CQ Researcher

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Free-Press Disputes

Are courts blocking the public's right to know?

Two nationally known reporters face possible jail sentences for refusing to answer grand jury questions about their confidential sources in the criminal probe of the leak of the name of a U.S. intelligence agent. The contempt of court case against Matthew Cooper of *Time* and Judith Miller of *The New York Times* is one of several similar conflicts between journalists and prosecutors and private lawyers viewed as less favorable to freedom of the press. Prosecutors say journalists have the same obligation as anyone else to give evidence in legal proceedings. But journalists say that offering confidentiality to sources wishing to remain anonymous is sometimes necessary to get information about government and corporate wrongdoing, such as the Abu Ghraib prison abuses and the Enron accounting-fraud scandal. Meanwhile, media groups are clashing with the Bush administration over restrictions on government information imposed since the 9/11 terrorist attacks.

New York Times *reporter Judith Miller was found in contempt of court on Oct. 7, 2004, for refusing to reveal confidential sources during a federal investigation. Miller, here with Executive Editor Bill Keller, faces a possible 18 months in jail.*

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FREE-PRESS DISPUTES

Cover: *New York Times* reporter Judith Miller talks to the press after being found in contempt in Washington, D.C., on Oct. 7, 2004, for refusing to reveal confidential sources during an investigation into the unmasking of covert CIA officer Valerie Plame. Miller, here with Executive Editor Bill Keller, faces a possible 18 months in jail. (Getty Images/Brendan Smialowski)

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Free-Press Disputes

BY KENNETH JOST

THE ISSUES

Somebody usually ends up in trouble when investigative reporter Jim Taricani files one of his signature reports on crime for Channel 10, in Providence, R.I. Since January, however, the 30-year broadcast veteran has been silent — and in trouble with the law himself.

Back in February 2001, Taricani aired a leaked FBI videotape of a bribe to a local official — part of an anti-corruption probe that ended with the conviction of Providence's former mayor, Vincent A. "Buddy" Cianci. Taricani was subpoenaed and told to reveal the source. When he refused, Chief U.S. District Judge Ernest Torres convicted him of criminal contempt of court in November 2004 and sentenced him to six months of home confinement.

AP Photo/Victoria Arocho

Veteran investigative reporter Jim Taricani of Providence, R.I., is serving a six-month contempt of court sentence for refusing to reveal who gave him a leaked FBI video. Many journalism groups support legislation establishing a federal shield law to protect journalists' sources, but conservatives and pro-law enforcement observers generally argue that reporters should have no special privileges in criminal cases.

The judge spared Taricani a prison sentence for medical reasons — he had a heart transplant several years ago — but the 56-year-old reporter cannot leave his house except for medical visits; can receive visitors only four hours a day; and cannot work, use the Internet or give media interviews. [1]

Taricani is the only U.S. reporter currently confined for refusing to identify a confidential source. But in Texas in 2001 a novice crime writer who had been looking into the murder of a Dallas socialite served 168 days in jail after refusing a grand jury subpoena for her interviews with confidential sources. And at least 14 reporters — including some of the nation's most respected journalists — face possible jail terms for refusing federal court orders to disclose their sources. (*See chart, p. 300.*)

Journalism groups say the flurry of subpoenas — amid ongoing post-9/11 access disputes between the news media and the Bush administration — threatens reporters' ability to gain cooperation from sources wishing to remain anonymous.

"This is a wholesale assault on the media's ability to gather information," says Lucy Dalglish, executive director of The Reporters Committee for Freedom of the Press.

Without such protections, former tobacco industry scientist and whistleblower Jeffrey Wigand might never have revealed anonymously, and famously, to CBS' "Sixty Minutes" that the tobacco industry not only knew that cigarettes were addictive and harmful but also had deliberately increased their addictiveness. Nor would the Enron accounting fraud or the Abu Ghraib prison-abuse scandals have been exposed, argues Sandra Baron, executive director of the Media Law Resource Center, in New York.

The reporters in judicial jeopardy include two nationally prominent journalists, Matthew Cooper of *Time* and Judith Miller of *The New York Times*. They face up to 18 months in prison for defying a grand jury subpoena in the investigation of the politically charged leak of CIA operative Valerie Plame's name in summer 2003.

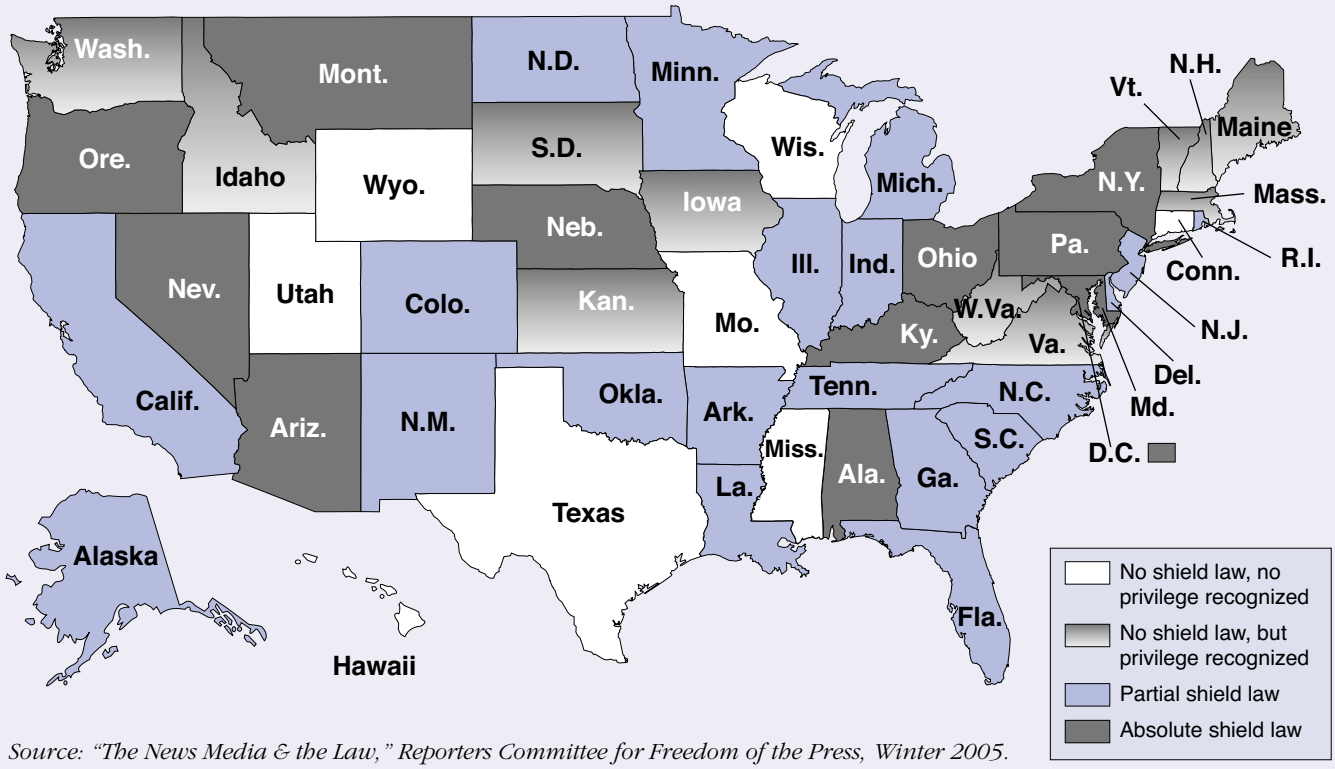
U.S. Attorney Patrick Fitzgerald is trying to find out who, if anyone, violated federal law by disclosing Plame's identity. Her husband, former diplomat Joseph C. Wilson IV, claims the leak — first put into print by conservative columnist Robert Novak — amounted to retaliation by the Bush administration for Wilson's earlier criticism of Bush claims that Iraq was seeking to obtain nuclear weapons.

Journalists have long used the promise of confidentiality to pry information from people who, for various reasons, do not want their names in print. In 1972, however, the U.S. Supreme Court rejected journalists' arguments that the First Amendment gives them a privilege to protect confidential sources comparable to such well-established privileges as attorney-client, doctor-patient and priest-penitent. In a significant concurring opinion in the 5-4 *Branzburg v. Hayes* decision, however,

Most States Protect Reporters' Sources

Thirty-one states and the District of Columbia have enacted so-called shield laws that permit reporters to protect confidential sources. In many states without such laws, reporters have been granted some privilege to protect their sources through state constitutions, common law or court rules.

Shield Laws and Privileges for Reporters' Sources



Source: "The News Media & the Law," Reporters Committee for Freedom of the Press, Winter 2005.

Justice Lewis F. Powell Jr. suggested reporters could claim such a privilege on a case-by-case basis. [2]

Since then, federal courts and many state courts have generally recognized a qualified or conditional privilege for reporters. Moreover, 31 states and the District of Columbia have passed so-called shield laws, which generally enable reporters to get subpoenas thrown out if the information sought is less important than the potential risk to newsgathering. (*See map, above.*)

The Plame controversy has triggered interest in Congress in establishing a federal shield law. Many journalism groups support such legislation, but some journalists worry that a law could be counterproductive if it defines the reporter's privilege more narrowly than existing court decisions. However, some legal observers — generally with conservative or pro-law enforcement views — argue that reporters should have no special privileges in criminal cases. (*See "At Issue," p. 309.*)

The confidential-source disputes have flared at a time when the judicial climate toward press freedom is mixed, according to journalism groups and First Amendment experts. Supreme Court decisions on libel and privacy beginning in the 1960s have given the media significant protections against liability in private lawsuits. But many state courts and the Bush administration — particularly after the Sept. 11, 2001, terrorist attacks — have restricted the press' access to government information and some legal proceedings.

"Overall, it is not a particularly positive time," says Rodney Smolla, dean of the University of Richmond Law School in Virginia and author of several books on First Amendment issues. "There's very little doctrinal expansion of rights for the press; and, in a number of instances, there's retreat."

Charles Davis, executive director of the freedom of information program at the University of Missouri's School of Journalism, in Columbia, says that after "tremendous expansions" of press rights

in the 1970s and '80s, there has been "some retrenchment" since the 1990s. "On the issue of confidentiality, we're seeing a revisiting of what we had thought of as an unassailable right," says Davis, who also chairs the freedom of information committee of the Society of Professional Journalists (SPJ).

Most journalism groups were sharply disappointed in mid-February when the federal appeals court in Washington upheld contempt citations against Cooper and Miller. [3] Some journalists and other First Amendment experts, however, warn that the Plame case is an unappealing vehicle for testing the confidential-source issue. They note that federal law makes it a crime under some circumstances to disclose the identity of an intelligence agent and that the leak did not advance the oft-invoked justification for journalists' privilege of disclosing official wrongdoing.

