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# Journalists and Confidential Sources

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## ESSAYS ON SOURCE CONFIDENTIALITY

### JOURNALISTS AND CONFIDENTIAL SOURCES

ROBERT ZELNICK\*

On February 15, 2005, the United States Court of Appeals for the District of Columbia Circuit affirmed the October 7, 2004, order of U.S. District Court Judge Thomas F. Hogan committing *New York Times* reporter Judith Miller to jail for civil contempt and his similar order, issued six days later, in the case of *Time* magazine reporter Matthew Cooper.<sup>1</sup> Claiming First Amendment protection, the two had refused to disclose to members of a special prosecutor's team the names of administration sources they had called while tracking a story that had appeared in the syndicated column of Robert Novak on July 14, 2003, in which Novak had published the name of covert CIA operative Valerie Plame.<sup>2</sup> The special prosecutors were trying to determine whether Novak's source had violated the Intelligence Identities Protection Act of 1982.<sup>3</sup> Ms. Plame is the wife of a former diplomat, Joseph C. Wilson IV. Wilson provoked a nasty little fight with the Bush administration by challenging the credibility of statements made by the President in his 2003 State of the Union address<sup>4</sup> regarding Iraq's attempt to purchase material

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\* Chairman, Department of Journalism, Boston University; Research Fellow, Hoover Institution. A version of this article appeared in the Hoover Digest.

1. The following cases detail this matter: *In re* Special Counsel Investigation, 332 F. Supp. 2d 26 (D.D.C. 2004); *In re* Special Counsel Investigation, 332 F. Supp. 2d 33 (D.D.C. 2004); *In re* Special Counsel Investigation, 338 F. Supp. 2d 16 (D.D.C. 2004); *In re* Special Counsel Investigation, 346 F. Supp. 2d 54 (D.D.C. 2004); *In re* Grand Jury Subpoena, Judith Miller, No. 04-3138, 2005 U.S. App. LEXIS 2494 (D.C. Cir. 2005).

2. Robert Novak, *Even After a Belated Admission of Error Last Week, Fingerprinting Continued*, CHI. SUN-TIMES, July 14, 2003, at 31.

3. Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 96 Stat. 122.

4. President George W. Bush, 2003 State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html#> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

called “yellowcake,” which is used to enrich uranium for nuclear weapons. In February and March of 2003, Wilson had traveled to Niger, reported one potential supplier, to investigate the matter for the CIA. That Ms. Miller had written nothing about the case was considered by the court to not bar her from testifying.

Cooper and colleagues—including Walter Pincus and Glenn Kessler of the *Washington Post* and Tim Russert of NBC News—earlier had skirted potential contempt decrees when their source under scrutiny, I. Lewis “Scooter” Libby, Chief of Staff to Vice President Dick Cheney, waived any confidentiality commitments from reporters, facilitating their testimony. It was widely known among those following the case that Special Prosecutor Patrick J. Fitzgerald and his colleagues had been putting heavy pressure on White House aides to waive any understandings of confidentiality with journalists they had spoken to, thus enabling the latter to testify without technically betraying their source. But the unsated Fitzgerald soon came back at Cooper seeking information about a different source, and when Cooper again demurred, Judge Hogan issued the contempt citation along with a quote from Yogi Berra: “It’s *deja vu* all over again.”<sup>5</sup>

Other substantial cases testing whether, despite so-called shield legislation on the books in thirty states plus the District of Columbia,<sup>6</sup> there exists any privilege allowing journalists to withhold confidential sources from disclosure to grand juries, prosecutors and defense lawyers, or rival litigants in civil cases, have also gained wide attention. In Rhode Island, a federal investigation into the dealings of former Providence Mayor Vincent Cianci, Jr., led to the indictments of Cianci and an aide, Frank Corrente.<sup>7</sup> The evidence included a videotape of an informer allegedly transferring bribe money to Corrente.<sup>8</sup> That evidence was one of several items circulated to counsel by U.S. District Court Judge Ronald R. Lagueux together with a protective order barring disclosure to third parties of any of the surveillance material made during the investigation.<sup>9</sup> Investigative reporter Jim Taricani of WJAR-TV, not personally subject to the order, broad-

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5. Susan Schmidt, *Reporter Held in Contempt of Court Again in Leaks Probe*, WASH. POST, Oct. 14, 2004, at A19.

