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 who admitted using steroids in the past, although he claimed he did not know at the time the substance he was taking contained steroids.

In the other, *New York Times* reporter Judith Miller served 85 days in jail over her refusal to disclose the source of information that identified a CIA employee, Valerie Plame. The case was complicated with political overtones dealing with the Bush Administration's claims in early 2003 that Iraq had weapons of mass destruction.

A number of other reporter privilege cases were ongoing during the same time period as these two, but the newsworthiness and the subject matter elevated these two cases in terms of extensive news coverage.[1] Particularly in the case of Miller, a high-profile reporter for what arguably is the most important news organization in the world, being jailed created a continuing story that was closely followed by journalists and the public.

Introduction to the Issue

Reporters generally have long believed there is a compelling need to keep confidential certain sources of information, and many believe there is a legal right to do so. The question of reporter privilege is simply this: Do journalists have any right to withhold information about sources when questioned as a part of the legal process? Is there any protection, constitutional or otherwise, that enables journalists to protect the confidentiality of sources used in the reporting process?

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[1] The Reporter's Committee for Freedom of the Press, a non-profit organization based in Arlington, Va., tracks reporter privilege cases as well as other issues relating to the media and the First Amendment. Detailed information on the numerous cases is available at http://www.rcfp.org/shields_and_subpoenas.html.

Currently, 32 states and the District of Columbia have specific statutes that establish at least some degree of protection for journalists. These laws are typically called shield laws, and they vary greatly from state to state.[2] In recent years there has been a move to establish a federal shield law. In October 2007, the U.S. House of Representatives overwhelmingly approved a federal shield law. The measure has passed the Senate Judiciary Committee but awaits action in the full Senate.[3]

The conflict over journalists keeping sources of information confidential has a long history that goes back to colonial times. In 1722, James Franklin, brother of Benjamin Franklin, was publisher of the *New England Courant*. When taken before authorities who sought information about criticism of government published in the paper, James Franklin refused to cooperate and was ordered to jail. Benjamin Franklin was also taken before authorities but received only an admonishment.[4]

James Franklin was in many ways the early prototype of the feisty, crusading newspaper editor. He had clashes with authority of all kinds, including that of the Puritan establishment led by Increase Mather and son Cotton. But it was his criticism and perceived libel of the government that landed him in jail. Though very literate and expressing many of the sentiments of the public against the authorities, the *Courant* declined in popularity, and James Franklin abandoned the paper several years later. After his release from jail, he accepted a position as government printer in Rhode Island.[5]

The basic issue has changed little from James Franklin to Judith Miller. The idea of a press that is independent and with extraordinary freedom to serve as a check on government has roots from the Enlightenment and was a given for the Founders. The Libertarian Theory of the Press, with maximum press freedom and minimal governmental interference, was critical to the Founders in establishing a society where the free flow of information was essential to the concept of self-governance.[6]

Long before journalism schools or even the hint of any ethics or standards for the press, the Founders envisioned a press with a rather special role in society. "Thus, the press, while comprised of ordinary citizens with no special office, has an extraordinary function, tied to the heart of the democratic process. And this peculiar obligation to the

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[2] See the Privilege Compendium on the Reporter's Committee for Freedom of the Press web site, www.rcfp.org/privilege/index.php.

[3] Elizabeth Williamson, "House Passes Bill to Protect Confidentiality of Reporters' Sources," The Washington Post, October 17, 2007, Sec. A, Page 3.

[4] Sam J. Ervin Jr., "In Pursuit of a Press Privilege," 11 Harvard Journal of Legislation 233 (1973-74), 233-234. This piece, authored by the distinguished North Carolina senator who gained fame as the chair of the Watergate hearings in 1973, is an excellent summary of the history of reporter privilege and congressional response to the Supreme Court decision in Branzburg v. Hayes (1972). The author notes in the introduction that the article is "not primarily a legal analysis, but a political one."

[5] Michael Emery, Edwin Emery and Nancy L. Roberts, *The Press and America: An Interpretive History of the Mass Media*, 9th ed. (Boston: Allyn and Bacon, 2000), 25-29.

[6] Fred S. Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press* (Urbana: University of Illinois Press, 1971), 40-44.

