

Danger Signals from Anonymous Sources

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In the spring of 2004, a college newspaper reporter at the University of Tennessee had dinner with a couple of graduate students in English and a visiting professor at the Sunspot on bordering Cumberland Avenue. It was a fairly casual dinner, with the reporter taking his time to ask the visiting professor questions about his literary reading earlier in the evening.

Suddenly, however, the visiting professor had blurted out a little tidbit that immediately piqued the budding journalist's attention. One of the administrators at the University of Tennessee was involved in some rather dubious personal and financial transactions, or at least the professor claimed. The reporter thought that this could be just another link in the chain of corruption that had bereft the university of its last two presidents at the time. As the graduate students nodded in concurrence to the professor's rather interesting observation, the reporter, still a neophyte even in the college paper level of journalism, thought that this may make for a breakout story if followed. The reporter developed a little power trip that night. He felt as if it was in his hands to tip over yet another domino in the university's administrative chain.

But the visiting professor gave one stipulation: no one must know that he spouted out the information, and what was said at Sunspot stays at Sunspot. The reporter did not feel this stipulation was particularly harmful at the time. After all, the reporter decided that any story he wrote did not have to include a quote from the professor. So he walked into the Sunday meeting with the news editor at his college paper on clouds.

And then his cloud immediately vaporized.

The reporter submitted the story idea to the news editor in front of all his fellow reporters. And the news editor immediately asked the reporter from whom he got such information.

The reporter replied that the source was to remain anonymous.

And immediately, the news editor replied that anonymous sources are dangerous business, especially for a college paper. First, the news editor, the managing editor and the editor-in-chief all had to know exactly who the source is and how they can be contacted. Unfortunately for the reporter, he did not even think to take down the professor's e-mail address or phone number during the Sunspot conversation. So that mixed any chance of the reporter making a breakthrough, at least in his mind at the time. In addition, the news editor, managing editor and editor-in-chief took the reporter aside and explained that even if the reporter had such contact information, the paper would be hesitant, if not completely unwilling, to follow through on such a dubious tip-off. Anonymous sources and tip-offs was one world in which an editorially independent college newspaper did not wish to tread, especially in light of current events at the highest level of U.S. government.

And this was when thoughts of Robert Novak and Valerie Plame Wilson flooded the head of the reporter. He thought of how, in the summer of 2003, anonymous sources had revealed to Novak and other reporters the identity of the CIA operative Plame, as well as the fact that Novak insisted on keeping the names of his sources a secret once he wrote his infamous column.¹ He thought of how the federal government, in conjunction with an overzealous reporter, victimized the wife of an ambassador, and then how that reporter, in turn, victimized the entire journalistic profession.

¹ Novak, Robert. "Mission to Niger." *The Chicago Sun-Times*. Syndicated. July 14, 2003.

The purpose of this essay is to exam several conundrums and dilemmas in the early 21st Century world of American journalists, a world where use of confidential sources may cause an ethical reporter to wind up in jail. Confidential sources – whistleblower sources, if you will – may be abused, but without journalists being able to pledge confidentiality, sources will dry up and whistle blowers will put away their whistles. This leaves reporters in the position of being tempted to promise confidentiality to get major news stories, and then face contempt of court citations and lengthy jail stretches if a judge asks a reporter to rat out an informant, and if the reporter sticks by a promise. More than 30 states (including Tennessee) now have reporter shield legislation to allow protection of confidential sources, but there is no shield involving federal courts. In 2007, journalistic organizations were campaigning for creation of a federal shield law, which might prove helpful to journalists. Note, however, that no shield statute is absolute, and when a judge rules that Sixth Amendment prosecutorial rights outweigh First Amendment rights of reporters, then reporters would still be faced with the hard choice of testifying and "burning their sources," or keeping their word and spending time in jail for contempt of court.

How a Journalist Abused Anonymity

The cauldron had started boiling when *The New York Times* published a column by former U.S. Ambassador Joseph C. Wilson, husband of the betrayed CIA operative Valerie Plame Wilson. The July 6, 2003, op-ed piece, titled "What I Didn't Find in Africa," detailed Wilson's own experiences and discoveries in his 2002 trip to the African country of Niger.² (Wilson, News Comm, Poli of Truth) On his CIA-sanctioned trip to verify an intelligence report concerning the sale of uranium cake from Niger,

² Wilson, Joseph. "What I Didn't Find in Africa." *The New York Times*. July 8, 2003.