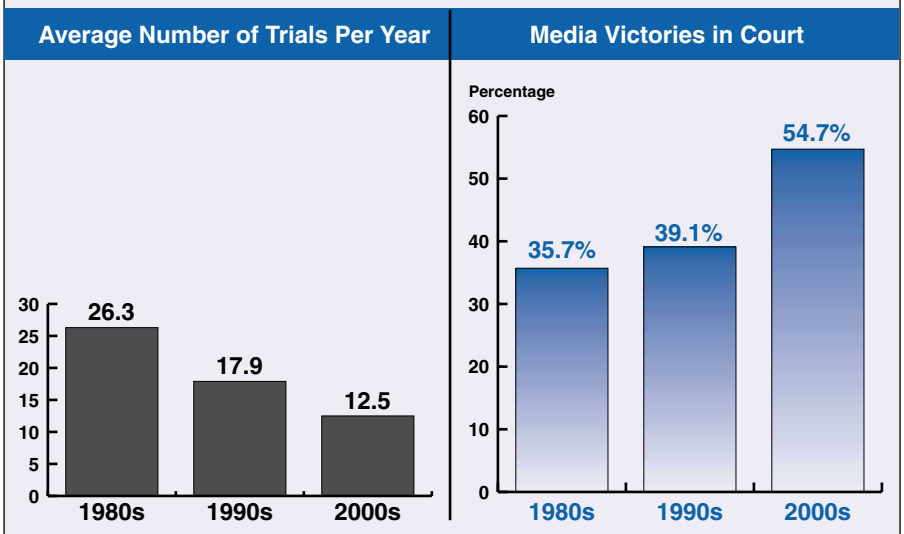
"The press is picking the wrong fight to fight," says Geoffrey Stone, a professor and former dean of the University of Chicago Law School. "This is about as bad a case to take to the mat as you can imagine."

Cooper and Miller want all nine judges on the federal appeals court in Washington to rehear the three-judge panel's decision upholding their contempt citations. In some respects, Cooper and Miller seem unlikely subjects for the subpoena fight since it was Novak — quoting "two senior administration officials" — who first identified Plame as a CIA "operative" in a July 14, 2003, syndicated column. [4]

Cooper, *Time*'s White House correspondent, helped write a story for *Time*'s Web site three days later questioning the administration's motives for disclosing Plame's identity. Miller, who covers intelligence for the *Times*, never published a story with Plame's identity but talked with confidential sources about Plame. It has not been revealed whether Novak has been subpoenaed or questioned in the investigation.

Media Facing Fewer Libel Trials

The number of libel, privacy and related claims against the media has decreased significantly over the last 25 years (graph at left) while the win rate for media defendants has risen (graph at right). Three-quarters of the claims against the media involved defamation. A total of 527 cases involved media defendants during the 25-year period.



Source: Media Law Resource Center, "2005 Report on Trials and Damages"

Taricani's case is also unusual because his confidential source acknowledged his role three days before Judge Torres handed down the contempt sentence. Attorney Joseph A. Bevilacqua Jr. admitted giving FBI videotapes to Taricani despite a court order barring their release. Channel 10 aired the tapes in February 2001. Bevilacqua, who testified in 2002 that he had not leaked the tapes, now faces possible contempt, obstruction of justice and perjury charges. [5]

As for Taricani, Judge Torres said he would consider reducing Taricani's penalty at the four-month point — April 9 — if he had complied with all restrictions. In late March, officials at Taricani's station were so skittish that they declined to give out any information about his condition.

Earlier, however, the station had cited the strains on Taricani in explaining the decision not to appeal the sentence. "The last several years have taken a tremendous physical and emotional toll on Jim and his family," the station said in a Dec. 21 statement, "and he is looking forward to getting on with his life and getting back to work." [6]

As disputes over confidential sources continue in federal courts, here are some of the questions being debated:

Is the government increasingly blocking press access to information?

Gov. Robert Ehrlich, R-Md., has had a prickly relationship with the news media ever since he moved into the statehouse in January 2003. But the capital press corps was still surprised in November 2004 when Ehrlich ordered all state agencies not to speak with two *Baltimore Sun* reporters who had written critical articles about his administration.

The *Sun* promptly challenged the order in federal court as a violation of the First Amendment. In February

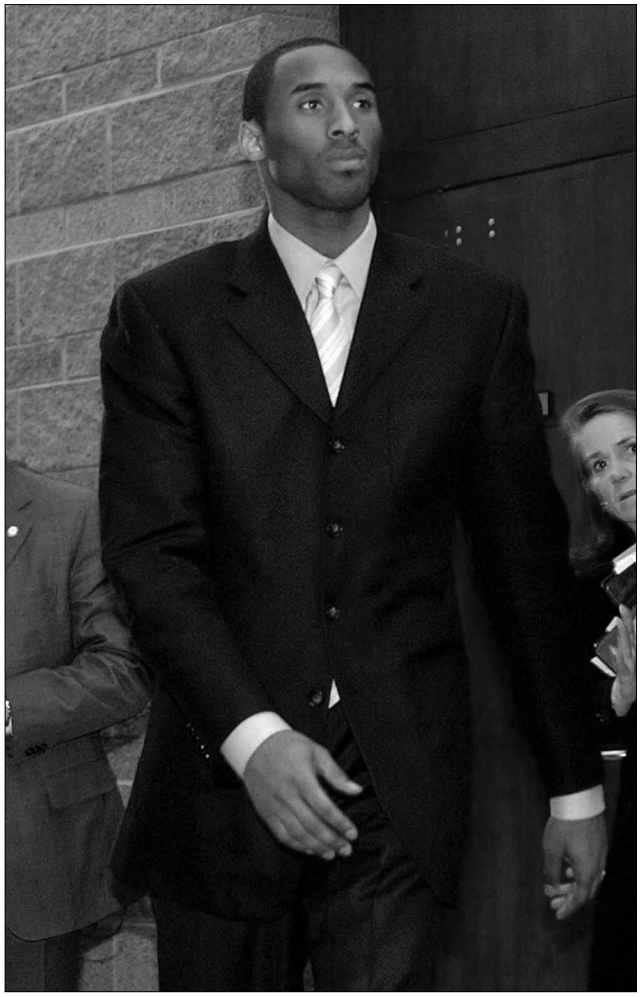
2005, however, Judge William Quarles rejected the suit. "A government may lawfully make content-based distinctions in the way it provides press access to information not available to the public generally," Quarles ruled. [7]

Quarles' decision — now being appealed by the newspaper — cites Supreme Court rulings saying reporters have no greater right of access to government information than the general public. But a leading media-law expert strongly criticizes both Ehrlich's order and the judge's ruling.

"The decision is just dead wrong," says Baron, of the Media Law Resource Center. "How can any nation hold itself up as a model of democracy and yet allow a chief executive to cut off access to those who disagree with him?"

Most clashes between the news media and public officials do not wind up in court, and those that do produce mixed results. The University of Chicago's Stone, author of a recent book on free speech in wartime, says the press "has fared reasonably well in the courts" through history. Still, for every celebrated press victory — such as the Supreme Court's 1971 decision permitting *The New York Times* and *The Washington Post* to publish the secret Defense Department study of the Vietnam War known as the Pentagon Papers — there are numerous small-scale judicial rulings barring news media access to information.

The number of such clashes has increased as a result of Bush administration policies adopted after the Sept. 11, 2001, terrorist attacks, according to journalism groups and First Amendment experts. "Sources are going to dry up, and the public is not going to be getting the level . . . or the quality of information that they have been getting in those isolated circumstances where [confidentiality] is appropriate," Stone says. The government "has been obsessively and unduly secretive" since 9/11.



AFP Photo/Ed Andrieski

During the rape trial of basketball star Kobe Bryant, a Colorado judge barred news media from publishing testimony from a closed-door pretrial hearing. Journalists are concerned that judges have begun prohibiting publication of information already in the hands of news organizations. The charges against Bryant were dropped on Sept. 1, 2004, after the alleged victim refused to testify.

In the most clearly drawn fight, the administration imposed what the Reporters Committee called "unprecedented secrecy" on the immigration proceedings against hundreds of people — mostly men of Arab and/or Muslim backgrounds — rounded up immediately after 9/11. The administration refused to release the names of the detainees and later closed the immigration hearings to the press and public. News organizations and others unsuccessfully challenged both policies. [8]

The administration justified the restrictions by saying that the information could have helped terrorists track the course of the government's investigations. But press groups and other critics said the policies were aimed at preventing scrutiny of the government's actions. "No doubt, the motives were a mix of the two," Stone says.

At the same time, Attorney General John Ashcroft rankled press groups by directing government lawyers whenever possible to defend agency refusals to release records under the federal Freedom of Information Act (FOIA). The Reporters Committee and several other press groups complained about the directive.

"This is an administration that has an intrinsic belief that secrecy is a good thing," Dalglish says. "This is policy that is coming down from on high."

Viet Dinh, a professor at Georgetown University Law Center in Washington who helped fashion the post-9/11 policies as assistant attorney general, defends the closure of the immigration hearings. "The judge made the determination that if information had gotten out to the general public, it would have helped the enemy follow the progress of the investigation," Dinh says. "I think he made the right decision based on the facts at the time."

Richard Samp, chief counsel of the conservative Washington Legal Foundation, guardedly agrees but adds that immigration proceedings should usually be open. More broadly, he disputes the criticism of the administration's information policies.

"I would deny that this administration has a terrible record of operating in the dark and that the press is being censored," Samp says. He says that there have been "far fewer instances of censorship" in the Iraq war than in the Persian Gulf War under the first President Bush and that the press has been given "relatively free access" to the military tribunal proceedings at Guantanamo Bay for foreign detainees captured in the Afghanistan war. [9]

White House spokesmen periodically defend the administration against charges of limiting access to information. At the same time, President Bush has said he rarely reads newspaper stories, preferring to rely on the "objective sources" on the White House staff. And Bush's chief of staff, Andrew Card, was quoted recently as saying of the press, "I don't believe you have a check-and-balance function." [10]

For his part, the University of Missouri's Davis charges that the Bush administration is "overtly hostile" to the press and that the attitude is filtering down to state and local governments — as in the Ehrlich case.

