
Michael R. Callahan

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For the past twenty years,\(^1\) and especially since the Supreme Court's seminal decision in *Branzburg v. Hayes*,\(^2\) federal courts have tried to resolve the question of whether the First Amendment provides a testimonial privilege for the news media. This privilege, it is argued, protects from compelled disclosure at trial, the identity of a reporter's confidential sources as well as any confidential information obtained from those sources. In *Herbert v. Lando*,\(^3\) the Second Circuit Court of Appeals not only recognized the existence of a qualified testimonial privilege for the news media, but further held that for purposes of pre-trial discovery in a libel case, the First Amendment affords the press an absolute privilege in matters where it exercises its editorial judgment.\(^4\)

In *Lando*, retired United States Army Lieutenant Colonel Anthony B. Herbert filed a defamation suit in federal district court against several defendants, including Barry Lando,\(^5\) producer of a CBS "60 Minutes" segment entitled "The Selling of Colonel Herbert."\(^6\) The telecast examined, in an unfavorable light, Herbert's allegations of Vietnam War atrocities and subsequent coverups.\(^7\) During pre-trial discovery, Lando released numerous exhibits, interview transcripts, reporters' notes, video tapes of interviews as well as a series of drafts of the telecast. He also answered innumerable questions relating to

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1. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), was the first federal case which dealt with an asserted testimonial privilege from revealing confidential sources. See notes 43-46 and accompanying text infra.
4. The term "editorial judgment" or "editorial process" is never actually defined by the court. While it generally pertains to the choice of material, decisions as to content, and the gathering of information which culminates in some form of publication or broadcast, the actual boundaries of this concept are unresolved.
5. The other defendants in this suit were Mike Wallace, the television commentator for the Herbert segment, CBS and the Atlantic Monthly Company which had published an article written by Lando about his investigation of Herbert. The Atlantic Monthly Company was not involved in this appeal from the district court's interlocutory order.
7. Lieutenant Colonel Anthony Herbert was a much-decorated Army officer who spent twenty-four years in military service. From September, 1968 to April, 1969, Herbert served with the 173rd Airborne Brigade in Viet Nam. On April 4, 1969, Herbert was relieved as Commander of the 2nd Battalion. While in Viet Nam, Herbert had allegedly reported a number of U.S. war atrocities to his superior officers. After an apparent coverup and lack of any satisfac-
these matters. Lando, however, refused to answer a number of queries as to his beliefs, opinions, intent and conclusions while preparing the program. Herbert's subsequent motion to compel discovery of this information was granted by the United States District Court for the Southern District of New York.8

In recognition of the first impression issue as to "whether the First Amendment erects any barriers to discovery of the editorial process,"9 the Second Circuit Court of Appeals granted an interlocutory appeal10 from the district court's order. The circuit court held that

tory investigation into these matters, Herbert brought charges against two of his superior officers. Herbert later filed a formal complaint with the Inspector General's Office. As a result of these charges Herbert received much news publicity and subsequently appeared on a number of national talk shows. Producer Barry Lando, after investigating some of the allegations made by Herbert, uncovered a number of discrepancies in Herbert's story. Lando's efforts culminated in the CBS presentation entitled "The Selling of Colonel Herbert." Herbert then instituted a defamation claim alleging $44,725,000 in damages to his reputation and financial impairment to his book "Soldier." Herbert v. Lando, 73 F.R.D. 387, 391 (S.D.N.Y. 1977).

9. 568 F.2d at 983.
10. 28 U.S.C. § 1292(b) (1974) provides in part:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such an order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order... .

While interlocutory appeals from discovery orders are rare, they are not nonexistent. See Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 936 (1974) (certification under § 1292(b) granted upon Fed. R. Civ. P. 37 (a) compelling defendant newspaper reporter, in a libel action, to disclose identity of eyewitness sources); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) (certification under § 1292(b) granted with respect to district court's order denying availability of attorney-client privilege in suit by stockholders against corporation); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) (§ 1292(b) certification granted following denial of motion for summary judgment in a libel suit). Contra, Alexander v. United States, 201 U.S. 117 (1906); Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969) (interlocutory appeal from a discovery order denied because it was found not to be a final order).

Judge Haight, in his Memorandum Opinion and Order, ruled that the touchstones of 1292(b) were satisfied. In so holding, he quoted Judge Feinberg, who stated:

When a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, there are escape hatches from the finality rule: a certification by the district court under 28 U.S.C. § 1292(b), apparently not sought here, or an extraordinary writ.

Herbert v. Lando, No. 74 Civ 434-CSH, slip op. at 9 quoting Judge Feinberg in American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 282 (2d Cir. 1967). See also Christian Echoes Nat. Ministry, Inc. v. United States, 404 F.2d 1066 (10th Cir. 1968); Grover, Christie & Merrit v. LoBianco, 337 F.2d 844 (D.C. Cir. 1964); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963). But see United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959) (court held that an order to produce documents over a claim of privilege did not involve a "controlling question of law" within the meaning of § 1292(b)).
answers to questions, posed by Herbert, which delved into Lando's opinions, thoughts and conclusions on matters relating to the preparation of the telecast, came within the ambit of the "editorial process" and therefore were constitutionally immune from compelled disclosure.\(^{11}\)

After presenting a brief historical development of the current constitutional standards in the area of libel, this Note will discuss and analyze a series of cases in which testimonial privileges were asserted. It will focus, in particular, upon the competing interests inherent in these cases and the test applied by courts in deciding whether or not to grant such a privilege. It is a contention of this Note that the court in Lando failed to address the limited nature of the testimonial privilege as discussed in these cases. In addition, it will argue that the Second Circuit's reliance on Supreme Court decisions in Miami Publishing Co. v. Tornillo\(^ {12}\) and Columbia Broadcasting System, Inc. v. Democratic National Committee,\(^ {13}\) to support its assertion that the editorial process should be absolutely privileged, is misplaced. Finally this Note will discuss the potentially disruptive effect that Lando may have upon the delicate balance of competing interests presented in a libel case governed by New York Times Co. v. Sullivan.\(^ {14}\)

**BACKGROUND**

Implicit in the maintenance of a free and democratic society is the corresponding duty of its citizenry to make informed decisions of a social, political and economic nature.\(^ {15}\) A free press\(^ {16}\) plays a vital role in our society by insuring a constant flow of information so as to

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11. 568 F.2d at 984.
15. *See T. Emerson, Toward a General Theory of the First Amendment* 3-15 (1963). Emerson suggests four values which a system of free expression seeks to protect: (1) assurance of individual self-fulfillment; (2) attainment of truth; (3) on-going participation by our society in social and political decision-making; and (4) maintenance of the balance between stability and change in our society, *Id.* at 3. *See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government* (1948).

