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# A Loss for Larouche Doesn't Mean a Victory for Reporter's Privilege

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## A LOSS FOR LAROUCHE DOESN'T MEAN A VICTORY FOR REPORTER'S PRIVILEGE

Without a doubt, the First Amendment's freedom of the press guarantee<sup>1</sup> is far from absolute.<sup>2</sup> Perhaps the greatest limit on this freedom has been in the area of tort liability for defamation—libel and slander.<sup>3</sup> In this context, Justice White asserted: “[it is] the prevailing view . . . that the press is not free to publish with impunity everything and anything it desires. . . .”<sup>4</sup>

The balance between the freedom of the press protections and defamation liability has been continually fine tuned,<sup>5</sup> but one area that remains far from settled concerns a reporter's privilege. When the Supreme Court held that the First Amendment neither protects the press from revealing the identity of informants in grand jury investigations<sup>6</sup> nor, from an inquiry into the state of mind of those who edit, produce or publish in a defamation suit,<sup>7</sup> it appeared that the Court denied the possibility of a reporter's privilege under the First Amendment. However, the Fourth Circuit Court of Appeals in *LaRouche v. National Broadcasting Company* (“*LaRouche*”)<sup>8</sup> recognized a First Amendment reporter's privilege, sufficient to deny Lyndon LaRouche the opportunity to depose the National Broadcasting Company's (“NBC”) sources. *LaRouche* is but

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1. The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .” U.S. CONST. AMEND. I.

2. C. DUCAT AND H. CHASE, CONSTITUTIONAL INTERPRETATION 1239-49 (1983).

3. There are some who have argued that freedom of the press has not been limited by defamation liability. This argument was presented in *Near v. State of Minnesota*, 51 S. Ct. 625, 631 (1930). In *Near*, the Supreme Court reviewed the historical meaning of freedom of the press “that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.” Thus, since libel imposes liability for what has already been said, and not for what can be prevented from being said, it does not impinge upon the freedom of the press rights protected by the First Amendment. In response, it has been argued that while holding the media liable for their defamatory remarks may not be a direct restraint upon the press, nevertheless, the litigation indirectly limits the freedom of the press by causing a “chilling effect” on the media's pursuit to report openly all of the information it has gathered.

4. *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972).

5. “This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

6. *Branzburg*, 408 U.S. 665.

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

8. *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986).

one case among many<sup>9</sup> that has put the issue of a reporter's privilege in an arena of uncertainty following what appeared to be a definitive answer by the Supreme Court.

#### PRESIDENTIAL HOPEFUL LYNDON LAROCHE FIGHTS BACK

By 1984, Lyndon LaRouche<sup>10</sup> had the experience of three past presidential elections behind him.<sup>11</sup> That year, he launched his most aggressive campaign for the presidency. Spending millions in advertising and with his own organization, the National Democratic Policy Committee, behind him, LaRouche made another unsuccessful bid for the Democratic Party nomination. As an independent candidate, he went on to receive less than one per cent of the popular vote and no electoral votes. But his campaign was not without controversy.<sup>12</sup>

In the heat of the campaign, NBC aired two stories about LaRouche, claiming that LaRouche said that Jews are responsible for all the evils in the world, that any serious investigation of the LaRouche organization by the Internal Revenue Service would lead to criminal indictment, and that LaRouche once proposed the assassination of President Carter and several of his aides. The stories appeared on the January 30, 1984 broadcast of the "Nightly News" and the "First Camera" broadcast of March 4, 1984.<sup>13</sup>

As a result of the broadcasts, LaRouche filed a complaint against NBC and others for defamation. NBC filed a counterclaim for interference with its business relations.<sup>14</sup> Early in discovery, LaRouche moved

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9. See *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *U.S. v. Criden*, 633 F.2d 346 (3d Cir. 1980); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975).

10. The vast political career of LaRouche has covered the entire ideological spectrum, from his participation in the Trotskyite Socialist Workers Party to his self-proclaimed hatred of communism. He has been labeled a neo-fascist by some groups and a KGB agent by others. Among his beliefs, LaRouche has claimed that world events were manipulated through conspiracies, led chiefly by the British and Zionists and that President Reagan was drugged. *Los Angeles Times*, May 27, 1984, at 16, col.1.

11. *Id.*

12. In 1986, LaRouche was indicted on 117 counts of fraud and obstruction of justice. The fraud charges arose from allegations that LaRouche followers used the credit card numbers of those who had purchased literature or had made donations to his campaign to make a million dollars in false charges. Huntley, *Lowering the Boom on LaRouche*, *U.S. NEWS & WORLD REPORT*, October 20, 1986, at 8.

