Reporter Privilege: A Con Job or an Essential Element of Democracy
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Two widely divergent cases in recent months have given the public some idea as to what exactly reporter privilege is and whether it may or may not be important in guaranteeing the free flow of information in society. Whether it's important or not depends on point of view, and, sometimes, one's political perspective.

The case of San Francisco Giants baseball star Barry Bonds and the ongoing issues with steroid use fueled one case in which two *San Francisco Chronicle* reporters were held in contempt and sentenced to 18 months in jail for refusing to reveal the source of leaked grand jury testimony. According to the testimony, Bonds was among several star athletes

public reinforces the reporter's determination to resist commands of the government which interfere with that obligation."[7]

This special role without portfolio for the press has been the starting point for many discussions and no doubt much of the modern resentment toward the media expressed by the public. While states typically license everything from doctors to barbers and from plumbers to chiropractors, any discussion of the licensing of journalists has historically been met with vigorous opposition and the notation of "make no law" firmly placed in the First Amendment. Journalists need no particular education, no specific training and need pass no exam to work in any media position in the United States. Yet the modern media is widely perceived as being one of the most powerful institutions in the United States.

There have long existed privileges from disclosure of information. The privileges between physician and patient, clergy and parishioner, lawyer and client, and husband

Novak: "Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me that Wilson's wife suggested sending him to Niger to investigate the Italian report."[11]

Miller and Matt Cooper, a reporter for *Time* magazine, also were told by White House officials that Plame worked for the CIA. Under federal law, identifying a CIA operative can be a crime. Wilson claimed that the White House identified his wife in retaliation for

the media have been damaged and whether the fundamental relationship between government and the media has changed.[15] Ultimately, after an investigation that lasted almost three years, no one was indicted for the leak of Valerie Plame's name, but Libby was indicted on charges of lying to federal prosecutors during the investigation. He was convicted and sentenced to 30 months in prison. President Bush commuted the sentence, even though he did not grant a full pardon.[16]

Barry Bonds, BALCO and the home run record

The ongoing controversy of the use of performance-enhancing supplements by top athletes as well as the countdown to breaking one of the most revered records in

In March of 2006, Fainaru-Wada and Williams published a book, *Game of Shadows* (Penguin Group), detailing alleged steroid use by Bonds. Subpoenas were issued to the reporters in May to appear before a grand jury and disclose sources for the stories written about BALCO and steroid use among athletes. The reporters refused to comply and were held in contempt. They were sentenced to 18 months in jail, and the *San Francisco Chronicle* was fined $1,000 a day. By early 2007, 24 states and 36 major news organizations had filed briefs on behalf of the reporters. House Speaker Nancy Pelosi of California asked Attorney General Alberto Gonzales to drop the subpoenas. The case against the reporters ended in February when a lawyer, Troy Ellerman, came forward to admit that he had leaked the grand jury testimony. Ellerman had represented the founder and another official of BALCO. He agreed to a guilty plea involving the disclosure of the grand jury transcripts.[18]

The case of the *The San Francisco Chronicle* reporters dealt with a more common reporter privilege issue—leaked grand jury testimony—than the Judith Miller case. And it was without the ugly political overtones. Even so, questions were raised about granting anonymity to a source that clearly had an agenda in the case. Ellerman had blamed prosecutors for the leaks and then argued that, because of the extensive publicity, his clients could not receive a fair trial. "This question is going to come up more and more: Was this source worthy of giving this degree of confidentiality?" said Jane Kirtley, a professor of media ethics and law at the University of Minnesota. "Some would say the confidentiality rule applies whether the source is sleazy or not. But if you are going to argue for protection for journalists, isn't there some obligation to ask questions about whether it's justified?"[19]

A brief history of reporter privilege

The long-held assumptions by journalists that the First Amendment provided protection from governmental intervention in the newsgathering process took a major hit in 1958 in the case of *Garland v. Torre*.[20] Marie Torre was a columnist for the *New York Herald Tribune* who authored an article on Judy Garland regarding the singer's out-of-work status. Torre quoted an unnamed CBS spokesman as saying that Garland "doesn't want to work. Something is bothering her (and) I wouldn't be surprised if it's because she thinks she's terribly fat."[21] Garland sued for libel and sought to compel Torre to reveal the source of the quote. When Torre refused, she was held in contempt by the trial court. The judge's ruling was upheld on appeal, and the Supreme Court refused to hear the case. The trial judge ordered Torre to jail for 10 days, which she served. Torre was the first

