

Testimony
United States Senate Committee on the Judiciary
Reporters' Shield Legislation: Issues and Implications
July 20, 2005

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In the United States Supreme Court, Mr. Levine has argued *Harte-Hanks Communications, Inc. v. Connaughton* on behalf of the newspaper defendant, and *Bartnicki v. Vopper* on behalf of the media defendants. He has litigated in the courts of more than 20 states and the District of Columbia and has appeared in most federal courts of appeal and in the highest courts of ten states. He is the author, along with Professors C. Thomas Dienes and Robert Lind, of the 1000-page treatise *Newsgathering and The Law* (Lexis Law Publishing 2d ed. 1999), and has written several articles, including *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 *Geo. Wash. L. Rev.* 13 (1988) (with M. Langley) and *Broken Promises*, *Colum. Journalism Rev.*, July/Aug. 1988 (with M. Langley).

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Introduction

Mr. Chairman, and Members of the Committee. Thank you for inviting me to testify today. At the Committee's request, I will address recent developments regarding the so-called "reporters' privilege" in the federal courts, the historical record concerning the role that confidential sources have played in the reporting of news, and the experience of the States with respect to their recognition of a journalist's right to maintain a confidential

relationship with his or her sources.

Recent Developments Regarding The Reporters' Privilege

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*, subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were rare. It appears that no journalist was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed. An unusually large number of subpoenas seeking the names of anonymous sources has been issued by federal courts in a remarkably short period of time to a variety of media organizations and the journalists they employ. Indeed, three federal proceedings in Washington, D.C. alone have generated subpoenas seeking confidential sources to roughly two dozen reporters and news organizations, seven of whom have been held in contempt in less than a year. By way of comparison, the last significant survey of news organizations conducted in 2001 by The Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential source identities issued from any judicial or administrative body that year, federal or state.

There appear to have been only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and in both, the subpoenas were quashed. Yet in the last four years, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history. In 2001, writer Vanessa Leggett served nearly six months in prison for declining to reveal sources of information related to a notorious murder, almost four times longer than any prison term previously imposed on any reporter by any federal court. Earlier this year, James Taricani, a reporter for WJAR-TV in Rhode Island, completed a four-month sentence of home confinement for declining to reveal who provided a videotape to him that captured alleged corruption by public officials in Providence. And, on July 6, Judith Miller of The New York Times was incarcerated for declining to reveal the identities of her confidential sources in response to a grand jury subpoena and it now appears that she will remain in prison for at least four months. Decisions such as these appear to have encouraged private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in similarly unprecedented fashion. In one pending civil suit, four reporters employed by The New York Times, Los Angeles Times, Associated Press and CNN have been held in contempt for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who claims such information was provided to them by government officials in violation of the Privacy Act. Contempt proceedings are currently pending against a fifth reporter in the same case. The five reporters in the Lee case include two Pulitzer Prize winners. And, in the wake of the success of Dr. Lee and the Special Counsel in the Judith Miller case, the plaintiff in another civil suit alleging violations of the Privacy Act, Dr. Steven Hatfill, issued subpoenas earlier this year to a dozen news organizations seeking to compel an even larger number of reporters to disclose the identities of their confidential sources.

The Importance of Confidential Sources

Congress and the public should be concerned about the imposition of such severe

sanctions against journalists for honoring promises of confidentiality because such sources are often essential to the press's ability to inform the public about matters of vital concern. The uncertainty that has now developed regarding the existence and scope of a reporters' privilege in the federal courts threatens to jeopardize the public's ability to receive such information. As the Supreme Court has recognized, the press "serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials." The historical record demonstrates that the press cannot effectively perform this constitutionally recognized role without some confidence in its ability to maintain the confidentiality of those sources who will speak only on a promise of anonymity.

There can be no real dispute that journalists must occasionally depend on anonymous sources to report stories about the operation of government and other matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in part on anonymous sources. While there is healthy debate within the journalism profession about the appropriate uses of anonymous sources, all sides of that debate agree that confidential sources are at times essential to effective news reporting.

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern. As WJAR reporter James Taricani testified before being sentenced to house arrest:

In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.

Indeed, Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president.

Pierre Thomas, recently held in contempt in the Wen Ho Lee case, recounted many similar examples in his testimony in that litigation. For example, information received from confidential sources enabled Mr. Thomas to report on the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles."

Confidential sources are not only critical to investigative journalists like Messrs. Taricani and Thomas, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. Without the ability to speak off the record to sources in the government who are not

officially authorized to do so, there is substantial evidence that reporters would often be relegated to spoon feeding the public the “official” statements of public relations officers. For this reason, among others, news reporting based on confidential source material regularly receives the nation’s most coveted journalism awards, including the Polk Awards for Excellence in Journalism and the Pulitzer Prize.

The history of the American press provides ample evidence that the information anonymous sources make available to the public through the news media is often vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. While the Washington Post’s “Watergate” reporting is perhaps the most celebrated example of journalists’ reliance on such sources, as the recent identification of W. Mark Felt as “Deep Throat” reminds us, there are countless other compelling examples of valuable journalism that would not have been possible if a reporter could not credibly have pledged confidentiality to a source. Consider the following examples:

Pentagon Papers – The Pentagon’s secret history of America’s involvement in Vietnam was, of course, leaked to The New York Times and The Washington Post. In refusing to enjoin publication of the leaked information, several members of the Supreme Court noted that the newspapers’ sources may well have broken the law, and they were in fact prosecuted, albeit unsuccessfully, after later coming forward. Nevertheless, as Justice Black emphasized at the time, “[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do,” and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.