"We're seeing government at the state, local and federal level less willing to pay homage to the press and more willing to take the press on directly," Davis says. "There seems to be this tacit recognition, 'What do we need the press for? We can just go around them. We can control the message a lot better that way.' "

But conservative commentator Bruce Fein, a columnist for *The Washington Times*, thinks the press exaggerates its difficulties. "There is such enormous respect for the press and its power and utility in democracy," says Fein, a Justice Department official under President Ronald Reagan. "There doesn't seem to be in First Amendment doctrine any weakening of protections of the press."

Should judges jail reporters for refusing to disclose confidential sources?

When he sentenced TV reporter Taricani for contempt of court, Judge Torres justified his decision with a nearly hourlong peroration from the bench. "A reporter should be chilled from violating the law in order to get a story," the judge said, or "from making ill-advised promises of confidentiality in order to encourage a source" to talk. [11]

Some evidence indicates popular approval of that sentiment. In the days after Taricani's sentence, *Providence Journal* columnist Mark Patinkin reported that out of "a few dozen" e-mails he received after criticizing Torres' decision, nearly 70 percent agreed with the judge. "I am outraged at the way you and the rest of the news media are circling the wagons to defend your profession as if it is holy ground," wrote one reader. [12]

Journalism groups defend the need to protect confidential sources as an important component of investigative reporting. "Clamping down on confidential sources ignores the role of confidentiality in whistle-blowing and investigative reporting, two very important checks on governmental power," says SPJ's Davis.

"What [government officials are] saying is, 'Don't speak to the press,' " Davis adds. "The end result is total reliance on government press releases."

Current and former prosecutors, however, generally defend questioning reporters who have information about criminal activity if it cannot be obtained in other ways.

"The law is very clear that reporters do not have an absolute or even a qualified privilege to resist grand jury subpoenas in criminal investigations," Joseph di Genova, a Washington lawyer and former independent counsel, told a television interviewer after *Time* reporter Cooper was first held in contempt. "A prosecutor who is doing his or her duty must subpoena reporters if that is the only other source of the information available to them." [13]

The Supreme Court's decision rejecting a First Amendment privilege came in three consolidated cases involving reporters with *The Louisville Courier Journal*, *The New York Times* and a New Bedford, Mass., television station. The *Courier Journal* reporter had observed and written about the manufacture of illegal drugs; the other two reporters had attended and written about activities of the Black Panther Party.

All three reporters said they could not have obtained their stories without promising confidentiality. Journalism groups today cite similar examples in arguing that compelled disclosure of confidential sources will eventually hurt what they call the public's right to know.

"Sources are going to dry up, and the public is not going to be getting the level of information they've been getting or the quality of information that they have been getting in those isolated circumstances where confidentiality is appropriate," Dalglish of the Reporters Committee says.

Whatever the merits of that general argument, even some journalists question the claim of confidentiality in the Plame investigation. Stephen Chapman, an editorial board member and columnist for the *Chicago Tribune*, calls the clash over the Cooper and Miller subpoenas "absolutely the worst case for the press."

"We have the same obligation as any citizen has to cooperate with law enforcement," Chapman says. "In cases like this, the promise that reporters give to sources to protect their confidentiality should be to do it within the limits of the law."

When Courts Demand Reporters' Sources

A total of 14 journalists face jail time as part of five active federal cases in which reporters have been subpoenaed to reveal their confidential sources or, in one case, telephone records:


Miller


Cooper

The Valerie Plame investigation (*In re: Special Counsel Investigation*) — Reporters Matthew Cooper of *Time* and Judith Miller of *The New York Times* have been fined and sentenced to jail for contempt of court in connection with an investigation of the leak of CIA operative Plame's name. Robert Novak published her name in a July 2003 column, attributing the leak to "senior administration officials," who reportedly sought retaliation against her husband, former diplomat Joseph C. Wilson IV, for criticism of Bush administration Iraq policies. Patrick Fitzgerald, U.S. attorney in Chicago, sought to question five reporters about the leak in spring and summer 2004; three provided limited testimony and are not under subpoena.

In October Chief U.S. District Court Judge Thomas Hogan held Miller and Cooper in contempt for declining to fully answer prosecutors' questions. (Cooper had provided limited testimony in August.) Hogan fined the reporters $1,000 a day and ordered them jailed until they testify. The sentences were stayed pending appeal. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld the contempt citations on Feb. 15, 2005 (*In re: Grand Jury Subpoena*, 04-3138). Cooper and Miller have asked the full nine-member court to reconsider the decision.


Hatfill

***Hatfill v. Ashcroft* —** Steven Hatfill, a former Army bioterrorism expert, has obtained subpoenas against eight news organizations and one reporter in connection with his Privacy Act suit against the government, which he contends leaked his name as a "person of interest" in the investigation of a series of anthrax attacks in 2001. The subpoenas were issued in December 2004 by U.S. District Judge Reggie B. Walton in Washington to ABC, CBS, NBC, The Associated Press (AP), Gannett Newspapers, *Newsweek*, *The Washington Post*, *Los Angeles Times* and former *Baltimore Sun* reporter Scott Shane. Eight of the subpoenas are being contested in Washington; the *Times* is contesting its subpoena in Los Angeles.


Lee

***Lee v. Department of Justice* —** Wen Ho Lee, a former nuclear physicist at the Los Alamos National Laboratory in New Mexico, obtained subpoenas against five reporters in connection with his Privacy Act suit against the government for disclosures about him while he was facing espionage charges — later dropped. The subpoenas were issued in October 2003 to James Risen and Jeff Gerth of *The New York Times*; Bob Drogin of the *Los Angeles Times*; Pierre Thomas, formerly of CNN and now with ABC; and Josef Hebert of the AP; and, in early 2004, to Walter Pincus of *The Washington Post*. All of the reporters but Pincus were found in contempt of court in August 2004 by U.S. District Judge Thomas Penfield Jackson in Washington for refusing to reveal their confidential sources and fined $500 per day; the fines were stayed pending appeals. Pincus is expected to face the same penalty.


Bin Laden

Global Relief Foundation grand jury investigation — The U.S. attorney's office in Chicago has subpoenaed the telephone records of *New York Times* reporters Judith Miller and Philip Shenon in connection with the leak of information about a planned FBI raid on the foundation, an Islamic charity suspected of funding terrorism. Charity representatives said they were tipped off to the Dec. 14, 2001, raid by reporters calling for comment. U.S. District Judge Robert Sweet in New York City ruled on Feb. 25, 2005, that the telephone records are covered by a reporter's privilege (*The New York Times Co. v. Gonzales*, 04-Civ. 7677).


Bonds

BALCO grand jury investigation — Federal prosecutors asked five San Francisco Bay-area reporters in midsummer 2004 to testify before a grand jury about confidential sources they used in covering alleged illegal steroid distribution by BALCO — Bay Area Laboratory Cooperative — a nutritional-supplement company. The reporters — Henry Lee, Lance Williams and Mark Fainaru-Wada of the *San Francisco Chronicle* and Elliot Almond and Sean Webby of the *San Jose Mercury News* — all declined; no subpoenas followed. Later, prosecutors asked for a Justice Department probe of ongoing leaks after publication in December of excerpts from sealed grand jury testimony by baseball players Barry Bonds and Jason Giambi.

Source: The Reporters Committee for Freedom of the Press (www.rcfp.org).

Other journalists, however, are backing Cooper and Miller's refusal to answer questions about confidential sources even while acknowledging some discomfort and some uncertainty about the investigation. "It's a troubling case, because the facts are so dreadful," Davis says.

"I'm not convinced that a law was broken in this situation," Dalglish says, noting that the federal law prohibits disclosure of a covert agent's identity only under specified circumstances. "I'm not sure how productive it is to go after Cooper and Miller," she adds.

For his part, Fein sharply criticizes Cooper and Miller. "It seems to me exceptionally obtuse for the two reporters to suggest that they are falling on their swords to protect the public's right to know," Fein says. "You have the reporters helping to conceal from the public what it has a right to know, namely, whether someone in the government committed a crime."

In other cases, journalism groups say a prosecutor's burden in subpoenaing a reporter should be very high. Dalglish, for example, says a reporter should be able to claim confidentiality unless the information sought would prevent serious bodily harm or a life from being threatened. "I haven't been presented with a set of circumstances that would override that privilege," she says.

Fein says the government should take care before deciding to subpoena reporters, but he says news organizations also should show more flexibility in such cases.

"The press does a disservice to itself in being so rigid in its insistence that there are no circumstances [in which] it can reveal a confidential source," he says. "When the press makes a claim for an absolute privilege, it loses what needs to be a very cherished reverence for its job of checking the government and informing the public."

Should courts issue "gag" orders to limit publicity in high-profile cases?

When a Jacksonville, Fla., television reporter quoted from a secret grand jury transcript in a high-profile murder case in July 2004, the judge threatened his stations with criminal prosecution or contempt of court. Seven months later, the judge's order is still on the books, even though the transcript is now public record and the reporter had obtained his copy from the state prosecutor in the case. [14]

The judge's order — now being challenged by the stations before the U.S. Supreme Court — is an extreme example of the increasing number of free press-fair trial disputes in high-profile cases. In many instances, judges limit out-of-court comments by attorneys or — as in the ongoing Michael Jackson sexual-molestation trial — even witnesses. Courts also are increasingly using "anonymous" juries to shield jurors from post-trial questioning by news media.

But journalists are especially concerned that a small number of judges have begun prohibiting publication of information already in the hands of news organizations or — as in the Jacksonville case — to threaten legal sanctions for doing so. For example, the Colorado judge in the rape case of basketball star Kobe Bryant barred news media from publishing testimony from a closed-door pretrial hearing after a court clerk accidentally e-mailed the transcript to several news organizations. The Colorado Supreme Court upheld the order, but the trial judge eventually released an edited transcript. * [15]

"We are seeing a lot more gag orders in all levels of courts," Dalglish says. "We see judges periodically kicking reporters out of [pretrial proceedings]. We are seeing prior restraints."

"The press has to be vigilant about the possibility of prior restraints," says Jay Wright, a professor at Syracuse University's Newhouse School of Communications and co-author of a leading media law casebook. "It never fails to amaze me how we can hear every year about prior restraints in some form or another."

A prominent criminal defense lawyer notes, however, that judges have very little leeway in prohibiting the press from publishing information. "Gag orders against the press traditionally have to be very, very narrow," says Nancy Hollander, an Albuquerque, N.M., lawyer and one-time president of the National Association of Criminal Defense Lawyers. "Courts can gag the lawyers far more easily than the courts can gag the press once the press finds out information."