[18] Bob Egelko, "Lawyer admits leaking BALCO testimony," *The San Francisco Chronicle*

reporter to put forth a specific First Amendment defense in an attempt to resist providing information.[22]

Judge Potter Stewart wrote the opinion of the court in *Garland v. Torre* before his nomination to the Supreme Court. The language in the opinion foreshadowed trouble with the reporter privilege argument. Stewart wrote: "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press."[23]

After her appeals failed and she was ordered to serve the time for contempt, Torre seemed to understand well the implications. She had a husband and two small children but was not at all reluctant to go to jail. "I don't feel brave about it," she said. "But it's just easier to serve the period of detention than go for the rest of my life having something like this on my conscience. I would be betraying my entire profession if I revealed my source." [24]

Even though, as noted above, there is a long history of confrontations between the press and government, relatively few incidents occurred before 1970. It is estimated that before 1965 there were only about 40 cases of reporters being held in contempt for refusing to testify.[25] But as journalists began to report on social movements and the civil unrest that marked the 1960s, subpoenas increased rapidly.[26]

A number of factors contributed to the increase in reporter subpoenas and higher profile of the issue in the late 1960s and early 1970s. The Vietnam War provided a major confrontation between government and the press, and the increasing numbers of activist groups, some of them espousing violence, became prime topics for investigative journalism. And reporters were natural sources for government agencies wanting information about the social currents sweeping the nation. "The investigating reporter, whose by-line was prominently displayed, made a particularly tempting figure for government investigators to begin with. He was obviously knowledgeable, articulate, kept notes and other records of his experience—in short, he would make a perfect witness."[27]

And as tensions between government agencies and the press seemed to escalate, particularly with the Nixon Administration, there was another factor that contributed to the tension. "A new aggressiveness crept into journalism, manifesting itself in 'advocacy journalism' as well as in the renewal of the investigative technique. No government likes

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[22] "Jailed & subpoenaed journalists—a historical timeline," First Amendment Center, http://www.firstamendmentcenter.org/about.aspx?id=16896 (accessed October 6, 2007).
[23] *Garland v. Torre*, 548.
[24] Protecting the Source, *Time*, Jan. 12, 1959, http://www.time.com/time/magazine/article/0,9171,937084,00.html.
[25] Teeter and Loving, 643.
[26] Ibid.
[27] Ervin, 244.

to have its failures bandied about in the press, and our recent administrations less than others. But to this aggressive, skeptical press, exposing the failures of government was

served 46 days in jail in 1972 for refusing to disclose a source that leaked a statement relating to the trial of mass murderer Charles Manson. At that time it was the longest that any reporter had served for contempt related to the refusal to disclose sources.[31] Myron Farber would serve 40 days in jail in 1978 and his paper, *The New York Times*, would pay almost $400,000 in civil and criminal contempt fines for Farber's refusal to disclose sources in a lengthy investigation of drug-related deaths in a New Jersey hospital.[32]

Despite Farr, Farber and other skirmishes over reporter privilege, out of the *Branzburg* decision grew sentiment for a qualified reporter privilege that stressed striking the balance to which Powell referred. And several lower-court decisions reached favorable decisions in protecting reporters.[33] Out of Branzburg also came what was called a "gentleman's agreement" involving Department of Justice guidelines that prosecutors would not abuse subpoena power against journalists. These guidelines became part of the Code of Federal Regulations.[34]

The guidelines, first proposed in a speech by Attorney General John Mitchell in August of 1970, seem generous in recognition of the privilege.[35] The guidelines state, "The approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." And in the next part, "All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media."

Perhaps more important, out of *Branzburg* grew general criteria that came to be known as the three-prong test. This test, taken from Justice Stewart's dissent, came to be a standard that had to be met before media could be forced to comply with subpoenas and would be adopted by numerous courts. Stewart began his vigorous dissent by noting the "crabbed view" of the First Amendment held by the majority. He went on: "Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice."[36] And in defining the test, Stewart wrote: "Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought. Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties."[37]

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[31] Teeter and Loving, 667-668.
[32] Ibid, 654-655.
[33] Ibid, 649.
[34] Code of Federal Regulations, Title 28, Section 50.10.
[35] Ervin, 252.
[36] Branzburg, 408 U.S. at 725, 92 S. Ct. at 2671-2672.
[37] Ibid, 408 U.S. at 739-742, 92 S. Ct. at 2679-2680.

