
Why Journalists Are Not Above the Law

Gabriel Schoenfeld

TO HEAR some tell it, the fundamental freedom of the press promised by the First Amendment of the U.S. Constitution is in peril today as perhaps never before. In his four decades representing the media, says Floyd Abrams, one of the country's leading First Amendment lawyers, the work of reporting has "never been as seriously threatened as it is today." Norman Pearlstine, until recently the editor-in-chief of Time Inc., warns that today's situation "chills essential news-gathering and reporting." William Safire, the longtime columnist for the *New York Times*, says "the ability of journalists to gather the news" is "under attack." Nicholas Kristof, also a *Times* columnist, says "we're seeing a broad assault on freedom of the press that would appall us if it were happening in Kazakhstan."

The source of the problem, according to these and other concerned observers, is the American government, in the form of the White House and the Justice Department. Both are threatening to prevent journalists from doing their work by depriving them of the right to rely on confidential sources of information: the lifeblood of the journalistic profession and the prime avenue through which the public learns about impending shifts in policy, about official wrongdoing, and about much else besides.

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Overstated or not, such worries reflect continuing reverberations from a number of recent cases. The most prominent involves Judith Miller, a reporter for the *New York Times* who had gathered information about the leak of an undercover CIA officer's name in possible violation of the Intelligence Identities Act. In his effort to uncover the leaker, the government's special counsel, Patrick Fitzgerald, brought Miller before a grand jury in 2005 to answer questions about what she had learned.

Declining to disgorge her confidential sources, and citing her First Amendment rights as a journalist, Miller refused to testify. In July 2005, the judge presiding over the process held her in contempt. She spent the next 85 days in the Alexandria City jail before finally naming her source: I. Lewis "Scooter" Libby, chief of staff to Vice President Dick Cheney.¹

The spectacle of a reporter from our country's premier newspaper going to prison for almost three months was only the most visible example of the heavy hand of government. Another journalist, a video blogger by the name of Josh Wolf, is currently sitting in a California jail for declining to turn over to a grand jury video clips of an anarchist riot in San Francisco. And there are similar cases elsewhere that have stirred fears among reporters over the increasing legal hazards of their work—not to mention the alarm of those like Floyd

¹ Shortly thereafter, Libby was indicted, not for any violation of the Intelligence Identities Act but for allegedly lying to the FBI during the course of the investigation.

Abrams who are convinced that the public's fundamental access to vital news is being impaired by an overreaching officialdom, bent on protecting itself from legitimate scrutiny.

With such apprehensions on the rise, Congress has come under increasing pressure to establish an official reporter's privilege—analogous to the attorney-client, the priest-penitent, and the husband-wife privilege that already exist in law—exempting a journalist from having to disclose his sources in any federal criminal investigation or trial. Today some 31 states have formally created such a “shield law,” while everywhere else, with the exception of Wyoming, reporters enjoy a more qualified privilege as a matter of common law. Only the federal system remains without such a statute—a deficit that a coalition of news organizations and First Amendment activists now seeks to rectify in the new Congress.

A number of prominent Republicans, including Senators Arlen Specter and Richard Lugar, have long championed such a law. The new chairman of the Judiciary Committee, Patrick Leahy of Vermont, and a bevy of other Democrats including Charles Schumer of New York and Christopher Dodd of Connecticut, are also firmly behind it. With bipartisan support in place, and with the Democrats now in charge, the prospects for passage of such a bill are better than they have been for a generation.

IN ITS modern form, the issue of a reporter's privilege is exceptionally nettlesome, and has been so ever since the Supreme Court ruling in *Branzburg v. Hayes* (1972). That ruling brought together a number of then-recent cases. Paul Branzburg, a reporter for the Louisville *Courier-Journal*, had witnessed people manufacturing and using illegal narcotics. More or less at the same time, two other journalists, a Massachusetts television reporter and a reporter for the *New York Times*, were also believed to have witnessed behavior that appeared to be illegal. All three were summoned to testify before grand juries. All three, citing the First Amendment, declined to answer questions about their confidential sources. All three were held in contempt.

Presenting the same set of legal issues, the three cases were combined and made their way up to the Supreme Court. Its majority decision, written by Justice Byron White, held that the First Amendment did not offer a privilege for journalists that “other citizens do not enjoy,” and the Court emphatically declined to create one.

