

not to publish was rejected in *Branzburg v. Hayes*<sup>954</sup> by a closely divided Court. “Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”<sup>955</sup> Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, but the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of reporters in avoiding the incidental burden on their newsgathering activities occasioned by such governmental inquiries.<sup>956</sup>

<sup>954</sup> 408 U.S. 665 (1972). “The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.” *Id.* at 682.

<sup>955</sup> 408 U.S. at 690–91. The cases consolidated in *Branzburg* all involved grand juries, so the reference to criminal trials should be considered dictum.

<sup>956</sup> Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court’s opinion. Justice Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, “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.” 408 U.S. at 710. Justice Stewart’s dissenting opinion in *Branzburg* referred to Justice Powell’s concurring opinion as “enigmatic.” *Id.* at 725. Judge Tatel of the D.C. Circuit wrote, “Though providing the majority’s essential fifth vote, he [Powell] wrote separately to outline a ‘case-by-case’ approach that fits uncomfortably, to say the least, with the *Branzburg* majority’s categorical rejection of the reporters’ claims.” *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).