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 and wife have their bases in the common law. [8] Even these privileges, however, have limitations. No such privilege has existed for journalists and sources, and case law has provided only limited and sporadic relief for journalists seeking to avoid subpoenas that compel testimony and disclosure of information.

For journalists to put forward the argument that they should have certain rights to resist subpoenas in the legal process–rights not typically granted other citizens–flies in the face of the longstanding position that journalists neither have nor want special privileges.

The Judith Miller case and its impact

The origin of the Judith Miller case can be traced to a line in the State of the Union address by President George Bush in January 2003. Bush, in outlining his case for future action against Iraq, said that Saddam Hussein had sought significant quantities of uranium in Africa. The White House later said that the statement was based on faulty intelligence and should not have been included in the speech.[9]

The previous year, Vice President Dick Cheney's office had contacted former Ambassador Joseph C. Wilson IV about the intelligence report on Iraq seeking nuclear technology. Wilson said the CIA then asked him to go to Niger to investigate. In a widely read piece in *The New York Times* published July 6, 2003, Wilson stated that he had found no evidence of Iraq attempting to buy uranium in Niger.[10]

On July 14, 2003, syndicated columnist Robert Novak published a column claiming that Wilson's wife, who worked for the CIA, had asked that Wilson be sent to Niger. Wrote

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[7] Ervin, 234-235.
[8] Dwight L. Teeter and Bill Loving, *Law of Mass Communication: Freedom and Control of Print and Broadcast Media*, 11th ed. (New York: Foundation Press, 2004), 636.
[9] Eric Lichtblau, "Early doubts about uranium sale to Iraq; '02 memo called deal with Niger 'unlikely,'" *The International Herald Tribune*, January 18, 2006, Sec. News, Page 3.
[10] Joseph C. Wilson 4th, "What I Didn't Find in Africa," *The New York Times*, July 6, 2003, Sec. 4, Page 9.

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 his criticisms of the Bush Administration's claims linking Iraq to attempts to secure nuclear technology.

This background set the stage for a messy debate fraught with politics involving reporter privilege. Patrick Fitzgerald, U.S. attorney for the Northern District of Illinois, was named special prosecutor to investigate the leak. Both Miller and Cooper were among the reporters subpoenaed to appear before a grand jury investigating the leak. Initially, both refused to testify, and the news organizations filed motions to quash the subpoenas. The motions failed, as did appeals to the U.S. Court of Appeals for the District of Columbia Circuit.[12] The Supreme Court declined to hear the case. Ultimately, Cooper testified. Miller refused and spent 85 days in jail before reaching an agreement for limited testimony.

Some reporters were less than enthusiastic about supporting Miller because they believed that she and the *Times* had simply been wrong in the coverage of weapons of mass destruction that seemed to reinforce the Bush Administration's argument for going to war in Iraq. In fact, on May 26, 2004, the *Times* had published an extraordinary statement admitting that its reporting on the weapons of mass destruction had not been as rigorous as it should have been and had tended to rely on questionable sources that should have been subjected to more scrutiny.[13]

Miller eventually became the lightning rod for the controversy, obscuring what many felt should have been a sincere and needed discussion about the role reporter privilege plays in the journalistic process and allowing the media to serve as a check on government. Columnist Richard Cohen stated the case well. "The fury at Miller is ugly and does journalism no good. Whatever her politics, whatever her journalistic sins (if any), whatever the whatevers, she is in jail officially for keeping her pledge not to reveal the identity of a confidential source. (S)he's in jail, upholding a principle that has been an integral part of American journalism for years and years: You don't reveal confidential sources. At the moment, that–not her politics or her reporting or her tempestuousness–is what matters." [14]

And subsequent events in the ongoing investigation, including the conviction of former vice presidential chief of staff I. Lewis Libby, only further fueled questions as to whether

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[11] Robert Novak, "Mission to Niger," *The Washington Post*, July 14, 2003, Sec. A, Page 21
[12] *In Re Grand Jury Subpoena, Judith Miller*, 365 U.S. App. D.C. 13; 397 F.3d 964.
[13] "The Times and Iraq," *The New York Times*, May 26, 2004, Sec. A, Page 10.
[14] Richard Cohen, "Miller in Jail: Principle vs. Politics," *The Washington Post*, August 2, 2005, Sec. A, Page 13.