13. *LaRouche*, 780 F.2d at 1136-37.

14. *Id.* at 1137. NBC alleged and the district court held that LaRouche had interfered with NBC's business relations when someone affiliated with his office, purporting to be from New York Senator Daniel Patrick Moynihan's office, called NBC to inform the broadcaster that a scheduled interview would be cancelled. Then, while claiming to be from NBC, someone called Senator Moynihan's office to cancel the same interview. Although the interview

to compel NBC's reporters to disclose the confidential sources of the information. The district court affirmed the Magistrate's ruling to deny the motion on the grounds that LaRouche had not exhausted other possible sources of this information.<sup>15</sup> The district court denied the renewed motion for the same reason.<sup>16</sup> The court also denied LaRouche's pretrial motion to preclude NBC from relying on information from confidential sources at trial.<sup>17</sup> NBC prevailed on the defamation claim and on its counterclaim.

On appeal, LaRouche charged error in the district court's refusal to compel NBC to disclose confidential sources and in its refusal to preclude NBC from relying on those sources at trial.<sup>18</sup> Applying the balancing test developed from Justice Powell's plurality opinion in *Branzburg v. Hayes*,<sup>19</sup> the Fourth Circuit Court of Appeals affirmed the district court's denial of LaRouche's motion to compel the disclosure of the identities.<sup>20</sup> The court based its conclusion on its determination that LaRouche had failed to exhaust alternative sources of the information.<sup>21</sup> The court held that the district court was within its discretion to deny the motion.<sup>22</sup>

## IS THERE A REPORTER'S PRIVILEGE?

### A. *Privileges Under The Rules of Evidence*

Perhaps the most fundamental maxim of evidence is that:

[T]he public has a right to every man's evidence. When we

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eventually took place, a good deal of confusion resulted from the calls. The court found that this confusion was a sufficient injury to award damages based on interference with business relations.

15. *Id.* The court found that LaRouche failed to depose some obvious sources of information, including former LaRouche associate, Larry Cooper, the revealed source of the Carter assassination story and Gordon Novel, a confidential source.

16. *Id.* There is some question as to whether the district court took into consideration the fact that a LaRouche publication, *New Solidarity*, claimed that LaRouche already knew the identity of the informants.

17. *Id.* at 1137.

18. *Id.* at 1138-39. LaRouche also claimed that the district court erred in not granting his motion for a judgment notwithstanding the verdict, claiming that the evidence was legally insufficient to find intentional interference with NBC's business relations and for failing to declare a mistrial in view of potential outside influence on the jury. One of the defendants, the Anti-Defamation League, appealed the district court's denial of sanctions against LaRouche and his lawyers pursuant to Rule 11 of the Federal Rules of Civil Procedure.

19. *Branzburg*, 408 U.S. at 709-10.

20. *LaRouche*, 780 F.2d at 1139.

21. The court applied the three-part test found in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980): (1) whether the information is relevant, (2) whether the information can be obtained by alternative means and (3) whether there is a compelling interest in the information. *LaRouche*, 780 F.2d at 1139.

22. *LaRouche*, 780 F.2d at 1139.

come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.<sup>23</sup>

In light of this tenet, Justice Frankfurter wrote: "As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible."<sup>24</sup> This broad language suggests that a criminal defendant or a civil litigant should be permitted to produce whatever evidence is necessary to elicit the truth.<sup>25</sup> But despite the ultimate goal of ascertaining the truth, there are recognized limits as to what is admissible and what is discoverable. In addition to limits imposed by the common law and promulgated rules of evidence, state and federal courts are also restricted by the Constitution.

Among the limits on admissible evidence and discovery are what have come to be known as privileges. A privilege results from a judicial pre-determination that the interest in protecting the communication outweighs any detrimental effect that it may have on any opposing interest and ascertaining the truth.<sup>26</sup> A reporter's privilege, such as that claimed by NBC, protects members of the press from being compelled to disclose the identity of sources in court proceedings.<sup>27</sup> Proponents of this privilege claim that the authorization for such an evidentiary exemption is grounded in the First Amendment's freedom of the press guarantee.<sup>28</sup> Although the court in *LaRouche* concluded that NBC could claim a First Amendment reporter's privilege, whether the reporter's privilege is actually grounded in the First Amendment, if it exists at all, is at best debatable.<sup>29</sup> However, there can be no doubt that such a privilege is inconsistent with the principle that all relevant evidence is admissible.

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23. 8 WIGMORE, EVIDENCE § 2192 (1961).

