IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.01-20745

IN RE: GRAND JURY SUBPOENAS

PETITION FOR A REHEARING EN BANC

Mike DeGeurin
Foreman, DeGeurin, Nugent & Gerger
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655 9000 Telephone
(713) 655 1812 Facsimile

Federal I.D. No. 3558

ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

IN RE: GRAND JURY SUBPOENAS

PETITION FOR A REHEARING EN BANC

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. All individuals are from Houston, TX.

1. Vanessa Leggett — Petitioner-Appellant
2. Mike DeGeurin — Attorney for Petitioner-Appellant
3. Terry Clark — Assistant U.S. Attorney- Appellee
4. Edward Gallagher — Assistant U.S. Attorney- Appellee
5. Paula Offenhauser — Assistant U.S. Attorney- Appellee

Mike DeGeurin, Attorney for Petitioner

BASIS FOR PETITION EN BANC

The panel's opinion conflicts with the United States Supreme Court's decision in *Branzburg v. Hayes,* 408 U.S. 665 (1972) and consideration by the full Court is necessary to secure and maintain uniformity under binding precedence. In addition, this proceeding involves questions of exceptional importance, including:

Whether it is error for a District Court to refuse to conduct any balancing of interests, required under *Branzburg,* when assessing a claim of First Amendment privilege?

Whether a government's subpoena that compels production of "any and all" copies of a journalist's research violates the First Amendment when compliance would prevent the journalist from writing and publishing her work?

Whether the panel's holding, that it does not recognize a balancing test when assessing a qualified privilege under the First Amendment for confidential information in criminal cases– an issue of first impression for the Fifth Circuit– conflicts with decisions of the First Circuit, *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); the Second Circuit, *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1983) and the Third Circuit, *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980)?

Whether a subpoenaed witness must confess guilt in order to invoke a Fifth Amendment privilege against self-incrimination when refusing to testify before a grand jury?

Mike DeGeurin, Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

STATEMENT OF THE ISSUES

Is it error for a court to refuse to conduct any balancing of interests when a journalist asserts a qualified First Amendment privilege to refuse to disclose confidential sources?

Is there a qualified privilege for journalists under the First Amendment to resist a grand jury subpoena requesting confidential materials?

Must a subpoenaed witness confess guilt in order to invoke her Fifth Amendment privilege against self incrimination?

STATEMENT OF THE CASE

A.Proceedings Below

On July 19, 2001, U.S. District Court Judge Melinda Harmon held freelance journalist, Vanessa Leggett, in civil contempt after Ms. Leggett refused to reveal her confidential source information in response to a grand jury subpoena.

Ms. Leggett was served with identical grand jury subpoenas—on June 20 and July 18, 2001. Both required Ms. Leggett to provide testimony and to produce an unspecified number of tapes and transcripts on one day's notice. Ms. Leggett's claims of constitutional privilege and procedural defects, in response to the subpoenas, were rejected by Judge Harmon in a July 6th hearing on Ms. Leggett's Motion to Quash and a government-initiated contempt hearing on July 19, 2001.[1] As a result, the Court ordered Ms. Leggett to be incarcerated on July 20, 2001 as a recalcitrant witness.

Ms. Leggett's motions for stay or bond pending appeal were denied both by the District Court and a two-judge panel of this Court. Oral argument on Ms. Leggett's expedited appeal was heard by a Fifth Circuit panel on August 15, 2001. On August 17th, the panel by *per curiam* opinion affirmed the District Court.

B. Statement of the Facts

Vanessa Leggett is a reporter and author[2] who has conducted four years of research throughout six states for a book on the "Robert Angleton murder case". Mr. Angleton was tried and acquitted of capital murder in a Texas state court in August, 1998. After his acquittal, the U. S. Attorney's office for the Southern District of Texas instituted an investigation of him for similar charges.

The F.B.I began its efforts to seek information from Ms. Leggett in July of 2000. In November 2000, the FBI tried to recruit Ms. Leggett as a secret investigator by offering her a confidential informant contract, which included oral promises of financial gain, but also required her to notify the FBI before disseminating or publishing her book or any of her materials. Ms. Leggett respectfully declined the offer. She believed that working for the government as a secret informant would impair her ability to research and write as an independent investigative reporter and did not want the government or the F.B.I. restricting the dissemination of her book.

