The Pen and the Sword

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For the last few months, one of the biggest stories in journalism has been journalism itself. A great deal of reporting over the course of 2005 has centered on the media, from an article appearing in *Newsweek* concerning the treatment of prisoners in Guantanamo Bay being retracted to the jailing of a *New York Times* reporter who refused to reveal her source before a grand jury. These recent events have raised important issues concerning the rights journalists require to maintain a "free" press and have called into question the very integrity of the media in this country.

Much of the talk in the media this summer surrounded the case against two journalists, Judith Miller of *The New York Times* and Matthew Cooper of *Time* magazine, who were subpoenaed by the grand jury in 2004. The grand jury was assigned by former Attorney General John Ashcroft to investigate the leaking of CIA agent Valerie Plame's identity by a government official. The prosecutor, Patrick Fitzgerald, has demanded that the journalists testify before the grand jury, which would involve revealing the names of their sources within the government. Cooper and Miller refused to divulge the names, claiming the inherent right and duty of journalists to protect their sources.

The case was brought before the District of Columbia Judge Thomas Hogan, who ruled with the prosecution, citing a precedent set by a 1972 Supreme Court ruling. Joseph diGenova, a former U.S. Attorney during the Reagan Administration in an interview with PBS said, "The Branzburg case in 1972 of the United States Supreme Court held that journalists must appear and must testify in grand juries when subpoenaed and that there is no abridgment of the First Amendment in either freedom of speech or news gathering by requiring them to do so." On June 27, 2005, the Supreme Court declined to hear the defense's appeal, leaving the decision to Judge Hogan. He was set to sentence both journalists to some form of imprisonment at the request of Fitzgerald, who believed that doing so might force the two to reveal their sources. While the attorneys for the two journalists requested house arrest, Fitzgerald pressed for detention in a federal facility, comparing home confinement to a "paid vacation."

In a twist not yet fully understood, both reporters had technically been exempt from protecting their sources by waivers their sources had signed in advance, but neither regarded those releases as valid. The waivers had been mass-produced and handed to many, possibly all, government officials as a blanket form renouncing their right to demand confidentiality of a journalist under any circumstance. On the morning of July 6, upon arriving at court, Cooper announced that he had received a personal, specific waiver from his source, who he later freely admitted was Karl Rove, permitting him to testify about Rove before the grand jury. Following his testimony, Cooper spoke to reporters, saying, "I think... the waiver we got was qualitatively different [from the previous one.] It was not a blanket waiver to everyone, covering every conversation in... utterly generic terms that were distributed by a government employee to everyone." The regularity with which these mass waivers are used, and exactly who issues them, remains unclear.

He reiterated his commitment to the right of a reporter to refuse a subpoena. "I believe that once a journalist makes a commitment to protect the confidentiality of a source, only the source can end that commitment -- not a court, not a corporation." Miller, who has not received such a release, continued to refuse to testify. Bill Keller, executive editor of *The New York Times*, characterized his reporter's opinion of the waiver her source had signed by saying, "A waiver that's signed with your employer looking over your shoulder is hardly something given... free and clearly. "She was sentenced to imprisonment by Judge Hogan in "some suitable facility in the District of Columbia," until she received a waiver by phone and in writing to reveal her source, Vice President Dick Cheney's chief of staff I. Lewis (Scooter) Libbey on September 19, 2005.

The leak is believed by many to be retaliation by the White House against Plame's husband, Joseph C. Wilson IV, who published an editorial in *The New York Times* on July 7, 2003 calling into question the validity of the President's justification for war in Iraq. In an editorial, Wilson, a former diplomat who had been on a trip to Niger at the request of the administration, claimed that he found no evidence that Iraq was trying to buy uranium from Africa. One week later, conservative columnist Robert Novak reported, "Two senior administration officials told me Wilson's wife… an Agency operative on weapons of mass destruction… suggested sending him [rather than someone else] to Niger." The column mentioned Wilson's wife by name. How Novak got Plame's name is still unknown. Some reports suggest that he simply found her name in her husband's "Who's Who" profile, where it is indeed listed. How he discovered that she was a CIA agent is a mystery, and one the Justice Department would love to solve.