24. *Elkins v. United States*, 364 U.S. 206, 234 (1960).

25. In fact, in promulgating the Rules of Civil Procedure, the Supreme Court acknowledged the importance of ascertaining the truth by providing for several rules governing pre-trial discovery, including Rule 37, which provides for sanctions against parties and deponents who fail to comply with an order compelling discovery. FED. R. CIV. P. 26-37.

26. See E.CLEARY, MCCORMICK ON EVIDENCE 170-72 (1984).

27. *Branzburg*, 408 U.S. at 680.

28. *Id.*

29. The *Branzburg* decision exemplifies this debate. While the majority in that case held that there was no First Amendment reporter's privilege, the plurality opinion of Justice Powell in fact contends that under certain circumstances, there is such a privilege. See Comment, *Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection*, 33 HASTINGS L.J. 623 (1982).

### B. Constitutionality of the Reporter's Privilege

The landmark Supreme Court decision concerning the reporter's privilege was handed down in the case of *Branzburg v. Hayes*.<sup>30</sup> In *Branzburg*, the Supreme Court rejected the reporter's claim of privilege and held that he had an obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation.<sup>31</sup>

Branzburg, a staff reporter for a Kentucky daily newspaper, refused to identify to a grand jury the individuals about whom he had written two stories on converting marijuana into hashish.<sup>32</sup> A state trial court judge ordered Branzburg to answer the grand jury's questions and rejected his contention that either the Kentucky reporters' privilege statute,<sup>33</sup> the First Amendment of the United States Constitution or, Sections 1, 2 and 8 of the Kentucky Constitution protected him from disclosing his sources.<sup>34</sup> Branzburg petitioned to the Kentucky Court of Appeals; however, his petition was denied.<sup>35</sup> In a second case involving Branzburg, under a similar factual setting, the Kentucky Court of Appeals again denied Branzburg's petition.<sup>36</sup>

The United States Supreme Court granted Branzburg a writ of certiorari.<sup>37</sup> The issue before the Court was whether the First Amendment gave a reporter immunity from answering questions before a grand jury

30. *Branzburg*, 408 U.S. 665.

31. *Id.*

32. *Id.* at 668-70.

33. The statute provides: "No person shall be compelled to disclose in any legal proceeding or trial before any court . . . the source of any information procured or obtained by him, and published in a newspaper or by radio or television broadcasting station. . . ." Ky. Rev. Stat. § 421.100 (1962).

34. *Branzburg*, 408 U.S. at 668.

35. *Id.*

36. The court of appeals concluded that it was the "generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." *Id.* at 670.

37. *Id.* at 671. The court also granted certiorari to two companion cases: *In re Pappas*, 358 Mass. 604 (1971) and *United States v. Caldwell*, 434 F.2d 1081 (9th Cir. 1970). Pappas was a television newsman/photographer who refused to answer the grand jury's questions regarding the identities of members of the Black Panther organization, which he had infiltrated while covering a report on civil disorders. Pappas appealed the Massachusetts Supreme Court's decision against any reporter's privilege. *In re Pappas*, 358 Mass. at 612. In *Caldwell*, the United States petitioned for certiorari following the court of appeals reversal of the district court's contempt order. The district court found Caldwell in contempt for refusing to appear before a grand jury to submit testimony and offer notes and tape recorded interviews given to him for publication by officers and spokesmen of the Black Panther organization. The court of appeals held that the First Amendment provided a qualified testimonial privilege to newsmen. Absent compelling reasons for requiring his testimony, he was privileged to withhold it. *Caldwell*, 434 F.2d at 1089.

concerning the identities of sources. Branzburg claimed that if his sources' identities were disclosed, they and the confidential sources of other reporters would be deterred from furnishing publishable information, diminishing the free flow of information as protected by the First Amendment.<sup>38</sup> Furthermore, he claimed that the First Amendment reporter's privilege should be overridden only in the face of a compelling need for the information, which was not present here.<sup>39</sup>

The Court, however, did not share Branzburg's sentiments. Writing for the four member majority, Justice White gave several reasons for denying a First Amendment reporter's privilege. First, he stated that in this case there was no intrusion upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.<sup>40</sup> He added, since citizens generally are not constitutionally immune from grand jury subpoenas, neither are reporters and other members of the media. Justice White concluded that this was the prevailing view, consistent with the great weight of authority.<sup>41</sup> In dicta, Justice White added that a news reporter is also not exempt from disclosing confidential information to a subpoena issued in a civil suit.<sup>42</sup> Such a claim, he added, has been almost uniformly rejected since *Garland v. Torre*.<sup>43</sup>

Justice White also rejected Branzburg's claim that without such a privilege the flow of information from sources would be impaired.<sup>44</sup> In doing so, he first recognized that the evidence failed to demonstrate that the flow of news would be constricted.<sup>45</sup> Citing surveys of reporters' opinions as to "chilling effects," he concluded that an inhibitive effect is merely speculative.<sup>46</sup> He also recognized several reasons why such infor-

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38. *Branzburg*, 408 U.S. at 679-80.