issue of most of the subpoenas on broadcasters typically was not confidential sources but rather outtakes, portions of video not used on the air. [42]

Even without a shield law, there was optimism in the 1980s and early 1990s that legal arguments of a privilege based on the First Amendment could prevail. In some cases early on, those arguments did prevail. In 1980, the U.S. Court of Appeals, 5th Circuit ruled in *Miller v. Transamerica Press Inc*. that a reporter's privilege did exist and endorsed the three-prong test. Even though in this case the court ruled that the reporter had to reveal the source, and that the standards had been met by the party seeking the information, there seemed to be agreement on the need for limiting subpoenas against reporters and for establishing a qualified privilege.[43]

A reporter for *The Dallas Morning News* successfully defended the privilege in a 1983 federal case involving a Dallas Independent School District administrator who filed a defamation suit against the district and its officials who made derogatory comments published in the paper. A federal court ordered the reporter, Bruce Selcraig, to identify the sources of the comments. When he refused, he was held in contempt. The 5th Circuit Court of Appeals vacated the trial judge's order, ruling that it was premature and that the administrator could prove publication of the statements without knowing the reporter's sources.[44] The court affirmed the ruling in *Miller* and made it clear that reporter privilege would apply in civil cases involving confidential sources.

A solid ruling followed in state court in 1987 in the First Court of Appeals in Houston in the case of *Channel Two v. Dickerson*.[45] In this case, a subpoena had been issued for materials related to a television news report about a lawsuit between two business partners. The trial court ordered the station to produce the materials. The Court of Appeals ruled in favor of the television

Karem was subsequently subpoenaed to produce materials relating to the interview and testify. When he refused, he was held in contempt and ordered to jail. Lawyers for Karem sought relief in federal court in San Antonio. U.S. Magistrate John Primomo denied Karem's motion, ruling that a First Amendment privilege did not exist.[46] Karem filed application to be heard in the U.S. Supreme Court, but that motion was denied.

The case of two Houston reporters subpoenaed for testimony in a state murder trial produced perhaps some of the strangest circumstances in a reporter privilege case in Texas. The reporters, James Campbell of the *Houston Chronicle* and Felix Sanchez of *The Houston Post*, had interviewed several teen-agers in connection with a double murder that occurred during a graduation party in May 1990. Anonymity was a condition for the interviews. A single suspect, David Charles Taylor, was charged with both murders.

At trial, Taylor's lawyer subpoenaed both reporters. However, both reporters said they were unable to identify the people they interviewed, and both reporters said they had no notes from the interviews. State District Judge William Harmon ordered the reporters to remain in court during the trial and identify any of the witnesses if they recognized them as among those interviewed for the newspaper articles. William Ogden, a First Amendment lawyer representing the *Houston Chronicle*, called the order "ridiculous."[47] In a later interview, Ogden said, "The judge is asking the reporters to sit like watch dogs in the courtroom and bark if they happen to recognize any of the witnesses."[48]

Both reporters refused to cooperate and were fined $500 and ordered to jail for 30 days. Although neither reporter actually went to jail, both were detained during the proceedings in judge's chambers. After the Court of Criminal Appeals refused to hear the case, lawyers for both papers appealed in federal court in Houston. The reporters claimed First Amendment privilege because the defense for Taylor had not met the three-prong test. U.S. Magistrate Nancy Pecht, in Judge Kenneth Hoyt's court, granted relief to the reporters and vacated Harmon's order of jail and a fine.[49] In her opinion, Pecht agreed that Harmon's order was premature and that the three-prong test had not been met. "While this court can conceive of other scenarios in which a reporter's qualified privilege to preserve confidential sources must yield to a defendant's rights to compulsory process and a fair trial, this is not such a case," she wrote.

An equally troubling case with no clear result

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"The Fifth Circuit spent most of the *Smith* decision intensively interpreting *Branzburg*. Specifically, it addressed other circuits' interpretations of the 'enigmatic' Powell concurrence. The court maintained that, contrary to popular interpretation, the concurrence did not advocate a broad qualified privilege in criminal cases. 'Justice Powell's separate writing only emphasizes that at a certain point, the First Amendment must protect the press from government intrusion.' According to the court, Powell believed the breaking point exists 'only when the grand jury investigation is not being conducted in good faith.' The court argued that Powell's concurrence, just as the plurality opinion, only went so far as to emphasize the government's limited subpoena power.