White's ruling was crystalline in its logic and seemingly absolute in its conclusion. But it did not put an end to controversy. For one thing, nothing in White's ruling barred Congress from establishing a reporter's privilege as an act of law. For another thing, the 5-4 decision of the Court was itself deeply muddled by a concurring opinion, written by Justice Lewis Powell, which even Powell's colleagues called “enigmatic.”

While adding his name to White's decision, Powell undercut its central premise by suggesting that courts should operate on a case-by-case basis, the better to strike “a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” Leaving unspecified the ground rules for this balancing act, Powell's opinion had the effect of plunging lower courts into confusion. Today, five of the twelve circuits in the federal system have relied on *Branzburg* to compel journalists to provide confidential information; another four, basing themselves on Powell's inscrutable words, have granted journalists a qualified privilege.

This confusion has only added fuel to the latest push for a shield law. But is such a privilege warranted? And is it desirable?

IN CONSIDERING those questions, one might profitably turn to another case now before the courts. This one, too, involves Patrick Fitzgerald and Judith Miller, and centers on the disclosure of sensitive government material. In contrast to the Scooter Libby affair, this case is surprisingly low-profile; and again in contrast to the Scooter Libby affair, it is of exceptional national importance.

In December 2001, federal law-enforcement officers were preparing to raid the offices and seize the assets of the Holy Land Foundation and the Global Relief Foundation—two Chicago-based Islamic “charities,” both of which were linked to terrorist organizations abroad. Evidently, on the eve of the raid, Miller and another *Times* reporter, Philip Shenon, acting on confidential information from a source inside a federal grand jury, telephoned officials of the two foundations and asked them questions that had the effect of tipping them off to the impending operation, thereby potentially if not actually nullifying its value and imperiling the law officers carrying it out.

Given this breach of closely held information, Fitzgerald, acting in his capacity as U.S. attorney in Chicago, opened an investigation. Among other things, he issued a subpoena for the telephone records of the two *Times* reporters during the peri-

od in which the leak was thought to have occurred. The *Times* strenuously resisted, and for the last four or five years the matter has slowly moved through the courts. This past August, a three-judge federal panel ruled against the *Times*. “We see no danger to a free press” in so ruling, wrote one of the panel’s members. “Learning of imminent law-enforcement-asset freezes/searches and informing targets of them is not an activity essential, or even common, to journalism.” In December, the Supreme Court, declining to hear an appeal, let stand the decision of the three-judge panel.

The *Times*, for its part, has steadfastly insisted that no damage was done by its reporters’ actions. According to an attorney for the paper, the pair were merely “conducting their journalistic duties by getting reaction to an ongoing story.” The *Times* editorial page has blasted the Supreme Court’s December action as “the latest legal blow to the diminishing right of journalists to shield informants.” Citing the public interest in the “dissemination of information,” it has seized the occasion to argue yet again that the “privilege granted to journalists to protect their sources needs to be bolstered with a strong federal shield law.”

But the *Times* is wrong. For here is an instance, one of many in the recent past, where it is hardly clear that the public interest resides in promoting the “dissemination of information.” To the contrary, where protecting the country from terrorism is at stake, the public interest may rather reside in *narrowing* access to information, and not in broadcasting it to terrorist fundraisers and to the public at large. Although the two reporters have not been charged with any crime, and although there is no evidence that either of them acted with malicious intent, a convincing argument can be made that in ferreting out secret information from a grand jury, and in placing telephone calls to criminal suspects on that basis, they endangered us all.

CONSIDERATIONS like these have, in fact, informed recent congressional debates over whether to enact a shield law. Thus, a bill considered by the Senate Judiciary Committee in 2005 made a point of excluding from any such privilege information that posed “imminent” harm to national security—a very narrow exclusion that was duly subjected to withering criticism by the Justice Department. The following year, a bill introduced by Lugar and Specter appeared to take Justice’s concerns into account, broadening the array of unprotected categories to include, among other things, any information necessary to government

in fulfilling its obligation to “prevent significant and actual harm” to national security.

