. 70-85, 70-94, and 70-57
Branzburg v. Hayes

Dear Byron,

In due course I expect to circulate
a dissenting opinion in these cases.

Sincerely yours,

PS:

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE POTTER STEWART

June 19, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-85, Branzburg v. Hayes
No. 70-94, In the Matter of Paul Papas
No. 70-57, U. S. v. Caldwell

Enclosed herewith to each of you
is a copy of a draft dissenting opinion I have
sent to the printer today.

Sincerely yours,

P.S.



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HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Stanford, California 94305-6060

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SUPREME COURT OF THE UNITED STATES

Nos. 70-57, 70-85, and 70-94

United States, Petitioner,)	On Writ of Certiorari to
70-57 v.	)	the United States Court
Earl Caldwell.	)	of Appeals for the
		Ninth Circuit.
Paul M. Banzburg,	)	On Writ of Certiorari to
Petitioner,	)	the Court of Appeals of
70-85 v.	)	Kentucky.
John P. Hayes, Judge, etc.,	)	To: The Chief Justice
et al.	)	Mr. Justice Douglas
In the Matter of Paul Papas,	)	Mr. Justice Brennan
Petitioner.	)	On Writ of Certiorari to
70-94	)	the Supreme Court of the
		Court of Massachusetts
		Mr. Justice Powell
		Mr. Justice Rehnquist

[June , 1972]

From: Stewart, J.

MR. JUSTICE STEWART, dissenting Circulated:

Recirculated:

The Court's crabbed view of the First Amendment reflects

a disturbing insensitivity to the critical role played by an independent

press in our society. The question whether a reporter has a constitu-

tional right to a confidential relationship with his source is of first

impression here, but the principles which should guide our decision

are as basic as any to be found in the Constitution. By holding that a newsman has no right whatever to protect his sources when called before a grand

jury, the Court invites state and federal authorities to undermine the

historic independence of the press by attempting to annex newspapers,



①
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Marked
1st DRAFT

SUPREME COURT OF THE UNITED STATES, *Stewart, J.*

Nos. 70-85, 70-94, AND 70-57 Circulated: 133

Recirculated: _____

Paul M. Banzburg,
Petitioner,
70-85 *v.*
John P. Hayes, Judge, etc.,
et al.

On Writ of Certiorari to
the Court of Appeals of
Kentucky.

In the Matter of Paul
Papas, Petitioner.
70-94

On Writ of Certiorari to the
Supreme Judicial Court of
Massachusetts.

United States, Petitioner,
70-57 *v.*
Earl Caldwell.

On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

[June —, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role played by an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles which should guide our decision are as basic as any to be found in the Constitution. By holding that a newsman has no right whatever to protect his sources when called before a grand jury, the Court invites state and federal authorities to undermine the historic independence of the press by attempting to annex newspapers, and other instruments of mass communication, as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected func-

1, 2¹, 2², 2³, 2⁸
stylized

2nd DRAFT

Mr. Vice Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

FATES
From: Stewart, J.

Nos. 70-85, 70-94, AND 70-57

Circulated:

JUN 27 1973

In the Matter of Paul Pappas, Petitioner. | On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
70-94

United States, Petitioner,
70-57 *v.*
Earl Caldwell. } On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

[June 29, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENnan and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles which should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
 Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

2nd DRAFT

Circulated: 5-29-72

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

Nos. 70-85, 70-94, AND 70-57

Paul M. Branzburg, Petitioner, 70-85 <i>v.</i> John P. Hayes, Judge, etc., et al.	On Writ of Certiorari to the Court of Appeals of Kentucky.
In the Matter of Paul Papas, Petitioner. 70-94	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
United States, Petitioner, 70-57 <i>v.</i> Earl Caldwell.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in these cases is whether requiring newsmen to appear and testify before State or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70-85, *Branzburg v. Hayes* and *Branzburg v. Meigs*, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky.