The Supreme Court in its adjudication of First Amendment cases has defined the phrase "the press" expansively so as to include many different forms of "expression." The following are
provide to the public the necessary tools with which to make these informed decisions. To facilitate this exchange of ideas or "marketplace" concept, the Supreme Court has recognized certain corollary rights to a free press. Among these is a right to be free from prior governmental restraint and governmental devices which might effectively inhibit the public dissemination of news as well as a recognition by the Court that the freedom to print is an unrequited liberty unless one has a right to receive that printed material. In addition, the Court has acknowledged three separate yet interrelated examples of areas which the Court has held to come within the ambit of the "press". See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970) (newspaper); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969) (dictum) (radio); Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967) (magazines); Estes v. Texas, 381 U.S. 532, 538-40 (1965) (dictum) (television); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (non-commercial advertisements); Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 502 (1952) (motion pictures); Thornhill v. Alabama, 310 U.S. 88, 104-06 (1940) (signs); Schneider v. New Jersey, 308 U.S. 147, 160 (1939) (leaflets); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (pamphlets).

17. In advocating First Amendment protection for the distribution of anti-war leaflets during World War I, Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616 (1919), established the marketplace analogy and declared the discovery of truth to be the goal best served by its maintenance. Justice Holmes stated:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubts of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our constitution. It is an experiment, as all life is an experiment.

Id. at 630. It is this analogy to a marketplace of ideas that has been used as a basis for upholding First Amendment freedoms. See also Learned Hand's definition of the interest protected by the First Amendment, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950).


19. The Court in Grosjean v. American Press Co., 297 U.S. 233 (1936), held unconstitutional, as a restraint upon both publication and circulation, a special license tax applicable only to newspapers with circulation in excess of 20,000 copies per week. The Court recognized that the tax would deter circulation in excess of 20,000 and therefore limit the flow of news to the public. Id. at 244-45.

20. Lamont v. Postmaster General, 381 U.S. 301 (1965). This case involved a challenge to legislation which required the Postmaster General to detain unsealed foreign mailings of "communist political propaganda" and to release the same only upon the addressee's request. The statute was held to violate the addressee's First Amendment right to receive information because it imposed upon him an affirmative obligation of requesting delivery, and he therefore might be deterred from performing the necessary steps in order to receive the information. Justice Brennan reasoned that the First Amendment protected dissemination of ideas and that such "dissemination can accomplish nothing if otherwise willing addressees are not free to receive and consider them." Id. at 308. (Brennan, J., concurring).
functions of the press: acquisition;\textsuperscript{21} dissemination;\textsuperscript{22} and gathering of information.\textsuperscript{23}

These protected rights, however, do not operate in a legal vacuum. At times, the operation of free press conflicts with, and potentially impedes the realization of other societal interests.\textsuperscript{24} Among these interests is an acknowledged need to preserve the integrity of an individual's reputation. Such is the basis for the law of defamation.\textsuperscript{25} Yet, an opposing interest advanced by the press and supported by the courts, that "the public has a right to be informed," has produced serious inroads into the law of libel.\textsuperscript{26} Consequently, in certain in-

\begin{footnotesize}
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\item See Lando, 568 F.2d at 976 n. 3.
\item See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939). In Martin, the Supreme Court held unconstitutional, as a denial of freedom of speech and press, an ordinance which prohibited the door-to-door distribution of handbills and circulars. Despite the argument advanced that the ordinance was a reasonable use of police powers, the Court stated that "[f]reedom to distribute information to every citizen where ever he desires to receive it is so clearly vital to the preservation of a free society that... it must be fully preserved." 319 U.S. at 146.
\item See Branzburg v. Hayes, 408 U.S. 665 (1972). In rejecting the assertion of a qualified privilege for the newsmedia from compelled disclosure of confidential sources, the Court also stated that "without some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 681. Justice Powell in his concurring opinion also noted that "[t]he Court does not hold that newsmen... are without constitutional rights with respect to the gathering of news or in safeguarding their sources." Id. at 709. See also Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 838 (1971); Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505 (1974).
\item Freedom of the press has also collided with other constitutionally guaranteed rights. This conflict is perhaps most keen when the newsmedia's assertion of an absolute privilege from compelled discovery collides with a criminal defendant's right to compel testimony and his right to a fair trial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury... (and) to have compulsory process for obtaining witness in his favor..." U.S. Const. amend. VI. Where these rights collide the Supreme Court has recognized that those of the press give way to those of the accused. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963). See also United States v. Liddy, 354 F. Supp. 208, 215 (D.D.C. 1972) (privilege denied in favor of an accused's right to a fair trial.)
\item While the law of civil defamation is ever evolving, see F.L. Holt, The Law of Libel (1818) and C. Lawhorne, Defamation and Public Officials (1971) for a presentation of the historical developments of the law of defamation, it generally seeks to redress an individual whose reputation has been impaired by some false and derogatory speech or writing. A libel action, such as the situation in Lando, is usually defined as a malicious publication, expressed in printing or writing, which damages the plaintiff's reputation and exposes him to ridicule, contempt and public hatred. See, e.g., Time, Inc. v. Hill, 385 U.S. 374 (1967); Beane v. Weiman Co., 5 N.C. App. 276, 168 S.E.2d 236 (1969). See also Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349 (1975).

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stances, the societal interest in self integrity has been subordinated to a desire that "debate on public issues . . . be uninhibited, robust, and wide open. . . ." 27

The tension raised by these two competing interests led to the Supreme Court's decision in New York Times Co. v. Sullivan. 28 Sullivan injected constitutional considerations into the law of libel by holding that under the First Amendment, the press will be held blameless for printing factual misstatements about public officials unless the press acted with "actual malice." 29 Later decisions enlarged the constitutional privilege to include misstatements regarding public figures 30 as well as "matters of public or general concern." 31 Still others have required that a subjective standard be applied in order to reach a finding of actual malice and, as a result, reckless disregard, the subjective element of actual malice, is present if the publisher "in fact entertained serious doubts as to the truth of his publication," or if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." 32 Thus, in Sullivan and the series of cases following it, the Supreme Court has subordinated the rights of private litigants to the public interest in a free and vigorous press by

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28. 376 U.S. 254 (1964). In Sullivan, the Court reversed a jury verdict which held the New York Times liable in a defamation suit for publishing a non-commercial full page ad describing certain alleged activities by police against black demonstrators in Montgomery, Alabama.
29. The requirement of actual malice was first raised in Sullivan where the court stated: The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.
30. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The Court described a public figure-plaintiff as one who because of status or conduct is the voluntary subject of continuing and substantial public interest independent of the publication at issue, and who therefore has access to the means of counterargument sufficient to rebut the defamatory falsehood directed at him. Id. at 154-55. Since Herbert conceded that he was a "public figure" in a libel action governed by Sullivan, the Court did not have to deal with this oftentimes difficult characterization. Brief for Appellee at 16. Herbert v. Lando, 568 F.2d 974, (2d Cir. 1977).
31. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) held that constitutional protection is to be extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." Id. at 44.
severely limiting the right of recovery for libel and invasion of privacy.  

The competing interests of an asserted First Amendment protection for the editorial process and the right to preserve an individual’s reputation form the background and basis for the decision rendered by the Second Circuit in Lando. In reaching its conclusion that the First Amendment recognizes an absolute privilege for the editorial process, Judge Kaufman in his majority opinion relied primarily upon three Supreme Court decisions. The court stated that since Branzburg v. Hayes recognized a qualified testimonial privilege for the news media, and Miami Herald Publishing Co. v. Tornillo and Columbia Broadcasting System v. Democratic National Committee protected the editorial functions of newspapers and broadcast media from governmental intrusions, it had no other choice but to conclude that the “editorial process must equally be safeguarded.”

