

IN THE SUPREME COURT OF THE STATE OF VERMONT
No. 2005-04

IN RE INQUEST SUBPOENA (WCAX)

ON APPEAL FROM THE DISTRICT COURT OF VERMONT, CHITTENDEN
COUNTY, UNIT II
Docket No. ____

**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,
GANNETT VERMONT PUBLISHING, HERALD ASSOCIATION, THE RADIO-
TELEVISION NEWS DIRECTORS ASSOCIATION, THE SOCIETY OF
PROFESSIONAL JOURNALISTS, AND TIMES ARGUS ASSOCIATION IN
SUPPORT OF APPELLEE**

Lucy A. Dalglish, Esq.
Gregg P. Leslie, Esq.
Grant D. Penrod, Esq.
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2211
(703) 807-2100

*Attorneys for Amicus Curiae The Reporters
Committee for Freedom of the Press*

(Attorney listings continued on following page)

Kevin M. Goldberg, Esq.
Cohn and Marks LLP
1920 N Street, NW, Suite 300
Washington, DC 20036
(202) 293-3860

*Attorney for Amicus Curiae American
Society of Newspaper Editors*

Robert B. Hemley, Esq.
Gravel and Shea
P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220

*Attorney for Amici Curiae Gannett
Vermont Publishing, Times Argus
Association and Herald Association*

Kathleen A. Kirby, Esq.
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-3360

*Attorney for Amicus Curiae Radio-
Television News Directors Association*

Bruce W. Sanford, Esq.
Robert D. Lystad, Esq.
Baker & Hostetler LLP
1050 Connecticut Avenue, Suite 1100
Washington, DC 20036
(202) 861-1500

*Attorneys for Amicus Curiae Society of
Professional Journalists*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

Gannett Vermont Publishing, Inc., Times Argus Association, Inc., and Herald Association, Inc. are the publishers of the three largest circulation daily newspapers in Vermont. Gannett Vermont Publishing, Inc. d/b/a *The Burlington Free Press*, Times Argus Association, Inc. d/b/a *The Barre-Montpelier Times Argus*, and Herald Association, Inc. d/b/a *The Rutland Herald* have been active advocates before state and federal courts in Vermont with regard to newsgathering and freedom of information litigation.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news professionals in broadcasting, cable and other electronic media in more than 30 countries.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and

stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

Amici's interest in this case is in preserving the news media's ability to pursue its constitutionally protected freedom to gather and report the news, free from intrusion by the government or other litigants. This case involves the important question of whether the State of Vermont recognizes a qualified privilege for journalists to withhold their non-confidential materials – such as notes, outtakes, and unedited or unpublished work – from subpoenas or other compulsory process. Requiring journalists to turn over these materials, especially where there has been no showing that the information is relevant and material to significant issues in a case and not adequately available from other sources, would substantially impair journalists' ability to gather and report the news by turning them into – or at least creating a perception that they are – unwilling investigators for the government and other litigants.

SUMMARY OF ARGUMENT

A qualified privilege from compelled disclosure of non-confidential material is necessary to protect journalists' ability to gather and report the news and is supported by Vermont law. Journalists perform the vital and constitutionally protected function of informing the public on a wide range of matters of public importance. According to James Madison, "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern

ignorance: And people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1980) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822)).

In performing this function of providing information on matters of public importance and interest, members of the news media regularly and routinely gather information and report on myriad matters – crime, accidents, disasters, scandal and corruption – that become the source of civil and criminal litigation. To permit the government or other litigants unfettered access to journalists’ non-confidential materials would create a substantial burden in terms of the time, effort and money required to respond to these subpoenas. Furthermore, when journalists become involved in litigation, sources of information and the public in general will view the news media as tools of government or litigant investigation, robbing journalists of the ability to act as observers and unattached conduits of information.

Recognizing the inhibitions to a free press created by forcing journalists to become involved in civil and criminal litigation, Vermont has joined other jurisdictions in recognizing a qualified reporter’s privilege. Because newsgathering and reporting is inhibited whether subpoenas seek journalists’ confidential sources or their non-confidential material, Vermont should recognize that the same protections it has afforded when subpoenas seek confidential sources apply to subpoenas for non-confidential materials as well.

ARGUMENT

I. A qualified news media privilege from compelled disclosure of non-confidential material is necessary to protect newsgathering.

Not recognizing a reporter's privilege for non-confidential materials, such as the unbroadcast videotape at issue in this case, would stifle newsgathering in newsrooms in Vermont for three reasons: (1) readers and journalists would begin to think of journalists as investigators for the government and private litigants; (2) the media will be burdened by an overwhelming number of requests for assistance by litigators in criminal and civil cases; and (3) journalists will curtail their research if they are required to serve as evidence collectors in addition to their traditional role as people who gather and disseminate news.

