

June 2008

Protecting Sources in America

By Shanshan Lu

This article explores how the U.S. legal system protects journalists' confidential sources and the threats that reporters face. In particular, this article highlights recent trends in judgments by the U.S. federal courts to limit the scope and availability of reporters' legal privilege and some effort reporters make to combat those limitations.

Protecting a source may yield to the public interest in disclosure

Pulitzer Prize winner Judith Miller, a 57-year-old New York Times reporter spent eighty five days in jail in 2005 for refusing to disclose the details of her conversations with Lewis "Scooter" Libby—the chief of staff to Vice President Cheney—to Special Counsel Patrick J. Fitzgerald. She was eventually forced to testify in court last year.

In October 2004, U.S. District Judge Thomas Hogan ruled Miller in contempt for refusing to provide evidence to a grand jury on who leaked the name of Valerie Plame, a CIA agent. In the U.S., publicly naming a CIA operative is a criminal offense.

After serving eighty five days in jail, Miller said that she had clearance from her source to disclose his identity and the details of their conversations.

Miller testified that Libby told her in a confidential conversation on June 23, 2003, that Valerie Plame, the wife of Joseph C. Wilson—a prominent ambassador and critic of the Iraq war—worked at the CIA.

Libby is charged with lying to FBI agents and a grand jury and with obstructing justice in the investigation of who leaked undercover CIA officer Valerie Plame's name to the media.

In this case, the U.S. Supreme Court declined to take up an appeal of a decision that rules the reporters' privilege does not protect Judith Miller of the New York Times from having to reveal her confidential

sources.

Peter Klein, an Emmy Award winning investigative journalist, and a CBS 60 Minutes producer, commented that the case was handled really badly in some way and “the way that the prosecution went after Judith Miller and locked her up” hit him personally.

“Because they had the information and they were just making an example of her,” said Klein.

This case shows the fragility of reporters' general working assumption that they can protect the identities of confidential sources. The problem, according to Klein, goes back to the fact that testimony can be compelled on a federal court level.

Fernando M. Pinguelo is a trial lawyer licensed to practice law in New York, New Jersey and Washington, D.C. Pinguelo said this case showed that the reporters' privilege is not absolute.

“In any given scenario, a court must balance the First Amendment interest in gaining access to crucial information necessary for the exposure of illegalities and other corruption in society, against the legal public policy perspective whereby a source's identity can be of critical importance to a criminal investigation or in a defendant's right to confront his or her accuser, or even in civil cases, in particular defamation lawsuits alleging the publication of false information.” Pinguelo said in an interview with the author.

Reporters' privilege is not recognized by the federal law

Both in Canada and the U.S., the privilege does not give journalists absolute protection from legal pressures to reveal their sources. Reporters' privilege is not recognized at a federal level.

The U.S. Supreme Court addressed the issue of a reporter's "privilege" in 1972. In Branzburg v. Hayes, the Court held that the First Amendment did not give journalists the right to refuse to testify in a grand jury proceeding and answering questions as to either the identity of his or her news sources, or information which he or she has received in confidence.

Despite repeated attempts, Congress has not enacted a law recognizing a reporter's privilege. However, the Senate Judiciary Committee has conducted hearings on the issue of proposed legislation that would afford some protection to journalists. While enactment of such a law is far from guaranteed, public outcry has again brought the issue to the forefront of debate.

No absolute protection from the “shield law” at the states’ level

In the U.S., the symbiotic relationship between journalists and confidential sources enjoys more protection in most states than it does in Canada. Even though the First Amendment does not protect journalists from being subpoenaed by a federal grand jury, the U.S. Supreme Court did acknowledge that newsgathering is not without protection and left it to the states and the federal courts to decide when newsgathering interests could reasonably support the reporter's claim of privilege.

So-called “shield laws” were enacted in many states to protect journalists from legal pressure to reveal their sources. Shield laws recognized the important protection required by reporters. Each state’s protections vary, with some states protecting only the "source," while others afford protection to both the source and the unpublished information.

In Canada, a few provinces have toyed with the idea of enacting their own shield laws—for example Quebec—but no such law has been proposed to date. A few provinces, notably British Columbia and Saskatchewan, have largely rejected the idea that media enjoys any special privileges.

When the seminal U.S. Supreme Court case Branzburg v. Hayes was decided in 1972, seventeen states had already enacted laws with varying degrees of protection to shield journalists for their sources and information. Today such laws have been enacted in at least thirty-two states and the District of Columbia.

According to Pinguelo, in states where the reporters’ privilege is recognized, various competing interests will be balanced when a court considers a reporter’s refusal to reveal the identity of his or her source. To tip the scale in favor of disclosure, this balance often includes a showing that: (1) the information is unavailable and cannot be obtained elsewhere; (2) the information is not cumulative and is "of central importance" to the case; and (3) the need for the information weighs in favor of disclosure.