THE TESTIMONIAL PRIVILEGE CASES

While the issue of a First Amendment protection for the editorial process is one of first impression, the nature of the dispute in Lando is analogous to those cases wherein reporters and other individuals sought to protect the identity of confidential sources and information from compelled pre-trial discovery. Judge Kaufman’s reliance on these cases is evidenced by his discussion of Branzburg v. Hayes.


34. The majority opinion in Lando never specifically states that the privilege granted is absolute. The Court, however, did imply this conclusion when it stated: 

These reciprocal developments in the law of libel and in freedom of the press narrowly define our task: we must permit only those procedures in libel actions which least conflict with the principle that debate on public issues should be robust and uninhibited. If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor’s thought processes.

568 F.2d at 980.

To further bolster this conclusion, both the concurring and dissenting opinions in Lando make clear the fact that Judge Kaufman recognized an absolute privilege for the editorial process. Id. at 984 & 996.


36. 568 F.2d at 978.

37. 408 U.S. 655 (1972) discussed in Lando, 568 F.2d at 977. See Judge Oakes’ reference to these cases. Id. at 986. See also notes 36-74 and accompanying text for a discussion of these privilege cases.
the first testimonial privilege case to be decided by the Supreme Court, and other privilege cases.\textsuperscript{38} An analysis of these cases will show that while \textit{Branzburg} recognized a qualified testimonial privilege, subsequent cases have generally limited the application of this privilege to non-libel civil actions.\textsuperscript{39}

The claim by reporters of a privilege from revealing certain confidences, so as to protect their sources and to assure future "revelations," is an interest which conflicts with federal policy that allows broad discovery.\textsuperscript{40} Under this policy, if the material or information requested is at all relevant to the subject matter of the case,\textsuperscript{41} discovery is allowed despite the fact that the materials would be inadmissible at trial.\textsuperscript{42} Furthermore, as long as "such information will have some probable effect on the organization and presentation of moving party's case,"\textsuperscript{43} or is calculated to lead to the discovery of admissible evidence,\textsuperscript{44} the information is also subject to discovery.

The first federal case to deal with this issue of whether to grant a testimonial privilege or to allow broad discovery was \textit{Garland v. Torre}.\textsuperscript{45} In this libel action brought by actress Judy Garland against the Columbia Broadcasting System, the Second Circuit rejected a newspaper columnist's claim of a testimonial privilege from revealing the names of CBS executives who allegedly made the defamatory re-

\textsuperscript{38} 568 F.2d at 977-78 & nn. 11-12.
\textsuperscript{39} See notes 45-74 and accompanying text infra.
\textsuperscript{40} As noted in one case: "It has long been held that the deposition-discovery rules are to be accorded broad and liberal treatment. . . ." Democratic National Committee v. McCord, 356 F. Supp. 1394, 1396(D.D.C. 1973).
\textsuperscript{41} In Cox v. E.I. DuPont de Nemours & Co., 38 F.R.D. 396 (D.S.C. 1965), the court stated: "Indeed it is not too strong to say that discovery should be considered relevant where there is any possibility that the information sought may be relevant to the subject matter of the action." \textit{Id.} at 398 quoting WRIGHT: FEDERAL COURTS at 310-11 (1963). See also Hickman v. Taylor, 329 U.S. 495 (1947); 4 MOORE'S FEDERAL PRACTICE ¶ 26.56(1) at 120-22 (2d ed. 1976) and cases cited therein; 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2007 (1975).
\textsuperscript{42} See Freeman v. Seligson, 405 F.2d 1326 (D.C. Cir. 1968); Boeing Airplane Co. v. Coggeshall 280 F.2d 654 (D.C.Cir. 1960).
\textsuperscript{44} See Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304 n.8 (5th Cir. 1973); E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D.Del. 1959). Despite the general rule allowing broad discovery, the federal rules limit its scope in two particular instances: (1) where the information or material sought is "privileged", \textit{Fed. R. Civ. P.} 26(b) (1); and (2) where the court finds that the scope of discovery subjects deponent to "annoyance, embarrassment, oppression, or undue burden or expense. . . ." \textit{Fed. R. Civ. P.} 26(c).
\textsuperscript{45} 259 F.2d 545 (2d Cir.), \textit{cert. denied}, 358 U.S. 910 (1958).
marks. While the opinion acknowledged the vital role of the press in a free society, the court stated that freedom of the press was not absolute.\textsuperscript{46} In rejecting the privilege, Circuit Judge Potter Stewart found that the information requested by Garland was material, relevant and more importantly, "went to the heart of plaintiff's claim."\textsuperscript{47} This three-pronged or "compelling need" test, to determine whether the court should grant a privilege, has been applied in one form or another in almost every civil action in which a privilege from revealing confidential sources or information has been asserted.\textsuperscript{48}

This privilege issue was finally addressed by the Supreme Court in \textit{Branzburg v. Hayes}.\textsuperscript{49} In \textit{Branzburg} and its companion cases, \textit{Caldwell v. United States}\textsuperscript{50} and \textit{In re Pappas},\textsuperscript{51} the Court was presented with two major issues: (1) whether a reporter who was witness to a crime could, under the First Amendment, be compelled to tes-

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\item \textsuperscript{46} \textit{Id.} at 548.
\item \textsuperscript{47} \textit{Id.} at 550. The record revealed that Miss Garland had actively taken independent steps to determine the identity of the confidential news source. Three CBS executives were deposed and all three denied knowing the identity of the network executive referred to in the Herald Tribune column. In view of these denials, the identity of Miss Torre's source became essential to the libel action.
\item \textsuperscript{48} Justice Stewart argued for such a test in his dissenting opinion in \textit{Branzburg} when he stated:
\begin{quote}
Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsmen has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.
\end{quote}
\textit{408 U.S.} 655, 743 (1972) (Stewart, J., dissenting).
\item \textsuperscript{49} \textit{408 U.S.} 665 (1972).
\item \textsuperscript{50} 434 F.2d 1081 (9th Cir. 1970), \textit{rev'd sub nom.}, \textit{Branzburg v. Hayes}, \textit{408 U.S.} 665 (1972). \textit{Caldwell} involved a reporter from the New York Times who had gained the trust of the Black Panther Party in Oakland, California. In an article written by Caldwell, he quoted a Panther leader who advocated the violent overthrow of the government and stated that he was going to assassinate President Nixon. A federal grand jury was called to investigate the Panthers and Caldwell was subpoenaed to testify as to the "aims, purposes, and activities" of this organization. \textit{Id.} at 1083 n.2. The district court denied Caldwell's motion to quash the subpoena but entered a protective order which precluded the disclosure of his confidential sources and information obtained in order to facilitate "his efforts to gather news for dissemination to the public through the press and other news media." In re Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970). Upon his continued refusal to appear before the grand jury despite the protective order, the district court held Caldwell in contempt, and he appealed. On appeal, the Ninth Circuit ruled that absent any showing by the government that the information would in any way benefit the grand jury, Caldwell need not appear.
\item \textsuperscript{51} 358 Mass. 604, 266 N.E.2d 297 (1971), \textit{aff'd sub nom.}, \textit{Branzburg v. Hayes}, \textit{408 U.S.} 665 (1972). In \textit{Pappas}, a television newswoman was allowed to enter the New Bedford, Massachusetts headquarters of the Black Panthers during a wave of civil disturbances. Because of his continued promises of confidentiality to the Panthers, Pappas refused to divulge to a state
tify before a grand jury as to what he had seen; and (2) whether a reporter could be ordered to appear before the grand jury in order to claim a privilege against testifying.52