39. *Id.* at 680.

40. *Id.* at 681.

41. *Id.* at 685.

42. Justice White cited *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) for the proposition that news gatherers are not exempted from disclosure of confidential sources pursuant to a subpoena issued in a civil suit. *Branzburg*, 408 U.S. at 686. In *Garland*, the famous actress Judy Garland brought an action against CBS for breach of contract and defamatory statements allegedly made concerning her by a network executive to a newspaper reporter. The district court held the columnist in contempt for failing to answer questions concerning the identity of the network executive. The court of appeals affirmed, concluding that the First Amendment of the Constitution conferred no right on columnists to refuse to answer questions concerning the identity of sources, and that there was no evidentiary privilege. *Garland*, 259 F.2d at 551.

43. *Branzburg*, 408 U.S. at 686-87.

44. *Id.* at 693.

45. *Id.* at 693-94.

46. *Id.* at 694. Justice White added that even if there was an actual "chilling effect," such

mation would not dry up even with knowledge that identities might be revealed.<sup>47</sup> Justice White concluded that “[f]rom the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.”<sup>48</sup>

Finally, Justice White rejected any notion that the courts should be involved in balancing “compelling” governmental interests against a reporter’s privilege.<sup>49</sup> To do so “would be making a value judgment that a legislature had declined to make . . . . The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.”<sup>50</sup>

Justice Powell provided the fifth vote in favor of denying *Branzburg* a reporter’s privilege; however, he authored a separate opinion.<sup>51</sup> Unlike the four vote majority, Justice Powell suggested that “the asserted claim of 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.”<sup>52</sup> This opinion has often been cited, as in the case of *LaRouche*,<sup>53</sup> to support granting a reporter’s privilege through balancing the interests.

The absence of a clear majority in *Branzburg* has caused divergent applications of the decision among lower courts; some courts have followed the White opinion, while others have taken heed to Powell’s balancing approach.<sup>54</sup> However, any problem with uniform application of the *Branzburg* decision should have been resolved following the Court’s

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an effect could never be quantified since the view’s of informants/sources could never be canvassed because of their secretive nature. *Id.*

47. Justice White wrote: “The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena. . . .” *Id.* at 694-95.

48. *Id.* at 698-99.

49. *Id.* at 705-06.

50. *Id.* at 706.

51. *Id.* at 709.

52. *Id.* at 710.

53. *LaRouche*, 780 F.2d at 1139.

54. Three courts of appeals have accepted the *Branzburg* majority approach: *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Cervantes v. Time, Inc.*, 484 F.2d 986 (8th Cir. 1972). Five of the courts have followed Justice Powell’s balancing approach: *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *U.S. v. Criden*, 633 F.2d 346 (3d Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977). The Seventh and the Eleventh Circuits have not taken a clear position as of yet.

6-3 rejection of a reporter's privilege in *Herbert v. Lando* in 1979.<sup>55</sup>

In that case, Anthony Herbert, a retired Army officer, brought an action against the Columbia Broadcasting System ("CBS") for defamation, alleging that a "60 Minutes" program had falsely and maliciously portrayed him as a liar and a person who had made war-crimes charges against his superior officers to explain his relief from command.<sup>56</sup> Herbert sought and obtained an order compelling Barry Lando, the producer and editor of the segment, to answer a variety of questions. The district court rejected Lando's contention that the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish or into the editorial processes.<sup>57</sup> In so ruling, the court found that these questions were relevant to disclose whether Lando had any reason to doubt the veracity of his sources.<sup>58</sup> A divided Second Circuit Court of Appeals reversed, finding that "the First Amendment lent sufficient protection to the editorial processes to protect Lando from inquiry about his thoughts, opinions, and conclusions . . . ."<sup>59</sup>

On appeal to the Supreme Court, as in *Branzburg*, Justice White delivered the majority opinion. In rejecting the court of appeals' finding, he concluded that "there is no privilege under the First Amendment . . . barring the plaintiff from inquiring into the editorial processes of those responsible for the publication where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action."<sup>60</sup> In reaching that conclusion, Justice White reasoned that since the Framers of the Constitution did not intend to abolish liability for defamation, such liability was not to be considered an abridgment of the right to freedom of speech or freedom of the press.<sup>61</sup> More importantly, he concluded that since proving the "malicious" state of mind is essential in defamation lawsuits, a First Amendment reporter's privilege protecting the media's thought processes would in fact preclude the plaintiff from carrying his heavy burden of proof and therefore, eliminate defamation liability against the media.<sup>62</sup> Finally, Justice White reiterated that it was important not to exempt evidence "[so] that more accurate results

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55. *Herbert*, 441 U.S. 153.

