IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-85

PAUL M. BRANZBURG - - - - *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - *Respondent*

AND

PAUL M. BRANZBURG - - - - *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

REPLY BRIEF FOR PETITIONER, PAUL M. BRANZBURG

I

The Amicus Brief of the United States suggests that the Petitioner is guilty of misprision of a felony by failing to disclose knowledge of an alleged crime

(p. 7). This statement indicates so basic a misunderstanding of the law that this reply is necessary.

Misprision of a felony, as defined by the authorities cited by the United States, is "a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after commission. . . ." 15A C.J.S., *Compounding Offenses,* § 2(2). Generally, something more than mere silence is necessary for one having knowledge of a felony to be guilty of the criminal neglect necessary for misprision. For example, under the federal statute cited by the United States, 1 Stat. 112, 18 U.S.C. §4, an essential element of the crime is that the defendant take some affirmative act to conceal the crime of the principal. *Lancey* v. *United States,* 356 F. 2d 407 (9th Cir. 1966), *cert. denied,* 385 U. S. 922; *Neal* v. *United States,* 73 F. 2d 795 (10th Cir. 1934); *United States* v. *Farrar,* 48 F. 2d 515 (D. Mass. 1930), *affirmed* 281 U. S. 624.

Nor is failure to report knowledge of a crime a violation of Kentucky law. The conduct of a person in failing to give warning of a crime threatened may be reprehensible but he is under no legal duty to prevent it. *Elmendorf* v. *Commonwealth,* 171 Ky. 410, 188 S. W. 483 (1916). "The mere knowledge that a crime has been committed and failure to tell of it does not make one an accessory after the fact." *Elmendorf* v. *Commonwealth, supra,* at 489.

Contrary to the government's assertion, the petitioner had no duty to disclose his knowledge of any criminal acts. Any argument based on this fundamental misunderstanding of the law must fail.

II

In addition, the Amicus Brief states that "it is important for the Executive and the Congress to know the extent of their responsibilities under the Constitution in this field" (p. 3). The Amicus then proceeds to argue that the question as to whether there should be a reporter's privilege and the extent of that privilege is for Congress to decide rather than the courts.

This position taken by the United States is difficult to understand. That it is the responsibility of the courts to interpret the Constitution needs no citation of authority, and it is clear that in the instant case the issues involved are issues arising under the Constitution of the United States. Furthermore, if it is important for the Executive and the Congress to know the extent of their limitations under the Constitution in this area, as the Amicus argues, then it is for this Court to decide those constitutional limitations, not the Congress or any other legislative body.

III

The Amicus Brief of the United States makes another interesting observation.

> The area of potential clash between law enforcement agencies and the claimed reporter's privilege is, therefore, a narrow one. It is largely confined, as the cases presently before this Court illustrate, to situations where reporters have witnessed or may have witnessed events which have a bearing on the commission of a crime (p. 7).

This observation, considered together with the fact that the primary purpose served by the First Amendment, "the widest possible dissemination of information from diverse and antagonistic sources . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945), will be seriously endangered if the asserted reporter's privilege is not recognized, compels the conclusion that there is little to gain but much to lose if a reporter's First Amendment privilege not to divulge confidential information is not recognized by this Court. The need of the grand jury to investigate criminal activities cannot be harmed to any significant extent by recognition of this privilege, since "the area of potential clash" is "a very narrow one." But it is clear that the harm done to the freedom of the press by the forced disclosure of confidential communications, or by the forced appearance of a reporter before a secret grand jury investigation, will be substantial.

Furthermore, the Amicus attempts to point out that the possibility that a reporter may be called upon to divulge his sources of information has not hampered news reporting in the past.

> The fact remains that the news gathering process has functioned effectively and efficiently in this country for almost 200 years without benefit of the special protection sought in these cases (p. 6).

But this statement ignores two important facts. First, until recently, the so-called "danger" that a reporter might be called upon to divulge his sources of information has been remote at best, and was never clearly

threatened as it is today. Secondly, the Amicus ignores the fact that many stories have reached the press solely due to the fact that anonymity has been promised the source by the newsgatherer. *See,* Guest and Stanzler, *The Constitutional Argument For Newsman Concerning Their Sources,* 64 Nw. L. Rev. 18 (1969). The actions of the Jefferson and Franklin County Grand Juries, if upheld, will make such assurances meaningless in the future, with the result that news will be withheld due to the valid fear of the source of such news that his identity will be forcibly discovered.

Respectfully submitted,

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