Here the Court rejected the testimonial privilege claimed by each of the reporters53 and actually held that there was a presumption against the existence of such a privilege.54 However, cases decided since Branzburg have limited the majority opinion to situations where journalists are being compelled to divulge confidential sources before a grand jury investigation into criminal matters.55 Furthermore, those courts which have granted a testimonial privilege from compelled discovery have often relied upon Justice Powell's concurring opinion in Branzburg,56 where he qualified the Court's holding by stating:

grand jury any information surrounding his visit to Panther headquarters on an evening when a police raid had been anticipated. The Massachusetts Supreme Judicial Court upheld the denial of Pappas' motion to quash the subpoena on the grounds that the grand jury was an appropriate device to determine the cause of the civil disorder in New Bedford. Id. at 607, 266 N.E.2d at 299 (1971). The court also relied on the fact that Massachusetts did not have a shield law which protected a reporter's confidences and therefore a newsperson had no statutory right to refuse to appear and testify before the grand jury. Id. at 612, 266 N.E.2d at 302-03.

52. Branzburg was a reporter for the Louisville Courier-Journal who had obtained information from confidential sources, pertaining to the alleged manufacture, sale and use of drugs in Kentucky. Shortly after the publication of two of his articles, two separate grand juries convened to investigate illegal drug traffic. When summoned before both grand juries, Branzburg was asked to reveal the identity of his sources as well as other confidential information obtained from them. Branzburg refused, claiming protection under: the Kentucky shield statute, KY. REV. STAT. § 421.100 (1972), which protects from disclosure, in any legal proceeding, the source of any confidential information; the Kentucky constitution, KY. CONST. §§ 1, 2, 8; and the First Amendment, U.S. CONST. amend. I. After finding that Branzburg had abandoned his constitutional claims, the Kentucky Supreme Court held that the shield law did not permit him to refuse to reveal the identity of his sources when such information was sought in the investigation of alleged criminal activity. The Court subsequently ordered him to testify.

53. In Branzburg, as well as Caldwell and Pappas, each reporter argued for a qualified privilege from compelled disclosure of confidential information and sources. The test articulated by each was essentially the same: that the privilege should prevail unless the government could show a "compelling need" for the information sought by a showing of relevancy, materiality and on inability to obtain the information elsewhere. See Goodale, Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen, 26 Hastings L.J. 709, 714 (1975). As early as 1934 the American Newspaper Guild adopted as a part of its code of ethics the following: "[N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies. . . ." G. BIRD & F. MERWIN, THE NEWSPAPER AND SOCIETY 567 (1942).


The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of information or in safeguarding their sources . . . Indeed, if the newsmen is called upon to give information bearing only a remote and tenuous relationship to the subject matter of the investigation . . . he will have access to the Court on a motion to quash and an appropriate protective order may be entered.57

Two years later in Saxbe v. Washington Post Co.,58 Justice Powell, in his dissenting opinion, took the opportunity to fully describe the limited nature of Branzburg, and in addition, pointed out that a decision to grant a testimonial privilege depended upon the competing societal interests involved in each case.59

The civil action testimonial privilege cases decided since Garland and Branzburg can be divided into two categories, libel and non-libel, with each category having its own distinguishing factors and set of competing interests. One of the distinguishing factors of the non-libel cases is that the journalist summoned to reveal his or her confidences is not normally a party to the suit. Furthermore, the information requested is sought merely to bolster the plaintiff's case. Such a situation was presented in Baker v. F&F Investment.60 Here, the

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57. 408 U.S. 665, 709-10 (1972) (Powell, J., concurring).
59. In Saxbe, Justice Powell, in his dissenting opinion, went to great lengths in explaining and limiting the application of Branzburg. Powell stated that the reason the assertion of a qualified testimonial privilege from grand jury investigation was rejected was on the ground that "the largely speculative public interest 'in possible future news about crime from undisclosed, unverified sources' could not override the competing interest 'in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.'" Id. at 858, quoting Branzburg v. Hayes, 408 U.S. 655, 695 (1972).
60. 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).
Second Circuit upheld the district court’s refusal to force disclosure\(^{61}\) by a non-party journalist of his confidential source based on the lower court’s finding that plaintiff had made no showing of relevance, necessity\(^{62}\) or that disclosure of the source went to the heart of his claim.\(^{63}\) Hence, a compelling need was not proven and the claim of privilege was upheld. A qualified privilege was upheld on similar grounds\(^{64}\) in Democratic National Committee v. McCord.\(^{65}\) Besides those factors articulated in Baker, the court also noted that alternative sources had not been sought out or even approached by the plaintiff.\(^{66}\)

The decisions in these and other non-libel cases\(^{67}\) have consistently applied a compelling need test and have held that where the individuals subpoenaed were not parties to the underlying action, where the parties made no adequate showing of materiality and relevancy, where alternative sources for obtaining the information were not exhausted or where the information sought did not go to the heart of plaintiff’s claim, the public interest in an unfettered press will generally prevail in the form of a testimonial privilege. Under such cir-

sought an order to compel disclosure of a journalist’s source who had described various discriminatory real estate practices. \textit{Id.} at 779-80.

61. \textit{Id.} at 781.
62. \textit{Id.} at 784.
63. \textit{Id.} at 783.
64. 356 F. Supp. 1394 (D.D.C. 1973). In McCord, the federal district court quashed a subpoena that had been issued to several non-party reporters, newspapers and magazines requesting that they produce any and all information in their possession which related to the Watergate break-in. \textit{Id.} at 1395. In granting a qualified privilege, the court emphasized that the subpoenaed groups were not parties to the proceeding, that there was no showing of materiality and that the information sought did not go to the heart of plaintiff’s claim. \textit{Id.} at 1397-98.
65. \textit{Id.} at 1397-99.
66. \textit{Id.} at 1398.
67. See, e.g., Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975). This case involved a civil action brought by a plaintiff suffering from permanent disabilities that resulted from the use of an anaesthetic drug. In this suit filed against the manufacturer of the drug, both the patient and manufacturer moved to compel the non-party publisher of a medical newsletter to reveal the source of an article containing facts and documentation of reported deaths from use of the drug. Here, as in Baker and McCord, the competing interests of a free and untrammeled press prevailed because the parties could not show that they were unable to obtain the information from any other sources, \textit{id.} at 80-81, nor could they prove that the documentation was “essential to the resolution of the judicial controversy.” \textit{Id.} at 82. The court also noted that: “In a libel case, unlike other civil actions, the reporter or publication is a \textit{party} to the suit. Moreover, the identity of the source may be crucial to the claim or defense.” \textit{Id.} (emphasis added). \textit{See also} Loadholtz v. Field, 389 F. Supp. 1299 (M.D. Fla. 1975) (privilege denied on the grounds that plaintiff had not exhausted alternative sources); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (disclosure limited to instances where the government can demonstrate a compelling state interest); Forest Hills Util. Co. v. City of Heath, 302 N.E.2d 593 (Ohio Ct. C.P. 1973) (court granted a non-party reporter a privilege where it found that information sought was not relevant to the underlying proceeding).
cumstances, requested third party materials are of little consequence
in the face of a potential chilling effect on the press and its sources. 68
The assertion of a testimonial privilege in a libel case, however,
presents a more complex situation. While it is generally conceded
that the need to safeguard open and robust debate is of great impor-
tance, Sullivan and its progeny have not negated completely the
societal interest in preserving the integrity of an individual’s reputa-
tion. 69 More importantly, the newsperson is usually a party-
defendant in these libel proceedings thus making the information
sought quite relevant to plaintiff’s burden in proving actual malice.
These factors have the effect of tipping the scales in favor of disclo-
sure and denying the claim of a testimonial privilege.