56. *Id.* at 156-57. The source of the complaint included an article published in the *Atlantic Monthly* by Barry Lando, who produced and edited the "60 Minutes" segment.

57. *Id.* at 157.

58. *Id.*

59. *Id.* at 158.

60. *Id.* at 153.

61. *Id.* at 158-59.

62. *Id.* at 160. Justice White wrote: "Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." *Id.*

will be obtained by placing all, rather than part, of the evidence before the decisionmaker."<sup>63</sup>

To summarize, the Supreme Court has twice rejected a First Amendment reporter's privilege. Although *Branzburg* was a non-majority decision in a criminal context, the *Herbert* decision had a clear majority which rejected a reporter's privilege in a civil context. *Branzburg* and *Herbert* could be limited to the particular facts of each case; however, the underlying principles that such a privilege is not within the historical meaning of freedom of the press, that granting a privilege would, in effect, impair defamation liability, that "chilling effects" are at best illusory<sup>64</sup> and that a reporter's privilege would undermine the ability of courts to ascertain the truth, are general enough to apply to a variety of factual situations.

#### THE COURT OF APPEALS FAILED TO APPLY THE CORRECT LAW IN *LAROCHE*

Although the Supreme Court denied a First Amendment reporter's privilege, it does not necessarily follow that a lower court can never find a reporter's privilege. As Justice White recognized in *Branzburg*, the state legislators are free to fashion their own standards as to such a privilege.<sup>65</sup> Not only can the state courts decide on the basis of state legislation and common law but, in diversity cases, federal courts as well do not have to follow the high court's decisions. Under Rule 501 of the Federal Rules of Evidence, the availability of an evidentiary privilege in a diversity case is governed by the law of the forum state.<sup>66</sup> Thus, since *LaRouche* was a diversity case in federal district court in Virginia, Virginia law should have been applied.<sup>67</sup> However, neither the district court

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63. *Id.* at 172-73.

64. *Laird v. Tatum*, 408 U.S. 1 (1972). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific harm." *Id.* at 13-14.

65. *Branzburg*, 408 U.S. at 706.

66. Rule 501 provides: "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Fed. R. Evid. 501. See Reese and Leiwant, *Testimonial Privileges and Conflict of Laws*, 86 LAW & CONTEMP. PROBS. 85 (1977).

67. Concerning a reporter's privilege, instead of a reporter's privilege statute or shield law, the Virginia Supreme Court has "tailored the privilege to the limits protected by the First Amendment." *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980). The Virginia Supreme Court in *Brown v. Commonwealth* followed the majority decision in *Branzburg* and thus, this was the applicable law. *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (1974).

nor the court of appeals applied Virginia law.<sup>68</sup> Instead, the court of appeals merely stated that a motion to compel discovery is within the sound discretion of the district court.<sup>69</sup>

### NBC'S REPORTER PRIVILEGE CONFLICTS WITH PRINCIPLES OF EVIDENCE

In *LaRouche*, not only did NBC's reporter privilege deny the public its right to "every man's evidence," but the truth as to the validity of LaRouche's claim was forever precluded from the jury's consideration; without the identities LaRouche could not prove actual malice by clear and convincing evidence.<sup>70</sup>

The *LaRouche* decision raises an additional evidentiary shortcoming of a reporter's privilege. Specifically, the court may allow a media defendant in a defamation suit to use the privilege not only as a shield but as a sword as well.<sup>71</sup> That is, the court may allow a reporter to claim a testimonial privilege as a shield, to protect confidential information (the source's identity), while disclosing parts of the protected information to bolster his defense. This results in the defendant producing whatever exculpatory testimony he desires, while leaving the plaintiff powerless to attack his honesty regarding that testimony.

In the context of *LaRouche*, NBC used its privilege as both a sword and a shield; the district court allowed NBC to allow the reporter to testify as to information provided by sources, while claiming a privilege to shield against LaRouche's attempt to discover the identity of the sources and impeach the reporter's testimony.