Pinguelo states that this shows the reporter’s privilege may be overcome if the identity of a confidential source goes to "the heart of the matter" and the plaintiff has exhausted all reasonable alternative avenues to learn the identity of the leakers.

Media’s continuing effort to protect sources

Despite limited legal protection, some efforts have been made by media to protect their sources in the U.S. in recent years.

On August 18, 2004, five reporters from The Post, the New York Times, the Los Angeles Times, ABC News and the Associated Press — were held in contempt of court after refusing a federal court's order to reveal their confidential sources for reports on the 1999 FBI espionage investigation of Wen Ho Lee, a former Los Alamos nuclear scientist.

Relying on confidential information, Lee was identified as the investigation's prime suspect by a number of news outlets in 1999.

The court ruled that Lee had exhausted his alternatives. Learning the identities of the sources also goes to the heart of Lee's lawsuit, the court added, because he needs to show that the leaks were intentional.

On June 3, 2006, the five media organizations agreed to pay Lee up to \$750,000 in conjunction with the government's \$895,000 to drop his lawsuit. All five media paid out of concern that their reporters would have to give Lee the names of their government sources, as courts had ordered.

In this case, the media's payments, particularly in conjunction with the government's payments, are "exceptionally" unusual and may well be unprecedented, according to Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, a nonprofit group that provides legal advice to reporters and media organizations.

Such a settlement, she told the Washington Post in 2006, potentially exposes the news media in other Privacy Act lawsuits, "I'm very troubled by the results," Dalglish said, "but I'm not sure I could have negotiated anything better."

Lawyer Pinguelo suggests that reporters should make any promises of confidentiality sparingly, because a reporter's interest in protecting the identity of the source may, in fact, yield to the public interest in disclosure. Pinguelo adds: "Don't make promises you can't or won't keep."

Klein, on the other hand, thinks it is a fundamental principle that reporters stick to the promises made to the confidential sources, even it means going to jail. It comforts him that the culture of journalism in the United States supported the idea.

"There is a badge of honor by going to jail and taking your confidential source's information with you to jail," said Klein "At least in the United States, the culture is there for that."

Shaping recent trend through debate—BALCO case in 2006

The San Francisco Chronicle published stories in 2004 about a BALCO steroids investigation, involving grand jury testimony of four baseball stars, Barry Bonds, Jason Giambi, Gary Sheffield and sprinter Tim Montgomery. The leaked testimony also was featured prominently in the writers' book, Game of Shadows, which recounts Bonds' alleged use of steroids.

In 2006, Lance Williams and Mark Fainaru-Wada, the two San Francisco Chronicle reporters were ordered jailed by a federal judge after they refused to divulge their source. The reporters repeatedly had said they would rather go to jail than reveal how they obtained the transcripts from a grand jury that investigated the Bay Area Laboratory Co-Operative.

A federal court judge ruled that San Francisco Chronicle reporters Lance Williams and Mark Fainaru-Wada must testify before a federal grand jury and reveal the name of the confidential source who leaked information to them about the testimony in the BALCO case.

The two reporters avoided jail time because attorney Troy L. Ellerman pleaded guilty to two counts of contempt. He, allowed the Chronicle reporters to see transcripts of each of the men's testimony in 2004 in violation of a court order when he represented Balco founder Victor Conte Jr. and Vice President James J. Valente.

According to *News Watch*, a U.S. weekly newsletter produced by the Gannett Corporate News Department, recent developments highlight an ongoing trend in federal courts to limit the scope and availability of the reporters' privilege.

But to Pinguelo, the trend is less obvious. "While recent high profile federal cases may appear on the surface to paint a bleak picture for the privilege, other signs show that the privilege has actually been strengthened over the past couple of years," said Pinguelo in an interview with the author. "Moreover, courts continue to uphold the existence of the privilege under state and federal law."

"By one estimate, the press was protected from compelled disclosure of information and sources in approximately sixty percent of the roughly twenty court cases decided two years ago." Pinguelo continued. This percentage is consistent with the pattern over the last thirty years.

Against this backdrop of diminishing protection for the reporters' privilege in the federal courts, legislation has been introduced in Congress that would establish a federal shield law similar to those enacted by many states. The legislation would provide significantly more protection to reporters than the federal courts currently do, and is supported by a broad based coalition of media and reporters' organizations.

Klein suggested that reporters should work together to put a federal shield law into place. Patience is needed, according to Klein, to push such a federal shield law into existence.

Klein said, "There are enough cases in which journalists have gotten burnt and hopefully, if there is a kind of cultural solidarity that remains we will be able to push something like that (a federal shield law) forward."