A parade of Senators have pronounced themselves satisfied with this compromise, hailing it as a way of ensuring the flow of information to the public while also safeguarding genuine secrets. But a moment’s reflection exposes the defect in this reasoning. For what exactly constitutes “significant and actual harm” to national security, and how would a court, of all institutions, go about determining it?

The military, diplomatic, and intelligence machinery of the U.S. government, acting under the authority of presidential executive orders and employing criminal sanctions enacted by Congress, classifies an immense volume of information. It also keeps a careful account of what it is doing—tabulating, for example, 14,206,773 “classification decisions” in fiscal year 2005 alone.² Three primary categories are in use—top-secret, secret, and confidential—of which the overwhelming share is “secret.” According to official definitions, the disclosure of “top-secret” or “secret” material “could reasonably be expected” to cause either “exceptionally grave” or “serious” damage to the United States, while disclosure of “confidential” material “could reasonably be expected” to cause only “damage.” By passing a shield law that requires prosecutors to demonstrate “significant and actual harm” before compelling a journalist to testify, Congress would effectively dismantle this entire classification system without erecting any safeguards in its place.

To begin with, while leaving statutes on the books that ostensibly criminalize leaks of *all* classified documents, the exception would almost automatically free journalists who come into possession of “confidential” information from the possibility of ever being subpoenaed—on its face, mere “damage” would not qualify as “significant” harm. But even “secret” and “top-secret” material might also not fall under the exception, since “actual” harm is virtually impossible to prove, hinging almost always on an evaluation of actions taken in secret by

² A “classification decision” is the bureaucracy’s label for the creation of a classified fact. Of this gigantic number, only 258,633 were brand-new classified facts; the remainder were “derivative,” that is, based upon a paraphrase or a restatement of an original decision to classify something. A widely recognized problem is that a significant fraction of what the government classifies or retains as classified is actually misclassified or over-classified. The solution has been an orderly and timely process to *declassify* records: in 2005, some 29,540,603 pages of historical records were declassified. A “record” is defined by law “as a book, paper, map, photograph, sound or video recording, machine-readable material, computerized, digitized, or electronic information, regardless of the medium on which it is stored, or other documentary material, regardless of its physical form or characteristics.”

an adversary about which we may not ever learn. It is for this very reason that the rules of the classification system do not speak of actual harm, safeguarding instead information that could “reasonably be expected” to injure our national security.

A shield law, in other words, would effectively immunize one large category of leakers at a stroke, and perhaps immunize almost all leakers, dramatically intensifying the flow of even the most sensitive secrets into the public domain. Every bureaucrat with a private agenda would feel free to contact a Judith Miller or an even more prolific collector of leaks like the *New Yorker’s* Seymour Hersh to relay classified national-defense information without any apprehension of ever being arrested or prosecuted on the basis of something that might one day be disclosed by a reporter in a court proceeding.

Protecting national secrets is already a problematic venture. Some of the most notorious leaks of the past several years have been not of the confidential but of the secret and top-secret variety. Thus, in 2005, the *Washington Post* revealed a highly classified network of clandestine CIA prisons in Europe for al-Qaeda captives. That same year, the *New York Times* disclosed the existence of a highly classified National Security Agency program of government surveillance of al-Qaeda suspects.³ In 2006, the *Times* revealed a highly classified program monitoring al-Qaeda financial transactions; most recently, it published the contents of a highly classified memo revealing administration misgivings about the prime minister of Iraq, a leak described by one government official as among the most damaging in recent memory. And this is not even to take account of leaks from the criminal-justice system like police and FBI investigative reports, surveillance tapes, and grand-jury transcripts (as in the Holy Land Foundation case) that are not marked with a classification stamp.

Such leaks have proliferated, even though *Branzburg* is on the books and the shadow of Judith Miller’s imprisonment has supposedly given pause to informants considering whether they can trust a reporter. This hardly suggests that journalists are in desperate need of a shield law to induce leakers to impart information to them. On the contrary, such a law would only unleash a great tidal wave of leaks, to be followed inevitably by an equally destructive backwash of litigation.

