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OUTLOOK



COMING MONDAY
■ After holding most of the reins of power in Washington and Austin for years, conservatives seem to find little joy in the advancement of their policy agenda. James Howard Gibbons, interim editor / opinion pages, wonders why.

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Down the slippery slope to 'newspeak'

■ Jailing journalists for refusing to reveal sources harms democracy

By VANESSA LEGGETT

This is not about another journalist going to jail. This is not about federal officials getting locked up for media leaks. Though any or all of these people could end up behind bars, and the government has already decreed the journalist should be the first.

This is about every American losing a significant measure of freedom, a certainty if the federal government succeeds in strong-arming Time magazine reporter Matthew Cooper or any other journalist into betraying confidential sources.

Fines and jail time are fast becoming job hazards for journalists who promise to protect unnamed sources. In three cases this month, seven reporters have been found in contempt of court for refusing to name confidential sources. Two other journalists under subpoena may soon raise that number to nine. Matthew Cooper is the only reporter who has been ordered jailed.

The other six were fined by federal judges — one in an FBI investigation, five in former nuclear weapons scientist Wen Ho Lee's civil suit against the government. Cooper is embroiled in grand jury proceedings, a criminal matter. Each contempt citation stems from alleged government leaks. All but one order has been stayed pending appeal. That order was affirmed by an appellate court, and since Aug. 12, the news organization has incurred \$11,000 in fines, which will continue to accrue at \$1,000 a day. Last Thursday, another three reporters received letters from the U.S. attorney's office asking for records obtained from confidential sources.

Confidentiality plays a vital role in the news-gathering process. Nowhere is this function more important than in Washington, D.C., the center stage of recent assaults on the First Amendment.

The Matthew Cooper controversy arose from a series of stories triggered by a contentious opinion article written
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Houston-based free-lance writer Vanessa Leggett spent 168 days in jail for refusing to reveal confidential sources. Her book, "The Murder of the Bookie's Wife," is due out in 2005 from Crown Publishing, a division of Random House.

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by former ambassador Joseph Wilson, who suggested President Bush twisted intelligence to justify an attack against Iraq.

The seminal article critical of Wilson's opinion piece appeared in several newspapers including the Washington Post. On July 14, 2003, syndicated columnist Robert Novak cited senior administration officials who revealed that Wilson's wife, Valerie Plame, is an agency operative on weapons of mass destruction.



LEGETT

A number of reporters viewed this bombshell as a politically motivated retaliation against Wilson's criticism of President Bush.

Within days of Novak's story, Time magazine reported that some government officials exposed Plame's covert status.

In a story that appeared a couple of months after Cooper's, The Washington Post cited two top White House officials who named Wilson's wife as an undercover agent to at least six Washington journalists. That article ran Sept. 29, 2003.

By the end of the year, a federal grand jury was impaneled to investigate the source of the leaks. The knowing disclosure of a covert operative's identity can be a felony if committed by a government official.

The media buzz quieted as the grand jury investigation began.

That is, until last May, when several members of the press received grand jury subpoenas.

Historically, prosecutors are discouraged from coercing information from the news media. In federal cases, however, reporters are especially vulnerable, since there is no shield law in place like those that can protect journalists in over half the states.

Federal prosecutors are asked to follow Justice Department guidelines, which prescribe a balancing of the public interest in effective law enforcement against the right to be informed without government interference.

To preserve the integrity of the news-gathering process as recognized under the First Amendment, prosecutors should first attempt to obtain the information from nonmedia sources. The guidelines, however well-articulated, are only guidelines, and do not confer any special privilege to reporters.

The courts offer little more relief, especially in the context of a grand jury. In *Branzburg v. Hayes*, the last Supreme Court case to visit the issue, the majority opinion held that unless a grand jury is conducted in bad faith or intended to harass, journalists must

testify like any other citizen.

But the 5-4 majority was carried by a judge whose concurrence — acknowledging a qualified privilege — seemed to weaken the majority, leading one of the four dissenters to call *Branzburg* the case that rejected a reporter's privilege by a vote of 4 and 1/2 to 4 and 1/2.

The concurring opinion held that a journalist may be protected from testifying, even before a grand jury, if doing so might threaten confidential sources without a legitimate need of law enforcement. A limited privilege was advocated to ensure that prosecutors are not free to annex the news media as an investigative arm of the government.

When considering claims of qualified privilege, courts often look to *Branzburg's* dissenting opinion, which recommends a three-part test to determine whether the information sought is relevant, material and unobtainable from nonmedia sources.