"Moreover, the Fifth Circuit dismissed claims that nonrecognition of the privilege in nonconfidential cases would have an adverse effect on the media's ability to gather news."[56]

A decision in 1998 by the Court of Criminal Appeals provided a crack in the door, albeit a very small one, against the seemingly adamant decision in *Healy v. McMeans*. Lawron Coleman was a member of the Oak Cliff Mafia street gang. He was indicted on a murder charge in the drive-by shooting death of a rival gang member in 1993. Two reporters who had covered gang activity for *The Dallas Morning News* were subpoenaed. At trial, lawyers for the paper were successful in getting the subpoenas quashed. In its first hearing, the Court of Criminal Appeals ruled that the subpoenas should not have been quashed. But on rehearing in *Coleman v. State of Texas*,[57] the court ruled that Coleman had not established that the reporters had any testimony that might help him in his defense. Though not a First Amendment argument, Coleman has provided reporters with a relevance argument in fighting subpoenas at the state level.

Even many journalists and media executives with a hard-line belief in the completeness of the First Amendment had softened on the idea of a shield law by the turn of the century. But another case out of Houston, this one involving a would-be crime writer named Vanessa Leggett, would even further focus state and national publicity on the issue as well as the aggressiveness of both state and federal prosecutors in Texas.

Leggett conducted research and interviews for a book about the 1997 murder of Houston socialite Doris Angleton. She was shot multiple times in the head and chest at the exclusive River Oaks home she shared with her husband, millionaire bookie Robert Angleton. Robert Angleton was accused of paying his brother, Roger Angleton, to commit the murder. Both were charged with the crime. Roger Angleton committed suicide in jail in Harris County in early 1998. Robert Angleton was later acquitted of the crime in a trial in state court, and a federal investigation followed.[58]

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[56] Sherwin, 166.
[57] *Coleman v. State of Texas*, 966 S.W.2d 525.
[58] "Author Lands in Jail for Refusing to Turn Over Notes," Reporters Committee for Freedom of the Press, http://www.rcfp.org/news/2001/0725inregr.html (accessed October 6, 2007).

Robert Angleton would be indicted in 2001 on federal charges of conspiracy, murder for hire and a firearm violation in connection with his wife's death. Leggett was subpoenaed to turn over notes and tapes of the interviews she had conducted. When she refused to comply, a federal judge ordered her to the Federal Detention Center in Houston. She would serve 168 days for refusing to comply with a subpoena.[59] Her detention created new interest in a federal shield law, and both those in Congress and in the media renewed discussions with a seriousness not seen since the years immediately after *Branzburg*.[60]

The Leggett case also created discussion and disagreement about whether she was a journalist; some groups were less than enthusiastic about backing the efforts of a writer not connected with any media organization. The Reporters Committee for Freedom of the Press had no such issue and backed Leggett completely.[61] The Reporters Committee also pointed out that federal authorities took advantage of the ambivalence about Leggett's status in refusing to follow established guidelines about subpoenaing reporters. And in a strange twist, Leggett was subpoenaed only after she refused an offer to work undercover and cooperate with the prosecution. "In other words, they considered her to be a journalist until she refused to become their paid informant. The attorney general and the court system should not let the federal prosecutors in Houston get away with such hypocrisy," wrote Lucy Dalglish of the Reporters Committee for Freedom of the Press.[62]

In the 2007 regular session of the Texas Legislature, a shield law was proposed and again rejected. The bill was still alive in the late days of the legislative session, and many thought it had a realistic chance of passage. In the end, a technical point was raised regarding the analysis that accompanied the bill. Once the point of order was raised, the bill was dead immediately.[63]

Sen. Rodney Ellis of Houston sponsored the shield bill. He had also sponsored the bill in 2005 but pulled it back after it was amended.[64] In his public comments about the bill, Ellis noted that many abuses in government and business had been reported because of anonymous sources. "Some people as whistleblowers will only tell that information to the media," Ellis said.[65]

But the bill has always been opposed by trial lawyers who see the measure as a serious limitation on the amount of information that might be available for legal proceedings. Interestingly enough, a member of the Legislature who has been a journalist and a former radio station owner, Sen. Dan Patrick, also opposed the measure. Said Patrick: "I'm still