These elements were present in Carey v. Hume, 70 a libel case, in
which the District of Columbia Court of Appeals affirmed a lower
court’s decision which granted plaintiff’s discovery motion to compel
disclosure of defendant’s sources for a news article. The court con-
cluded that the information sought from defendant-newspaper did go
to the heart of plaintiff’s libel claim 71 and further found that the
identity of the newspaper’s sources was most critical to the case. 72
The court also noted the repeated citation to Garland in post-Sullivan
cases which “suggests the continuing vitality of . . . [Garland] and
negates any inference that the Court does not consider the interest of
the defamed plaintiff an important one.” 73 Courts in other libel

68. See, e.g., Democratic National Committee v. McCord, 356 F. Supp. 1394, 1397
69. See note 106 and accompanying text infra.
70. 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974). In Carey, the news item
in question had charged that the plaintiff, who was general counsel to the United Mine Work-
ers, and the union’s president, had surreptitiously removed documents from union headquarters
during a federal investigation of its financial affairs. Id.
71. Id. at 636 (footnote omitted).
72. Id. at 637. As to the matter of exhausting alternative sources, the court found that due
to the imprecision of defendant’s own information and the impracticability of deposing all
the employees of the UMWA, it would not force the litigant to take on “wide-ranging and onerous
discovery burdens when the path is as ill-lighted as that emerging from [defendant’s] deposi-
tion.” Id. at 639. It is unclear whether Carey is suggesting a new standard. Since these actions
are decided on a case-by-case analysis, Carey may only be attributing some flexibility to the rule
that parties must exhaust alternative sources before trying to compel a journalist to reveal his or
her confidences.
73. Id. at 635 & n.5. Branzburg, and especially Justice Powell’s pivotal concurring opinion,
not only left undisturbed but in fact endorsed the particularized test used in Garland. But see
J., dissenting) (claiming that Garland would have been decided differently if it had been a
post-Sullivan decision).
cases have gone as far as not to recognize any form of a testimonial privilege for the news media.\footnote{4}

These civil cases clearly show that the compelling need test first proposed by Justice Stewart in \textit{Garland} and reiterated in \textit{Branzburg} \footnote{5} now appears to be the well established approach in balancing the competing interests presented in these cases. Because of the greater degree of difficulty in meeting this test by plaintiffs in non-libel cases, a qualified privilege is usually granted. However, libel cases present a different set of competing interests and a privilege is not so readily recognized. Moreover, in view of the complaining party's burden of proving actual malice, the identity of a reporter's confidences and the information itself often times goes to the heart of plaintiff's claim.

\footnote{4} In one case, the Massachusetts Supreme Judicial Court's previous decision in \textit{In re Pappas}, see note 31 supra, was relied upon in Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973), to again show its reluctance to grant a journalist's privilege. Although the court agreed that \textit{Branzburg} was not controlling, it noted that the denial of a testimonial privilege in \textit{Pappas} applied to the entire judicial process and was therefore not limited to criminal proceedings. \textit{Id.} at 320, 303 N.E.2d at 849. \textit{But see Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973)} where the court stated: "[T]o compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity." \textit{Id.} at 993 n.10. The rule in \textit{Cervantes} is designed to prevent the initiation of libel suits merely for the purpose of requiring disclosure of sources. \textit{See also Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969). aff'd per curiam, 449 F.2d 306 (9th Cir. 1971)} (holding that there shall be no disclosure of sources where there is little or no probability of success under \textit{Sullivan}).

The court in \textit{Dow Jones} also distinguished \textit{Baker v. F&F Investment}, see notes 60-63 and accompanying text \textit{supra}, by pointing out that the deponent was a party to the proceeding and that the information was central to the plaintiff's claim whereas in \textit{Baker}, neither of these facts was true. The court also pointed out that unlike New York, where the suit in \textit{Baker} had been brought, there had been no shield law enacted in Massachusetts. Moreover, as in \textit{Baker}, there was no finding that the judge in the court below had abused his discretion. \textit{But see Lando, 568 F.2d at 978 n.12, where the Second Circuit noted that its decision did not rely upon the New York or Illinois shield statutes.}

Similarly, in Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977), the court refused to grant a newspaper publisher and a reporter a qualified privilege. Here the court cited the majority opinion in \textit{Branzburg} to support its conclusion that no journalist's privilege, protecting them from divulging confidential sources, exists under the First Amendment in either a qualified or absolute form.

Both \textit{Dow Jones} and \textit{Caldero} are unique in that they expand rather than limit the holding in \textit{Branzburg} to encompass litigation in civil actions. While neither case acknowledges Justice Powell's concurring opinion, the court in \textit{Dow Jones} does refer to factors of the compelling need test. One possible reason why \textit{Caldero} did not discuss the test was its conclusion that the First Amendment does not recognize any testimonial privilege thereby negating any need to apply it.\footnote{5} See note 47 and accompanying text & note 48 \textit{supra}.
ANALYSIS OF THE COURT’S DECISION

While the facts in Lando can be distinguished from those discussed in the privilege cases above, in that Lando is not seeking to protect a confidential source or confidential information per se, the analysis of competing interests and application of the compelling need test are quite relevant. Although Judge Kaufman followed their lead by taking note of Justice Powell’s concurring opinion in Branzburg to support his conclusion that the Supreme Court had acknowledged a testimonial privilege for the newsmedia, his cursory treatment of the subject area completely glossed over the limited nature of the privilege as discussed in testimonial privilege cases decided subsequent to Branzburg. In these cases, as noted above, a decision to grant a privilege was made only upon a finding that the compelling need test was satisfied. At no time does the Second Circuit even refer to this test, much less analyze whether its requirements were met. In doing so, the majority opinion either rejected the compelling need test, or simply felt its application to be unnecessary since it decided to grant an absolute rather than a qualified privilege for the editorial process. In light of its decision in Baker which applied the test, it is more likely that the court may have incorrectly felt the analysis was unnecessary.