A month later, Ms. Leggett was served with a federal subpoena that required her to testify before the grand jury. Ms. Leggett complied, relying on the F.B.I.'s promise that she would not be asked to reveal her confidential sources or confidential information. That promise was honored when she testified.

She continued to work on her book until June of 2001, when the government, without warning and apparently without authority from the Attorney General[3], served her with a new grand jury subpoena that compelled her to produce the following items:

"**Any and all** tape recorded conversations, **originals and copies**, of conversations you had with the following individuals, [34 people listed] or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, **and all transcripts** prepared from those tape recordings:" [Emphasis added.]

Ms. Leggett hired an attorney and filed a Motion to Quash. On July 6, 2001, the District Court denied the motion reasoning that there is no qualified privilege for journalists to protect confidential sources in the Fifth Circuit, at least not since *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). Ms. Leggett filed a *pro se* Motion to Reconsider on July 16th.

An identical subpoena was again served on Ms. Leggett on July 18, 2001 directing her to appear before the grand jury the next morning. At 11:00 p.m., the night she was served, Ms. Leggett hired her present attorney. Ms. Leggett appeared as directed, but refused to produce the requested materials or disclose her confidential sources asserting her First and Fifth Amendment privileges. The Assistant U.S. Attorney, in recognition of Ms. Leggett's Fifth Amendment privilege, produced an "informal letter" for use immunity. When Ms. Leggett continued to assert her privileges, the government applied to the Court to hold her in criminal contempt.

The District Court judge was frank in her need for guidance during the contempt proceedings, when she stated, "[b]eing unfamiliar with this process, having never done this before and needing to rely upon the experience of all the attorneys here..." (July 19, 2001 HG, TR p. 44). What resulted was a one-sided series of events in which the government improperly lead the Court to hold Ms. Leggett in "criminal" contempt (later clarified in the Court's order as "civil contempt") without a meaningful hearing where "just cause" defenses and mitigation would have been raised and argued.[4] The contempt hearing did not include any balancing of the interests of the public to a free press, asserted through Ms. Leggett's First Amendment claim, and further, did not address Ms. Leggett's contention that the informal offer of partial use immunity was insufficient to remove her Fifth Amendment privilege.[5]

The Court went on to deny Ms. Leggett's' *pro se* Motion to Reconsider without argument and held her in contempt— ordering her to be incarcerated the next day. The District Court denied a stay and bond pending appeal.

THIS COURT SHOULD GRANT AN EN BANC REHEARING

I. It is error for a District Court to refuse to conduct any balancing of interests when a journalist asserts a qualified First Amendment privilege not to disclose confidential sources and information.

A qualified privilege for news gatherers under the First Amendment means there is a balancing test conducted on a case by case basis. *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972). Here the district court failed to conduct *any* balancing of interests when assessing Ms. Leggett's claim of qualified journalistic privilege. En Banc consideration of the panel's opinion, that affirmed the lower court's decision, is necessary in order to recognize *Branzburg* as binding precedence.

The balancing test that forms the basis for a journalist's qualified privilege arises from Justice Powell's concurring opinion in *Branzburg* which states:

> The asserted claim of privilege [by a journalist] should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. 408 U.S. at 710 (Powell, J., concurring).

Here, the District Court improperly reasoned there was no qualified privilege for journalists to protect confidential sources in criminal cases and therefore, it erred when it refused to balance competing societal and constitutional interests based on the merits of this case. The Court denied Ms. Leggett's First Amendment claim without developing and weighing any particularized facts which in turn, prevented the panel from properly applying the *Branzburg* balancing test before ruling on her appeal.

Acceptance of either court's practice would erroneously amount to a finding that

the public's interest in prosecution always prevails over their right to a free press. This is clearly not the recognized standard. *Branzburg* demands that the interests be balanced.

Therefore, it was also improper for the District Court to limit review of Ms. Leggett's First Amendment rights solely to relief from government harassment. Journalists, like any other witness, already possess the right, irrespective of the First Amendment, to challenge a subpoena on the basis of government harassment or bad faith under the Federal Rules of Criminal Procedure 17(c).[6] The qualified privilege recognized under *Branzburg* guarantees protections beyond those of a procedural nature, as was evidence when the court said: "[t]he Court does not hold that newsmen, subpoenaed to testify before the grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709. It is the balancing test— asserted through a newsperson's claim of qualified constitutional privilege— that serves to protect the public's First Amendment right to be informed.