6. Bob Herbert, *The Journalist and the Whistle-Blower*, N.Y. TIMES, Feb. 6, 2004, at A27.

7. *In re* Special Proceedings, 373 F.3d 37, 40 (1st Cir. 2004). For a further description, see *In re* Providence Journal Co., 293 F.3d 1, 3–12 (1st Cir. 2002).

8. *Special Proceedings*, 373 F.3d at 40.

9. For a description of the protective order, see *Special Proceedings*, 373 F.3d at 40; see also *In re* Special Proceedings, 291 F. Supp. 2d 44, 47 (D.R.I. 2003).

cast a videotape of the alleged bribery transaction in his local newscast on February 1, 2001.<sup>10</sup> Chief District Court Judge Ernest Torres then appointed a special prosecutor, Marc DeSisto, to find out the source of the leak. Despite conducting fourteen interviews, DeSisto came up empty-handed. The court then ordered Taricani to disclose his source and, upon his refusal, ordered the reporter to commence paying a \$1,000 daily fine.<sup>11</sup> (As the recipient of a heart transplant, Taricani was considered a poor health risk for imprisonment.)<sup>12</sup> That order was upheld by a federal appellate court.<sup>13</sup> Ironically, by the time Taricani, or more correctly, his employer, commenced paying his fine, both trials had concluded with convictions and imprisonment of Cianci and his aide. But the thirst by Judge Torres to find the source of the leak was unquenched. Long after the case ended, the court stopped collecting the fines, which by then had reached \$85,000, and instead found Taricani guilty of criminal contempt. Another strange twist: on the morning of his conviction, Taricani, told by an old FBI acquaintance that his source had signed a waiver of confidentiality, blurted out the name of the source, Joseph A. Bevilacqua, Jr., counsel to one of the defendants. Bevilacqua admitted his role.<sup>14</sup> Taricani was subsequently sentenced to six months house arrest.<sup>15</sup> His station declined to appeal.

In a third case, on August 18, 2004, U.S. District Court Judge Thomas Penfield Jackson ordered five members of the national media to pay \$500 per day in civil contempt fines unless they revealed the source for reporting a link between former Los Alamos scientist Wen Ho Lee to massive acts of espionage on behalf of China.<sup>16</sup> Lee, who eventually pleaded guilty to a single felony count of mishandling classified information,<sup>17</sup> is suing the federal government for allegedly breaching the Privacy Act by leaking a wealth of private information without his consent.<sup>18</sup> No espionage charges were ever filed against him. The *New York*

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10. *Special Proceedings*, 373 F.3d at 40.

11. *Id.* at 41.

12. Jonathan Alter, *Your Right To Know Is at Stake*, NEWSWEEK, Feb. 28, 2005, at 36.

13. *Special Proceedings*, 373 F.3d at 47.

14. For a colorful account of these events, see BOSTON PHOENIX, Dec. 18, 2004, at 1.

15. Alter, *supra* note 12.

16. *Lee v. United States Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *The Times and Wen Ho Lee*, N.Y. TIMES, Sept. 26, 2000, at A2.

17. *The Times and Wen Ho Lee*, *supra* note 16.

18. For a description of Lee's suit against the government, see *Lee v. United States Dep't of Justice*, 287 F. Supp. 2d 15, 16-17 (D.D.C. 2003).