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 professional sports added to the drama of two *San Francisco Chronicle* reporters who refused to comply with a subpoena. The reporters—Mark Fainaru-Wada and Lance Williams—published stories based on leaked grand jury testimony regarding the Bay Area Laboratory Co-operative (BALCO). The stories reported testimony from baseball players Barry Bonds, Jason Giambi and Gary Sheffield and sprinter Tim Montgomery. Bonds and Sheffield, according to the testimony, said they didn't knowingly take steroids. However, they said, they did take substances that matched prosecutors' descriptions of steroids supplied by BALCO. The testimony was related to an investigation of BALCO begun in 2002 based on a tip that federal agents received that the laboratory was distributing steroids.

At the time of the leaked testimony and the stories in the *San Francisco Chronicle*, Montgomery was a world record-holder in the 100-meter dash. Giambi was a superstar first baseman and designated hitter with the New York Yankees who had played previously with the Oakland Athletics. Sheffield was an outfielder and designated hitter for the Detroit Tigers. Bonds was an outfielder for the San Francisco Giants and was on course to break the all-time Major League home run record of 755 held by Henry Aaron. Bonds broke Aaron's record in August 2007. Because of the allegations of steroid use by Bonds and other baseball stars, baseball fans have anguished over the legitimacy of the record and the legacy that Bonds and other stars of the era ultimately will have in baseball history.[17]

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[15] For an excellent and very readable summary of the events involving Judith Miller and Matt Cooper, see Norman Pearlstine's book *Off the Record: The press, the Government, and the War Over Anonymous Sources*, (New York: Farrar, Straus and Giroux: 2007). Pearlstine is the former editor in chief of Time Inc. and made the decision that Cooper should testify in the Plame case. Though heavily criticized at the time, Pearlstine offers interesting and to some extent valid reasons for his decision. Pearlstine also offers sharp criticisms of modern journalists and cites examples of their often-contradictory conduct on the issue of reporter privilege. Both Miller and Cooper come in for harsh criticism in their reporting practices.

[16] Amy Goldstein, "Bush Commutes Libby's Prison Sentence," *The Washington Post*, July 3, 2007, Sec. A, Page 1.

[17] Dave Sheinin, "Steroids Scandal on Deck for Baseball Hall Voters," *The Washington Post*, July 30, 2006, Sec. E, p. 1. Sports pages and sports talk radio shows continue to be full of argument on whether Bonds' home run record should have an asterisk by it. The debate will no doubt continue as the steroids scandal in baseball and legal issues against individual players, including Bonds, continue with no end in sight.

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

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[18] Bob Egelko, "Lawyer admits leaking BALCO testimony," *The San Francisco Chronicle*, February 15, 2007, Sec. A, Page 1.

[19] James Rainey and Joe Mozingo, "Reporters in BALCO scandal criticized: Journalists' decision to grant anonymity to a source with an ax to grind is questioned," *Los Angeles Times*, February 16, 2007, Sec. B, Page 1.

[20] *Garland v. Torre*, 259 F.2d 545 (1958).

[21] Protecting the Source, *Time*, Jan. 12, 1959, http://www.time.com/time/magazine/article/0,9171,937084,00.html?iid=chix-sphere (accessed October 29, 2007).

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 part of its calling; and it was particularly sensitive to any attempt on the part of government to diminish its prerogatives. Whether or not the 1969-1970 rash of Justice Department subpoenas was part of such an effort, it was certainly perceived as that by the press."[28]

The Supreme Court's decision in *Branzburg v. Hayes* in 1972 was a watershed event in United States journalism. [29] Three separate cases were combined in the Branzburg decision. The cases all involved reporters refusing to cooperate with authorities conducting investigations. Branzburg, a reporter for *The Courier-Journal* of Louisville, Ky., refused to answer a grand jury's questions after he had witnessed hashish being synthesized from marijuana. The other two cases involved government investigations of Black Panther activities. Earl Caldwell was a reporter for *The New York Times* in San Francisco and had covered Black Panther activities. He refused to appear or testify before a federal grand jury. Milt Pappas was a television reporter in New Bedford, Mass., who had visited Black Panther headquarters. He refused to disclose to a grand jury what he had seen. Courts in Kentucky and Massachusetts refused to grant any protection to Branzburg or Pappas. Caldwell, on the other hand, had received a favorable ruling from the U.S. Circuit Court of Appeals, 9th Circuit that had affirmed the existence of a qualified privilege.