However, the use of a testimonial privilege as both a sword and a shield should be disallowed because it is unfair for the court to allow a

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68. *LaRouche*, 780 F.2d at 1139. The court of appeals cited *Tiedman v. American Pigment Corp.*, 253 F.2d 803 (4th Cir. 1958) for the proposition that a motion to compel discovery is addressed to the sound discretion of the district court, even when the object of the discovery is a journalist's confidential source. However, the court failed to recognize that such discretion exists only if the court follows Justice Powell's concurring opinion in *Branzburg*. Justice Powell proposed that courts should apply a balancing of interests approach, such as in *Garland*. This argument must fail, however, because the majority's opinion in *Branzburg* expressly denied court discretion, stating that the courts should not get involved in weighing the interests. *Branzburg*, 408 U.S. at 705-06.

69. *LaRouche*, 780 F.2d at 1139.

70. In a public figure defamation suit, the plaintiff must prove actual malice by clear and convincing evidence. That is, he must show that the defendant acted with knowledge that the information was false or with reckless disregard of whether it was true or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

71. *International Tel. and Tel. Corp. v. United States Tel. Co. of Florida*, 60 F.R.D. 177 (M.D. Fla. 1973).

witness to "have it both ways."<sup>72</sup> It is especially unfair in a defamation action where the plaintiff carries a heavy burden.<sup>73</sup> In *LaRouche*, it was unfair to allow NBC to produce whatever damaging testimony from the reporter it desired, while depriving LaRouche the opportunity to challenge the veracity of the testimony; without the identity of the sources he could only produce witnesses to deny that he had ever made such statements. To be fair, if the court was going to uphold the privilege, it should have at least precluded NBC from introducing the privileged information.

#### NBC'S REPORTER PRIVILEGE DOES NOT FALL WITHIN CONSTITUTIONAL PROTECTIONS

In addition to conflicting with principles of evidence, NBC's reporter privilege does not fall within the protections of the First Amendment. NBC's argument that the power to protect the identity of informants is an inherent right within the conception of a free press, as provided for in the First Amendment, was most clearly rejected in *Garland v. Torre*.<sup>74</sup> In *Garland*, CBS asserted that compelling reporters to disclose the confidential sources would encroach upon the First Amendment right because "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."<sup>75</sup> But the court rejected CBS' "practical restraint" argument and allowed Garland to compel the disclosure of the sources' identities.<sup>76</sup>

In rejecting CBS' argument, the court stated that it has long been recognized that freedom of the press connotes a meaning entirely different from that which CBS asserted.<sup>77</sup> Citing *Near*,<sup>78</sup> the court stated that freedom of the press within the historical meaning of the First Amendment meant primarily freedom from prior governmental restraints and not *de facto* restraints or restraints that result as a practical matter.<sup>79</sup> Under such an interpretation, for example, the argument that the press

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72. *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983).

73. *See supra* note 70.

74. *Garland v. Torre*, 259 F.2d 545, 547-48 (2d Cir. 1958).

75. *Id.*

76. *Id.*

77. *Id.* at 548.

78. *Near*, 283 U.S. 697.

79. The Court in *Near* quoted Blackstone:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undisputed right to lay what sentiments he pleases before the public; to forbid this, is to destroy the

would be restrained by a "chilling effect," resulting from requiring the reporter to disclose the identities of his sources, would fail. Not only would it fail because such a "chilling effect" (restraint) is illusive, as Justice White noted in *Branzburg*,<sup>80</sup> but also because the government imposed no restriction upon what can or cannot be published. Thus, the First Amendment would not be violated by denying a reporter's privilege based on an alleged "chilling effect."

In the context of *LaRouche*, no direct prior restraint was involved; no one prevented NBC from broadcasting what they wanted to broadcast. Rather, the suit concerned the impact of what was broadcasted. Since there was no danger of a prior restraint, the court's finding of a First Amendment privilege was inappropriate.

Beyond the historical meaning of freedom of the press, if the idea that the First Amendment protects also against indirect restraints is carried to its logical extreme, no interference whatsoever would be permissible, for it could affect the free flow of information to the public. For example, a tax on newsprint could affect the flow of information because there would be less of the newspaper's resources left for information gathering.<sup>81</sup> Additionally, the press would be immune from all civil liability and criminal prosecution because any such litigation would restrain the free flow of information by reducing the resources available for information gathering. However, this notion was clearly rejected in *New York Times Co. v. Sullivan* when the Supreme Court stated that the press is not free to publish with impunity everything and anything it desires.<sup>82</sup> Thus, NBC's claim that the reporter's privilege falls within the First Amendment's freedom of the press guarantee ignores the realities of history and

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freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

The Court also quoted Madison: "This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." *Near*, 283 U.S. at 713-14.

