CASE STUDY

THE CIA LEAK INVESTIGATION

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ROBERT NOVAK AND VALERIE WILSON

When Robert Novak revealed the name of Valerie Plame Wilson as a CIA agent, a chain of events was set in motion that few anticipated. Novak, a nationally syndicated columnist who writes for the Chicago Sun-Times and is co-host of CNN’s “Crossfire” news program, stated in his column of July 14, 2003, that “Valerie Plame is an Agency operative on weapons of mass destruction.” What made this information important for Novak to reveal is that Valerie Plame is the wife of Joseph Wilson, former ambassador to Gabon and officer at the National Security Council over African affairs, who had been highly critical of the Bush administration’s management of information related to the weapons of mass destruction in the lead up to the invasion of Iraq in 2003. Novak’s article came just eight days after Mr. Wilson stated in a July 6, 2003, Op-Ed piece in the New York Times that “some of the intelligence related to Iraq’s nuclear weapons program was twisted to exaggerate the Iraqi threat.” Six months prior, President Bush said in his State of the Union Address that “The British Government has learned that Saddam Hussein recently sought significant quantities of Uranium from Africa.”

When Novak was questioned regarding the source of this information, he responded that he had learned it from unnamed senior Bush administration officials. One of these sources was later alleged to be I. Lewis “Scooter” Libby, Chief of Staff to Vice-President Dick Cheney. Although these sources asked Novak not to use Plame’s name (which he did), Novak claims that he was not told she was a covert operative, but a “CIA employee working on weapons of mass destruction.” Referring to his actions as “no great crime,” Novak admitted that “they asked me not to use her name, but never indicated that it would endanger her or anybody else. According to a confidential source at the CIA, Mrs. Wilson
was an analyst, not a spy, not a covert operative and not in charge of undercover operators.”

This issue leads to the questions regarding what the White House sources knew about Plame’s status with the CIA and why they chose to reveal her identity. On memos made known to administration officials within two weeks before Novak’s story, the paragraphs containing information on Plame were marked “S” for “secret” and thus classified. It was later revealed that Novak was not the only reporter during the same period who obtained information from the White House regarding Plame’s connection to the CIA. Other reporters who were alleged to receive this information included Matthew Cooper and Viveca Novak of Time Magazine, Glenn Kessler, Walter Pincus and Bob Woodward of the Washington Post, Judith Miller of the New York Times, and Tim Russert of NBC News. Joseph Wilson claims that the reason for the leak was retaliation for his high-profile criticism of the Bush Administration, claiming that they were manipulating intelligence related to Iraq to justify war.

THE SPECIAL PROSECUTOR

As a result of this leak of classified information a Federal Grand Jury was convened in October, 2003, to investigate whether or not the source of the leak committed a crime, including a violation of the 1982 Intelligence Identities Protection Act under which it is a crime to intentionally reveal the identity of a covert agent “as a result of having access to classified information.” Patrick Fitzgerald was named as Special Prosecutor and as the result of a two-year investigation, charges were filed against Lewis Libby. The charges involved one count of obstruction of justice, two counts of perjury, and two counts of making false statements. The indictment alleges that Libby lied both to FBI investigators and during sworn testimony to the grand jury. An important charge is that Libby claimed he first heard about Valerie Plame from Tim Russert, Washington Bureau Chief for NBC News, a claim later refuted by Russert in testimony before the grand jury.

The indictment further alleges that Vice-President Cheney, along with other officials in the Bush Administration, provided information about Ms. Plame to Libby and that Libby contacted multiple reporters with this information, presumably in an effort to make it public and thus discredit Joseph Wilson. However, the underlying alleged criminal activity being investigated, e.g. the Intelligence Identities Protection Act, was
Fitzgerald claimed in his press conference on October 29, 2005, that the perjury and false statements on the part of Libby have prevented investigators from finding out whether the crimes specified on the indictment had been committed. Legally, perjury does not require proof of an underlying crime. To prove perjury, one must show 1) that the testimony was given under oath, 2) that the testimony is false and that the accused knew it to be false, and 3) that the testimony concerned a matter that was “material” to the crime being investigated.6

In the attempt to make his case, Fitzgerald subpoenaed several of the above-named reporters to testify regarding their conversation with White House officials or other sources about Valerie Plame. Russert was initially reluctant to testify, arguing through his lawyers that revealing these conversations would harm his relationship with other sources and presumably undermine the ability of other reporters to obtain valuable information from confidential sources in the future. In his grand jury testimony, Russert denied that the conversation referenced by Libby regarding Plame ever took place. Other reporters also resisted testifying, arguing similarly that they should not be effectively turned into investigatory agents of the government and hence that, given their role as journalists, they have a “constitutional right to conceal their confidential sources even against the subpoenas of grand juries.”7 The Federal District Court rejected motions by reporters’ lawyers to quash the subpoenas on First Amendment grounds.