In a 5-4 decision, the Supreme Court ruled that no reporter privilege existed that could protect the reporters from testifying. But the decision was sharply divided. In his often-quoted dissent, Justice Potter Stewart noted that the decision "invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government." And even in his concurring opinion, Justice Lewis F. Powell Jr. noted that it was not the court's ruling that journalists were "without constitutional rights with respect to the gathering of news or in safe-guarding their sources.'' Powell said that a claim of reporter privilege "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." [30]

During the 1970s two cases that brought lengthy jail terms to reporters continued to heighten the issue. William Farr, a reporter for the *Los Angeles Herald Examiner*,

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[28] Ervin, 249-250.

[29] *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646 (1972).

[30] Journalists and lawyers have pondered for more than three decades what Powell meant. *The New York Times* (October 7, 2007, A Justice's Scribbles on Journalists' Rights, Sec. Nation, P. 4) reported on a recently discovered document among Powell's papers at Washington and Lee University. The document contained handwritten notes by Powell on the court's private conference after hearing oral arguments in *Branzburg*. "We should not establish a constitutional privilege," Powell wrote. He added that such a privilege would create problems "difficult to foresee," including "who are 'newsmen'—how to define?" But Powell was very clear in writing "there is a privilege analogous to an evidentiary one which courts should recognize and apply…to protect confidential informants." But even the notes leave disagreement over what Powell meant. *The Times* quoted noted First Amendment lawyer Floyd Abrams as saying the notes confirmed his position that there is a privilege. But former federal prosecutor Randall D. Eliason expressed doubt. "I'm not sure the notes clear up anything at all," he told *The Times*.

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.

More commonly stated, to overcome the three-prong test, the party seeking the information must establish that the information sought from media is demonstrably relevant and not "tangentially germane." Other possible sources of obtaining the information must be sought first. "Even with a showing of relevance and compelling interest, disclosure cannot be forced if there is a possibility that the information can be obtained through other channels." And finally, the information must go to the heart of a claim before the court and not just be "useful." It must be information that is "crucial to the determination of the ultimate fact in question."[38]

The three-prong test gained acceptance in state and federal courts over the years, and, together with the guidelines on issuing subpoenas to reporters, provided a reasonable level of protection. Many journalists and First Amendment lawyers believe the end of that trend came with a ruling out of the U.S. Court of Appeals, 7th Circuit in Chicago in 2003 in *McKevitt v. Pallasch*.[39]

It has been speculated that Judge Richard Posner, a conservative who wrote the opinion for the majority, had been looking for a case to shoot down the idea that a reporter privilege had been established in *Branzburg*.[40] The language in the opinion would suggest that. The case involved Michael McKevitt who was being prosecuted in Ireland on charges of terrorism and being a member of a banned organization. McKevitt sought taped interviews from journalists with a key prosecution witness. When the trial court ordered the journalists to comply, they appealed to the 7th Circuit. Their appeal was rejected in a ruling that was quite clear. "A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, '' Posner wrote. "The cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of government, and so forth…. Since these considerations were rejected by *Branzburg* even in the context of a confidential source, these courts may be skating on thin ice."[41]

The status in Texas

Texas remains among the minority of states without a shield law for reporters. There have been ups and downs on the issue from a media perspective over the years, but there now appears to be a solid consensus of both print and broadcast media that a shield law is essential to protect the newsgathering process in the state. Attempts to pass a shield law have been made off and on since the early 1970s and the immediate post-Branzburg era when a number of states passed shield laws. Passage has been close in Texas on several occasions. But during much of that time there had been at least some disagreement between broadcasters and newspapers over the issue. For the most part, newspapers were less inclined to seek a shield law in Texas. Broadcasters aggressively sought a shield law because, as in other states, they typically were subjected to many more subpoenas. The

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[38] Robert T. Sherwin, 32 Tex. Tech L. Rev. 137 (2000), at 153-154. This piece provides an excellent overview of the issue as well as an examination of the reporter privilege issue in Texas.
[39] *McKevitt v. Pallasch*, 339 F.3d 530 (2003).
[40] Pearlstine, 55.
[41] *McKeavitt*, 532-533.