The media play a critical role in our democracy. An independent press provides information the public needs to make important decisions about the functioning of public and private institutions. Broadcasters and publishers produce scores of news stories each day. By their very nature, the events that are of interest to the public and therefore newsworthy – actions of government officials, crime, fires, accidents, and natural disasters – often result in civil and criminal litigation. Journalists have played an important role in uncovering the truth about crimes, government corruption and scandal, and exposing them to the general public.

If journalists are required to routinely hand over documents, notes, photographs, and video to prosecutors and other litigants, sources may begin to view the media as an investigative arm of the government and decline to participate in newsgathering, particularly where, as here, the demand is not for information about a known, particular criminal act, but

for potential evidence related to possible crimes. The result will undoubtedly be a shared sense that journalists may, at any time, be compelled to serve as witnesses against those they interview – a result that will surely make news sources less likely to come forward, less likely to speak freely, and more likely to fear that journalists are acting as possible agents of their future prosecutors.

Journalists will have less access to information if they lose their independence, or if others conclude that they are not independent. At their very best, journalists are objective reporters of the news. They are not tools of the prosecution or investigative arms of government or courts – and it is important to honor this distinction. By compelling reporters to testify whenever a litigant determines that they might have pertinent testimony, the courts will rob journalists of their status as observers and transform them into participants, thus undermining their credibility and independence.

In 2003, the Reporters Committee published *Agents of Discovery*, which was subtitled “A Report on the Incidence of Subpoenas Served on the News Media in 2001.” THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *AGENTS OF DISCOVERY* (2003) (*See Appendix*). In conducting the survey, the Reporters Committee mailed more than 2,000 surveys to print and broadcast outlets in every state and the District of Columbia. *Id.* at 5. Fourteen percent of the outlets responded to the survey, and the results illustrate the effect that an unfettered right of obtaining information from journalists has on the ability of the media to gather and disseminate the news. *Id.* at 4, 14.

At least one subpoena was reported in 41 states and in the District of Columbia and the average number of subpoenas received among all respondents was 2.6. *Id.* at 6-7. The

average number of subpoenas received by television news stations was 7.7. *Id.* at 11.

The subpoenas issued against journalists vary in scope and originate from a variety of sources. *Id.* at 7. A subpoena may request anything from a copy of a published article or broadcast story to the disclosure of a confidential source. *Id.* at 7-9.

More subpoenas originated from criminal proceedings – trials, investigations and grand juries – than from all other sources combined. *Id.* at 5. Criminal defendants served more subpoenas on the news media than anyone else, with a total of 223 reported (46 percent of criminal subpoenas and 27 percent of all subpoenas). *Id.* at 7. Prosecutors issued 206 subpoenas to the responding news media outlets (43 percent of criminal subpoenas and 25 percent of all subpoenas). *Id.* One broadcaster, in San Antonio, Texas, had so many subpoenas from a local prosecutor that it had to institute a policy of charging prosecutors for copies of material that was actually broadcast. *Id.* The station instituted the fees “in hope it would slow the number [of] requests and to account for tapes/man hours required to make dubs,” the respondent wrote. *Id.*

Receipt of any subpoena requires a news outlet to allocate staff time to responding to it. Each attempt to obtain an order to quash or to appeal a judge's denial of a motion to quash compels the news outlet to incur additional expense of time, attorney's fees, and court costs. *Id.* at 13-14. Kay Lain of WGHP-TV in High Point, S.C., explained that each request involves “archive searches, locating tape, viewing tape and finding footage,” plus “paperwork to have [a] copy of [the] tape made,” time for drafting a cover letter and official declaration for the court, conversations with the station's legal department, as well as discussions with the requesting party, a process that takes “several hours.” *Id.* at 13.

According to an editor in Ohio, “It takes time away from newsgathering and supervision and it is an additional cost.” *Id.* at 14. Many of the subpoenas do not seem to be serving a legitimate need for information because they demand material that can be obtained elsewhere or simply appear to be part of a fishing expedition. *Id.* at 12.

The report found that responding news organizations often took remedial actions, such as instituting editorial policies to destroy notes and unaired videotape, removing subpoenaed reporters from trial coverage, notifying confidential sources that their confidences would not be kept upon receipt of a subpoena, or not using confidential sources at all. *Id.* at 12.