In the current application of *Branzburg*, Chief Federal Judge Thomas F. Hogan maintains that the facts of Matthew Coopers case fall within the core of the *Branzburg* majority. The investigation is legitimate and the information sought is relevant.

But is the information unobtainable from other sources?

When the media received subpoenas, the grand jury had nearly a year remaining to complete its investigation. Calling journalists to testify within the first third of the grand jury's term does not leave the impression that reporters were subpoenaed as a last resort. Should we take the court's word that, at that relatively early stage, all available alternative means of obtaining the information had been exhausted?

Thus far, only the journalists appear to have been exhausted.

Perhaps a clash between constitutional interests prompted the subpoenas to the media in the Plame leak investigation. If the government's targets have testified truthfully, it could be that one or more invoked a Fifth Amendment privilege against answering a question. Maybe Judge Hogan has ruled that his or her right against self-incrimination should trump a journalist's right to refuse based on First Amendment grounds.

Prosecutors routinely employ other methods of discovery to circumvent constitutional safeguards. The government should use the full force of its investigative arsenal before ordering journalists to serve as agents of discovery.

Even before the war on terror cast its shadow on civil liberties, the Justice Department did not appear to hesitate when it secretly subpoenaed an Associated Press reporter's phone records. Then as now, the U. S. Attorney's Of-

Government to subpoena reporters kills messenger

office needed to identify official sources suspected of illegal leaks.

Has the special prosecutor subpoenaed phone records of government officials and checked for numbers belonging to journalists who might have been called on telling dates? The articles by Novak and Cooper appeared last year during the same week in July, and at least Cooper received his information from official sources who

its intent to seek the death penalty against Angleton.

As Hogan has ordered with Cooper, I was confined until I named my sources or the grand jury expired.

To keep promises of confidentiality and to preserve a limited privilege by requiring the government to balance the public's interests, I did not comply. When the grand jury disbanded almost six months later, the court was forced

to pursue, and not just to a federal judge for his in-camera review.

While grand jury proceedings are secret, judges can release portions of the record to the public. In fact, in the proceedings involving Cooper, Hogan recently unsealed his opinion and documents filed by both sides as well as a transcript of the hearing that led to the contempt order, which has also been released.

However, in the opinion issued last July but made public Aug. 9, Hogan simply asserts that the prosecutor demonstrated to the courts satisfaction that the information is unobtainable from other means.

Because the source documentation, a sworn statement, was selectively withheld, journalists and other interested parties cannot be as satisfied. Hogan should unseal the special prosecutor's affidavit as well.

Allowing the government to subpoena journalists kills the messenger and, in the process, weakens an essential support of a functioning democracy. Journalists cannot be expected to serve as watchdogs of government if the government is allowed to leash the press through the power of subpoena.

Forcing journalists to name their sources will not restore Plame's covert status. Any victory the government could hope for would be Pyrrhic at best. If the prosecution succeeds in identifying the source of the leaks, the offender could be punished. The corollary, of course, is that Washington insiders will be warned: If you compromise government secrecy, we will find you and you will be prosecuted.

The most insidious consequence has been obscured by an overzealous prosecution, which, in its pursuit of journalists, has diverted the public's attention from the real issue.

What is certain to occur if Cooper or any other journalist is forced to break promises of confidentiality should have every American's attention: Those sources best positioned to expose government corruption will keep their mouths shut.

Prior restraint, as Hogan correctly noted, is not in jeopardy here. Unless the government backs off these journalists, however, the problem we face will be one of future restraint. Vows of confidentiality broken now will chill insiders' willingness to speak with investigative reporters. Fear and intimidation via government inquisition will freeze the free flow of information to the public.

This does not mean we will no longer have access to news.

But the most readily accessible information will be government sanctioned newspeak, free of static from independent voices.



called.

The government cannot always tip its hand, as a society interested in curbing crime understands. But in cases where fighting crime collides with preserving constitutional rights, it is not unreasonable to question whether prosecutors have exhausted all means to obtain what they claim is essential information.

This I know first-hand.

In 2001, a federal judge found me in contempt for protecting confidential sources. Prosecutors insisted that unless I complied, the grand jury would not be able to indict Robert Angleton, a murder-for-hire suspect. The government raised the stakes by representing

to release me.

Prosecutors convened a separate grand jury, but did not subpoena me to testify. Within a month, Angleton was indicted and the U.S. attorney's office decided not to seek the death penalty after all.

Despite representations to the court that there was no other way, prosecutors were able to obtain the necessary evidence after a journalist's refusal to be used as an agent of discovery forced them to do their own work. No reporter should have to languish in jail while prosecutors take another tack.

Before prosecutors come knocking at the press' door, the government should have to show that all other ave-