

Testimony of Lee Levine  
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Before the

Committee on the Judiciary of the  
United States House of Representatives

Hearing on

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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 1400-page treatise *Newsgathering and The Law* (Lexis Law Publishing 3d ed. 2005), 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).

Mr. Levine has represented several journalists and news organizations from whom litigants have sought to compel the disclosure of confidential sources in federal courts, including in recent cases addressed in this testimony. The views expressed, however, are his own and are not necessarily shared by his clients.

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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.<sup>1</sup>

**Recent Developments Regarding The Reporters' Privilege**

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*,<sup>2</sup> 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 unprecedented number of subpoenas seeking the names of confidential

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<sup>1</sup> Any opinions expressed in this testimony are my own and are not necessarily those of my law firm or its clients. My testimony is substantially derived from "friend-of-the-court" briefs submitted by my law firm on behalf of a coalition of media organizations to the United States Supreme Court in *Miller v. United States* and *Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1199075, and to the United States Court of Appeals for the Ninth Circuit in *In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams* and *In re Grand Jury Subpoena to The San Francisco Chronicle*, Nos. 06-16995 & 06-16996. The Media Law Resource Center has published a comprehensive treatment of issues related to the privilege entitled *White Paper On The Reporters' Privilege*, available at [www.medialaw.org](http://www.medialaw.org) (last visited June 13, 2007). In addition, the Reporters Committee for Freedom of the Press offers a frequently updated summary and analysis of cases in which journalists have been subpoenaed, entitled *Special Report: Reporters and Federal Subpoenas*, on its website at [www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html) (last visited June 13, 2007).

<sup>2</sup> 408 U.S. 665 (1972).

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 recently generated subpoenas seeking confidential sources to roughly two dozen reporters and news organizations in less than a year, many of whom were held in contempt. By way of comparison, a 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.<sup>3</sup>

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.<sup>4</sup> Yet, beginning in 2001, four federal courts of appeals have affirmed contempt citations issued to reporters, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.<sup>5</sup> In 2001, writer Vanessa Leggett served nearly six months in prison for declining to reveal sources

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<sup>3</sup> See [www.rcfp.org/agents/material.html](http://www.rcfp.org/agents/material.html) (last visited June 13, 2007).

<sup>4</sup> See, e.g., *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982). There appear to be no reported judicial decisions at all addressing subpoenas to reporters until roughly the beginning of the twentieth century. Only roughly a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. See *Branzburg*, 408 U.S. at 685-86 (citing cases). Indeed, prior to the late 1960s, there appear to be only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds unrelated to privilege. See *Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant). And, during those brief, exceptional periods in American history when subpoenas were issued to reporters in significant numbers, most notably in the years immediately surrounding the Supreme Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. See *infra* note 49.

<sup>5</sup> The longest sentence previously known to have been served by a reporter for refusing to reveal a source was 46 days in a case arising shortly after *Branzburg*. See *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); [www.rcfp.org/jail.html](http://www.rcfp.org/jail.html) (*Los Angeles Herald-Examiner* reporter William Farr).

of information related to a notorious murder, almost four times longer than any prison term previously imposed on any reporter by any federal court.<sup>6</sup> In 2005, 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.<sup>7</sup> In 2005, Judith Miller of *The New York Times* was incarcerated for 85 days for declining to reveal the identities of her confidential sources in response to a grand jury subpoena, and was released only when her source waived the protection of the promise she had extended to him.<sup>8</sup> Earlier this year, videographer Joshua Wolf was released from prison after serving some seven months after he declined to provide federal authorities with unpublished video footage of a protest he covered at a G-8 summit.<sup>9</sup> And, finally, although it was ultimately not enforced because the identity of their confidential source was discovered through other means, *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada were sentenced to up to 18 months in prison for refusing to reveal who gave them information revealed to a federal grand jury about steroid use in professional sports.<sup>10</sup>

Decisions such as these have emboldened private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in

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<sup>6</sup> See *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam).

<sup>7</sup> See *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

<sup>8</sup> See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); see, e.g., David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

<sup>9</sup> See *In re Grand Jury Subpoena (Joshua Wolf)*, 201 Fed. Appx. 430 (2006); see also, e.g., Associated Press, *Videographer is freed after cutting a deal*, KANSAS CITY STAR, April 14, 2007, at A4.