Taking these actions for legal, rather than editorial, reasons undermines journalists’ First Amendment right to gather and disseminate the news. Even those news organizations that sidestepped the subpoena threat by routinely destroying unpublished notes or unbroadcast videotape and by refusing to use confidential sources did not defeat the subpoena threat — they merely traded editorial freedom for a safe harbor from compelled disclosure.

In the context of a libel case, the U.S. Supreme Court has noted that the law can have a deterrent effect on truthful speech by imposing “doubt [about] whether it can be proved in court or fear of the expense of having to do so,” forcing critics “to make only statements which ‘steer far wider of the unlawful zone.’” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (internal citations omitted). The same principle applies if reporters are forced to accept that all of their notes, outtakes, and research can and will be used against the subjects of their stories. To avoid such entanglements and threats against their professional

independence, reporters will have to use such a high level of self-restraint that their freedom to report on matters of public concern will be greatly diminished.

Concepts like “chilling effect” and “self-censorship” are not simply abstract, but are immediate concerns that even now affect how journalists do their jobs. If this court finds that no privilege exists for journalists’ non-confidential materials, fewer journalists will take on meaningful but controversial stories knowing that they could lead to a costly legal battle and the compromise of journalistic integrity. Reporters cannot do their jobs in the vigorous, innovative and truly autonomous way befitting an open and democratic society if they are looked at as informational resources to be called upon by the state at any time for any reason. Not recognizing a qualified privilege for the news media to withhold non-confidential material in this case would give prosecutors and other litigants a free and abundant new resource. A subpoena to a news organization will become part of the first round of discovery. Rather than do their own legwork, there will be nothing to stop litigants from appropriating the legwork of a reporter. For most citizens, responding to a subpoena is an irksome yet unusual occurrence, but for the news media, whose primary function is reporting on unusual and controversial events, responding to subpoenas would become an exceptionally cumbersome burden. The result will not only be a loss of time and money, but also may “substantially undercut the public policy favoring the free flow of information to the public.” *von Bulow v. von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987) (quoting *U.S. v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)).

II. A qualified news media privilege from compelled disclosure of non-confidential material is supported by Vermont law.

The reporter's privilege was first articulated by the U.S. Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the Court decided three cases involving journalists obligations to appear before a grand jury and testify about alleged criminal activity that they witnessed. *Id.* at 667-81. Although the majority found no privilege protecting reporters who are eyewitnesses to crimes from testifying before grand juries, it acknowledged that "without some protection for seeking out the news, freedom of the press would be eviscerated." *Id.* at 681.

A majority of the justices – four dissenters and one who otherwise concurred with the Court – also made clear that reporters enjoy a qualified privilege, based on the First Amendment, to resist compelled disclosure of their newsgathering activities. *Id.* at 709 (Powell, J. concurring); *Id.* at 725-52 (Stewart, J. dissenting); *Id.* at 711-25 (Douglas, J. dissenting).

In his critically important concurring opinion effectively establishing a majority recognition of a constitutionally based privilege, Justice Powell wrote separately to emphasize the limited nature of the Court's holding, and to explicitly advocate a case-by-case balancing test to determine journalists' claims of privilege.

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 ... that state and federal authorities are free to "annex" the news media as "an investigative arm of government." ... 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 courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

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

Any subpoena of a reporter implicates the First Amendment. Journalists object to subpoenas because they inevitably turn them into “investigative arms” of police, prosecutors, criminal defense attorneys and civil litigants. As Justice Stewart noted in his dissent in *Branzburg*, the failure to recognize this impact of subpoenas marks a “disturbing insensitivity to the critical role of an independent press in our society.” *Id.* at 725 (Stewart, J. dissenting).

Stewart recognized that it is difficult, if not impossible, for the media to prove that subpoenas impair the flow of the news with scientific precision in order to justify an absolute constitutionally-based privilege in all situations. But a common-sense analysis demonstrates that this is the case. As Stewart observed:

Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Id. at 733.

Following *Branzburg*, this Court recognized a qualified reporter’s privilege in 1974 in *State v. St. Peter*, the only reported Vermont case addressing the reporter’s privilege. 132 Vt. 266, 315 A.2d 254 (1974). Exercising sound judicial discretion, this Court limited the application of its holding to the facts of the case before it at the time – the compelled

disclosure of a reporter's confidential source – *Id.* at 268, 255, but the standard applied by the Court applies equally in the current case.

The right of discovery in Vermont is of great liberality, and the law is the better for it. But it is not of constitutional dimension and has no common law equivalent. When it is confronted by policy considerations related to a constitutional privilege, a carefully considered modification in the light of both concerns is in order.