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[59] Monica Dias, "Branzburg revisited? Landmark ruling limiting reporter's privilege turns 30, but release of jailed writer sparks call for review," *The News Media and the Law*, Winter 2002, 4-6.
[60] Monica Dias, "Leggett's case revives talk about shield law," *The News Media and the Law*, Winter 2002, 7-8.
[61] Lucy Dalglish, "Real Journalists," *The News Media and the Law*, Winter 2002, 3.
[62] Ibid.
[63] Polly Ross Hughes, "Shield bill fails because of typo," *Houston Chronicle*, May 22, 2007, Sec. B, Page 4.
[64] Janet Elliott, "Patrick helps stop shield bill for media," *Houston Chronicle*, April 20, 2007, Sec. B, Page 1.
[65] Ibid.

concerned that the area where we're dealing with criminal activity and lives may be in danger, that a reporter somewhere for whatever reason, makes a prosecutor go through these extra hurdles to get information and during that period of time someone is being hurt, someone is being killed. And that's my concern with this shield."[66]

The ethics of confidential sources

Earl Caldwell, *The New York Times* reporter in the Branzburg case in 1972, was one of the few outsiders who had gained the confidence of the leaders of the Black Panthers. It was a time in the United States when racial tension remained high and the prospect of street violence continued. Few can argue that it was important for the public to be informed about the workings of groups such as the Black Panthers. *The New York Times*

Polls consistently show the public's doubts about the media's role in American society. There is a marked decline in the credibility that Americans place in media. In a poll conducted by the Pew Research Center for the People and the Press, percentage of those saying they believe most of what they read in their daily newspaper dropped from 84% in 1985 to 54% in 2004. Similar but less dramatic trends are seen by the survey in people's opinions toward network and local television news.[73]

Former CBS Television producer Bernard Goldberg wrote an enormously successful book about media bias that seemed to coincide with rising public anger about media. *Bias: A CBS Insider Exposes How the Media Distort the News*, was a bestseller published in 2002 that quickly became required reading for conservatives who believed

determine whether criminal activity had occurred. In effect, the law would require 'trial before investigation.' Even worse, in cases involving leaks of classified information, the law would require the government to disclose in a hearing the specific damage caused by the leak–information often more sensitive than the leak itself."[76] Fitzgerald also argued that the overly broad definition of a journalist in the federal bill would protect a whole range of potential sources from "charity" organizations fraudulently raising money for groups affiliated with al-Qaeda to child pornographers who communicate over the Internet.

Conclusion

With the recent developments in the Valerie Plame case and the highly partisan debate that ensued, together with Justice Department issues being raised on national security, it becomes difficult to sort out the legitimate need and complex issues relating to reporter privilege. Yet if one acknowledges that the media do have a special role in American society, especially vis-à-vis government as viewed by the Founders, then sorting out the issues becomes essential. There is also the question of whether events of the last few years have indeed impacted the relationship between media and government, with numerous investigations and subpoenas creating a major impediment to the media's ability to report on matters of public concern, especially relating to government.

Norman Pearlstine, the former editor of Time Inc. directly involved in the case of *Time* magazine and Matt Cooper, leaves no doubt as to his belief that the government's aggressiveness in pursuing journalists as sources in investigations has hindered the media's ability to report news. "The indictment of Scooter Libby was a milestone in the Plame-Cooper-Miller story," Pearlstine wrote. "It exposed the Bus-17aLicoTfo0 TDetween -1.h:00 direc

years ago.''[78] *The Times* went on to quote Theodore J. Boutrous Jr., one of the lawyers who represented *Time* magazine in the Cooper case: ""Every tenet and every pact that existed between the government and the press has been broken."

Others see recent developments as simply the continuation of events begun years ago. "I think the situation between the media and government certainly has changed. Making predictions about the future is more perilous," said Bruce Sanford, a noted First Amendment lawyer and partner in the firm of Baker Hostetler in Washington, D.C. "Prosecutors are more willing to sign subpoenas on reporters, and we've seen them used in more civil cases as well. In those kinds of cases the law itself has changed. We began seeing about five years ago a real deterioration in the qualified privilege. We didn't say a lot about it because we didn't want a self-fulfilling prophecy. But I'm not one of the Cassandras saying the sky is falling. The sky fell a number of years ago.''[79]

Jane Kirtley, professor of media ethics and law at the University of Minnesota and former executive director of the Reporter's Committee for Freedom of the Press, says that ethical issues with Miller and two San Francisco Chronicle reporters in the steroids case have damaged the public's perception of media and journalists. And she remains less than completely supportive of a federal shield law. "I'm not