The Supreme Court in 1976 unanimously struck down an effort by a Nebraska judge to bar the press from publishing accounts of open-court proceedings in a high-profile murder trial. In the main opinion, however, Chief Justice Warren E. Burger left open the possibility of upholding a prior restraint under some, unspecified circumstances. Fourteen years later, however, the court declined to review a federal appeals court decision barring CNN from broadcasting excerpts of a tape recording between former Panamanian President Manuel Noriega and lawyers representing him in a drug-conspiracy case in Florida. [16]

Prosecutors and defense lawyers sometimes have a common interest in limiting publicity about criminal trials. Defense lawyers fear the potential influence of media coverage on jurors while prosecutors worry it could jeopardize any conviction on appeal. "A gag order certainly might be justified to the extent that the judge believes that if the testimony leaks out it would meaningfully interfere with the right of the defendant to get a fair trial," says Alfredo Garcia, a law professor at St. Thomas School of Law in Miami who has been both a prosecutor and criminal defense lawyer.

In the Jacksonville case, attorney George Gabel, representing two local TV stations, says Judge Robert Mathis ignored state law when he tried to prevent publication of the grand jury transcript in the murder trial of Justin Barber. The transcript of Barber's grand jury testimony — denying that he had killed his wife — became public record under Florida law when prosecutors turned it over to the defense, according to Gabel.

* The charges against Bryant were dropped on Sept. 1, 2004, after the alleged victim refused to testify.

In addition, the prosecutor in the case gave a copy of the transcript to the stations' reporter, Daryl Tardy. Yet Mathis on July 30, 2004, prohibited the stations from airing information from the transcript on the basis of another Florida law mandating secrecy of grand jury proceedings. Ten days later, Mathis specified that the station would be subject to prosecution or criminal contempt for revealing contents of the transcript.

"There are no reasons for secrecy," Gabel says. In any event, the lawyer continues, "Where the news media receive information lawfully — even if it's stolen — the press can't be restrained from publishing it."

"It's healthy for the press to be very vigilant about these things," says the University of Chicago's Stone, "because if it isn't made a big issue, then the temptation to [subpoena reporters] comes more often." ■

BACKGROUND

Freedom of the Press

The United States began its history with an already established tradition of a robust, even rambunctious press and a strong but inchoate commitment to press freedom enshrined in the Bill of Rights and in state constitutional provisions. [17]

Despite the First Amendment's guarantee of freedom of the press, courts have sometimes served as the government's instrument for restraining the press. Over time, however, courts have strengthened press protections and, to a lesser extent, interpreted the First Amendment as safeguarding press access to some government information and proceedings.

The press played an important role in the American Colonies' fight against British authorities and eventually for independence from Britain. Early in the struggle, a legal battle between New York's royal governor, William Cosby, and an opposition newspaper helped give birth to a distinctively American view of freedom of the press. In 1735 Cosby obtained an indictment for seditious libel against John Peter Zenger, who printed (but did not write or edit) *The Weekly Journal*, in New York. In defending Zenger, attorney Andrew Hamilton successfully argued for an acquittal by using truth as a defense — contrary to English law. Although jury verdicts do not establish binding precedent, similar prosecutions nonetheless "petered out" after the case, according to the prominent constitutional historian Leonard Levy. [18]

As drafted in 1787 and ratified a year later, the Constitution included no protection for freedom of the press or other individual rights — an omission criticized by opponents and remedied by the adoption of the Bill of Rights. As originally drafted by James Madison, the First Amendment would have prohibited either Congress or the states from enacting any law to abridge "the freedom of speech, or of the press." The states were dropped from the final language. Levy argues that the drafting history and the debate in Congress give few clues about whether the Framers intended simply to prohibit prior government censorship or also to bar subsequent punishment for "seditious" publications.

A decade later, the Federalist-controlled Congress found the First Amendment no barrier to passing the notorious Sedition Act of 1798, which made it a crime to publish "any false, scandalous, and malicious" writing about the president, Congress or the U.S. government. [19] The law was ostensibly designed to strengthen the government in the looming conflict with France but was aimed at and used against the Federalists' Republican opponents. Ten people were convicted under the act, including at least three journalists. Supreme Court justices, sitting as trial judges, refused to find the law unconstitutional, but the issue never reached the full court; the act expired in March 1801.

The Civil War provided the next occasion for the federal government to move against journalists. Early in the war, the government barred three pro-secessionist newspapers in Maryland from being distributed via the U.S. mail and later had their editors arrested. By one estimate, some 300 Democratic newspapers were suspended for at least a brief period — including papers in such major cities as Chicago, Philadelphia and St. Louis — typically for expressing anti-war or anti-administration views. In his account, however, Professor Stone depicts most of the actions as initiatives by Union generals in the field, not by President Lincoln himself, whom he credits with "an admirable respect for free expression — even when he was the target of attack." [20]

A half-century later, World War I produced more thoroughgoing repression of dissent, though the government's actions were aimed primarily at radical activists and pamphleteers and not the mainstream press. At President Woodrow Wilson's urging, Congress passed two laws allowing the government to punish anti-war expression. The Espionage Act of 1917 made it a crime to promote insubordination in the military or to obstruct recruitment. The act also authorized the postmaster general to bar such publications from the mails, but significantly Congress rejected a provision to authorize government censorship. A year later, Congress passed the Sedition Act of 1918; broader than the 1798 law, it criminalized criticism of the U.S. government, the Constitution or the military.

Although the new Sedition Act was little used before the war ended, the Espionage Act was widely invoked to bar radical materials from the mails and prosecute anti-war activists. With the war's end, the Supreme Court began to receive appeals stemming from some of those convictions as well as appeals of convictions under state laws

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Chronology

Before 1900

Congress, but not states, barred under First Amendment from abridging freedom of the press; few court rulings to interpret provision.

Early 1900s

Supreme Court restricts free press and speech rights during World War I; later, court extends First Amendment rights to states, limits "prior restraints."

1925
Supreme Court says First Amendment bars states from violating freedom of speech.

1931
Supreme Court says states cannot censor press except under limited circumstances (*Near v. Minnesota*).

1960s-1980s

Supreme Court gives press major victory by limiting libel suits by public officials, public figures . . . Court later rebuffs effort to establish reporter's privilege to protect confidential sources, but many states pass reporter shield laws in response.

1964
In *New York Times v. Sullivan*, Supreme Court establishes constitutional protections against libel suits by public officials; three years later, rule expanded to suits by public figures.

1966
Congress passes Freedom of Information Act (FOIA) guaranteeing access to federal agency records, subject to various exceptions; over time, many states and municipalities enact similar laws.

1971
Government's effort to block publication of Pentagon Papers rejected by Supreme Court.

1972
Supreme Court, in 5-4 ruling, rejects efforts by three reporters to avoid contempt for defying grand jury subpoenas to disclose confidential sources; Justice Powell's concurring opinion seen by some as backing reporter's privilege in some cases (*Branzburg v. Hayes*).

1974
Supreme Court gives press partial victory with ruling to raise hurdles for libel suits by private figures.

1978
Supreme Court refuses to recognize First Amendment privilege against newsroom searches.

1980
First Amendment gives public and press right to attend criminal trials except under limited circumstances, Supreme Court rules (*Richmond Newspapers v. Virginia*); later rulings say closure must be narrowly tailored to serve overriding interest, and no alternatives are possible.

1989
Supreme Court gives media protection against privacy suits by barring liability for publishing information lawfully obtained from government.

2000s

Free-press disputes proliferate after access restrictions are imposed following 9/11; court disputes over confidential sources increase.

2001
Vice President Cheney limits access to meetings, records of energy task force . . . Immigration judge closes hearings for people rounded up after Sept. 11 terrorist attacks . . . Attorney General John Ashcroft tells federal agencies to take stricter approach toward FOIA requests.

2003
Supreme Court won't hear challenge to immigration hearings closure . . . Justice Department opens probe of leak of name of CIA operative Valerie Plame after publication in July; U.S. Attorney Patrick Fitzgerald named in December as special counsel for case.

2004
Several reporters subpoenaed in the Plame case; Matthew Cooper of *Time* and Judith Miller of *The New York Times* decline to answer questions about confidential sources and are held in contempt of court in October; fines and jail sentences stayed pending appeal . . . Five reporters held in contempt in August for defying subpoena in privacy suit by nuclear scientist Wen Ho Lee . . . Rhode Island federal judge in November holds TV reporter James Taricani in contempt for refusing to identify confidential source; Taricani sentenced to six months' home confinement in December. . . . Federal judge in Washington issues subpoenas to news organizations, journalists in privacy suit by bioterrorism expert Steven Hatfill; journalists file challenges.

2005
Federal appeals court upholds contempt citations against Cooper, Miller; lawyers seek rehearing, vow Supreme Court appeal if necessary.

Are Bloggers Journalists?

Whether posting breaking news or news about the break-up of their latest relationship, bloggers suddenly seem to be everywhere.

Loosely defined as online diaries, the esitmated 8 million blogs saturating the online universe include everything from personal rants to serious reporting. In fact, bloggers have become so ubiquitous they now have their own segment on CNN's "Inside Politics," and major research organizations like the Brookings Institution invite them to participate in panel discussions.

The innovative way bloggers disseminate information — constant updates, conversational tones and heavy doses of opinion — have *The Washington Post* and the *Chicago Tribune* taking notice: The front "pages" of their Web sites now link to various blogs.

Despite the deluge of mainstream media attention, controversy over bloggers' use of confidential sources has raised a fundamental question: Are bloggers true journalists or just overcaffeinated computer jockeys with attitude?

For instance, in a California case being widely watched, Apple Computer contends that three blogger sites — Thinksecret.com, Appleinside.com and Powerpage.org — should disclose their sources of leaked company secrets. The sites say California's shield law and the Constitution's First Amendment give them the privilege to protect the identities of their confidential sources.

Since blogs are such a new and relatively unstudied media phenomenon, no one agrees on whether bloggers merit the same protections enjoyed by mainstream journalists. No court has set such a precedent, and the issue is confused by the wide variety of blogs. While bloggers can take credit for discovering the information that took down the careers of both CBS's Dan Rather and CNN's chief news executive Eason Jordan, most of their colleagues seem to be posting mundane items about their own lives with no news value.

"The question should not be whether [all] bloggers are journalists, but which bloggers are journalists?" says Kurt Opsahl, a staff attorney with the Electronic Frontier Foundation, which represents two of the Web sites involved in the Apple case. "The medium of expression should not be the determinate of whether or not you're a journalist. What makes journalism journalism is not the format but the content, and my clients have been publishing daily news, feature stories and the latest happening about Apple products for years," Opsahl says.

A California Superior Court judge sidestepped the question, ruling in March 2005 that the state's shield law did not protect anyone — journalist or not — who disseminates "stolen property." However, the question will undoubtedly come up in the foundation's appeal, Opsahl says.