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 station and held that the trial court had insufficient basis for ordering the station to produce the materials because the three-prong test had not been applied.

But any feeling of certainty about a reporter privilege in Texas would prove to be premature. Some troubling cases were soon to follow that would involve reporters being jailed for contempt.

Brian Karem served 13 days in jail in San Antonio after refusing to comply with a subpoena related to an interview he obtained with a capital murder suspect in the killing of a police officer. The officer was killed in March 1989, and two brothers, Henry David Hernandez and Julian Hernandez, turned themselves in after being sought by police. Karem, a reporter for KMOL television, obtained a telephone interview with Henry Hernandez while he was incarcerated. In the interview, Henry Hernandez said that he fired the fatal shot while his brother sat in the police officer's car. Both brothers were indicted on capital murder charges.

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[42] Sherwin, 154.
[43] Miller v. Transamerican Press Inc., 621 F.2d 721 (1980).
[44] *In re Bruce Selcraig*, 705 F. 2d 789 (1983).
[45] *Channel Two v. Dickerson*, 725 S.W. 2d 470 (1987).

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 involved Libby Averyt, a reporter for the Corpus Christi Caller-Times. Averyt conducted interviews with a murder defendant, Jermarr Arnold, charged in the 1983 killing of a jewelry store clerk. The interviews were conducted in jail and over the telephone. In stories written by Averyt, Arnold described his involvement in the crime, his lack of remorse and how he deserved the death penalty.

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[46] Karem v. Priest, 744 F. Supp 136 (1990).
[47] Bill Coulter, "2 reporters face jail for contempt," Houston Chronicle, February 6, 1991, Sec. A, Page 1.
[48] William Ogden, February 6, 1991, interview with the author.
[49] *Campbell v. Klevenhagen*, 760 Fed. Supp. 1206 (1991).

[50] When subpoenaed and order to testify regarding the interviews, Averyt said she would discuss nothing except what was published.

She was ordered to jail and spent two days before being released. Her attorney convinced the judge that she would not change her mind and testify, and that further incarceration would be fruitless.[51] Avert, 26 at the time of her jailing, was not convinced of the need for a shield law. "I'm not convinced that is what we need, " Averyt said at the time, "I'm not convinced that it would help anything in Texas because the courts could still interpret it as they like."[52]

But there were two cases—one at the state level and one federal—that proved persuasive in getting most Texas media on board to support a shield law. The first case involved a subpoena for testimony and video from two Houston television stations in a case in which a body was dumped in front of a funeral home, resulting in charges against a funeral home operator for abuse of a corpse. Confidential sources were not an issue. Motions to quash the subpoenas were granted by the trial judge. The district attorney pursuing the case against the funeral home owner then filed an appeal with the Texas Court of Criminal Appeals seeking to reinstate the subpoenas. Unfortunately for those holding out hope of a reporter privilege in Texas, the court could not have been clearer, and *Healey v. McMeans* marked a definite closing of the door in Texas on the criminal side. "The recognition of a 'newsman's privilege' is clearly contrary to well-settled law," the court said. "Newsmen have no constitutional privilege, qualified or otherwise, to withhold evidence relevant to a pending criminal prosecution."[53]

"The Healey case was pretty much the final straw," said William Ogden. "There was kind of a building storm, and when that case came down most of the media lawyers in the state threw up their hands and said, 'We need a shield law.' At that point the lawyers began talking with their media clients and encouraging them to back a shield in Texas."[54]

More difficult news for journalists followed in 1998 from the U.S. Court of Appeals, 5th Circuit in *United States v. Smith*.[55] A New Orleans television station was subpoenaed to produce outtakes of an interview conducted with a man accused of arson. After reviewing the tapes in camera, the trial court ruled that the tapes contained no new evidence and that the station could maintain the qualified privilege to withhold them. However, the 5th Circuit vacated the order to quash the subpoena and rejected the television station's claim of reporter privilege.