Id. at 270, 256. Relying on Justice Powell's concurrence in *Branzburg*, this Court expressed "concern for the adoption of the investigative function of a free press as an arm of the prosecution." *Id.*

That concern is heightened here by the liberal discovery rules available in this State. Personal concerns, other than possible self-incrimination, must yield to the deposing procedures. But legitimate objections to disclosure based on First Amendment grounds require careful evaluation by the judicial officer before answers are compelled, or the sanctions of fine or imprisonment involved.

Therefore, we hold that, when a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer appealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence. If such a showing cannot be made to a measure consistent with the overriding of any First Amendment concern, the deponent cannot properly be compelled to answer the question.

Id. at 270-71, 256.

The Second U.S. Circuit Court of Appeals first recognized a qualified reporter's privilege from production of non-confidential materials based on its earlier rulings on confidential sources in 1983 in *U.S. v. Burke*, 700 F.2d 70 (2d Cir. 1983). "Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing." *Id.* at 77. "[T]he process of newsgathering is a protected

right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public." *von Bulow*, 811 F.2d at 142.¹ "[T]he relationship between the journalist and his source may be confidential or nonconfidential for purposes of the privilege" and "unpublished resource material likewise may be protected." *Id.*

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties – particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

Gonzales v. National Broadcasting Company, Inc., 194 F.3d 29, 35 (2d Cir. 1999). The privilege has been applied in the Second Circuit as recently as a few months ago. *See Mandal v. City of New York*, No. 02CIV1234 (WHP)(FM), 2004 W.L. 2375817 (S.D.N.Y. Oct. 21, 2004).

Although the Second Circuit in *Gonzales* held that a narrower privilege applies where confidential sources are not involved, *Gonzales*, 194 F.3d at 36, it did so for reasons that do

¹ *But see Gonzales v. National Broadcasting Company, Inc.*, 194 F.3d 29, 36 n.6 (2d Cir. 1999), noting but declining to reconcile, difference within the Circuit over whether the privilege is based in the Constitution or the common law.

not apply in Vermont. The court held that the privilege for non-confidential materials is overcome when a litigant shows that “that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.” *Id.* For confidential sources, the privilege is overcome when “the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources.” *Id.* at 31 (internal citations omitted). The stronger privilege afforded for confidential sources in the Second Circuit is based not only on the “broader concern” for maintaining a “vigorous, aggressive and independent press,” but also on more specific concerns for protecting confidential sources. *Id.* at 33 (internal citations omitted). Vermont’s privilege, which is overcome when “there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence,” *St. Peter*, 132 Vt. at 256, 315 A.2d at 271, is more akin to the narrower privilege afforded to non-confidential materials in the Second Circuit, and like that privilege is based on broad concerns of protecting newsgathering, not the more specific concern for protecting confidential sources that form the basis of the stronger privilege in the Second Circuit. *Id.* at 255, 269-70.

Even if the only consequence of these subpoenas was the distraction of journalists from their constitutionally protected duties, the implications would be serious. But in fact, such subpoenas, especially when issued by the prosecution, threaten the independent watchdog role of the press, which is crucial to our democracy. Although use of such subpoenas may appear to be expedient in a particular case, in the long run, it will result in a significant diminution of the flow of information to the public. As Justice Stewart noted

in his dissent in *Branzburg*, “the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given ‘breathing space’” *Branzburg*, 408 U.S. at 746 (Stewart, J. dissenting).

CONCLUSION

For the aforementioned reasons, *amici curiae* respectfully urge this Court to affirm the judgement of the District Court recognizing a qualified privilege from production of journalists' non-confidential materials and quashing the inquest subpoena served on appellee WCAX.

Respectfully submitted February 23, 2005,

By _____
Lucy A. Dalglish, Esq.
Gregg P. Leslie, Esq.
Grant D. Penrod, Esq.
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2211
(703) 807-2100

*Attorneys for Amicus Curiae The Reporters
Committee for Freedom of the Press*

Kevin M. Goldberg, Esq.
Cohn and Marks LLP
1920 N Street, NW, Suite 300
Washington, DC 20036
(202) 293-3860

*Attorney for Amicus Curiae American
Society of Newspaper Editors*

Robert B. Hemley, Esq.
Gravel and Shea
P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220

*Attorney for Amici Curiae Gannett
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Kathleen A. Kirby, Esq.
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-3360

*Attorney for Amicus Curiae Radio-
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Bruce W. Sanford, Esq.
Robert D. Lystad, Esq.
Baker & Hostetler LLP
1050 Connecticut Avenue, Suite 1100
Washington, DC 20036
(202) 861-1500

*Attorneys for Amicus Curiae Society of
Professional Journalists*

APPENDIX:

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
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