The judge misapplied the test used to determine when California's constitutional reporter's privilege can be overcome, Opsahl says, insisting that the question of whether bloggers are reporters is still at the heart of the case. "Apple would never go after a mainstream media organization in the same way," he adds.

Garrett Graff of FishbowlDC.com recently became the first blogger to receive White House press credentials and considers his work journalism. He agrees that the material published

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against political dissidents. Until then, the court had had scant opportunity to define the scope of the First Amendment. But it began to lay the foundations of modern free-speech and free-press law in the 1920s and '30s.

Two cases in particular helped create the basis for a more extensive protection for freedom of the press. In *Gitlow v. New York* (1925), the court ruled that the First Amendment applies to both the states and the federal government. The decision nonetheless upheld the conviction of a radical journalist under New York's Criminal Anarchy Act. Six years later, in *Near v. Minnesota* (1931), the court struck down a state law allowing officials to prohibit publication of "malicious, scandalous or defamatory" newspapers or magazines. Writing for the 5-4 majority, Chief Justice Charles Evans Hughes said prior restraint against the press could be justified only under limited circumstances, such as wartime military information, obscenity or incitement to violence or the overthrow of the government. [21]

Press Privileges

The Supreme Court substantially enlarged press protections with landmark decisions on libel, privacy and courtroom access between the 1960s and '80s. At the same time, however, it rebuffed press efforts to gain privileges against compelled disclosure of sources or newsroom searches. Meanwhile, Congress and many states passed freedom of information and open-meetings laws that guaranteed the public and the press access to more government records and proceedings. The web of statutory and constitutional provisions gave the press valuable tools for gathering news and fairly strong protections against the most common forms of private lawsuits.

In the first and most important of the rulings, the high court gave the news media an all-but-impenetrable shield against the financial threat of libel suits by public officials. The court's landmark ruling in *New York Times Co. v. Sullivan* (1964) held that a public official could recover in a libel suit only by proving "actual malice" — that is, that the news organization published a defamatory statement knowing that it was false or with reckless disregard of its truth or falsity. [22] The ruling dismissed a $500,000 award won by an Alabama police commissioner for the *Times'* publication of an advertisement by a civil-rights group that included several in-

on the Web sites involved in the Apple case is journalism worthy of protection because the sites are "designed to report, break and disseminate news." But he says the work of those bloggers is more the exception than the rule.

"There are a small number — maybe several thousand of the about 8 million bloggers — who would consider themselves journalists, but the vast majority of bloggers would not consider their blogs journalism," Graff says.

"What I do on Wonkette is not journalism," says Ana Marie Cox of her "gossipy, raunchy and potty-mouthed" blog. [1] But that does not mean that all blogs are without journalistic merit, she adds. "If bloggers are presenting their work as reporting, then we judge it by the standards of reporting. And if they present it as commentary and analysis and snarkiness, then there are fewer standards to go by."

Lucy Dalglish, executive director of The Reporters Committee for Freedom of the Press, in Arlington, Va., agrees. Her organization does not think anybody with a computer can call himself or herself a journalist. "That's not journalism," she says,

Courtesy Ana Marie Cox

Ana Marie Cox of Wonkette

of those posting musings or family information on the Web.

Two bills pending in Congress propose a federal shield law for reporters. One, sponsored by Sen. Christopher Dodd, D-Conn., covers bloggers, while the other — sponsored by Rep. Mike Pence, R-Ind., and Sen. Richard Lugar, R-Ind. — does not. Dalglish says a shield law that does not include bloggers would be "unfortunate, but I would probably support it."

Los Angles Times media columnist David Shaw believes extending any federal shield law to bloggers would harm journalism as a whole. "If the courts allow every Tom, Dick and Matt who wants to call himself a journalist to invoke the privilege to protect confidential sources, the public will become even less trusting than it already is of all journalists," Shaw wrote. "That would damage society as much as it would the media." [2]

— Kate Templin

[1] Julie Bosman, "First With the Scoop, if Not the Truth," *The New York Times*, April 16, 2004, Sect. 9, p. 10.

[2] David Shaw, "Do Bloggers Deserve Basic Journalistic Protections?" *Los Angeles Times*, March 27, 2005, p. E14.

consequential inaccuracies about police behavior against demonstrators. The court later extended the *Times v. Sullivan* rule to libel suits by public figures who were not officials and created less stringent protections against suits filed by private individuals. [23]

News organizations sought an analogous legal privilege to limit civil liability for invasions of privacy for publishing truthful information, however personally embarrassing. The Supreme Court refused to go that far, but in two significant decisions it barred liability for publishing information lawfully obtained from government sources. In one case, the court in 1975 threw out a privacy suit by the family of a rape-murder victim after a local television station obtained the victim's name from court records. In 1989, the court similarly blocked a rape victim's suit after a newspaper reporter published her name after it was mistakenly released by the local sheriff's office. The high court steered clear of privacy-invasion suits involving non-official information, but plaintiffs through the 1980s generally had only limited success in lower courts. [24]

The Supreme Court gave the news media a less qualified victory in 1980 with a decision recognizing a right of access for the press and public to criminal trials — except in extraordinary circumstances. The ruling in *Richmond Newspapers, Inc. v. Virginia* came after a handful of courts in various states had closed pretrial hearings or in a few cases actual trials in an attempt to protect defendants from prejudicial publicity. Two subsequent decisions, extending the right of access to jury selection and preliminary hearings, effectively established a rule that criminal proceedings can be closed only if narrowly tailored to serve an overriding interest that cannot be protected by some alternative step. [25]

The libel, privacy and courtroom access rulings all involved issues that journalists confronted on a regular basis. The news media's most dramatic victory in the period, however, came in an all-but-unique setting: the government's effort in 1971 to block *The New York Times* and later *The Washington Post* from publishing the Pentagon Papers. President Richard M. Nixon instructed the Justice Department to block stories on the report, leaked to the newspapers by Pentagon-consultant-turned-antiwar-activist Daniel Ellsberg. Lower courts temporarily restrained the publications, but the Supreme Court — citing *Near v. Minnesota* — voted 6-3 that the government had failed to carry the "heavy burden" needed to justify an injunction. [26]

Against these news-media victories, the *Branzburg* decision stood as the most important setback for journalists. For the majority, Justice Byron R. White rejected warnings from news organizations that refusing to recognize a reporter's privilege would be "a serious obstacle to either the development or retention of confidential news sources by the press." Four years later, the court similarly ruled that news organizations have no right to prevent police from searching newsrooms for evidence — in the specific case, photographs by a college newspaper of a student demonstration. And in the same year the federal appeals court in Washington, D.C., allowed the government to subpoena reporters' telephone records despite the possible intrusion on confidentiality. [27]

Congress and state legislatures softened the effects of the adverse rulings with some legislative relief. State shield laws gave journalists qualified privileges to resist disclosure of confidential sources. Congress did not pass a comparable federal law, but the Justice Department adopted guidelines that ostensibly limited subpoenas to reporters for confidential sources. And Congress in 1980 passed a law prohibiting newsroom searches by federal authorities unless journalists were themselves suspected of crimes.

In addition, both Congress and the states had been passing laws since the mid-1960s to provide access to government records and proceedings. The freedom of information acts and so-called government-in-the-sunshine laws typically included various exceptions, which courts — including the Supreme Court — construed narrowly in some cases and more broadly in others. Still, by the end of the 1970s governments at all levels generally operated under statutory provisions that gave journalists and the public at large a presumptive right of access to government information and meetings.

Getty Images/Paul S. Howwell

Texas writer Vanessa Leggett spent a record 168 days in jail after refusing a grand jury subpoena to give federal authorities her notes of interviews with confidential sources during the investigation of the 1997 murder of Dallas socialite Doris Angleton. Leggett was released from jail on Jan. 4, 2002.

Press Complaints

Almost as soon as he was inaugurated, President Bush came under fire from media groups complaining that his administration was limiting press access to government information. The criticism intensified after sweeping restrictions on press access were instituted following the Sept. 11, 2001, terrorist attacks, but the policies survived legal challenges. Frustrated by their lack of success, journalist groups and others said the administration's policies were contributing to an anti-press climate at all levels of government. The complaints grew in 2004 with the flurry of cases involving efforts to subpoena reporters who insisted on protecting their confidential sources.

From the start of his presidency in January 2001, Bush minimized the number of full-dress White House news conferences, holding only three by one count in his first seven months in office. [28] With little public notice, he also used his power under the Presidential Records Act to delay release of President Reagan's personal papers. In a higher-profile dispute, Vice President Dick Cheney blocked access to a high-level task force on energy policy created in spring 2001. The group met in secret and refused to release even the names of industry executives who participated. Also in 2001, the Justice Department rankled press advocates in August by subpoenaing the telephone records of a reporter covering a corruption investigation of Democratic New Jersey Sen. Robert Torricelli. [29]

Shortly after the Sept. 11 attacks, the administration began imposing broad press restrictions. In an unannounced order on Sept. 21, Chief Immigration Judge Michael Creppy of the Justice Department barred access to immigration hearings for the hundreds of individuals rounded up for alleged immigration violations following the attacks. The

order barred releasing even the names of those detained, mostly men of Arab or Muslim backgrounds. [30]

The Justice Department justified the order by saying that terrorists could use the names or information to track the course of the investigation of the attacks. News organizations challenged the closures in courts in Michigan and New Jersey, largely on First Amendment grounds. Separately, a public-interest group sued in federal court in Washington seeking the names of the detainees under the Freedom of Information Act. News groups won in the Michigan case but lost both the New Jersey case and the FOIA case in Washington. The Supreme Court in 2003 declined to take up the issues. [31]

Meanwhile, Attorney General Ashcroft in October 2001 directed government agencies to take a more skeptical view of FOI requests. The memo told agencies to "carefully consider" reasons for withholding government records and promised to defend any decisions unless they were "without sound legal basis." The memo reversed a Clinton administration policy that called for releasing government records unless disclosure would be "harmful." [32]

Against this seemingly unfavorable climate, the assorted reporter subpoena disputes that emerged in 2003 and 2004 engendered a sense of fear and foreboding among many journalism groups and some First Amendment experts. The cases were widely separated by geography and subject matter, but together they left many journalists fearing that courts were far too willing to let either the government or private parties put reporters in the uncomfortable position of deciding whether to disclose confidential sources or go to jail for refusing to do so.