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[50] Joel Williams, Associated Press, "Reporter ordered jailed after hearing," published in the *Houston Chronicle*, December 7, 1990, Sec. A, Page 32.
[51] Associated Press, "Corpus reporter freed from jail after 2 days," published in the *Houston Chronicle*, Dec. 10, 1991, Sec. A, Page 19.
[52] Steve Friedman, "New calls for shield law follow legal moves against reporters," *The Houston Post*, Dec. 10, 2007, Sec. A, Page 1.
[53] Healey v. McMeans, 884 S.W. 2d 772 (1994)
[54] William Ogden, partner with Ogden, Gibson, White, Broocks & Longoria, interview with the author, October 4, 2007.
[55] *United States v. Smith*, 135 F.3d 963.

"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* argued exactly this point, as well as the devastating consequences to trust and confidentiality that would result from Caldwell's cooperation with a grand jury.[67]

But the recent cases and the public's increasing skepticism about the integrity of media call into question how ultimately the issue should be balanced. An unfortunate string of ethics scandals in recent years has been met with increasing anger and resentment by the public toward all media. One of the first media scandals to break was the case of Janet Cooke and *The Washington Post*. Because of a fabricated story in 1981 about an eight-year-old addicted to heroin, the paper was compelled to return a Pulitzer Prize.[68] Stephen Glass was an up-and-coming reporter for *The New Republic* until it was discovered in 1998 that he had fabricated numerous stories published by the magazine.[69] *The New York Times* was tainted by scandal when it was learned that Jayson Blair plagiarized and fabricated much of his work over a two-year period.[70] A similar scandal was uncovered at *USA TODAY* involving reporter Jack Kelley, who reported fantastic stories about international events that never happened. The paper had nominated Kelley several times for a Pulitzer Prize.[71] And CBS was embarrassed by a report on President Bush and his National Guard service that was based on documents whose authenticity ultimately could not be established. Four journalists were fired and longtime anchor Dan Rather resigned in the aftermath.[72]

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[66] Ibid.
[67] Teeter and Loving, 673.
[68] Teeter and Loving, 674.
[69] Robin Pogrebin, "Rechecking a writer's facts, a magazine uncovers fiction," *The New York Times*, June 12, 1998, Sec. A, Page 1.
[70] *The New York Times* published a full account of the Blair scandal on May 11, 2003, beginning on Sec. A, Page 1, and written and reported by numerous staff members at the paper. The opening paragraph said: "A staff reporter for *The New York Times* committed frequent acts of journalistic fraud while covering significant news events in recent months, an investigation by *Times* journalists has found. The widespread fabrication and plagiarism represent a profound betrayal of trust and a low point in the 152-year history of the newspaper. ''
[71] "The problems of Jack Kelley and USA Today," USA Today, April 22, 2004, http://www.usatoday.com/news/2004-04-22-report-one_x.htm, (accessed October 7, 2007).
[72] "CBS ousts 4 for Bush Guard story," CBS News, January 10, 2005, http://www.cbsnews.com/stories/2005/01/10/national/main665727.shtml, (accessed October 7, 2007).

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 that media showed a consistent liberal bias. Goldberg was particularly harsh on CBS anchor Dan Rather, the leader of what he called the News Mafia with its particularly brutal way of dealing with any opinion that didn't conform to the predetermined prejudices in place. Goldberg compared the news operations to *The Sopranos*, the fictional organized crime family on HBO cable television led by Tony Soprano. Goldberg claims that it was Rather who wanted him "whacked" for calling attention to the liberal tendencies of the network.[74]

In making any compelling ethics case for a privilege to withhold information from the legal process, journalists need to establish that the potential good done by investigative and explanatory journalism clearly outweighs harm done by withholding information. In arguing the need for a federal shield law, many news organizations have taken the approach that such a law protects the public as much as journalists. *The New York Times'* editorial position is typical. "A shield law does protect journalists. But the real benefit for society is that it protects sources, allowing whistle-blowers or other insiders to expose wrongdoing in government and the private sector. The information they provide is vital to the public's ability to know what government and businesses are doing and to make informed judgments."[75]