In the case of each such contested leak, courts would be asked to weigh whether the disclosed information caused “significant and actual harm” to national security, which in every instance the press

would deny, claiming (a) that the information at issue, even if secret or top secret, was improperly classified and (b) that disclosure of this information provided a vital service to the public weal. The main effect of a shield law would thus be to draw the judicial branch into the very heart of foreign-policy decisionmaking, requiring judges to evaluate matters that they lack either the expertise or the experience to assess. As a result, the confusion that now exists among the various federal circuit courts would not be cleared up; it would be deepened.

AND EVEN that is not the end of it. Any legislation in this area would ineluctably have to specify exactly who is worthy of being shielded. Anticipating this very problem, Justice White observed in *Branzburg* that, sooner or later, administering a constitutional privilege for reporters would necessitate defining “those categories of newsmen who qualified for the privilege.” But such a procedure, he noted, would itself inevitably do violence to “the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”

The Lugar-Specter bill already does precisely this sort of violence. It defines the term “journalist” as a person who, “for financial gain or livelihood,” is engaged in the news business “as a salaried employee of or independent contractor” to a news agency. This definition, with its emphasis on monetary compensation, no doubt applies to many journalists. But it excludes many more. And it takes a large first step toward erecting a system of federally recognized or federally licensed journalists.

In the Internet age, the functional equivalent of the lonely pamphleteer is the lonely blogger, working at home in front of his computer screen. Internet blogs have become a major force in the dissemination of news and opinion; one has only to recall the role played by the website PowerLine.com in unmasking the fraudulent documents employed by Dan Rather and CBS in their 2004 election-eve coverage of the military service of George W. Bush. In the Lugar-Specter version of a shield law, bloggers would be ineligible for membership in the new privileged caste.

Nor would they be alone. As Justice White stressed in *Branzburg*, freedom of the press is not a

³ For a discussion of this case, and the broader framework of laws governing the publication of national-defense information, see my “Has the *New York Times* Violated the Espionage Act?” in the March 2006 COMMENTARY.

right “confined to newspapers and periodicals” but rather a “fundamental personal right” that attaches to all of us. Any effort to restrict this personal right to a few select professionals will collide with the reality that “[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.” Herein, continued White, lies the difficulty in crafting a shield, for almost any author “may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.”

The proposed shield legislation attempts to surmount this difficulty by excluding amateurs and many other categories of purveyors of information from its reach—thereby violating the spirit if not the letter of the First Amendment. Even worse, however, is that it would *include* under its protection all sorts of highly dubious *professional* journalists: American reporters in the employ of Al Jazeera, the pan-Arab broadcasting company, for example; American journalists working in, say, the Washington bureau of the Chinese Communist party’s *People’s Daily*; journalists for extremist domestic publications like the Nation of Islam’s *The Call*, or the Liberty Lobby’s avowedly racist *Spotlight*, or Lyndon LaRouche’s crackpot *Executive Intelligence Review*. So long as they were drawing a salary, they too could receive immunity for any leaked confidential information they collected or published.

SO WHERE does that leave us? When all is said and done, do we really want to retain a system that on occasion can imprison journalists merely for going about their daily work? Is there perhaps some alternative, short of enacting a shield law, that would avoid that untoward result?

A better question is this: do we need such an alternative? Despite what newsmen and their lawyers incessantly tell us, our current laws governing confidential informants do not require journalists to go to prison *ever*. On the contrary, this is always a choice they make of their own free will. Like every journalist who has dealt with a confidential informant, Judith Miller made a series of such choices, each of her own volition, before she was led away to her cell. They are worth reviewing.

In the first place, as she went about gathering information about the leak of an (allegedly) undercover CIA officer, Miller was under no obligation to promise her contacts in or out of government

that she was prepared to violate U.S. law to protect their identity. In seeking to gain their trust and cooperation, she might have chosen to promise something less—that, for example, she would never disclose their identity unless she herself were subpoenaed. Such a promise might well have sufficed to elicit the information she was pursuing while avoiding any suggestion that she was ready to go to prison to keep her word.

Many confidential informants would readily accept such terms, as Miller’s own case eventually proved. For after she was hit with a contempt citation, I. Lewis Libby, the man who turned out to be her principal source, offered to sign letters freeing her of any obligation to observe promises of confidentiality she had made. What this suggests is that an absolute promise, one that holds the potential of dragging a reporter into conflict with the law, is likely to be necessary only under extraordinary circumstances.