In the most significant case, special prosecutor Fitzgerald in early 2004 began demanding testimony from five nationally prominent reporters in his investigation of the leak of Plame's name to columnist Novak. Three of the reporters — Tim Russert of NBC and Glenn Kessler and Walter Pincus of *The Post* — provided limited testimony that satisfied Fitzgerald, but he went forward with subpoenas for Cooper and Miller. Chief U.S. District Judge Thomas Hogan held Miller and Cooper in contempt of court on Oct. 7 and Oct. 13, respectively; fined them $1,000 per day; and ordered them jailed until they testified. The fines and sentences were stayed pending appeal.

Meanwhile, Fitzgerald was also subpoenaing telephone records for Miller and her *Times* colleague Philip Shenon in an investigation by a grand jury in Chicago of a leak about a planned FBI raid on the Global Relief Foundation, an Islamic charity suspected of funding terrorism. Federal prosecutors also asked five San Francisco-area reporters in August 2004 to disclose confidential sources they used in covering the so-called BALCO investigation of allegedly illegal steroid distribution by a San Francisco lab. The leak investigation remains open, but no subpoenas had been issued as of the end of March.

In addition, two former government scientists obtained subpoenas for journalists in their Privacy Act suits against the government for leaks related to official investigations directed at them. Wen Ho Lee, a nuclear physicist at Los Alamos National Laboratory in New Mexico, sued after the government dropped espionage charges against him. A federal judge in Washington held five reporters in contempt on Aug. 18, 2004, for refusing to reveal their confidential sources.

Meanwhile, former Army bioterrorism expert Steven Hatfill obtained subpoenas against eight news organizations and one reporter after news stories identified him as a "person of interest" in the government's investigation of anthrax attacks in 2001 that killed five people. As of March 2005, the subpoenas were being contested in federal courts in Washington and Los Angeles. ■

CURRENT SITUATION

Jail Time?

Reporters Cooper and Miller are continuing to work on high-profile news stories while their lawyers, including prominent First Amendment expert Floyd Abrams, are urging the federal appeals court in Washington to overturn a decision that could send them to jail for up to 18 months for refusing to reveal confidential sources.

Miller, a 28-year *Times* veteran, has been immersed in covering the United Nations' "food for oil" scandal. Cooper, *Time*'s White House correspondent, has contributed reporting to a range of diplomatic and political stories, including President Bush's appointment of former U.S. representative to the U.N. John Negroponte as the first director of national intelligence.

Cooper and Miller strongly defend the importance of confidentiality and say they will go to jail rather than disclose their sources to the grand jury investigating the leak of CIA operative Plame's identity. "People with information about waste, fraud, abuses, dissenting assessments and yes, even gripes, must feel that we will protect them if they trust us with sensitive information," Miller told *Time* in February. "That's why I cannot disclose their identities." [33]

Those concerns failed to sway Judge Hogan, who held the reporters in contempt in October 2004, or the three-judge appeals court panel that heard the case two months later. In separate opinions issued on Feb. 15, the three judges all upheld the contempt citations. Under the federal civil contempt of court statute, Cooper and Miller could be jailed up to 18 months unless they comply with the subpoena.

Student Journalists Fight Campus Censorship

As editors of their college newspaper, Margaret Hosty and Jeni Porche made a lot of waves with critical investigative articles about the faculty and administration at Governors State University, outside Chicago. When Dean of Students Patricia Carter decided in October 2000 that all future issues would require administration approval before publication, the students suspended publication.

The dispute has left the 9,000-student university without a campus paper for more than four years. And it triggered a major legal battle over college press freedom now awaiting a decision from the federal appeals court in Chicago. [1]

The case of *Hosty v. Carter* illustrates the sometimes contentious and often unsettled legal environment for high school and college journalists today. Student reporters and editors have to deal with legal issues comparable to those facing mainstream journalists, such as getting access to campus crime reports. But they also have to deal with oversight — or more — from high school principals or college administrators who may wield power over newspaper or broadcast budgets as well as the individual educational careers of student journalists.

A Supreme Court ruling in 1988 held that high school administrators have discretion to censor student newspapers. By a 5-3 vote, the court said in *Hazelwood School District v. Kuhlmeier* that administrators can block publication of material inconsistent with a school's "basic educational mission." Justice Byron R. White cited as examples materials that are "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." [2]

In response, eight states have adopted so-called anti-*Hazelwood* laws aimed at protecting high school journalists' freedom of expression. [3] In other states, however, high school journalists have "an uphill battle" in resisting growing interference from school administrators, according to Mark Hiestand, an attorney with the Student Press Law Center.

"School officials seem to be more interested in good PR, and oftentimes that will conflict with good journalism," Hiestand says. "It's very unfortunate, but I think the First Amendment is kind of an afterthought for many school officials these days."

College newspapers operate with greater freedom, Hiestand says. But when Horsty, Porche and reporter Steven Barba sued Carter, the Illinois attorney general's office answered by seeking to extend the *Hazelwood* principle to colleges and universities. College journalists' First Amendment rights are not "greater than the limited rights accorded to the [high school] students in *Hazelwood*," the state argued in a legal brief.

A three-judge panel of the 7th U.S. Circuit Court of Appeals soundly rejected that argument in April 2003. Treating college students "like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step," the court wrote.

In a surprise move, the full 11-member appeals court granted the state's motion to reconsider the decision and heard arguments in January 2004. More than a year later, the case is still undecided — an unusually long delay. In the meantime, however, a lower federal court in Michigan issued a ruling that student-press advocates welcomed as limiting high school administrators' powers under *Hazelwood*.

The ruling stemmed from a decision by Utica Community Schools officials in 2002 to censor an article by Utica High School student journalist Katy Dean about a lawsuit alleging that diesel fumes from the Michigan school's garage exacerbated a nearby resident's lung cancer. In a strongly worded opinion, U.S. District Judge Arthur Tarnow said student journalists "must be allowed to publish viewpoints contrary to those of state authorities without intervention or censorship by the authorities themselves." [4]

The issue of editorial-viewpoint control has divided other federal appeals courts, according to the Student Press Law Center. Of the six appeals courts to consider the issue, three have ruled that high school administrators can censor articles or editorials solely because they disagree with the views expressed, while three others say such actions go beyond the authority recognized in *Hazelwood*.

Apart from court battles, Hiestand says student-press advocates also worry about signs of limited support for First Amendment freedoms among high school students today. In a recent nationwide study, nearly one-third of the 112,000 high school students surveyed — 32 percent — said the press has too much freedom. [5]

On the other hand, a majority — 58 percent — said high school students should be allowed to report controversial issues in their student newspapers without approval of school authorities. Among principals surveyed, only 25 percent agreed.

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[1] For coverage and legal materials from both sides, see "Hosty v. Carter: The Latest Battle for College Press Freedom," Reporters Committee for Freedom of the Press, www.rcfp.org. See also Richard Wronski, "Court Rips College for Censoring Paper," *The Chicago Tribune*, April 11, 2003, Metro, p. 6.

[2] The citation is 484 U.S. 260 (1988). For earlier coverage, see Charles S. Clark, "School Censorship," *The CQ Researcher*, Feb. 19, 1993, pp. 145-168.

[3] The states are Arkansas, California, Colorado, Iowa, Kansas and Massachusetts (statutes); and Pennsylvania and Washington (regulations).

[4] The case is *Dean v. Utica Community Schools*, No. 03-CV-71367DT (Nov. 17, 2004).

[5] The survey was conducted in spring 2004 by researchers at the University of Connecticut and sponsored by the John S. and James L. Knight Foundation. See "Future of the First Amendment: What America's High School Students Think About Their Freedoms," Jan. 31, 2005 (http://firstamendment.jideas.org).

Significantly, two of the judges — David Sentelle and Karen Henderson — specifically held that the First Amendment creates no privilege for reporters in regard to grand jury investigations. That holding challenges the prevailing view among media attorneys that the Supreme Court's 1972 *Branzburg* decision recognizes a limited privilege even though the ruling upheld the reporters' subpoenas being challenged in the case.

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At Issue:

Should Congress pass a federal shield law for journalists?

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WRITTEN FOR THE *CQ RESEARCHER*, APRIL 2005

A federal shield law would set national and consistent standards for a privilege that currently exists under statute, constitutional or common law in 49 states and the District of Columbia, and under the case law in all but two of the federal circuits. The specifics may differ somewhat around the country, but all recognize that the proper functioning of the press in a democratic society — and its essential role in keeping the citizenry informed — depends on the existence of a privilege.

A federal shield law is intended to enable the press to hold government and other institutions accountable for their actions and to establish reasonable and reasonably predictable standards for both shielding and compelling disclosure of sources and information.

Promises of confidentiality, protected by a shield law, allow journalists to obtain and report information from sources who only speak on condition of anonymity — information that might otherwise never be revealed. The accounting fraud at Enron and abuse of Iraqi prisoners at Abu Ghraib are but two recent national stories that required confidential sources.

But confidences in newsgathering are just as important in local coverage. Thanks to the press' receipt of information from confidential sources, most communities in America can point to a significant risk revealed or fraud uncovered, such as stories exposing toxic-waste dumping in local waterways, sexual misconduct at a youth shelter and failing infrastructure of an urban transit system.

Subpoenas to journalists, whether for confidential or non-confidential sources and information, risk:

- reducing reporters to routine, involuntary participants in the judicial and investigatory process;
- allowing government interference with the ability of reporters to do their jobs;
- disrupting press/source relationships; and
- encouraging potential sources simply to refuse to come forward.

Nearly a dozen journalists are currently litigating threats of sanction from federal courts for failure to reveal confidential sources. One is finishing a sentence of house arrest. The federal courts are in conflict with one another as well as with states' laws and policies.

A federal shield law is urgently needed that protects confidential sources and adequately balances the public interest in the fair administration of justice against the press' need to remain free of too-easy access to their non-confidential newsgathering and testimony.

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WRITTEN FOR THE *CQ RESEARCHER*, MARCH 2005

The law frowns on evidentiary privileges. Thus, confidential communications of even the president of the United States must bow to the needs of criminal justice.

Privilege claims should defeat truth only when absolutely necessary to advance compelling interests. By that yardstick, a federal newsman's privilege statute falls short of the mark. A shield law is superfluous to investigative reporting and the exposure of government abuses.

The Free Flow of Information Act of 2005 is sponsored by Sen. Richard Lugar, R-Ind., joined by cosponsors Sens. Lincoln Chafee, R-R.I., Lindsey Graham, R-S.C., and Christopher Dodd, D-Conn. It is not partisan legislation, but it is wrongheaded.