No where is the need for a balancing test more apparent than when the government issues a subpoena that compels "**any and all . . . originals and copies**" of four years of a journalist's investigative research, as is the case here. The panel erred by failing to

recognize that the government's subpoena goes far beyond collecting information sufficient for the grand jury to execute its investigatory function. By seizing all copies of Ms. Leggett's journalistic interviews, without any justification, the government will effectively prevent Ms. Leggett from writing her book and substantiating her accounts to a publisher. More importantly, the government will be preventing Ms. Leggett from disseminating her book to the public, thereby denying the public their right to a free and independent press. The Court's faulty decision, to not balance whether the government's subpoena infringed on First Amendment rights, deserves the full Court's review. There is no reason why Ms. Leggett should have been denied copies of her own work.[7]

Branzburg makes it clear that its balancing test does not include allowing state and federal authorities to "annex" the news media as "an investigative arm of the government" and yet, that is exactly what occurred in this case. 408 U.S. at 709. The F.B.I. went so far as to offer Ms. Leggett a *confidential informant contract,* in order to gain access to her research which included oral promises of financial gain and also required notice to the F.B.I before she disseminated her work to the public. When Ms. Leggett refused their repeated requests, the government subpoenaed all of her investigative interviews, including all copies. The government's exhaustive efforts to make Ms. Leggett "an investigative arm of the government" by exploiting the very fact that she is a journalist and attempting a wholesale seizure her four years of research materials was not weighed by the district court, and therefore not by the panel, either under the balancing test or Ms. Leggett's claim of government harassment. The panel's actions failed to satisfy *Branzburg* and its opinion should be reversed.

The court should find it especially alarming, that Ms. Leggett has now lost her liberty in a case where the government has admitted they do not even know what they are looking for when they subpoenaed her research. During the July 19, 2001 contempt hearing, Prosecutor Terry Clark admitted that the subpoena itself was "unspecific" and that he was unsure of the participants or the content of the interviews he was demanding. July 19, 2001, HG, TR p. 25, 30-31. Although the powers of the grand jury are broad, they do not allow for this type of arbitrary "fishing" expedition. *United States v. R. Enterprises,* 498 U.S. 292, 300 (1991). Similarly, they cannot be used solely for pre-trial discovery or trial preparation. *See United States v. Star,* 470 F.2d 1214 (9th Cir. 1972).

It is clear that the Court in *Branzburg* did not intend the District Court to carry the sole burden of conducting a "case by case" review of all claims of qualified privilege. The Supreme Court contemplated "that the bulk of disagreements and controversies between press and federal officials" would be handled internally by the U.S. Attorney General through the Department of Justice's own regulations regarding subpoenas to the press. 408 U.S. at 707; *See* 28 C.F.R. § 50.10. The regulations mandate federal prosecutors attempt "to strike the proper balance" between the public's right to know and the public's interest in effective law enforcement when compelling a journalist's information. [8]

Whether or not the government has conducted its own balancing test, before subpoenaing information from the press, has been a factor specifically weighed by not only the Supreme Court, but by this circuit as well. [9] *See U.S. v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) ("A single subpoena issued only after considered decision by the Attorney General . . . is no harassment.") The District Court erred in this case when it failed to balance issues such as whether the public's interest in effective law enforcement included an interest in the government following its own internal laws. Further, the Court failed to assess whether the government's omission was indicative of harassment.

Aside from the government's *own* regulations, the balancing test under *Branzburg* also does not allow the government to compel a journalist's *confidential* source information without first demonstrating a "legitimate need." 408 U.S. at 710. Here the Court erred by never inquiring into the issue of confidentiality, let alone whether the government had a recognized need for the wholesale seizure of all of Ms. Leggett's research. Additionally, it did not inquire how the government could legitimately justify seizing Ms. Leggett's interviews with their own agents on the basis that "they didn't want to be embarrassed" when their agents testified at trial.[10]

No one disputes that a journalist's ability to promise confidentiality is an important tool in gathering the truth. *Branzburg's* "legitimate need" test helps distinguish that confidential information deserves extra consideration under its balancing test. It is well recognized that confidentiality is the heart of the freedom of press.