Another possible explanation for the court’s exclusion of this approach and its decision to grant an absolute privilege is that if the Second Circuit had actually applied the test, it would have been hard pressed in justifying a grant of such a broad privilege in this case. Not only is Lando a party to the libel proceeding, but on its face, Herbert’s request had satisfied the requirements of materiality, relevancy and an inability to obtain the information from alternative sources. In addition, it cannot be denied that Lando’s state of mind during the preparation of the “60 Minutes” program goes to the heart of Herbert’s defamation action.

A second analysis which the majority opinion seems to have overlooked pertains to those rules governing the scope of pre-trial discovery. As noted before, the federal rules allow broad discovery of

76. See notes 58-75 and accompanying text supra.
77. Judge Oakes, in his concurring opinion, comments on the test in selecting an appropriate level of protection for the editorial process, but only after he concludes that the privilege is recognized under the First Amendment. 568 F.2d at 994 (Oakes, J., concurring). He also claims that the compelling interest test applied in Baker and Garland does not control in Lando because the issues involved did not pertain to the editorial process. Id.
79. See notes 40-44 and accompanying text supra.
materials which may affect a party's presentation and organization, which are at all relevant to the subject matter of the case, or which might lead to other discoverable evidence. Furthermore, discovery motions on review are not usually reversed unless the appellate court finds that the district court has abused its broad discretion.80

Nowhere in Lando is this point ever discussed despite the fact that Judge Haight's decision not to grant a privilege for the editorial process was overturned.81

Safeguarding the Editorial Process

In addition to Branzburg, Judge Kaufman relied upon two other Supreme Court decisions to hold that the editorial process must be as equally safeguarded82 as the "constitutional protection afforded the

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80. The Ninth Circuit recently declared that: "'Relevance' on discovery has a very broad meaning . . . and the question is for the district court." Heathman v. United States Dist. Ct. for Cent. Dist. of Cal., 503 F.2d 1032, 1035 (9th Cir. 1974). See also Borden Co. v. Sylk, 410 F.2d 843, 845 (3d Cir. 1969); Tiedman v. American Pigment Corp., 253 F.2d 803, 806 (4th Cir. 1958).


81. Upon receipt of Herbert's request to produce documents for inspection, see FED. R. Civ. P. 34. Lando and CBS objected to the number of requests as well as to certain questions which fell into five categories as grouped by the court of appeals:

1. Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

568 F.2d at 983. Lando contended that answers to these inquiries were protected from disclosure under the privilege afforded the editorial process under the First Amendment. Upon his refusal to turn over documents or answer questions coming within the ambit of this privilege, Herbert filed a motion requesting the district court to force Lando to release this information. On the district court level, Judge Haight ruled in favor of Herbert's Rule 37(a) motion, see FED. R. Civ. P. 37(a), refusing to acknowledge a discovery privilege for the editorial process. He held that as a result of a public figure's high burden in proving actual malice under Sullivan, the court should allow broad discovery of defendant's state of mind. 73 F.R.D. 387, 385-96 (S.D.N.Y. 1977).

82. 568 F.2d at 978.
dissemination and acquisition of information." 83 In the first of these cases, Miami Herald Publishing Co. v. Tornillo, 84 plaintiff grounded his suit on Florida's 'right to reply' statute 85 after newspaper-defendant refused to provide equal space in response to an editorial which was highly critical of his candidacy for public office. The Florida Supreme Court reversed the circuit court which had held the statute unconstitutional as an infringement upon the press. 86 In doing so, the court argued that free speech was actually enhanced by the statute and was "designed to add to the flow of information and ideas" and not as "an incursion upon First Amendment rights . . . ." 87

On appeal, the Supreme Court framed the issue as whether editors or publishers could be compelled to publish that which "reason tells them should not be published." 88 In an unanimous opinion reversing the lower court's decision, Chief Justice Burger wrote:

[The Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the functions of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitation on the size and content of the paper, and treatment of public issues—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. 89

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83. Id.
85. FLA. STAT. ANN. § 104.38 (West 1970) provides in part:
   If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election . . . or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such a reply, provided such reply does not take up more space than the matter replied to.
87. Id. at 82.
89. Id. at 258 (footnote omitted) (emphasis added). "A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what should be printed." Id. at 259 (White, J., concurring). In holding this governmental "intrusion" unconstitutional the Court at no time used a balancing approach even though such an approach was advocated by appellee. See Note, 88 Harv. L. Rev. 174, 178 n.31 (1974). It has been suggested that the reason for this exclusion is that the Supreme Court "sees no legitimate role for the government in rectifying private censorship. . . ." and in viewing compulsory access statutes as a type of prior restraint, such statutes will be held presumptively invalid. Id. See Emerson, The Doctrine of Prior Restraint, 20 L. & CONTEMP. PROB. 648 (1955).
The second case relied upon by Judge Kaufman to support his assertion that the First Amendment protects the editorial process was Columbia Broadcasting System, Inc. v. Democratic National Committee. In that decision, with Chief Justice Burger again writing for the Court, it was held that neither the First Amendment nor the Communications Act of 1934 requires broadcasters to accept paid political advertisements. A plurality of the Court concluded that a licensee could adhere to the fairness doctrine by providing a more comprehensive means of presenting a balanced treatment of important issues than that provided for by editorial advertising. In addition, the Court pointed out that this policy determination was fundamentally a matter of journalistic judgment to be exercised in the licensee’s capacity as “private entrepreneur.” The particular importance of this case as it relates to Lando, is the Court’s observation that “[f]or better or for worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided.”

From the discussion of these two cases, Judge Kaufiman concludes that the thrust of Tornillo and CBS is a desire to “encourage, and protect against encroachment, full and candid discussion within the newsroom itself.” However, by limiting these two cases to their facts, Judge Kaufman’s reliance on Tornillo and CBS seems misplaced. Neither case speaks to the assertion of a privilege from compelled disclosure of a party-defendant’s confidences in a libel suit.

92. Based upon the principle that the “airwaves” belong to the public and not only to private licensees, the fairness doctrine mandates that a broadcaster provide adequate coverage to public issues as well as to fairly represent opposing views. See Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968); Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768 (1972).
94. Id. at 118-19.
95. Id. at 124-25.
96. 568 F.2d at 979. Judge Oakes is even more explicit:
    Tornillo and Columbia Broadcasting recognize the inviolability of the editorial function. As such they reflect a keen judicial recognition of the role of the press in American society and its need for protection, a trend that has been evidenced by practically solid judicial response in favor of protection.
    Id. at 988-89 (Oakes, J., concurring).
much less his or her state of mind. They stand for the proposition that the Supreme Court will not condone governmental compulsion of public access to newspapers and the broadcast media. And, as noted by Judge Meskill in his dissenting opinion in Lando, neither of these two cases propose that intrusions into the decision-making process of editors are prohibited under the First Amendment.

Furthermore, the distinction between legislative and regulatory control and judicial intervention is crucial. The governmental interferences with which Tornillo and CBS were concerned was the passage of statutes and regulations which attempted to establish control over the actual content of publications and broadcasts. What was particularly objectionable in these cases was that the intrusions were of an editorial and political nature, thereby forcing editors to provide access to views over which they had no control. While the purpose of the statutes was to provide public access to the media, the fear instilled by the sanctioning of such laws is that they are seen as the first step towards direct governmental control over editorial functions.