<sup>10</sup> *In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams*, No. CR 06-90225 (JSW), 2006 U.S. Dist. LEXIS 73134 (N.D. Cal. Sept. 25, 2006); see, e.g., Bob Egelko, *Lawyer Who Leaked Athletes' Testimony Seeks Less Prison Time*, S.F. CHRONICLE, June 7, 2007, at B2.

similarly unprecedented fashion. Five reporters employed by *The New York Times*, *Los Angeles Times*, *The Washington Post*, *Associated Press* and *CNN* were held in contempt for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who had sued several federal agencies claiming that such information was provided to the press by government officials in violation of the Privacy Act.<sup>11</sup> They were spared the imposition of judicial sanctions only because the news organizations for which they worked collectively paid \$750,000 to Dr. Lee, even though neither the reporters nor their employers were, or lawfully could have been, defendants in his case against the government.<sup>12</sup> Most recently, the plaintiff in another civil suit alleging violations of the Privacy Act in federal court, Dr. Steven Hatfill, issued subpoenas to and/or moved to compel disclosure of the identities of confidential sources from eight news organizations and six reporters.<sup>13</sup> There can be no legitimate dispute that this deluge of subpoenas in the federal courts is unprecedented in American history.

### **The Importance of Confidential Sources**

Congress and the public should be concerned about the imposition of 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

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<sup>11</sup> See *Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004), *aff'd in relevant part*, 2005 WL 1513086 (D.C. Cir. June 28, 2005); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in relevant part*, 2005 WL 1513086 (D.C. Cir. June 28, 2005). The trial court's orders holding these journalists in contempt were affirmed on appeal the day after the Supreme Court denied petitions for writs of *certiorari* filed in *Miller v. United States* and *Cooper v. United States*. See *Lee v. U.S. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005). My law firm served as counsel for two of the journalists held in contempt in the *Lee* case.

<sup>12</sup> See, e.g., Paul Farhi, *U.S., Media Settle with Wen Ho Lee; News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A01.

<sup>13</sup> See *Special Report: Reporters and Federal Subpoenas*, Reporters Comm. for Freedom of the Press, [www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html) (last visited June 12, 2007). My law firm represents journalists and news organizations that have received subpoenas in the *Hatfill* litigation.

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."<sup>14</sup> 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 question that journalists must occasionally depend on confidential sources to report stories about the operation of government and other matters of public concern. An examination of roughly 10,000 news media reports, conducted in 2005, concluded that fully thirteen percent of front-page newspaper articles relied at least in part on confidential sources.<sup>15</sup> While there is healthy debate within the journalism profession about the appropriate uses of confidential sources, all sides of that debate agree that they are at times essential to effective news reporting.<sup>16</sup>

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them

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<sup>14</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

<sup>15</sup> See [http://www.stateofthenewsmedia.org/2005/narrative\\_overview\\_contentanalysis.asp?cat=2&media=1](http://www.stateofthenewsmedia.org/2005/narrative_overview_contentanalysis.asp?cat=2&media=1).

<sup>16</sup> See generally *2004 Confidential-Sources Survey*, [http://www.firstamendmentcenter.org/about.aspx?item=2004\\_confidential\\_sources](http://www.firstamendmentcenter.org/about.aspx?item=2004_confidential_sources) (last visited June 13, 2007). Much of the debate regarding confidential sources concerns whether such sources are overused or misused. At bottom, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

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.<sup>17</sup>

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, who was 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."

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<sup>17</sup> Mr. Taricani's testimony, as well as that of the other journalists quoted herein, is taken from a compendium of affidavits submitted to the Supreme Court by a coalition of media organizations in *Miller v. United States* and *Cooper v. United States*. See Appendix B to the *Brief Amici Curiae of ABC, Inc, et al.*, in *Miller v. United States* and *Cooper v. United States*, *supra* note 1. The affidavits submitted to the Supreme Court are from journalists employed by news organizations who have been subpoenaed in recent federal proceedings. Their testimony more fully documents the role played by confidential sources in the reporting of public matters.

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<sup>18</sup> and the Pulitzer Prize.<sup>19</sup>

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,<sup>20</sup> as the

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<sup>18</sup> In 2005, for example, the Polk Awards for Television Reporting, National Reporting, and Foreign Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. See <http://www.brooklyn.liu.edu/polk/press/2005.html> (listing awards) (last visited June 13, 2007).

<sup>19</sup> For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. See, e.g., Alix M. Freedman, ‘Impact Booster’: Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of the *Washington Post* “for its comprehensive coverage of America’s war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments.” See [www.pulitzer.org/year/2002/national-reporting](http://www.pulitzer.org/year/2002/national-reporting). The *Post*’s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. See, e.g., Barton Gellman, U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed, WASH. POST, Oct. 3, 2001, at A1.