*Times*, following an exhaustive editorial review, conceded that Mr. Lee had been the victim of some unduly credulous reporting.<sup>19</sup>

As the most complex and politically charged of the three cases, the Wilson matter deserves particular inspection. Wilson had been the chargé d'affaires in Baghdad in 1990 and an ambassador to two African countries before joining President Clinton's National Security Council as a senior specialist on Africa. In February 2002, the CIA asked him to travel to Niger to determine the extent and results of Saddam Hussein's efforts to purchase yellowcake uranium. The choice of Wilson was curious, not only because of his close ties to the Clinton administration but also because, after leaving government, he had contributed to the 2000 campaign of Al Gore. Rejecting suggestions that his wife had been the initial advocate for his trip, Wilson would maintain that, apart from serving as a conduit for communications between himself and the CIA, "Valerie had nothing to do with the matter."<sup>20</sup> But the Senate Select Intelligence Committee, which reviewed intelligence failures leading up to the Iraq war, found a memo from Valerie Plame urging her husband's assignment for the trip because "my husband has good relations with both the PM [prime minister] and the former Minister of Mines . . . ."<sup>21</sup>

After eight days in the area, Wilson reported orally to the CIA that he had found no hard evidence of any sale of yellowcake to Iraq. However, former Nigerian Prime Minister Ibrahim Miyaki told him that he had met with an Iraqi trade delegation in 1999, one year after the Iraqis had tried to purchase 400 tons of the compound. The delegation chairman wanted to discuss "expanding commercial relations" between Niger and Iraq. An intelligence report based on Wilson's account of the meeting interpreted "expanding commercial relations" to mean that "the delegation wanted to discuss expanding yellowcake uranium sales," essential for its nuclear program, a compound that also happened to be Niger's principal export.<sup>22</sup> British intelligence later reached a similar conclusion, and, in his 2003 State of the Union address mobilizing support for the coming war against Iraq, President Bush famously declared, "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."<sup>23</sup>

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19. *The Times and Wen Ho Lee*, *supra* note 16.

20. JOSEPH WILSON, *THE POLITICS OF TRUTH* 5 (2004).

21. S. REP. NO. 108-301, at 39 (2004).

22. *Id.* at 43.

23. President Bush, *supra* note 4.

Although the President's statement was consistent with British intelligence and not inconsistent with anything Wilson reported, the former ambassador, now an advisor to Democratic presidential hopeful John Kerry, went public in spectacular fashion, publishing an op-ed piece in the *New York Times* on July 6, 2003, and appearing on NBC's *Meet the Press* the same day, strongly suggesting that his information ran contrary to the President's words. In the *Times* he charged that if "the information was ignored because it did not fit certain preconceptions about Iraq, then a legitimate argument can be made that we went to war under false pretenses."<sup>24</sup> One can only imagine the fury at the Bush White House over what they perceived as a blatant act of political treachery. Wilson, sent on a sensitive information-gathering mission, had manufactured a conflict of fact where none existed and then offered the conflict as proof that the President had misled the nation into war.

The October 1, 2003, Novak column on Wilson and his wife asked the obvious question as to why a Clinton-Gore loyalist had been sent on so sensitive a mission. When Novak raised the issue "[d]uring a long conversation with a senior administration official," he was told that "Wilson had been sent by the CIA's counterproliferation section at the suggestion of one of its employees, his wife."<sup>25</sup> Novak described the earlier remark as "an offhand revelation from this official, who is no partisan gunslinger."<sup>26</sup> Novak added on October 1st that, when he had called the CIA for confirmation, an official requested that Wilson's wife's name not be used and suggested that, although she was unlikely to receive another foreign assignment, exposing her name might cause her "difficulties" if she traveled abroad.<sup>27</sup>

Novak's July column provoked instant fury in the liberal community. Wilson accused the Bush White House of seeking crude retribution by outing his wife, indicating that Bush political adviser Karl Rove had orchestrated the assault.<sup>28</sup> Others speculated that the culprit was I. Lewis "Scooter" Libby, a senior aide to Vice President Cheney. The Bush people, it was said, had peddled the story to six unwilling scribes before the accommodating Novak agreed to run the information. Wilson also told Walter Pincus, a *Washington Post* reporter, that he knew that any sugges-

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24. Joseph C. Wilson IV, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, at 9.