Lando, on the other hand, involved judicial review of a discovery motion specifically provided for in the Federal Rules of Civil Procedure. As pointed out before, district court judges are given broad discretion in determining the proper scope of discovery and are only reversed when the appellate court finds that this discretion has been abused. More importantly, Lando involves a private action which

98. As used by many recent commentators, "right of access" refers to the theory that broadcast licensees may not refuse on mere policy grounds to accept editorial advertisements. Whether the right is based on the Constitution or on statutory provisions and to what degree it is limited by the rights of broadcasters to control what is transmitted over their assigned frequencies are matters of intensive debate. See, e.g., J. Barron, Freedom of the Press for Whom?: The Right of Access to Mass Media 126-303 (1973); Jaffe, supra note 91, at 780-92; Note, A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access, 39 Geo. Wash. L. Rev. 532, 561-67 (1971).
99. It is interesting to note that the cases Judge Kaufman chose to support the need to acknowledge an absolute privilege for the editorial process so as to maintain a "marketplace of ideas" are cases which actually limit that concept. Proponents of the access doctrine argue that as a result of the media monopolies which exist in this country, not only is the flow of disparate viewpoints constricted, but the failure of the courts to compel access to the news media has the combined effect of sounding the death knell for the "marketplace" concept. Cases such as Tornillo and CBS, it is argued, merely promote this continued constricting of the interchange of ideas.
100. 568 F.2d at 997 (Meskill, J., dissenting).
101. But see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), where the Court upheld the constitutional validity of an ordinance which had prohibited the use of sex-based help-wanted advertisements.
seeks only to hold a producer responsible for an alleged defamatory television program. Neither this libel action nor the district court’s decision to allow discovery into Lando’s state of mind seek to control the editorial content of decision-making process as did the statutes in Tornillo and CBS. Despite these significant differences between governmental and judicial “intrusions,” the court in Lando drew no distinction between them and in fact equated the two.102

THE DISRUPTIVE IMPACT OF THE LANDO DECISION

During the past fourteen years, since the decision in New York Times Co. v. Sullivan,103 the Supreme Court has established and maintained a delicate balance between the media’s right to criticize and an individual’s right to be protected from defamatory remarks. The burden placed upon a public figure to prove with “convincing clarity”104 that the statements made were knowingly false or were with reckless disregard of the truth has been established to promote the First Amendment guarantee to uninhibited discussions of public issues. Furthermore, the Court has refined the element of reckless disregard by formulating a subjective test in order to determine the state of mind of the individual with respect to the truthfulness of his or her published statements.105 This further refinement, however, has yet to abrogate the right to protect one’s reputation and self-integrity. Sullivan did not erect an absolute privilege to publish defamatory statements about public figures. While it indeed made recovery more difficult, it did not relieve the press from its responsibility to the public or from exposure to suit.106

102. 568 F.2d at 982 (Oakes, J., concurring). But see discussion in note 107 infra.
104. Id. at 285-86.
105. In Lando, Judge Kaufman discussed this “evolving” standard and stated: “The opinions applying these additional constraints do so in recognition of the constitutional safeguards cloaking the press, and the need to protect editors and broadcasters. They speak with the same voice as do CBS and Tornillo.” 568 F.2d at 979. See Edwards v. National Audubon Society, 556 F.2d 113 (2d Cir. 1977); Buckley v. Littel, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

In another concurring opinion Justice Brennan remarked that while “the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.” Nebraska Press Ass’n. v. Stuart,
The Lando court’s conclusion that “the ratio decidendi for Sullivan’s restraints on libel suits is the concern that the exercise of editorial judgment would be chilled,”107 effectively disrupts the balance of competing interests previously reached by Sullivan and its progeny. By creating an absolute privilege for the editorial process, the court has precluded from discovery direct proof of a defendant’s state of mind. The result is to alter significantly the substantive law of libel by imposing an even greater burden on plaintiffs in their attempt to

427 U.S. 539, 588 (1976) (Brennan, J., concurring). See also Goldwater v. Ginsberg, 414 F.2d 324, 337 (2d. Cir.), cert. denied, 396 U.S. 1049 (1969) where the Second Circuit observed: “Repetition of another’s words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports.” Id. at 337.

107. 568 F.2d at 980. The basic thrust of the Court’s argument is that the decision in Lando merely reflects the spirit and scope of protection afforded the press under the First Amendment as enunciated in previous Supreme Court decisions. After setting forth a historical and judicial development of freedom of the press, Judge Kaufman stated: “The acquisition of newsworthy material stands at the other pole of the press’s function. Freedom to cull information is logically antecedent and necessary to any effective exercise of the right to distribute news. Indeed, the latter prerogative cannot be given full meaning unless the former right is recognized.” 568 F.2d at 977.

Implicit in this freedom to cull information is the essential element of human judgment which must constantly probe, investigate and eventually “transform the raw data of reportage into a finished product.” Id. at 978. It is this element of human judgment which the court is seeking to protect, because it believes that to allow unrestricted discovery into the thought processes of an editor made during the preparation of a news piece is to “put a freeze on the free interchange of ideas within the newsroom.” Id. at 980. The Court went further to point out that: “A reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the sine qua non of responsible journalism.” Id. at 980. Moreover, the Court argues that this chilling effect would indirectly subvert the constitutionally protected right to gather information as well as impede the necessary day-to-day editorial decisions which form the heart of the editorial process.

Judge Oakes, in his concurring opinion, offered a varied and more in depth analysis in reaching the same conclusion as the majority opinion that the editorial process should be absolutely privileged. Like Judge Kaufman, he indiscriminately cited the journalist privilege cases to suggest “by analogy that other First Amendment limitations on discovery in Sullivan cases may be similarly appropriate.” Id. at 986 (Oakes, J., concurring). Judge Oakes also relied upon Tornillo and CBS to conclude that the editorial process is inviolable and “entitled to special protection...” Id. at 988.

The heart of Judge Oakes’ argument is his assertion that liberal and unrestricted discovery into the functions of editors acts as a prior restraint in the news media. The doctrine of prior restraint presumptively invalidates governmental censorship of the news in advance of its publication or distribution to the public. Id. at 989 n.18. While the decision as to the scope of discovery in a libel suit does not take place until after the alleged defamatory remarks are made, Judge Oakes contends that “[t]he broad discovery order in this case operates after publication to deter editorial choice concerning subsequent publications. Because the order operates as a prior restraint... it should be presumed invalid.” Id.

According to Judge Oakes, this presumption of invalidity becomes even more compelling when viewing freedom of the press as a First Amendment protection of a structural entity
prove actual malice. The court in Lando, however, maintained that it had not altered the balance struck by Sullivan. It was careful to point out that Lando had been very cooperative in pre-trial discovery by turning over volumes of material and information pertaining to the creation of the Herbert segment and that the jury could still infer, based on this material, whether or not Lando had defamed Herbert. Yet to equate the quantity of available evidence with the quality of evidence needed to meet the issue of subjective proof is to deny the plaintiff the very evidence that is needed to support his or her burden of proving actual malice.