changes throughout

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice Marshall
 Mr. Justice Blackman
 Mr. Justice Powell
 Mr. Justice Rehnquist

365
 From: White, J.

2nd DRAFT

Circulated: _____

Circulated: 6-23-72

SUPREME COURT OF THE UNITED STATES

Nos. 70-85, 70-94, AND 70-57

Paul M. Banzburg, Petitioner, 70-85 <i>v.</i> John P. Hayes, Judge, etc., et al.	On Writ of Certiorari to the Court of Appeals of Kentucky.
In the Matter of Paul Papas, Petitioner. 70-94	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
United States, Petitioner, 70-57 <i>v.</i> Earl Caldwell.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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MM
no changes from
Xeroxed circ of 6-23

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

3rd DRAFT

Circulated: _____

Supreme Court of the United States ~~Circulated: 6-27-72~~

Nos. 70-85, 70-94, AND 70-57

Paul M. Banzburg, Petitioner, 70-85 <i>v.</i> John P. Hayes, Judge, etc., et al.	On Writ of Certiorari to the Court of Appeals of Kentucky.
In the Matter of Paul Papas, Petitioner. 70-94	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
United States, Petitioner, 70-57 <i>v.</i> Earl Caldwell.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

June
[May —, 1972]

Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1972

Re: Nos. 70-85, 70-94 and 70-57 -
Branzburg v. Hayes, etc.

Dear Potter:

Please join me.

Sincerely,


T.M.

Mr. Justice Stewart

cc: Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1972

Re: No. 70-85 - Branzburg v. Hayes
No. 70-94 - In Matter of Paul Pappas
No. 70-57 - U. S. v. Caldwell

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

lfp/sa 3cc 6/23/72

No. 70-85 Branzburg v. Hayes
No. 70-94 In the Matter of Paul Papas
No. 70-57 U. S. v. Caldwell

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Justice J.
Circledate: JUN 24 1972

MR. JUSTICE POWELL, concurring, in the opinion

of the Court.

I add this brief statement to emphasize what seems to

me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media - basically free and untrammeled in the fullest sense of these terms - were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be

tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protection order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

In short, the Court merely holds that a newsman (however he may be defined) 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 where legitimate First Amendment interests require protection.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

FROM: Powell, J.

Nos. 70-85, 70-94, AND 70-57

Circulated: JUN 24 1972

Paul M. Banzburg, Petitioner.	Recirculated: _____
70-85 v.	On Writ of Certiorari to the Court of Appeals of Kentucky.
John P. Hayes, Judge, etc., et al.	
In the Matter of Paul Papas, Petitioner.	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
70-94	
United States, Petitioner, 70-57 v. Earl Caldwell.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1972]

MR. JUSTICE POWELL, concurring, in the opinion of the Court.

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P3

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
■ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

Nos. 70-85, 70-94, AND 70-57

Paul M. Banzburg,
Petitioner,
70-85 *v.*
John P. Hayes, Judge, etc.,
et al.

On Writ of Certiorari to
the Court of Appeals of
Kentucky.

In the Matter of Paul
Pappas, Petitioner.
70-94

On Writ of Certiorari to the
Supreme Judicial Court of
Massachusetts.

United States, Petitioner,
70-57 *v.*
Earl Caldwell.

On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

From: Powell, J.

Circulated:

JUN 28 1972

Recirculated:

[June 29, 1972]

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Court.

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"an investigative arm of government." The solicitude
repeatedly shown by this Court for First Amendment
freedoms should be sufficient assurance against any such
effort, even if one seriously believed that the media—
properly free and untrammeled in the fullest sense of
these terms—were not able to protect themselves.

2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 31, 1972

Re: Nos. 70-85, 70-94, and 70-57 - Branzburg v. Hayes; In the Matter of Paul Papas; and U.S. v. Caldwell

Dear Byron:

Please join me in your opinion in these cases.

Sincerely,

Mr. Justice White

Copies to the Court