The outing of a CIA agent whose identity the government is trying to conceal is a felony under the 1982 Intelligence Identities Protection Act, and all fingers point to Karl Rove, Bush's senior political advisor and deputy chief of staff at the White House. Documents released by *Time* magazine prior to the waiver offered to Cooper specifically cite Rove as

one of the government officials with whom Cooper had contact regarding the Plame matter, and Rove's representatives have confirmed that he was in communication with the *Times* reporter in the week preceding the leak. However, Rove's attorney, Robert Luskin, claims that Rove learned of Valerie Plame's role in the CIA not from a State Department memorandum denoting her identity as secret, but from Novak himself, and that in his communication with Cooper he was unaware of the secret status of her identity.

One of the difficulties in proving a transgression against the architect of George W. Bush's political career is showing that he knowingly "outed" an agent whose identity the government was trying to conceal. If, however, it is true and can be proven, Rove faces significant consequences: President Bush has publicly stated that "if somebody committed a crime, they will no longer work in my administration," raising the possibility that Bush will be forced to make a choice between his loyalty to Rove and his word to the people. It would be a great blow to the credibility of the Republican White House if a senior official were found responsible for this breech of national security.

Miller's paper, *The New York Times*, stands behind her, claiming that if journalists could not guarantee confidentiality to their sources, vital news might never reach the public, as potential whistle-blowers would fear that journalists would not be able to protect them. "I would say in general all reporters worry about this trend," says Cindy Skrzycki, journalist-in-residence of the English Department at Pitt. Skrzycki, who has worked for *The Washington Post* for 16 years, says the subpoenaing of reporters has increased over the past 15 years, and is becoming a concern for the entire journalistic community.

Others, such as *Chicago Herald* columnist Steve Chapman, believe that Miller's actions are criminal themselves; the phrase "journalists are not above the law" floated around in the media all summer. These journalists generally believe that their colleagues have an obligation to follow the dictates of the justice system. The "obligation [to keep a promise of confidentiality to a source] ends where the law begins," Chapman said on "The News Hour with Jim Lehrer" on July 6. Like Judge Hogan, who noted that the law requiring journalists to reveal sources suspected of criminal activity was passed before the Watergate scandal, these journalists believe the Branzburg v. Hayes precedent will not keep sources from speaking to reporters.

"I think most reporters will go about their business," says Skrzycki, who noted that there has been a push on the part of the community as a whole to avoid the use of anonymous sources. "But there are many stories that would never get done without them, and, of course, the biggest one is Watergate."

The case of Miller, who was only recently released from a federal facility in Alexandria, Virginia, has prompted journalists to go before the Senate Judiciary Committee in an attempt to gain approval for a bill providing a shield for journalists to protect their confidential sources. "The federal courts are in a state of utter disarray about whether a reporter's privilege protecting confidential sources exist," Norman Pearlstine, Time Inc.'s editor in chief, said before the committee. Cooper also appeared before the committee, stating that, "The rules of the road are, to put it mildly, quite confusing for a working journalist such as myself in the absence of any clear federal standard." The bill, sponsored by Connecticut Democrat Christopher Dodd and Senator Indiana Republican Richard Lugar a Republican from Indiana, includes an exception for cases in which there is an imminent threat to national security.