The bill does not find that a single government scandal or a single media investigation into private misconduct has been derailed or impaired by the absence of a federal privilege law. That omission speaks volumes. For 33 years since the United States Supreme Court spoke in *Branzburg v. Hayes* (1972), newsmen have been vulnerable to compelled testimony or notes in federal criminal or civil proceedings. Despite the inability of reporters to guarantee ironclad anonymity to sources, investigations of Watergate, the Iran-contra affair, Whitewater and other government scandals were thorough and pivoted on anonymous sources and classified information. Indeed, a day seldom passes without a confidential-source news story in *The New York Times*, *The Washington Post* or *The Wall Street Journal*.

The political incentive to leak or to curry favor with the press by passing along "breaking news" ordinarily dwarfs any foolproof guarantee of anonymity. Experience also teaches that the probability of discovering leakers approaches zero. Finally, Department of Justice guidelines permit prosecutors to subpoena the press only as a last, desperate measure.

States are divided over newsmen's privilege laws. Yet no evidence has been assembled indicating that the press in privilege states is more robust or muscular than in non-privilege states.

The Free Flow of Information Act would subvert the mission of a free press to reveal government crimes or malfeasance. Suppose a government official violates the Intelligence Identity Protection Act by leaking to several reporters the name of a covert CIA operative to discredit a government critic. A grand jury subpoenas the reporters to identify the criminal culprit. Under Section 4 of the act, the effort to punish the government crime would be thwarted. It crowns the media with an absolute privilege to refuse disclosure of any anonymous source.

The truth is too important to law enforcement to be left to the press.

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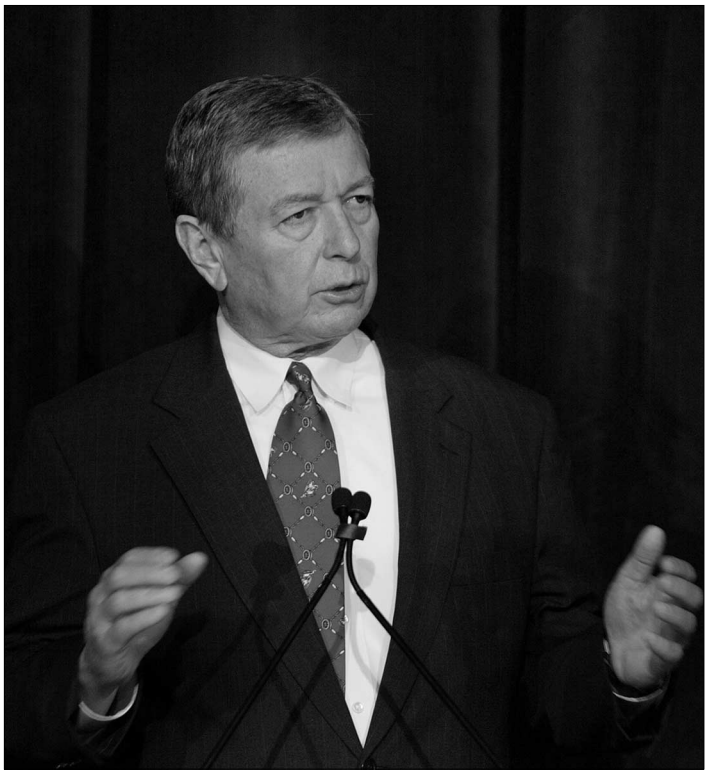
Attorneys for Cooper and Miller are emphasizing the argument in a petition for a rehearing filed with the full nine-judge court on March 21. Under the panel's earlier decision, the lawyers write, journalists "are now faced with a disturbing new landscape." Instead of having a "qualified privilege," the lawyers continue, reporters "now proceed with newsgathering at peril of having no protection at all."

The argument turns on the meaning of Justice Powell's stance in *Branzburg*. He joined the majority in the 5-4 decision but wrote in a concurring opinion that any privilege claim "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 with respect to criminal conduct."



AFP Photo/Luke Frazza

Attorney General John Ashcroft directed government agencies in October 2001 to take a more skeptical view of press requests for the release of government records under the Freedom of Information Act. The action reversed a Clinton administration policy that called for releasing government records unless disclosure would be "harmful." The Reporters Committee and other groups complained about the directive.

Since then, many courts have interpreted Powell's opinion as effectively modifying the majority opinion's rejection of a reporter's privilege. However, both Sentelle and Henderson decisively reject that interpretation. "Whatever Justice Powell specifically intended," Sentelle writes for the two judges, "he joined the majority."

Sentelle also rejects any privilege for reporters under federal common law. Henderson avoided that direct issue but said special prosecutor Fitzgerald had established sufficient grounds to override any privilege that might exist. The third judge — David Tatel — recognized a common-law privilege but said the special prosecutor had adequate basis for enforcing the subpoena.

In urging the appeals court to let the panel's decision stand, Fitzgerald emphasized that all three judges agreed that he had presented evidence to overcome any privilege. In addition, he argued that the reporters' lawyers were misreading Powell's opinion in *Branzburg*. "The simple fact is that Justice Powell joined the majority opinion," Fitzgerald wrote.

Smolla at the University of Richmond Law School calls the panel's decision "extraordinary" in rejecting any reporter's privilege. The decision "attacks at its heart what had been the orthodoxy, that the Powell opinion did in fact narrow the plurality opinion," he says.

Meanwhile, a coalition of 36 news organizations is using another argument in asking the court to reconsider the contempt citations: They question whether the disclosure of Plame's identity amounted to a crime at all. In a 40-page friend-of-the-court brief, the groups contend that the statute at issue — the Intelligence Identities Protection Act of 1982 — prohibits only the intentional disclosure of a true covert agent and only if the government is taking "affirmative measures" to protect the identity.

"There is ample evidence on the public record" to doubt that those criteria have been met, the brief argues.

Petitions to reconsider appeals panels' decisions typically are denied, but they are most likely to be granted if the case involves significant and unsettled legal issues. The D.C. court has no deadline to act, but Fitzgerald urged the court to act quickly, saying the reporters' refusal to cooperate has "stalled" his investigation. Lawyers for the reporters say they will take the case to the Supreme Court, if necessary.

Federal Protection?

Media groups are seeking to counter the flurry of subpoena disputes by urging Congress to follow the lead of a majority of states and adopt a federal shield law for reporters. At the same time, the media groups are joining other open-government advocates in backing a bipartisan bill to increase access to government records under the Freedom of Information Act.

The proposed federal shield laws have bipartisan sponsors in both chambers of Congress. The Free Flow of Information Act in the Senate is

cosponsored by Sens. Richard G. Lugar, R-Ind., and Christopher Dodd, D-Conn., and an identical House bill is sponsored by Reps. Mike Pence, R-Ind., and Rick Boucher, D-Va. Dodd is also separately sponsoring a somewhat broader bill (S. 369) that also covers Web-only journalists, or "bloggers."

All three bills give reporters an absolute privilege to protect the identity of confidential sources. "Without an assurance of anonymity, many conscientious citizens with evidence of wrongdoing would stay silent," Dodd and Lugar wrote in an op-ed article in *USA Today*. "They would rightly fear for their job, their reputation — even, in some cases, for their safety." [34]

The bills provide qualified subpoena protection for reporters' information in criminal or civil cases: Litigants seeking to enforce a subpoena must show "clear and convincing evidence" that they have exhausted all other reasonable attempts to get the information. In criminal cases, there would have to be "reasonable grounds" to believe that a crime had occurred and that the testimony sought is "essential to the investigation, prosecution, or defense." In civil cases, a litigant would have to show that the testimony or document sought is "essential" to an issue "of substantial importance" to the case. Dodd's bill sets slightly different criteria.

The bipartisan measures also would extend the same qualified privilege to journalists' telephone records or e-mails held by third parties. Journalists would have to be notified and given an opportunity to contest any subpoena before it could be enforced.

Journalism groups generally support a federal shield law, although some reporters have reservations about some of the proposed legislation. A shield law "is needed because we need some consistency in the [federal] circuits," says Baron of the Media Law Resource Center. "It would give reporters some real and consistent idea of what the law is rather than the more random application that we have seen [in federal courts] in recent years."

Dalglish of the Reporters Committee says the experience under state shield laws shows that a federal law would be useful. "State shield laws, by and large, work," Dalglish says. "Even if they don't completely protect confidential sources, they at least slow down the service of subpoenas on reporters. They at least put the brakes on it."

The Society of Professional Journalists has strongly supported shield laws, but FOI committee Chair Davis acknowledges that he is "somewhat ambivalent" on the subject. "I would much rather see a judicial recognition of the privilege than a statutory mandate," he says, "because statutory mandates come and go with the political winds."

Some journalists also are concerned that shield laws put the courts in the position of determining who qualifies as a journalist. "That horse is already out of the barn," Dalglish responds. "I find it repugnant to have the government deciding who journalists are, but I find it more repugnant to have journalists sitting in jail."

The main bills cover newspapers, magazines, book publishers, broadcasters and cable or satellite systems and their employees or free-lancers with contracts. Dodd's bill goes further by covering anyone who "engages in the gathering of news or information" for dissemination to the public through "any printed, photographic, mechanical, or electronic means" — a definition that includes bloggers. (*See sidebar, p. 304.*)

All of the bills have been referred to committees, with no hearings scheduled as of April 2005. A spokesman in Dodd's office says no organized opposition has been heard.

In a second legislative issue for journalists, Sens. John Cornyn, R-Texas, and Patrick Leahy, D-Vt., are proposing revamping the Freedom of Information Act for the first time in nearly a decade. Among other provisions, the bipartisan bill would create an ombudsman to mediate disputes between government agencies and FOIA requesters. It would also make government-owned information held by outside contractors subject to the law.

Cornyn, a former Texas state attorney general, is described by the Reporters Committee as a "seasoned advocate" for open government. Leahy was the principal sponsor of the Electronic FOI Act of 1996, which sought to ensure access to electronic records. Several witnesses testified in general support of the bill before a Senate Judiciary subcommittee on March 15, including longtime Washington journalist Walter Mears and representatives of the American Civil Liberties Union, the Heritage Foundation and the nonprofit National Security Archives. ■

OUTLOOK

Chilling Effects?

With contempt citations moving forward against *Time*'s Cooper and the *Times*' Miller, there is widespread concern among journalists that the confidentiality dispute may be causing jitters among some potential sources.