Prosecutors are on the opposite end of the argument. Patrick Fitzgerald, appointed as special prosecutor in the Valerie Plame case, has emphasized the government's position that a federal shield law would inhibit the government's ability to safeguard national security. "The proposed shield law poses real hazards to national security and law enforcement. The bipartisan Sept. 11 commission and the Robb-Silberman commission on prewar intelligence both found our national security at great risk because of the widespread leaking of classified information. The proposed law would have the unintended but profound effect of handcuffing investigations of such leaks. In many cases, authorities would face the Catch-22 of being required to prove specific criminal activity–in a hearing before a judge, often resulting in notice to the subjects of investigation or their associates–before they could take the investigative steps to

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[73] "Public more critical of press, but goodwill persists," The Pew Research Center for People and the Press, June 26, 2005, http://people-press.org/reports/display.php3?ReportID=248 (accessed October 9, 2007).
[74] Bernard Goldberg, *Bias: a CBS Insider Exposes How the Media Distort the News*, (Washington, D.C.: Regnery Publishing, Inc., 2002), 9-11.
[75] *The New York Times*, "Toward a Federal Shield Law," May 3, 2007, Sec. A, Page 22.

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 Bush administration's efforts to manipulate the press while trying to destroy those who would criticize the President and his policies. But for those in the administration, battles with journalists were part of a broader effort to control leaks and to corral the press, which it had come to see as a part of the enemy forces it had to fight."[77]

The New York Times, in an analysis on the news pages published after the Libby conviction, made the point clearly that the general truce that had existed between government and media since *Branzburg* was over. "(T)he institution most transformed by the prosecution, and the one that took the most collateral damage from Patrick J. Fitzgerald's relentless pursuit of obstruction and perjury charges against Mr. Libby, may have been the press, forced in the end to play a major role in his trial. After Mr. Libby's conviction…it is possible to start assessing that damage to the legal protections available to the news organizations, to relationships between journalists and their sources and to the informal but longstanding understanding in Washington, now shattered, that leak investigations should be pressed only so hard. Ten out of 19 of the witnesses in Mr. Libby's trial were journalists, a spectacle that would have been unthinkable only a few

[76] Patrick Fitzgerald, "Shield Law Perils: Bill Would Wreak Havoc on a System that Isn't Broken," *The Washington Post*, October 4, 2007, Sec. A, Page 25.
[77] Pearlstine, 195. See earlier details in footnote 15.

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 ready to throw in the towel completely, even after Miller," Kirtley said. "A solid privilege is still recognized in a number of federal circuits. And I think a lot of problems would be solved with an attorney general who would simply recognize the established guidelines for issuing subpoenas on reporters."[80]

How reporter privilege continues to be recognized, whether in individual courts or in the form of a federal shield law, will determine to some extent if and how the media will be able to perform its function as a check on government. Presidents other than George Bush have warred against the media. Leaks have been a part of the give and take between government and the media for years. The media serve as an integral part in the process of governance by being able to report on matters of trifling importance but also on issues of public concern ranging from Watergate to the Abu Ghraib prison scandal.

Only time will tell if the aggressiveness of the Bush Administration becomes a pattern in seeking to "annex the journalistic profession as an investigative arm of government," as Justice Powell wrote in *Branzburg* more than 30 years ago. Despite the public's misgivings about the media and all of the media's own failings, individually as journalists and collectively as an institution, a free press was at the heart of the Founders' intentions on establishing democracy. And democracy cannot and will not function without a free, robust and independent media.

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[78] Adam Liptak, "After Libby Trial, New Era for Government and Press," *The New York Times*, March 8, 2007, Sec. A, Page 18.

[79] Bruce Sanford, partner with Baker Hostetler in Washington, D.C., interview with the author, August 27, 2007.

[80] Jane Kirtley, Silha Professor of Media Ethics and Law at the School of Journalism and Mass Communication at the University of Minnesota, interview with the author, October 8, 2007.