The Justice Department has its own highly restrictive internal guidelines that sharply limit the circumstances in which it will subpoena reporters. Historically, indeed, such subpoenas have been rare; the Justice Department has issued only 12 over the past 15 years.⁴ Ours is thus not a hostile environment for journalists but a congenial one, assuring them that they need incur the risk of offering an absolute promise of confidentiality only when the information at stake is worth the highest price in terms of the public’s right to know. There was certainly no information of such value in the Miller fiasco. Whatever she learned from Libby, she wrote about only in her notebook; neither she nor, evidently, her editors ever thought it sufficiently important to be printed in the pages of the *New York Times*.⁵

⁴ A different set of issues is presented by the fact that, in the aftermath of *Branzburg*, the press has been hit with a growing number of subpoenas for source material arising out of *civil* litigation, including in two high-profile cases. In 2004, five reporters were held in contempt by a federal judge for refusing to testify about their sources in a case brought by Wen Ho Lee, the Los Alamos atomic scientist who pleaded guilty to a charge of mishandling secret documents but then sued the government for violating his privacy rights. The case was dropped when the five news agencies involved agreed to contribute \$750,000 to a settlement with Lee to avoid having their reporters testify. In a libel case brought against Nicholas Kristof by Stephen J. Hatfill, who had been named by Kristof as a suspect in the post-9/11 anthrax attacks, a federal magistrate judge ruled that the *Times* could not refuse to identify Kristof’s confidential sources. That case is still moving through the courts.

⁵ As we now know, for its own partisan reasons the *Times* was wildly overstating the significance of the leak, which had its origins not (as the paper alleged) in a White House plot to discredit its critics but in the careless talk of a ranking official at the Department of State named Richard Armitage.

Confronted by a subpoena to a grand jury, and having failed to quash that subpoena, Miller still could have chosen to avoid jail merely by following the law of the land, fulfilling her obligation as a citizen to tell the grand jury what she knew about a possible crime. This she declined to do. But despite the plaudits she earned from many for keeping her promises, it is debatable whether this act of civil disobedience on her part was either honorable or wise. For what Miller was defying was the will not only of the special counsel or of the Supreme Court but of the highest power in a democracy, namely, the American people.

AT THE TIME Miller was incarcerated, the American people acting through their elected representatives had had decades to contemplate establishing a testimonial privilege for journalists. Up until then, and indeed up until this moment, they have declined to bestow such a privilege on a profession they do not hold in particularly high esteem. Successive Congresses have considered the idea of a shield law only to reject it; and as I have tried to show, they have had good reasons for rejecting it. It was proper that Miller should have been cited for contempt, for she was being contemptuous of a grand-jury process that is the cornerstone of our criminal laws.

Once again, Justice White cut to the essence. “[I]t is obvious,” he wrote in *Branzburg*, “that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.” Historically, White pointed out, citizens not only are forbidden to conceal a crime, they have a positive “duty to raise the ‘hue and cry’ and report felonies to the authorities.” Concealment, even of a crime

in which one is oneself not a participant, is itself a crime—misprision of a felony—punishable by a statute enacted by the very first Congress and still on the books. Covering up a crime, wrote White, “deserves no encomium, and we decline to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand-jury subpoena and answer relevant questions put to him.”

The claim that Miller, or any other journalist in similar circumstances, had no choice but to go jail is, therefore, specious in the extreme, a rationalization put forward by spokesmen of the establishment media in their own effort to gain and maintain their privileges and powers. These they require not in order to report the news but rather, it would appear, to ratify their self-proclaimed position as the arbiters and shapers of American opinion. In the performance of that role, they fancy, their exalted position should place them beyond the reach of American law.

A free press is a vital component of our democracy, but it is not the only component. The same preamble of the Constitution that speaks of securing “the blessings of liberty to ourselves and our posterity” also speaks of insuring “domestic tranquility” and providing “for the common defense.” At a moment when the United States faces the present danger of assault by Islamic terrorists and is struggling to protect itself from falling victim to a second September 11, a murmuration of overzealous, self-interested, and mistaken advocates is striving to shield the press’s freedom of movement at the expense of many if not all of the competing imperatives of a system based upon the rule of law. By acquiescing in this hubristic folly, Congress would do a disservice both to the First Amendment and to the security of the American people.