This court has also placed greater weight on confidential information when balancing First Amendment claims of journalistic privilege. In *United States v. Smith,* 135 F.3d 963, 969 (5th Cir. 1998) this court distinguished confidentiality as being "critical to the establishment of privilege." Yet, whether a qualified journalistic privilege is recognized in criminal cases involving confidential information is an issue of first impression for the Fifth Circuit.[11]

The First, Second and Third Circuits have all recognized a qualified privilege in criminal cases, under *Branzburg*, where a journalist has been compelled to disclose confidential materials. *See United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1983) and *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980). Further, in *In re Williams*, 766 F.Supp. 358, 370-71 (W.D.Pa. 1991), *aff'd by equally divided court,* 963 F.2d 567 (3rd Cir. 1992) (en banc) it

was held that the government failed to overcome a three- pronged qualified news gatherer's privilege against compelled disclosure of confidential news sources before a federal grand jury.

This Court has recognized a similar three-pronged qualified journalist's privilege involving confidential material in *Miller v Transamerican Press*, 621 F.2d at 726 (5th Cir. 1980), where it found that such a privilege can only be defeated where the litigant has demonstrated 1) the information was relevant; 2) it cannot be obtained by alternative means; and 3) there was a compelling interest in that information. *See also In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). In *Smith*, this court ruled that the *Miller* test did not apply in criminal cases where "non-confidential" and "off the record" information was at issue. This is clearly not the situation here. Since confidential information is involved in this case, the balancing test under *Branzburg* should also include the *Miller* standard.

II. A subpoenaed witness does not have to confess guilt in order to invoke a Fifth Amendment privilege against self-incrimination.

Under the Fifth Amendment, a witness may resist not only testimony but also the production of personal documents that may by incriminating. Ms. Leggett asserted her Fifth Amendment privilege based on a reasonable fear of self- incrimination, or in other words, a good faith basis, thereby requiring the government to secure immunity under 18 U.S.C. §§ 6001 et al.

Of course, a witness need not confess guilt to any crime, or even be guilty of any crime, to properly invoke the Fifth Amendment. Here, the District Court focused not on whether Ms. Leggett had a legitimate concern to invoke the Fifth Amendment— but on whether the government had properly immunized her and removed that concern. The District Court's decision, thus, was based on the erroneous conclusion that the prosecutor's offer of a unilateral letter of "immunity" was equivalent to Section 6001 et al. Immunity, however, can be granted only (1) by following the requirements of Section 6001 et al; or (2) by a mutually agreed letter or contract between the government and the witness, and not by a rejected offer of an "immunity letter." The validity of a letter agreement is determined by contract law - arms length bargaining, a meeting of the minds on the essential terms of the agreement and acceptance without coercion . Here the government said either you agree to the terms of the letter or we will ask the court to jail you for criminal contempt . An important difference between statutory/formal immunity and informal immunity is that the latter is not binding upon the States. This follows from the fact that the local prosecutor representing the State is normally not a party to the agreement between the witness and the federal prosecutor, and thus, cannot be contractually bound by the federal prosecutor's agreements. This distinction is especially important in this case where the government recognized that Ms. Leggett may need additional state immunity if she made non-

consensual recordings of conversations outside the state of Texas. *See July 19, 2001, HG, TR p. 35.* [12] Yet, the government refused to seek statutory or state prosecution immunity, unless Ms. Leggett gave incriminating details supporting her asserted privilege. Ms. Leggett was not properly immunized and for this reason alone, the order of contempt should be vacated and Ms. Leggett released.[13]

III. Conclusion

It is respectfully requested that this Court accept review of this petition and allow Ms. Leggett to be released on bond pending its consideration and/or if this Court were to decide that this case should be remanded to the lower Court. *See* 28 U.S.C. § 1826*; In re Brummitt,* 608 F.2d 640, 644 (5th Cir. 1979). (Requirements of 18 U.S.C. § 1826 and "fundamental fairness" required contempt case to be remanded to allow presentation of defenses and/or mitigation for proper consideration.)

Respectfully submitted,

Mike DeGeurin,
Foreman, DeGeurin, Nugent & Gerger
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655 9000 Telephone
Federal I.D. No. 3558

CERTIFICATE OF SERVICE

I, Mike DeGeurin, certify that today, September 7, a copy of the Petition for Hearing En Banc, and the Appendix was sent by U.S. Mail to Paula Offenhauser, Terry Clark and Edward Gallagher, Assistant U.S. Attorneys at 910 Travis, 15th Floor, Houston, Texas 77002.