The Second Circuit’s decision to grant an absolute rather than a qualified privilege was motivated, in part, by its concern that if a plaintiff is allowed to select only those facts of a reporter’s mental process which are advantageous to his or her position, the threat of distorting the editorial process then becomes very real. The Federal Rules of Evidence, however, protect against such selective inquiry by enabling a party to introduce evidence to clarify that which was taken out of context. Under the decision in Lando, the situation is now reversed. A libel defendant is now free to selectively reveal those intentions, opinions and conclusions which are helpful to his case. The plaintiff, however, is prohibited from inquiring into the defendant’s

versus that of an imprecise concept. Relying exclusively on a speech given to the Yale Law School by Justice Stewart, Judge Oakes claims that the Supreme Court has distinguished a free press from free speech so as “to create a fourth institution outside the Government as an additional check on the three official branches.” Id. at 988, quoting Stewart, “Or of the Press,” 26 Hastings L.J. 631, 634 (1975).

Judge Oakes further claims that a “chilling effect” similar to that which results from prior restraints will similarly result from unbridled discovery of the editorial process. This leads Judge Oakes to assert that:

Uninhibited discovery into the motivation of the editor in a libel action poses precisely the same danger sought to be avoided by the landmark cases which have established the prior restraint as hornbook constitutional law. Accordingly, the principles underlying the doctrine necessitate the application of the Free Press guarantee to protect the independence of the press against such discovery.

Id. at 990.

108. In his district court opinion, Judge Haight wrote:

If the malicious publisher is permitted to increase the weight of the injured plaintiff’s already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished.

Nothing in the First Amendment requires such a result.


109. 568 F. 2d at 984.

110. Id. at n.23.

111. See Fed. R. Evid. 106.
state of mind so as to put into perspective that evidence revealed by
the defendant. Moreover, by finding this privilege to be constitut-

ional in nature, the plaintiff is precluded from relying upon the fed-

eral rules as a remedial measure.

A final criticism of the Lando decision is that in establishing an
absolute privilege, the court set no real guidelines as to what ac-

tivities the editorial process encompasses.112 Taken to its logical ex-

tremes, the amorphous concept of an “editorial process” could possi-

bly subsume the entire publishing process. Lando was the editor of
the Herbert segment but he was also the reporter whose investiga-

tive efforts culminated in the “60 Minutes” program at issue in this suit.
The question arises, at what point in time do the functions of a
reporter end and those of an editor begin? In this instance, they were
really one and the same. This potential spillover effect into the ac-

tivities of a reporter not only complicates any attempt by future
courts to establish reasonable bounds for the “editorial process,” but
could also effectively foreclose any real possibility for recovery in a
defamation action.

CONCLUSION

On its face, the First Amendment argument set forth by the Sec-

ond Circuit is appealing. The decision, however, is based more upon
constitutional extrapolation than it is upon precedent. The trilogy of
Branzburg, Tornillo and CBS, upon which the court relies so heavily,
is clearly distinguishable from the facts in Lando. Furthermore, not
only does the court fail to engage in any real analysis of the journalist
privilege cases, it conveniently avoids a balancing of interest and
compelling need approach by suggesting that the First Amendment
provides for an absolute rather than a qualified privilege for the
editorial process.

Moreover, the privilege asserted by Lando was distinctly different
from the testimonial privilege asserted by reporters to protect confi-
dential sources. Here, Lando wanted to preclude from pre-trial dis-

112. Judge Oakes, however, does attempt to define the boundaries of the editorial process:
The obvious starting point, however, is the Chief Justice’s delineation in Tornillo:
“The choice of material to go into the broadcast, the decisions made on the dura-
tion and content of the broadcast, and treatment of public issues and public offi-
cials - whether fair or unfair - constitute the exercise of editorial control and judg-
ment.” Thus, Tornillo mandates that the mental processes of the press regarding
choice of material, duration and content of the broadcast are to be protected from
scrutiny.

568 F.2d at 995 (Oakes, J., concurring) (citation omitted).
covery that which goes to the very core of this defamation action, that is, his state of mind. Requiring a public figure to show that the defendant "in fact entertained serious doubts as to the truth of his publication"113 is to force the public figure-plaintiff to delve into the mind of the alleged defamer114 in order to sustain his or her burden of proving actual malice as mandated by Sullivan. To deny discovery of facts which would reveal a libel defendant's state of mind, because of a possible chilling effect, is to effectively disrupt the balance of competing interests previously established by Sullivan.115

The Second Circuit's recognition of an absolute privilege for the editorial process is surely a quantum leap in the area of libel. Furthermore, since the court found that the privilege existed within the ambit of the First Amendment, it is arguable that the privilege is not limited to libel cases but applicable to other civil and criminal cases as well. That the decision in Lando may have exceeded itself is reflected by the fact that the United States Supreme Court has granted Herbert's

114. As pointed out by Judge Haight:

The second species of unprotected false statements is at once more subtle, complex and subjective. The concept of 'reckless disregard for truth' inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish.

115. Judge Meskill remarked in his dissenting opinion:

Under New York Times v. Sullivan, 376 U.S. 254 (1964), he may prevail if he proves that the defendants acted with 'actual malice' that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind - their thoughts, beliefs, opinions, intentions, motives and conclusions - to the light of judicial review. Obviously, such a review has a 'chilling' or deterrent effect. It is supposed to. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent that it is already being chilled as a result of the very review permitted by New York Times v. Sullivan. The majority's attempt to eliminate or reduce that chill is supportable in neither precedent nor logic.

568 F.2d at 995-96 (Meskill, J., dissenting).

One case has already chosen to apply the holding in Lando. In Jenoff v. The Hearst Corp., No. H75-692 (Jan. 20, 1978), the plaintiff Leonard Jenoff filed a libel suit in the United States District Court of Maryland. During pre-trial discovery Jenoff requested the court to allow him to continue the deposition of an employee of the defendant who claimed that certain information in a letter was privileged under the editorial process. While the court held in an oral opinion that the deponent had waived any privilege he might have had by answering questions candidly in a previous deposition, the court also stated "that if this case did squarely present the question as to whether Herbert should apply, my answer would be no. . . . The Supreme Court cases cited in Herbert v. Lando do not, in my opinion, recognize any such privilege in a case of this sort. I would agree completely with the dissent of Circuit Judge Meskill. . . ." Id. at 6.

568 F.2d at 995-96 (Meskill, J., dissenting).
petition for certiorari. While the Court may use this decision as a means to further clarify and refine previous constitutional doctrine or to espouse a new approach altogether, it would seem that as to the privilege issue, the Court at best should recognize only a qualified privilege for the editorial process thereby forcing the lower court to at least apply the compelling need test. Given the Supreme Court’s treatment of those issues affecting the press in recent cases, it is questionable whether the Court would be willing to go even this far.

Michael R. Callahan

117. See, e.g., Zurcher v. The Stanford Daily, 98 S. Ct. 1970 (1978). In this case, the Court held that neither the First nor Fourth Amendments forbade law enforcement officials from obtaining warrants to search the possessions of any non-suspect third parties so long as there existed probable cause to believe that evidence of a crime could be found at a specific location. The Court made this decision despite a unanimous claim by the media that such searches of newspaper offices would severely inhibit the functioning of the press.