80. Recall that Justice White in *Branzburg*, considered possible chilling effects in the context of a fear of criminal prosecution. Justice White concluded that such effects were at best speculative and that there was no significant impact on the press. *Branzburg*, 408 U.S. at 693-99. It seems that in *LaRouche* as well as most civil suits, the sources would not face any criminal sanctions and that there would be a lesser chance of a chill factor.

81. The notion that the press was immune from general forms of taxation was dispelled in *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Likewise, the media is not exempt from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, nor the Sherman Act. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937).

82. *New York Times Co.*, 376 U.S. at 279-80.

modern conceptions of the press as being far from free of all governmental interference.

### PRACTICAL PROBLEMS WITH A BALANCING APPROACH

But even if Justice Powell's suggestion that a reporter's privilege is within the protections of the First Amendment when the interest in freedom of the press outweighs the duty to submit all relevant evidence, such a balancing approach should be rejected because of the practical problems created in applying the tests: 1) the amount of judicial discretion in balancing the opposing factors allows the courts to dispose of the plaintiff's claim without a valid reason, 2) the plaintiff's ability to recover is seriously impaired, and 3) the press would be at liberty to make injurious remarks without fear of liability.

#### A. *Balancing Test Equals Excess Discretion*

To demonstrate the potential for judicial abuse balancing permits, look no farther than *LaRouche*. In applying a balancing test, both the trial and appellate courts abused their discretion by denying LaRouche's motion on the grounds that he failed to exhaust all reasonable alternative means of obtaining the sought after information.<sup>83</sup> Not only did the courts apply the wrong criteria for "exhaustion," but both failed to acknowledge the efforts LaRouche made in deposing possible sources. Beyond that, even if it is conceded that LaRouche did not exhaust all reasonable alternative sources of the information, the court of appeals abused its discretion by failing to perform a complete balancing test. If a complete balancing had indeed been performed, it could not have reached the same conclusion.

The court's first abuse arose from its application of the "exhaustion" requirement. As the court found in *Garland v. Torre*, exhaustion requires only "reasonable efforts" under the circumstances and not complete exhaustion.<sup>84</sup> In *Garland*, the court concluded that although the plaintiff deposed only three possible sources of the statements in question, the plaintiff's efforts were reasonable and thus, satisfied the exhaustion requirement.<sup>85</sup> The court's conclusion appeared to rest on the fact that the plaintiff deposed those possible sources identified by CBS' secretary, but that all three denied making the statements.<sup>86</sup>

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83. *LaRouche*, 780 F.2d at 1139.

84. *Garland*, 259 F.2d at 551.

85. *Id.*

86. *Id.* at 547.

In *LaRouche*, instead of focusing on whether LaRouche had expended reasonable efforts, the court of appeals merely stated that LaRouche failed to depose the two actual sources and that he had failed to exhaust all his non-party depositions.<sup>87</sup> The court appeared to disregard the fact that LaRouche took eleven depositions, including five non-party depositions, which was the limit imposed by the court.<sup>88</sup>

Moreover, under the circumstances, his efforts should have been deemed more than reasonable. First, NBC interviewed over one hundred individuals for the broadcasts, a number far greater than a party should be expected to depose in a defamation action. Secondly, unlike *Garland*, LaRouche did not have the benefit of inside information as to possible sources. Thus, any depositions LaRouche took involved a substantial amount of guesswork. It seems unreasonable that a court should expect a party to expend vast amounts of resources, with no more than a slim chance of success.<sup>89</sup>

In addition to abusing its discretion by applying an overly strict "exhaustion" standard, the *LaRouche* court also abused its discretion by failing to counterbalance the exhaustion test against the relevancy of the information and the compelling interest in the information, the other tests in the three part balancing. With respect to relevancy, the heavy burden on a plaintiff in a public figure libel case to prove actual malice<sup>90</sup> "[makes] discovery of confidential sources critical to any hope of carrying that burden."<sup>91</sup> Thus, the identity of the sources is more than relevant, it goes to the "heart of the claim."<sup>92</sup>

*LaRouche* exemplifies the relevancy of the source's identity. Without the source's identity, LaRouche was precluded from proving that NBC was reckless.<sup>93</sup> For example, with the source's identity, LaRouche could have called the source of the "IRS allegations" to the stand to show that that person was in no position to know the finances of the LaRouche organization. From there, he could have proven that NBC was aware of that fact, but that they aired the allegations anyway. With-

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87. *LaRouche*, 780 F.2d at 1139.