The United States Court of Appeals heard arguments in the case and released its decision on February 15, 2005.

Appellants assert that the information concealed by them, specifically the identity of confidential sources, is protected by a reporter’s privilege arising from the First Amendment, or failing that, by federal common law privilege. The District Court held that neither the First Amendment nor the federal common law provides protection for journalists’ confidential sources in the context of a grand jury investigation. For the reasons set forth below, we agree with the District Court that there is no First Amendment privilege protecting the evidence sought. We further conclude that if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court.8
As a result of this ruling, they all eventually testified before the grand jury, making clear that they had been released from their confidentiality agreement with Libby.

The reluctance of Russert, Miller, and others to testify is consistent with the traditional resistance of news organizations to subpoenas regarding confidential sources. As a result of the decision by the District Court, George Freeman, assistant general counsel for the New York Times Company, said that “we regret that Judge Hogan has denied our motion to quash the subpoena on Judy Miller seeking that she reveal her confidential sources. Journalists should not be forced to testify about their confidential sources when they have done nothing more than aggressively gather news about government actions.”

In his effort to overcome this potential hurdle, Fitzgerald and his team asked White House officials early on in the investigation to 1) sign waivers that would release reporters from earlier agreements of confidentiality, and 2) reveal the identity of their sources. The waiver stated that “no member of the news media assert any privilege or refuse to answer any questions from federal law enforcement authorities on my behalf or for my benefit.” Many White House officials initially declined to sign the waiver on advice of counsel, possibly to prevent incrimination of themselves and/or shed negative light on the actions of the Bush Administration. Many eventually did sign the waiver, including Libby and Karl Rove, White House deputy Chief of Staff and another target of the investigation. Reporters, however, were reluctant to testify fearing that the waivers were not freely agreed upon, but were the products of coercion due to fear of retribution by the Justice Department of possibly even this White House, which had previously stated that it was cooperating fully with the investigation. George Freeman, Assistant General Counsel for The New York Times Company, declared, “Our understanding is that the consent was coerced and that the government employees could have been fired if they did not sign the forms. So the waivers do not affect the essence of the confidential relationship between reporter and source.” This led some reporters to seek direct assurance from their sources that they (the sources) were comfortable with the waiver. Recognizing the extraordinary nature of this investigation, Fitzgerald indicated that he did not want a “First Amendment showdown.”

I do not think that a reporter should be subpoenaed anything close to routinely. It should be an extraordinary case. But if you’re dealing with a crime and what’s different here is the
transaction is between a person and a reporter, they’re eyewitnesses to the crime; if you walk away from that and don’t talk to the eyewitness, you are doing a reckless job of either charging someone with a crime that may not turn out to have been committed . . . So I think the only way you can do an investigation like this is to hear from all the witnesses.11

Despite Fitzgerald’s reticence on the matter, several media scholars and lawyers have observed over the past few years the growing frequency of cases in which reporters are being subpoenaed. The CIA leak investigation along with other high-profile cases, including the NSA wiretapping controversy, has led to growing uncertainty regarding legal status of the media. Balanced against the possibility of reporters being used as an investigative arm of the government is what many have observed as the government being able to use confidentiality between reporter and source to political advantage. “What I am concerned about is the way in which the powerful have learned to game the system . . . Anonymous sourcing in Washington exists today much more to protect government spinners than it does actual whistle-blowers,” said Martin Kaplan, Associate Dean of the Annenberg School for Communication at the University of Southern California.12

**JUDITH MILLER AND THE NEW YORK TIMES**

Judith Miller, an award-winning reporter who had been covering the war with Iraq for the New York Times, was also subpoenaed to appear before the grand jury. With the support of her employer, she refused to cooperate with the investigation and eventually spent 12 weeks in jail. Arthur Sulzburger, Jr., publisher of the New York Times, said that “she’d given her pledge of confidentiality. She was prepared to honor that. We are going to support her.”13 Only after Miller received assurances from Libby that she was no longer bound by confidentiality agreements between reporter and source, did she agree to testify stating that she “went to jail to preserve the time-honored principle that a journalist must respect a promise not to reveal the identity of a confidential source. I chose to take the consequences, 85 days in prison, rather than violate that promise. The principle was more important to uphold than my personal freedom.”14 She testified in September, 2005, that one of her sources was indeed Lewis Libby, but that it was someone else who revealed the identity of Valerie Plame to her. Furthermore, Miller stated that Libby
“wanted to modify our prior understanding that I would attribute information from him to a ‘senior administration official.’ When the subject turned to Mr. Wilson, Mr. Libby requested that he be identified only as a ‘former Hill staffer.’ I agreed to the new ground rules because I knew that Mr. Libby had once worked on Capitol Hill.”15