25. Robert Novak, *Columnist Wasn't Pawn for Leak*, CHI. SUN-TIMES, Oct. 1, 2003, at 49.

26. *Id.*

27. *Id.*

28. WILSON, *supra* note 20, at 4, 5-6.

tion of a sale of yellowcake by Niger to Iraq was false, as “the dates were wrong and the names were wrong.”<sup>29</sup> But it turned out the letter with the phony dates had not yet been circulated.

Long before Wilson’s credibility was shattered, the hunt for Novak’s source had taken on vast new dimensions. Under the Intelligence Identities Protection Act of 1982, it is a felony for a person with clearance for access to classified information deliberately to disclose the identity of a covert agent. (Reporters are exempt from the law unless they engage in “a pattern” of naming agents with the intent to undermine intelligence activities.)<sup>30</sup> Members of the liberal press like the *Nation*, never at the epicenter of support for covert intelligence operations, now worried that the political score-settlers at the White House would impede Plame’s “dicey and difficult mission” of learning about WMDs.<sup>31</sup> Senator Diane Feinstein took the floor to declare that “for [Plame] to be essentially ‘outed’ by the administration can put every CIA agent in jeopardy.”<sup>32</sup>

The President, unwilling to look “soft” on national security, invited the Attorney General to investigate the source of the leak and reportedly instructed his staff to cooperate fully with the investigation. As the investigation matured, the Attorney General handed it over to a special prosecutor, Patrick Fitzgerald, who convened a special grand jury and quickly subpoenaed the notes of two reporters, Tim Russert of NBC and Matthew Cooper of *Time* magazine.<sup>33</sup> Both contested the subpoena.<sup>34</sup> A third reporter, Glenn Kessler of the *Washington Post*, submitted to an interview, after Libby and other White House staffers signed waivers to any confidentiality agreements reached with the press. Novak, the obvious target for prosecutors, appeared to be under little duress, perhaps because prosecutors had learned who his

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29. Susan Schmidt, *Plame’s Input Is Cited on Niger Mission: Report Disputes Wilson’s Claims on Trip, Wife’s Role*, WASH. POST, July 10, 2004, at A9 (detailing Wilson’s untruths unmasked by the Select Senate Committee); Walter Pincus, *CIA Did Not Share Doubt on Iraq Data; Bush Used Report of Uranium Bid*, WASH. POST, June 12, 2003, at A1.

30. Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 96 Stat. 122.

31. David Corn, *Capitol Games: A White House Smear*, NATION, July 16, 2003, available at <http://www.thenation.com/capitalgames/index.mhtml?bid=3&pid=823> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

32. Dietz Smith, *The Story of Joe Wilson and Valerie Plame*, RANT, Sept. 29, 2003, at <http://www.therant.info/archive/001187.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

33. See cases cited *supra* note 1.

34. *Id.*

sources were and were convinced that the criminal provisions of the law protecting intelligence agents were inapplicable.

In the absence of legal compulsion, it is considered at least a breach of journalistic ethics to violate a pledge of confidentiality with respect to accurate information, but there is also a legal obligation not to violate a pledge. In the 1991 case *Cohen v. Cowles Media Co.*, the Supreme Court held that a source who suffered harm through breach of a pledge of confidentiality was entitled to damages.<sup>35</sup> Dan Cohen, a Minnesota GOP political operative, had been assured by two reporters that his identity would be protected if he provided information on the past legal difficulties—including three counts of unlawful assembly and a conviction in 1970 of petit theft—of the Democratic candidate for lieutenant governor.<sup>36</sup> Both newspapers reneged on the deal and ran Cohen's name in their stories.<sup>37</sup> Cohen lost his job, sued, and was rewarded with a substantial verdict.<sup>38</sup>