The debate over this bill cuts to the heart of the controversy: should the country be more concerned about the rights of journalists or getting to the bottom of a leak that could constitute a threat to national security? What constitutes a threat to national security? The outing of a CIA operative, which endangers not only one agent but all of her contacts, poses an unnecessary risk to the American people, especially in the current political climate. At the time of Novak's article, Plame had a desk job at the CIA, and was not in the field, but releasing her name still potentially compromises the secret identities of her contacts. There is no way to know exactly how the leak of Plame's name affected the intelligence network. Similarly, however, there is no way to know to what degree journalism, one of the few safeguards the American people have against abuses of power by the government, will be less effective if confidentiality cannot be protected. "I think most reporters will go about their business," says Skrzycki, who noted that there has been a push on the part of the community as a whole to avoid the use of anonymous sources. "But there are many stories that would never get done without them, and, of course, the biggest one is Watergate."

Watergate, which occurred after the 1972 Supreme Court ruling in Branzburg v. Hayes, gives some credence to the argument that the chilling effect on journalism will be minimal. In fact, Judge Hogan himself noted the infamous scandal in the preceding against Miller and Cooper, and the fact that Felt came forward, even after the ruling.

There are, however, a few signs that this case is having an effect on anonymous sources already. The *Cleveland Plain Dealer* announced, weeks after the ruling, that it would decline to run two of its articles for fear

that it would face legal ramifications if it refused to reveal its sources who asked to remain confidential. In addition, several of *Time* magazine's sources refused to continue communications with the publication after it handed over documents to the grand jury, perpetuating a debate as to how great the effect on anonymous reporting will be.

Skrzycki, who works mostly with sources within the federal government, seems to believe that these incidents will be isolated. "People want to get their story out. Most reporters, particularly reporters who work in Washington or do any kind of investigative reporting, have cultivated very careful relationships with their sources," she said. And while she believes that there may be a temporary dearth in the number of sources that come forward while the current scandal plays out, she believe that, in the long run, there will always be a strong relationship between journalists and their sources within the government.

An interesting element in determining the effect that this case could have on journalism might be found in the divergent choices of *Time* and the *New York Times*. Thirty years ago, when Felt came forward to blow the whistle on Nixon, news organizations didn't own a sizeable portion of the entertainment industry, as AOL-Time Warner does today. *Time* magazine, as part of a larger organization with a number of interests beyond journalism, may have more trouble in the future in protecting the identities of confidential sources. In this case, pressure from the top forced Time Inc. editor Norman Pearlstine to hand over e-mails and other electronic notes of Cooper's to the grand jury. The issue that this raises is whether more independent organizations, such as *The New York Times* and *The Washington Post*, who have stood up to demands for source revelation in the past, will be at an advantage in the future because they are better equipped to secure confidentiality for their sources. A news organization linked to a larger company, which must look after its stockholders' interests, may be more likely to cave in to pressure when faced with such a crisis.

"It wouldn't surprise me if sources would be leery of [Time magazine]," Skrzycki said. However, she does not believe that many sources will discriminate between news organizations in most cases. "A very sophisticated source with a very big story [might shop a story to an independent paper], but I think in smaller issues, it probably won't matter that much."

Little can be agreed on when it comes to this case. However, almost everyone in the journalistic community agrees that a rule must be established governing the right of journalists to protect their sources. "Everyone, prosecutors and journalists alike, would benefit from knowing what the rules are," Cooper said before the Senate Judiciary Committee. However, what those rules should be are far from agreed upon. Does there need to be a "Fourth Estate" to protect the American people from the corruption of the government and corporations, and does that Fourth Estate have the power to oppose the other three in ways not provided for explicitly in the Constitution? Is there any situation in which there should be exceptions to these rules, or should they be based on pragmatism rather than principle?

In the end, it seems unlikely that any federal law providing protection for journalists will be passed, at least not in the near future. Although 31 states and the District of Columbia have their own shield laws, those do not apply to federal cases. The Supreme Court, by refusing to hear the appeal of Miller and Cooper, has shown that it will not be overturning the conclusion reached thirty years ago. Barring major changes in the political landscape, it will be left largely to the discretion of journalists and the organizations for which they work to protect the names of confidential sources, even if their actions are criminal or the information they possess may incriminate others. ■