Neutron Bomb – Journalist Walter Pincus of The Washington Post relied on anonymous sources in reporting that President Carter planned to move forward with plans to develop a so-called “neutron bomb,” a weapon that could inflict massive casualties through radiation without extensive destruction of property. The public and congressional outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it. Mr. Pincus, who never received a subpoena concerning the neutron bomb or any other matter in his distinguished, decades-long career, has recently received two—one from the Special Counsel in the Valerie Plame matter and one in the Wen Ho Lee case.

Fertility Fraud – In 1996, the Orange County Register received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor. The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic. The disclosure of these records to the Register may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, “prompted the American Medical Association to rewrite its fertility-industry guidelines,” and instigated legislative action.

Enron – In a series of articles published in 2001, the Wall Street Journal relied on confidential sources and leaked corporate documents to reveal the illegal accounting practices of a corporation that had “routinely made published lists of the most-admired and innovative companies in America.” Among other things, confidential sources

provided the Journal with “confidential” information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company’s investors.

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for The New Yorker, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq. Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was “not meant for public release,” CBS and Mr. Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only “on the condition that they not be identified because of concern that their military careers would be ruined.”

BALCO – In 2004, the San Francisco Chronicle published details of grand jury testimony given by some of the most prominent athletes in professional sports, part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports. Baseball players Barry Bonds and Jason Giambi and other prominent athletes testified before the federal grand jury investigating the distribution of undetectable steroids by the Bay Area Laboratory Cooperative (“BALCO”). In some instances, their testimony was at odds with their public denial of steroid use. While the Chronicle’s sources may have violated grand jury secrecy rules, the newspaper’s reporting led to congressional hearings on steroid use in Major League Baseball as well as a decision by its Commissioner to tighten rules regarding the use of banned substances.

Needless to say, the prospect of substantial prison terms and escalating fines for honoring promises to sources threatens this kind of journalism. As New York Times reporter Jeff Gerth, another Pulitzer Prize-winning reporter who was held in contempt by the trial court in the Wen Ho Lee case has testified:

Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality. . . .

Or as Los Angeles Times reporter and Pulitzer Prize recipient Bob Drogin, also currently in contempt of a federal court, testified in the Lee litigation:

I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist.

Indeed, in the wake of the judicial decisions about which I have spoken this morning, the Cleveland Plain Dealer recently decided that it was obliged to withhold from publication two investigative news stories because they were predicated on documents provided to the newspaper by confidential sources. Doug Clifton, editor of the newspaper, has explained that the “public would be well-served to know” these stories, but that

publishing them “would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn’t an option and jail is too high a price to pay,” Mr. Clifton explained to his readers, “these two stories will go untold for now. How many more are out there?”

State Law Recognition of The Reporters’ Privilege

The situation that currently exists in the federal courts has not been replicated in the States. In fact, forty-nine states and the District of Columbia recognize some form of reporters’ privilege. Of those jurisdictions, thirty-two have enacted “shield laws.”

Although these statutes vary in the degree of protection that they grant to journalists, they “rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest.”

Indeed, the Attorneys’ General of thirty-four states and the District of Columbia – each of whom is, by definition, ultimately accountable for the enforcement of the criminal law in their respective states – also recently filed a “friend-of-the-court” brief urging the Supreme Court to recognize a federal reporters’ privilege. In their brief, the Attorneys’ General noted that the States “are fully aware of the need to protect the integrity of the factfinding functions of their courts,” yet they have reached a nearly unanimous consensus that some degree of legal protection for journalists against compelled testimony is necessary.

Perhaps most significantly, the experience of the States demonstrates that shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, criminal or civil. As the Attorneys’ General have explained, a “federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect” serves to undermine “both the purpose of the [States’] shield laws, and the policy determinations of the State courts and legislatures that adopted them.” Indeed, the Attorneys’ General have aptly observed that [t]he consensus among the States on the reporter’s privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. . . . These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an “uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

The experience of the States is by no means unique. Particularly in other democratic nations that consider freedom of speech and of the press to be an essential liberty, there is a clear consensus that the protection of journalists’ confidential sources “is one of the basic conditions for press freedom.” Perhaps most notably, the European Court of Human Rights has held that requiring a journalist to disclose confidential sources of information, in the absence of an “overriding requirement in the public interest,” violates Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. “Without such protection,” the court explained, “sources may be deterred from assisting the press in informing the public in matters of public interest.”

Here in the United States, journalists have heretofore looked to the Supreme Court to address the confusion that now surrounds the scope and application of the reporters’ privilege in the federal courts. The Court, however, has consistently declined to intervene, most recently in the context of the Miller and Cooper cases. As a result, it has

now been more than thirty years since the decision *Branzburg v. Hayes*, the first and last time the Supreme Court addressed this important issue.

In *Branzburg* itself, Justice White's opinion for the Court indicated that recognition of a reporters' privilege might more naturally fall within the province of the Congress. "At the federal level," Justice White wrote, "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate."

More recently, in his opinion in the *Miller and Cooper* cases, Judge Sentelle of the U.S. Court of Appeals for the District of Columbia expressed the similar view that "reasons of policy and separation of powers counsel against" the courts exercising whatever authority they may possess to recognize a reporters' privilege as a matter of federal common law. Instead, Judge Sentelle recommended that "those elements of the media concerned about this privilege[] would better address those concerns to the Article I legislative branch ... [rather] than to the Article III courts."

Conclusion

The recent surge in the number of subpoenas, the increase in the severity of contempt penalties, and the lack of clear guidance concerning the recognition and scope of a reporters' privilege in the federal courts, will almost certainly restrict the ability of the American public to receive information about the operation of its government and the state of the world in which we live. There is, therefore, now a palpable need for congressional action to preserve the ability of the American press to engage in the kind of important, public-spirited journalism that is often possible only when reporters are free to make meaningful commitments of confidentiality to their sources.