88. Brief for Appellant at 7, *LaRouche v. NBC*, 55 USLW 3232 (U.S. May 20, 1986) (No. 85-1914).

89. In *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), the court concluded that litigants should not "be made to carry wide-ranging and onerous discovery burdens where the path is [so] ill-lighted . . ." *Id.* at 639.

90. *New York Times Co.*, 376 U.S. at 254.

91. *Carey*, 492 F.2d at 634.

92. *Garland*, 259 F.2d at 550.

93. In a public figure defamation case, the plaintiff must prove by clear and convincing evidence that the defendant acted with knowledge that it was false or with reckless disregard of whether it was true or not. *New York Times Co.*, 376 U.S. at 279-80.

out the identities, LaRouche could only personally refute the allegation, far short of what he needed to prove NBC's malice by clear and convincing evidence. Thus, because the identity went to the "heart of the claim" the relevancy test was clearly in LaRouche's favor.

Closely related to relevancy is the compelling interest test. Certainly a plaintiff, such as LaRouche, has a compelling interest in the information because his claim depends upon it. But even more compelling are the interests of the public and the government in seeing that the courts properly administer justice. It can hardly be said that the court has administered justice when a plaintiff is, in effect, deprived of the opportunity to prove his case. Courts are expected to expedite and not preclude plaintiffs from recovering for injuries suffered.

Thus, it seems that the information was highly relevant and that there was a compelling interest in the identity, but that the courts in *LaRouche* abused their discretion by disregarding these countervailing factors. The reasons for this oversight are left for speculation,<sup>94</sup> but the fact remains that when a court has the discretion to balance the interests, the potential for judicial abuse is great while the plaintiff's valid claim can be nullified at the court's whim. For these reasons, the courts in *LaRouche* should have followed the majority opinion in *Branzburg* and *Lando* by rejecting the balancing approach.

### B. *Balancing Impairs a Plaintiff's Claim*

Secondly, the balancing approach makes it practically impossible for a plaintiff with a defamation claim to prevail against members of the press. For example, in order for LaRouche to prove his case, he had to prove actual malice by clear and convincing evidence—that NBC broadcasted with knowledge that the information was false or with reckless disregard for whether it was true or not. However, since the reporter was able to protect the identity of her sources, LaRouche had no means to attack the reliability of the information. Only with the identities of the sources could he have attacked the veracity of the reporter's testimony and proven actual malice by showing that NBC acted with reckless disregard of whether the information was true or not. By granting the reporter's privilege the court of appeals, in effect, foreclosed any opportunity for LaRouche to prevail.

Thus, precluding the discovery of the identities of crucial sources has the effect of denying the plaintiff the opportunity to prove that the

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94. It is this author's opinion that the courts were disinclined to favor LaRouche because he came into court with "unclean hands"—he had interfered with NBC's business relations.

reporter acted with actual malice and was not merely reporting the news. Unless liability is to be completely foreclosed, the identity of informants of the alleged defamer must be open to examination.

### C. *Balancing Opens the Door for Careless Reporting*

On a broader scale, the final practical effect of finding a reporter's privilege could be to remove any deterrent effect the threat of potential liability will have upon members of the press who go beyond reporting of the facts.<sup>95</sup> Without the threat of defamation liability, there will be little incentive for members of the media to report only information given by reliable informants. Since they will never be held accountable, the incentive may be to publish the incredible rather than the truth.

### CONCLUSION

What is left after *LaRouche* varies little from the confusion prior to *LaRouche*—two divergent approaches to the reporter's privilege problem and no consistency among the courts. A majority of the circuit courts apply the Powell balancing approach found in his concurring opinion in *Branzburg*.<sup>96</sup> But with the *Herbert* decision, it seems that the Supreme Court is bent on rejecting the idea of any reporter's privilege. However, the Court, in denying *LaRouche*'s petition for certiorari, did not see *LaRouche* as the case to unify the lower courts. Nevertheless, if plaintiffs in defamation actions are not to be precluded from proving their cases, and if the courts are truly concerned with following constitutional guidelines, the reporter's privilege should be rejected.

*Michael Spector*

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95. In *Herbert*, Justice White added that liability was an important deterrent which discouraged the media from publishing material threatening injury to individual reputation. Without disclosure, there would be no liability and the media would not be deterred. *Herbert*, 441 U.S. at 171.

96. *Branzburg*, 408 U.S. at 709-10.