<sup>20</sup> Notably, several journalists, including Bob Woodward and Carl Bernstein, were subpoenaed to reveal their confidential sources in 1973 in the context a civil action brought by the Democratic National Committee against those allegedly responsible for the burglary of the committee’s offices at the Watergate

identification of W. Mark Felt as “Deep Throat” reminded 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*.<sup>21</sup> 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.<sup>22</sup> 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,”<sup>23</sup> and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.<sup>24</sup>

Neutron Bomb – Journalist Walter Pincus of *The Washington Post* relied on confidential 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

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building. *See Democratic Nat’l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973). One year after the Supreme Court’s decision in *Branzburg*, the district court quashed the subpoenas, explaining that it “cannot blind itself to the possible ‘chilling effect’ the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public.” *Id.*

<sup>21</sup> *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>22</sup> *See, e.g., id.* at 754 (Harlan, J., dissenting); Sanford J. Ungar, *Federal Conduct Cited As Offending ‘Sense of Justice’; Charges Dismissed in ‘Papers’ Trial*, WASH. POST, May 12, 1973, at A1.

<sup>23</sup> *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

<sup>24</sup> Solicitor General Erwin N. Griswold, who argued the government’s case, wrote some twenty years later that he had not “seen any trace of a threat to the national security from the publication.” Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

casualties through radiation without extensive destruction of property.<sup>25</sup> 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.<sup>26</sup> Mr. Pincus, who never received a subpoena concerning the neutron bomb or any other matter in his distinguished, decades-long career, has now received *two*—one from the Special Counsel in the Valerie Plame matter and one in the *Wen Ho Lee* case.

Walter Reed Army Medical Center – This year, Dana Priest and Anne Hull of *The Washington Post* revealed the plight of outpatient soldiers at Walter Reed Army Medical Center, who were being kept in squalid conditions while waiting to be treated, discharged, or returned to duty.<sup>27</sup> Their report, which relied extensively on information provided by patients and staff members who insisted that their identities be kept confidential, resulted almost immediately in the firing of the Medical Center’s commander, and prompted highly publicized efforts to improve conditions at Walter Reed and other military medical facilities.<sup>28</sup>

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

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<sup>25</sup> See, e.g., Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

<sup>26</sup> See Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that “[w]ithout the [Post] articles, neutron warheads would have been deployed”).

<sup>27</sup> See Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army’s Top Medical Facility*, WASH. POST, Feb. 18, 2007 at A01.

<sup>28</sup> See, e.g., Steve Vogel & William Branigin, *Army Fires Commander of Walter Reed*, WASH. POST, Mar. 2, 2007 at A01.

anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.<sup>29</sup> The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.<sup>30</sup> 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.<sup>31</sup>

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.”<sup>32</sup> 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.<sup>33</sup>

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<sup>29</sup> Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1.

<sup>30</sup> Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

<sup>31</sup> Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

<sup>32</sup> Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron’s Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

<sup>33</sup> Rebecca Smith & John R. Emshwiller, *Enron CFO’s Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron’s Fall, A Culture of Operating Outside Public’s View*, WALL ST. J., Dec. 5, 2001, at A1.

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.<sup>34</sup> 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,”<sup>35</sup> 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.”<sup>36</sup>

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.<sup>37</sup> 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

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<sup>34</sup> 60 Minutes II, Apr. 28, 2004, [www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories](http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories) (last visited June 13, 2007); Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

<sup>35</sup> Hersh, *supra* note 34.

<sup>36</sup> See, e.g., Todd Richissin, *Soldiers' Warnings Ignored*, BALTIMORE SUN, May 9, 2004, at A1 (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Mofeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential “Pentagon documents” and interview with a “Pentagon source with knowledge of internal investigations into prisoner abuses”).

<sup>37</sup> See, e.g., Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

public denial of steroid use.<sup>38</sup> 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. Nevertheless, the reporters who wrote these stories were held in contempt and sentenced to prison.<sup>39</sup>

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

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<sup>38</sup> See, e.g., Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion'*, S.F. CHRONICLE, June 24, 2004, at A1.