Astonishingly, the lust for Bush administration blood in the Wilson affair was so strong in the liberal media that two of its premier members, former *Washington Post* ombudsman Geneva Overholser and Jonathan Alter of *Newsweek*, urged Novak, or others who had received the leak, to betray their confidential source. Treating Wilson as the good guy "whistle-blower," Overholser claimed in a *New York Times* column that Novak had "turned a time-honored use of confidentiality—protecting a whistle-blower from government retribution—on its head."<sup>39</sup> Overholser called on Novak "to acknowledge his abuse of confidentiality and reveal his sources himself."<sup>40</sup> Alter, who acknowledged that the story had become "a festival of hypocrisy," urged reporters who received the confidential tips about Plame to betray their source by leaking "the name of a source to another reporter, confident that no one would know where it came from."<sup>41</sup> But he admitted that most reporters would regard such conduct as "scummy."<sup>42</sup>

In an unusual signed editorial appearing on the op-ed page of the October 10th *New York Times*, chairman and publisher Arthur Ochs Sulzberger, Jr., and chief executive Russell T. Lewis

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35. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

36. *Id.* at 665.

37. *Id.* at 666.

38. *Id.*

39. Herbert, *supra* note 6.

40. *Id.*

41. Jonathan Alter, *Hey, Rat Out That Source!*, NEWSWEEK, Oct. 13, 2003, at 33.

42. *Id.*



urged that the stakes in the case went far beyond the “appalling prospect” of jail for Ms. Miller simply for doing her job as a journalist.<sup>43</sup> “The press simply cannot perform its intended role if its sources of information—particularly information about the government—are cut off,” they wrote.<sup>44</sup> “Without an enforceable promise of confidentiality, sources would quickly dry up and the press would be left largely with only official government pronouncements to report.”<sup>45</sup>

Such claims have long been made by the press but have found little in the way of judicial support, at least at the federal level. In 1958, media columnist Marie Torre published some unflattering comments about Judy Garland, which she attributed to an unnamed CBS executive.<sup>46</sup> The singer filed a defamation suit and demanded that Torre reveal her source. The columnist declined.<sup>47</sup> The Second Circuit, in a decision written by Judge Potter Stewart, found no precedent for such a claim, noting that while freedom of the press is vital, it is “not an absolute.”<sup>48</sup> Ms. Torre spent ten days in jail for criminal contempt before the case was settled.

The Supreme Court put its definitive stamp on the issue in 1972 when three cases were consolidated into *Branzburg v. Hayes*.<sup>49</sup> The *Branzburg* trilogy involved one reporter who had written on the manufacture of hashish in Louisville and the drug scene in Frankfort, Kentucky, and two reporters who had separately gained access to different elements of the Black Panther Party, one in New Bedford, Massachusetts, the other in northern California. All had refused to honor grand jury subpoenas.<sup>50</sup> In the Supreme Court, they argued that the First Amendment implied protection for newsmen against having their sources hijacked by federal prosecutors and grand juries.<sup>51</sup> Writing for a 5-4 majority, Justice Byron R. White declined to create that privilege, finding no basis for holding that the real but speculative burden on news-gathering of requiring a journalist’s testimony was of greater concern than the effective functioning ride of grand jury and trial proceedings. In White’s words, “The crimes

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43. Arthur Ochs Sulzberger, Jr. & Russell T. Lewis, *The Promise of the First Amendment*, N.Y. TIMES, Oct. 10, 2004, at 11.

44. *Id.*

45. *Id.*

46. *Garland v. Torre*, 259 F.2d 545, 547 (2d Cir. 1958).

47. *Id.*

48. *Id.* at 548.

49. 408 U.S. 665 (1972).

50. *Id.* at 679–80.