Prior to the Iraq war, Miller, a 28-year veteran of the New York Times, had written prominent articles that supported the contention, made by the Bush Administration and others, that Iraq possessed weapons of mass destruction, a contention that turned out to be false. While embedded with the Army’s MET Alpha Team16 in Iraq, she obtained a level of classified security clearance and was reported to have had some influence on the operations of the unit. This unit was responsible for inspecting possible weapons sites after the invasion. The Washington Post reported in June, 2003, that during the previous April, “Miller wrote a letter objecting to an Army commander’s order to withdraw the unit, Mobile Exploitation Team Alpha, from the field. She said this would be a ‘waste’ of time and suggested that she would write about it unfavorably in the Times. After Miller took up the matter with a two-star general, the pullback order was dropped.”17 The result of the security clearance was that she was not able to discuss some sources of information with the editors at the New York Times, placing her in an unusually influential position with regard to her stories and their sources.

Critics later alleged that her coverage of these issues did not express appropriate skepticism and thus helped the case for war based upon false information. She later indicated that “W.M.D. — I got it totally wrong, the analysts, the experts and the journalists who covered them — we were all wrong. If your sources are wrong, you are wrong. I did the best job that I could.”18 In an agreement with the New York Times, Miller agreed to leave the paper in November, 2005, citing the importance of the reporter not becoming the story itself. Miller is reported to have had tremendous freedom in her reporting over the past several years, and editors at the paper have since expressed regret that her journalistic practices were not more carefully monitored and scrutinized during her war coverage.

Critics have accused the Times of allowing her to maintain this unusual position, which included blocking other reporters in the Times’ Washington Bureau from doing stories on Lewis Libby. The result, according to these critics, is that it diminished the objectivity of reporting on the White House. Todd Purdum, veteran reporter at the Times, observed that “Everyone admires our paper’s willingness to stand behind us and our
work, but most people I talk to have been troubled and puzzled by Judy’s seeming ability to operate outside of conventional reportorial channels and managerial controls.”19 One reporter asked that his name be removed from a story he co-wrote with Miller on Al Qaeda because he did not trust her objectivity. He said that her work is “filled with unproven assertions and factual inaccuracies.”20 The public editor of the New York Times, Byron Calame, has written several stories outlining the challenges the paper has faced in covering this issue given that it is a major part of the story. “A major problem, no matter how candid and complete the article, is the possible natural tendency of some readers to assume that The Times or any other paper isn’t telling the whole story when covering itself. If an article depicts a setback for the newspaper or its owner, I fear that too many readers assume the real situation is even worse than reported. And I fear that they tend to assume things aren’t as rosy as an upbeat article may suggest.”21

CONCLUSION

At the writing of this case, the CIA leak investigation is ongoing. In preparation for trial, attorneys for Lewis Libby have sought classified information to which Libby had access prior to his departure from the Vice-President’s Office. These documents include the President’s Daily Brief, among the most classified documents produced by the CIA, who is resisting this request. The Libby team maintains that the documents are “material to establishing that any misstatements he may have made were the result of confusion, mistake and faulty memory resulting from his immersion in other, more significant matters, rather than deliberate lies.”22 Special Counsel Fitzgerald has expressed concern that the Libby defense team is engaging in “graymail,” a tactic aimed at forcing the government to either reveal classified documents or drop the case, as charge the Libby team rejects.

Of particular note, the Bush Administration has recently launched an investigation aimed at preventing leaks of classified information, including polygraph tests for selected CIA and NSA (National Security Agency) employees. In response to the apparent leaks regarding secret CIA prisons and the NSA’s “warrantless domestic surveillance program,” the FBI has been conducting dozens of interviews of agency personnel and the Justice Department has issued a warning to reporters that they could be subject to prosecution under the 1917 Espionage Act, which “prohibits publishing classified information.” According to David Greenberg, a professor of journalism at Rutgers University, “you haven’t
seen this kind of crackdown on leaks since the Nixon administration.” The investigation and its outcome are almost sure to have lasting effects on the way in which government and the media interact.

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NOTES


4 “Novak: ‘No Great Crime’ with Leak,” emphasis added.

5 Intelligence Identities Protection Act, United States Code, Title 50, Chapter 15, Subchapter IV, Section 421.


10 Pear and Liptak, “Times Reporter Ordered to Testify.”


12 Quoted in Jeffrey Toobin, “Name that Source,” The New Yorker, January 16, 2006.


16 MET is an acronym for Mobile Exploitation Team.