<sup>39</sup> See *supra* p. 3. Such reliance by the press on confidential sources is by no means a modern phenomenon. When the First Amendment was enacted, the Founders understood the importance of such speech to maintaining an informed citizenry:

Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

*Talley v. California*, 362 U.S. 60, 64-65 (1960). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "[t]he liberty of the Press ought not to be restrained" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

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. . . .<sup>40</sup>

Or as *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, who was also held 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.<sup>41</sup>

Indeed, in the wake of some of the judicial decisions about which I have spoken this morning, the *Cleveland Plain Dealer* 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.<sup>42</sup> Doug Clifton, editor of the newspaper, 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?”<sup>43</sup>

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<sup>40</sup> See Appendix B to the Brief Amici Curiae of ABC, Inc, et al. in *Miller v. United States and Cooper v. United States*, supra note 1. The trial court order holding Mr. Gerth in contempt was ultimately reversed. See *Lee v. U.S. Dep’t of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

<sup>41</sup> Dep. of R. Drogin, *Lee v. U.S. Dep’t of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9.

<sup>42</sup> Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at A10.

<sup>43</sup> *Id.*

## 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.<sup>44</sup> Of those jurisdictions, thirty-four have enacted "shield laws."<sup>45</sup> 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."<sup>46</sup>

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 – have urged the Supreme Court to recognize a federal reporters' privilege.<sup>47</sup> In doing so, 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.<sup>48</sup>

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

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<sup>44</sup> See generally *The Reporter's Privilege*, Reporters Comm. for Freedom of the Press, <http://www.rcfp.org/privilege/index.php> (last visited June 13, 2007). It does not appear that a Wyoming state court or that state's legislature has yet addressed the issue. See *id.*

<sup>45</sup> See, e.g., <http://www.rcfp.org/news/2007/0530-con-report.html> (last visited June 13, 2007). The most recent state to pass such a law was Washington, see H.B. 1366-2007-08. The law will go into effect on July 22, 2007.

<sup>46</sup> *Brief Amici Curiae Of The States Of Oklahoma, et al., Miller v. United States; Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1317523.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

judicial proceedings, criminal or civil.<sup>49</sup> 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."<sup>50</sup> 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."<sup>51</sup>

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."<sup>52</sup> Perhaps most notably, the European

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<sup>49</sup> In 1896, Maryland became the first state to pass a shield law, spurred by the jailing of a *Baltimore Sun* reporter who refused to identify his sources for a story about public corruption to a grand jury. In the late 1920s and early 1930s, several reporters in various states were similarly imprisoned for refusing to appear before grand juries. Ten states responded by enacting laws similar to Maryland's. In the early 1970s, federal prosecutors began regularly issuing grand jury subpoenas to journalists, a development that culminated in the *Branzburg* decision. At the time of the *Branzburg* decision, seventeen states had statutory privileges. *Branzburg*, 408 U.S. at 689 n.27. Ten more states passed shield laws in its immediate wake and still others recognized the privilege by judicial decision. Today, as noted, thirty-three states and the District of Columbia have shield laws, with sixteen others affording common law protection.

<sup>50</sup> *Brief Amici Curiae Of The States Of Oklahoma, et al.*, *supra* note 46.

<sup>51</sup> *Id.* (citing *Jaffee*, 518 U.S. at 18) (additional citation omitted).

<sup>52</sup> *Goodwin v. United Kingdom*, 22 EHRR 123, 143 (1996). See generally Floyd Abrams & Peter Hawkes, *Protection of Journalists' Sources Under Foreign and International Law*, *Media Law Resource Center White Paper On The Reporters' Privilege*, available at [www.medialaw.org](http://www.medialaw.org). As Messrs. Abrams and Hawkes demonstrate, "protection for journalists' sources is recognized in countries on every inhabited continent, under very diverse legal systems, based on sources ranging from statutes to constitutional

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.<sup>53</sup> “Without such protection,” the court explained, “sources may be deterred from assisting the press in informing the public in matters of public interest.”<sup>54</sup>

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 Court’s decision in *Branzburg v. Hayes*, the first and last time it 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.”<sup>55</sup>

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interpretation to the common law.” *Id.* (citing, *inter alia*, legal protections afforded under the laws of Australia, Canada, France, Germany, Japan, Nigeria, and Sweden).

<sup>53</sup> *Goodwin*, 22 EHRR at 143.

<sup>54</sup> *Id.*

<sup>55</sup> *Branzburg*, 408 U.S. at 706.

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.<sup>56</sup> 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.”<sup>57</sup>

### **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, has impaired 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.

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<sup>56</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 979.

<sup>57</sup> *Id.* at 981.