51. *Id.* at 680.

of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."<sup>52</sup>

The Court found the claims of great harm to investigative reports lacking in historical experience. "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."<sup>53</sup>

Casting himself now as a dissenting champion of press freedom, Justice Potter Stewart raised a second possible danger: that state and federal prosecutors will for all intents and purposes "annex" the press as "an investigative arm of the government."<sup>54</sup> But Justice Lewis F. Powell, concurring with the majority, as much as pledged that the Supreme Court would tolerate no such conduct.<sup>55</sup> One might say that Justice Powell's guarantee is very much at issue in the Miller and Traficani matters. Indeed, the Washington-based Reporters Committee for Freedom of the Press calculates that subpoenas and other quests for journalists' sources of information now approach two thousand per year.

Not all federal courts have held *Branzburg* applicable to civil cases,<sup>56</sup> an exception not applicable here but of potential significance in, for example, the Wen Ho Lee case.

Below the federal level, thirty-one states plus the District of Columbia have enacted "shield laws" of one variety or another beginning with Maryland in 1890. Most seek to strike a balance between the importance of the information, its relevance to the case at bar, and the possibility of developing it from other sources. Efforts to enact a national law have often foundered on the failure of journalists themselves, not to mention the organizations that represent them, to agree to a common approach.

The state laws are not without efficacy. Lucy Dalglish, Director of the Reporters Committee for Freedom of the Press, has estimated that judges in states boasting shield laws are four times as likely to quash subpoenas directed against representatives of the media than states without such laws. But even strongly worded state shield laws sometimes run up against competing principles that the courts are reluctant to subordinate. In the

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52. *Id.* at 692.

53. *Id.* at 698-99.

54. *Id.* at 725 (Stewart, J., dissenting).

55. *Id.* at 709-10 (Powell, J., concurring).

56. *See, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

mid-1970s, for example, *New York Times* reporter Myron Farber wrote a series of articles on a number of mysterious deaths which had occurred in a New Jersey hospital and which led to the indictment on multiple murder allegations of a physician. During the trial, defense lawyers demanded from the *Times* and Farber notes of interviews with people who later testified against the accused.<sup>57</sup> Although the existing shield law purported to protect journalists from having to disclose confidential sources in any court proceeding, including both grand and petit juries, the state court held that a defendant's Sixth Amendment right to confront his accusers and subpoena evidence took precedence, at least upon a showing of materiality, relevance, and non-availability from any other source.<sup>58</sup> Farber eventually spent forty days in jail and the *Times* paid a total of \$285,000 in fines. The defendant was acquitted after a six-month trial.

Two other potential protections for journalists exist in federal cases. The Department of Justice's own guidelines urge prosecutorial restraint in seeking information from the press unless, for example, "the information sought is essential to a successful investigation," and reasonable efforts have been made "to obtain the desired information from alternative sources."<sup>59</sup> Further, "except under exigent circumstances," prosecutors should limit their quest "to the verification of published information."<sup>60</sup>

But just as that mandate was conveniently ignored by the Department of Justice in the case of Miller, the guidelines are held by the courts to be internal guidance for government prosecutors which create no substantive rights for the journalist.<sup>61</sup>

A second avenue involves the common law. Such historic privileges as husband-wife, doctor-patient, lawyer-client were rooted neither in constitutional law nor any legislation, but rather in the common law. Would similar protection obtain here as Judge Tatel calculated it does in eighteen federal jurisdictions? Perhaps, but that too proved to be of little help to the two reporters as it could be overcome by a strong showing of prosecutorial need. So while one of the three judges argued against common law privilege, a second saw no need to reach the question and a third held it existed but was overcome by the prosecutor; all three voted to send the reporters to jail.

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57. *State v. Jascavevich (Matter of Farber)*, 394 A.2d 330, 333 (N.J. 1978).

58. *Id.*

59. 28 C.F.R. § 50.10(f)(1) (2003).

60. *Id.* § 50.10(f)(4).

61. *See In re Grand Jury Subpoena, Judith Miller*, No. 04-3138, 2005 U.S. App. LEXIS 2494 (D.C. Cir. 2005).