Clark Hoyt, Washington editor of Knight Ridder Newspapers, said he knew of two cases where people had backed away from providing information to reporters on a confidential basis for fear they might be investigated or their identities discovered from a subpoena of the reporters' phone records. "There is no question that there is

greater anxiety among sources about talking to journalists," Hoyt told The Associated Press in October 2004. [35]

The house-arrest sentence now being served by Providence broadcaster Taricani underscores the threat, according to a report published in December 2004 by The Reporters Committee for Freedom of the Press. "Jim's case underscores the need for Congress to pass a federal shield law to protect journalists from being compelled to reveal their confidential sources," NBC said. "Without that protection, critical information provided to a reporter from a source — which serves the public's right to be informed — will be constrained and could ultimately be cut off." [36]

The Supreme Court discounted fears of a chilling effect on potential sources when it refused to recognize a reporter's privilege in the *Branzburg* case in 1972. But journalism groups insist the danger is real. Without protection for confidentiality, "whistleblowers and others would be afraid to come forward to expose wrongdoing and to effect change," Barbara Cochran, president of the Radio-Television News Directors Association, said in a Feb. 15, 2005, statement after the federal appeals court decision upholding the contempt citations against Cooper and Miller.

Cooper, Miller and other reporters caught up in the confidentiality disputes may be more immediately concerned with the prospect of spending time in jail to protect their sources. "It's a scary time," says Syracuse University Professor Wright. But Davis at the University of Missouri predicts a backlash if any of the reporters is eventually jailed. "It's going to become a public-relations nightmare for the Justice Department," he says.

Courts are posing obstacles to reporters in several other areas. Trial judges, for example, are continuing to issue orders limiting information or publicity about high-profile cases. In one recent federal case, a federal judge in New York prohibited the news media from publishing the names of jurors in the obstruction of justice trial against Wall Street investment guru Frank Quattrone even though the names were read aloud in open court. The federal appeals court in New York eventually overturned the judge's order nearly a year after the trial had ended with Quattrone's conviction. [37]

For its part, the Supreme Court is giving media groups little help on access issues. The justices in 2004 turned aside the media-backed challenge to Vice President Cheney's refusal to disclose information about the energy task force, which by then had been disbanded for nearly three years. In the same year, the court disappointed journalism groups by creating a new hurdle for some Freedom of Information Act requests. The court ruled that autopsy photographs of President Clinton's White House counsel Vincent Foster were protected from disclosure on privacy grounds unless the person requesting the documents could first show evidence of government misconduct. [38]

Journalism groups expect continuing frustrations on access issues in President Bush's second term. "They're going to think they have a mandate to continue to be more secretive," says Dalglish at the Reporters Committee.

"Part of a free press is not merely legal requirements and mandates being handed down by the courts," Davis adds. "You have to have a government that sees the press as an integral part of democratic government, as part and parcel of how we run the system, not just as an extraneous pain."

Still, the University of Richmond's Smolla cautions against overemphasizing journalists' legal problems. For one thing, the Supreme Court and other courts have been "very protective" of free-speech issues generally. "That benefits the press in the same way that it benefits anybody who's engaged in expression," Smolla says.

"In terms of the large march of history, there's been a steady and constant increase in judicial recognition of freedom of expression, and the press has benefited generally from that," Smolla continues. "There may be little ticks up and down in any given year or in any given decade, but generally speaking the protection for freedom of the press is robust." ■

Notes

[1] For a profile of Taricani, see Mike Stanton, "Taricani on Trial — A journalist's day in court. The Defendant — Worried, but ready to 'tough this out'," *The Providence Journal*, Nov. 18, 2004, p. A1. The multipart package on the day of Taricani's contempt hearing also included a profile of Judge Torres by *Journal* staff writer Edward Fitzpatrick.

[2] The citation is 408 U.S. 665 (1972).

[3] The cases are *In re: Grand Jury Subpoena*, 04-3138, -3139, -3140 (Feb. 15, 2005).

[4] Robert Novak, " Mission to Niger," *Chicago Sun-Times*, July 14, 2003, p. 31.

[5] See Tracy Breton, "Judge Asks U.S. Attorney to Investigate Bevilacqua," *The Providence Journal*, Dec. 11, 2004, p. A1.

[6] See W. Zachary Malinowski, "Taricani Won't Appeal Punishment," *The Providence Journal*, Dec. 22, 2004, p. B3.

[7] The case is *The Baltimore Sun Company v. Ehrlich*, civ. WDQ-04-3822 (USDC Md.), Feb. 14, 2005. Ehrlich's order applied to David Nitkin, the *Sun's* statehouse bureau chief, and columnist Michael Olesker. For coverage, see Stephen Kiehl, "Sun's Challenge of Ehrlich's Order Is Dismissed by a Federal Judge," *The Baltimore Sun*, Feb. 15, 2005, p. 1A.

[8] For background see Kenneth Jost, "Civil Liberties Debates," *The CQ Researcher*, Oct. 24, 2003, pp. 893-916.

[9] For background see Jost, *ibid*., and David Masci and Patrick Marshall, "Civil Liberties in Wartime," *The CQ Researcher*, Dec. 14, 2001, pp. 1017-1040.

[10] Quoted in Michiko Kakutani, "After Years of Taking Heat, Spokesman Takes Potshots," *The New York Times*, March 1, 2005, p. E5. Bush's quote was in a 2003 interview with Brit Hume of Fox News; Card's remark appeared later in *The New Yorker* magazine.

[11] Pam Belluck, "Reporter Who Shielded Source Will Serve Sentence at Home," *The Providence Journal*, Dec. 10, 2004, p. A28.
[12] Quoted in Mark Patinkin, "Media Don't Fare Well in Unscientific Survey of Taricani Case," *The Providence Journal*, Dec. 16, 2004, p. G1.
[13] "NewsHour with Jim Lehrer," Public Broadcasting Service, Aug. 11, 2004.
[14] See "State Appeal Court Refuses to Quash Prior Restraint," Reporters Committee for Freedom of the Press, March 4, 2005 (www.rcfp.org).
[15] The Colorado Supreme Court decision is *In re: People v. Bryant*, July 19, 2004 (http://www.courts.state.co.us/supct/supctcaseanncts index.htm). For coverage, see Steve Lipsher and Felisa Cardona, "Media Drop Bryant Lawsuit," *The Denver Post*, Aug. 4, 2004, p. B2.
[16] The cases are *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Cable News Network v. Noriega*, 498 U.S. 976 (1990).
[17] For a brief historical overview, see T. Barton Carter, Marc A. Franklin, and Jay B. Wright, *The First Amendment and the Fourth Estate: The Law of Mass Media* (9th ed.), 2005, pp. 27-34.
[18] Leonard W. Levy, *Emergence of a Free Press* (1985), p. 44.
[19] Account drawn from Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (2004), pp. 33-78.
[20] *Ibid*., p. 123.
[21] The citations are *Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931). For an account of the *Near* case, see Fred W. Friendly, *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case That Gave New Meaning to Freedom of the Press* (1981).
[22] The citation is 376 U.S. 254 (1964). For an account, see Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991).
[23] The cases are *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); and *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974). In *Gertz*, the court held that a private figure must prove some measure of fault in order to recover in a libel suit.
[24] The cases are *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); and *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).
[25] The cases are *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court* (I), 464 U.S. 501 (1984) (jury selection); *Press-Enterprise Co. v. Superior Court* (II), 478 U.S. 1 (1986).
[26] The case is *New York Times Co. v. United States*, 403 U.S. 713 (1971). For an account, see David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (1996).
[27] The cases are *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co*., 593 F.2d 1030 (D.C. Cir. 1978).
[28] See Mark Fitzgerald, "Suffering for Silence," *Editor & Publisher*, Aug. 13, 2001, p. 11.
[29] Todd Shields, "Feds Stir Double Trouble by Using Subpoena Power," *Editor & Publisher*, Sept. 3, 2001, p. 5.
[30] See William Glaberson, "Closed Immigration Hearings Criticized as Prejudicial," *The New York Times*, Dec. 7, 2001, p. B7.
[31] *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); Center for *National Security Studies v. Department of Justice*, 331 F.3d. 918 (D.C. Cir. 2003).
[32] Ashcroft's memorandum can be found at http://www.usdoj.gov/04foia/011012.htm. For coverage, see "Critics Say New Rule Limits Access to Records," *The New York Times*, Feb. 27, 2002, p. A18.
[33] Quoted in "The Cost of Keeping Mum," *Time*, Feb. 28, 2005, p. 44.
[34] Christopher J. Dodd and Richard G. Lugar, "Secrecy: It Can Work for You," *USA Today*, March 18, 2005, p. 25A.
[35] See Seth Sutel, "Pressure on Reporters Begins to Spook Sources," The Associated Press, Oct. 24, 2004.
[36] Grant Penrod, "A Journalist's Home Is His Prison," *News Media and the Law*, winter 2005.
[37] The decision by the Second U.S. Circuit Court of Appeals is *United States v. Quattrone*, 04-2432 (March 22, 2005). For coverage, see David Rovella, "Media Had Right to Use Names of Quattrone Jurors, Judge Says," Bloomberg News, March 23, 2005.
[38] The decisions are *Cheney v. U.S. District Court*, 540 U.S. — (2004); *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004).

FOR MORE INFORMATION

Media Law Resource Center, 80 Eighth Ave., Suite 200, New York, NY 10011; (212) 337-2000; www.medialaw.org.

Radio-Television News Directors Association, 1600 K St., N.W., Suite 700, Washington, DC 20006-2838; (202) 659-6510; www.rtnda.org.

The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; (703) 807-2100; www.rcfp.org.

Society of Professional Journalists, 3909 N. Meridian St., Indianapolis, IN 46208; (317) 927-8000; www.spj.org.

Student Press Law Center, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209-2275; (703) 807-1904; www.splc.org.

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The article opens with a short retelling of the origins of the *Branzburg* decision and then details the various pending cases on confidential-source disputes, focusing on the investigation of the leak of the identity of CIA operative Valerie Plame.

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On the Web

Two advocacy groups in particular provide comprehensive, timely coverage of press-related issues in the courts and elsewhere: The Reporters Committee for Freedom of the Press (www.rcfp.org) and the Student Press Law Center (www.splc.org). Thorough and timely coverage can also be found on Media Law Profs Blog (http://lawprofessors.typepad.com/media_law_prof_blog/); the editor is Christine A. Corcos, associate professor of law, Louisiana State University.

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Additional Articles from Current Periodicals

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Apple Computer has asked the courts to decide who should be considered a journalist and therefore have the right to keep sources confidential.

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A media critic says the Bush administration has embarked upon a campaign to strip the press of "their traditional influence in national affairs."

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With the re-election of Bush, the most media-averse president in recent memory, the ongoing siege against the press will only worsen.

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The executive editor of *The New York Times* and the editorial-page editor of the *Los Angeles Times* debate whether reporters have an "absolute right" to protect sources.

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The big problem with shield laws is how to decide who is a journalist.

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