_____
Mike DeGeurin

[1] Ms. Leggett's *pro se* Motion for Rehearing was also denied on July 19, 2001.

[2] Ms. Leggett has previously received media credentials from *Texas Monthly* and the *Houston Press*. She has also been published by *Newsweek* and the F.B.I.

[3] The Department of Justice has issued a statement of policies to its attorneys restricting the issuance of subpoenas to members of the news media. 28 C.F.R. §50.10. The policy requires that prior to subpoenaing a member of the press, an assistant U.S. Attorney must seek the Attorney General's express authorization for the subpoena.

[4] Review of the transcript clearly shows that adequate notice and time to prepare, as was repeatedly requested by the defense, would have aided the proceeding, giving counsel and the Court time to research the appropriate procedures to be used and allowing both parties to properly litigate their issues.

[5] The prosecutor acknowledged that his informal immunity letter was not the same as statutory immunity pursuant to 18 U.S.C. §6001, et. seq., but mistakenly thought the difference was that the letter did not offer transactional immunity.

[6] Fed. R. Crim. P. 17(c) stated in relevant part: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." Ms. Leggett continues to also assert that the subpoena violated this rule.

[7] The government's earlier attempt to control the dissemination of her book by contract failed when Ms. Leggett rejected the confidential informant contract. Seizing by grand jury subpoena, all of her interviews both originals and copies would of course delay the writing of her book. And surely, her incarceration for resisting the subpoena has stopped the book from being disseminated to the public altogether, "[a]n inmate currently confined in an institution may not be employed or act as a reporter or publish under byline." Department of Justice- Federal Bureau of Prisons, P.S.1480.05 § 540.60(3)(d).

The *Branzburg* majority found it important to point out that the cases under its consideration (Branzburg, Hayes and Pappas) did not involve the element of *prior restraint.*

"But these cases involve 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." 408 U.S. at 681; 92 S.Ct. at 2657.

Surely Ms. Leggett's "right to publish without prior governmental approval" (Near v. Minnesota, 283 U.S. 697, 51 S.Ct.625 (1931); New York Times Co. v. United States, 403 U.S. 713; 91 S.Ct. 2140 (1971)) is a given and should have been part of a proper balancing analysis by the district court.

[8] Its policy statement reads: "Because the freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." 28 C.F.R. § 50.10

[9] Although the regulations state that they are "not intended to create or recognize any legally enforceable right," courts have relied on the regulations to quash subpoenas for prosecutors' failure to abide by them. *See In re Williams*, 766 F. Supp 358, 370-71 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3rd Cir. 1992) (en banc); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982); *Maurice v. NLRB*, 7 Media L. Rep. (BNA) 2221, 2224 (S.D. W. Va. 1981), vacated on other grounds, 691 F.2d 182 (4th Cir. 1982). Rejecting the regulations own limitation, the courts have found that "[g]overnment agencies must follow their own regulations when important individual constitutional rights are affected, even if such regulations are more rigid and strict than required by law." *Maurice*, 7 Media L. Rep. (BNA) at 2224. In *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), the court held that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."

[10] Ms. Leggett's testified that she was told by F.B.I. agents that they were seeking her interviews with members of law enforcement "because they didn't want to be embarrassed" when their agents testified at trial. *See* July 6, 2001, HG, TR p.17-18.

[11] *Smith* clearly limited its holding to nonconfidential information. *"We conclude that newsreporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases."* Smith, supra, at 972.

[12] The subpoena requests all taped interviews "either with or without their consent." Additionally, the mere possession of surreptitious interception and recording devices may also be a violation of federal law under 18 U.S.C. § 2512. It remains questionable whether the prosecutor's informal immunity letter would be binding on federal prosecutors outside of the Southern District of Texas.

[13] The need for immunity was especially important here. The Fifth Amendment protects against production of tapes or notes, when the act of production is testimonial. *Fisher v. United States,* 425 U.S. 391, 408, 96 S.Ct. 1569, 1579 (1976). As this Court has explained:

[T]he testimonial component involved with order for production of documents "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. ... A defendant is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness. There would then be testimonial compulsion.

In re Grand Jury Subpoena (Kent) 646 F.2d 963, 968 (5th Cir. 1981). See also U.S. v. Doe, 465 U.S. 605, 612-13 (1984) (act of production of items covered by Fifth Amendment, establishes that the papers exist, are in the witness' possession or control, and are authentic.)