Unfortunately for the cause of protection for journalists, the information conveyed by Novak and Taricani seemed at times to mock the exalted First Amendment values at stake. For example, Novak's initial column would have lost none of its impact had the author included all the information in it save the name, Valerie Plame. And Taricani's audience could readily have waited for the bribery tape to be introduced into evidence with all appropriate safeguards, rather than shown at a time when jurors had yet to be impaneled.

As a journalist—active or in academia—for some thirty-seven years, I have never been comfortable until very recently with the notion of a reporter's privilege extending beyond the relatively modest standard that the evidence being sought is both relevant and material to the case and that it cannot reasonably be obtained from other sources. In an era when sitting presidents have been compelled to produce incriminating evidence or remain available for ordinary civil lawsuits, I have found it difficult to see why a member of the press should be immune from testifying about a crime he has witnessed or an event that affects the rights and liabilities of parties to a legal dispute. If a journalist, even one as distinguished as Judith Miller, finds that she cannot, in conscience, breach a confidential source, she should be prepared to spend some time in jail for that act of civil disobedience. My sense is that *Branzburg* and its progeny have done little to inhibit enterprise reporting—Watergate, Iran-Contra, and the Clinton foibles were among the vast number of investigative stories pursued in the years since *Branzburg*.

Upholding a blanket journalist privilege rule would raise other problems as well, such as defining the very term "journalist." Clergymen, doctors, and lawyers—all holders of common law privilege—are specially trained and certified. Journalists may or may not receive training and cannot, consistent with the First Amendment, be licensed. The term is sufficiently elastic to embrace freelancers, part-timers, perhaps even bloggers. Historically a fair number have—through professional reputation or known sympathies—gained access to criminals, groups practicing violence, even terrorists. Do we want such individuals to enjoy an absolute shield against inquiry? And what about a criminal defendant's Sixth Amendment right to confront his accuser and subpoena necessary witnesses? If an investigative report has led to his predicament, might not a reporter's privilege, as in the Farber case, block an even more fundamental right? Then there is the libel area where the press has long enjoyed special "actual malice" constitutional protection decreed by the Supreme Court

in *New York Times v. Sullivan*.<sup>62</sup> Do we wish to produce a situation whereby a reporter responds to allegations of malice with the claim that his report relied on credible sources and then asserts his privilege to protect from the plaintiff the identities of those sources? I remain uncomfortable with what in that context amounts to legal favoritism for the reporter over the rights of his asserted victim.

The Novak and Taricani cases, however, both raise red flags. The value of the information, or, in Taricani's case, the timing of the report, may have been questionable, but still the insult to basic freedoms was palpable. The underlying national security breach in the case of Plame—whose covert identity was widely known and who was in the middle of a political battle of her husband's making—was, at worst, marginal. The more one studies the facts, the more the case appears a political hissing match that never should have resulted in a criminal investigation. Similarly, the object of the hunt in Rhode Island is the source of the leak, not any substantive information to be derived from the repeatedly seen videotape of the bribery footage. In these cases, we seem to be ignoring Justice Stewart's dark prediction in *Branzburg* and making the press an investigative arm of government. In the Taricani case, with both defendants safely jailed, we may be going even beyond that, turning the media into an agent for enforcement of orders from the bench that the court itself was unable to enforce.

In *Branzburg*, the majority allowed for future excesses to be litigated and corrected by the Court, with protections extended to the media as necessary. The Novak and Taricani cases may be good places to start. They may also drive home to the press the need to unite behind a sensible federal shield law. Such a law should protect the confidentiality of a journalist's source except where one seeking access to the information can establish that it is highly relevant and material to the issue at hand, it cannot be obtained from any other source, it engages important societal values, and it clearly serves the interest of justice. The scales are now tipped too far in the direction of forced disclosure. They should be brought back into balance.

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62. 376 U.S. 254 (1964).