Wilson met with Barbro Owens-Kirkpatrick, U.S. Ambassador to Niger. Owens-Kirkpatrick, whose embassy would have very closely monitored the sale of uranium cake, told Wilson she already knew of the claims of uranium sales to Iraq and had already reported those claims as false in her last report to Washington.³ After a series of observations in the country and interviews with current and former Niger government officials and people in the uranium business, Wilson concluded that Niger could not have made a transaction with Iraq because the small industry of uranium mining was very tightly regulated in that country. His findings agreed with Owens-Kirkpatrick's.⁴

Moreover, Wilson did not even deny outright in his column that Iraq was buying uranium from Africa, leaving open the possibility of one of the other three African countries that produced uranium for a source.⁵ But Wilson also mentioned that the State Department had published a fact sheet in December 2002 that deflated the Niger case – one month before President George W. Bush uttered the “Sixteen Words” from his 2003 State of the Union address that were a catalyzing factor in the United States’ 2003 invasion of Iraq – “The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.”

Nor did Wilson outright state the government's pretenses were false, but only that the information upon which the government is acting may not be complete.⁶

Nevertheless, Wilson was soon attacked. Presidential press secretary Ari Fleisher put a spin on Wilson's Niger findings to the media, stating, “Wouldn't any government

³ Wilson, Joseph. “What I Didn't Find in Africa.” *The New York Times*. July 8, 2003.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

deny it?”⁷ Wilson was also attacked as a “partisan Democrat” for having “told the truth.”⁸

Former Secretary of Defense Caspar Weinberger, in a *Wall Street Journal* op-ed piece, played up the fact that Wilson sipped tea in his meeting with Niger officials as an insinuation that Wilson did not approach his assignment with a businesslike mind.⁹

Wilson recalled that he did not take attacks such as those from Fleisher and Weinberger seriously.

Until July 14, 2003. Eight days after “What I Didn’t Find in Africa.”

And it really should have been sooner.

Six days before Novak published that fateful latest edition of his *Chicago Sun-Times*-syndicated column, a friend of Wilson’s had struck up a conversation with Novak. Novak told Wilson’s friend, who did not let on that he knew Wilson, that Wilson is “an asshole. The CIA sent him. His wife, Valerie, works for the CIA. She’s a weapons of mass destruction specialist. She sent him.”¹⁰ Wilson heard of this encounter from his friend, and then two days later, Wilson and Novak spoke on the phone. Novak apologized for telling “a complete stranger” what he had thought he had known about Wilson’s wife, and then asked Wilson to confirm “what he had learned from a CIA source” about Valerie Plame Wilson. Wilson declined to answer.¹¹

The apology was apparently hollow, for four days later, Novak’s latest syndicated column, titled “Mission to Niger,” appeared in newspapers across the country, including

⁷ Wilson, Joseph. *The Politics of Truth*. New York: Carroll and Graf, 2005. p. 336.

⁸ Ibid., p. 337.

⁹ Ibid., p. 338.

¹⁰ Ibid., p. 343.

¹¹ Ibid., p. 344.

The Washington Post, in which the Wilsons first made the public discovery of Valerie Plame Wilson's identity leak.¹² The column's sixth paragraph read:

Wilson never worked for the CIA, but his wife, Valerie Plame, is an Agency operative on weapons of mass destruction. Two senior administration officials told me Wilson's wife suggested sending him to Niger to investigate the Italian report.¹³

Novak also confirmed that Wilson refused to comment about his wife later in that same paragraph:

The CIA says its counterproliferation officials selected Wilson and asked his wife to contact him. "I will not answer any question about my wife," Wilson told me.¹⁴

Wilson especially made note of the fact that Novak had told him on the phone that a CIA source had revealed his wife's identity to Novak, but the column instead cited two senior administration officials. Wilson contacted Novak about this, and Novak responded, "I misspoke the first time we talked."¹⁵

Wilson also noted that the CIA requested that Novak not publish the name of Valerie Plame in his column, a request confirmed by *American Prospect* journalist Murray Waas.¹⁶ Novak responded to Wilson that the "no" the CIA gave was "a soft no, not a hard no."

On his *Crossfire* appearance in late September 2003, Novak confirmed that a CIA source asked him to not mention Plame's name, but still seemed to interchange the "senior administrators" with the CIA source:

"They asked me not to use her name, but never indicated 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

¹² Wilson, Joseph. *The Politics of Truth*. New York: Carroll and Graf, 2005. p. 345.

¹³ Ibid., p. 345.

¹⁴ Novak, Robert. "Mission to Niger." *The Chicago Sun-Times*. Syndicated. July 14, 2003.

¹⁵ Wilson, Joseph. *The Politics of Truth*. New York: Carroll and Graf, 2005. p. 345.

¹⁶ Ibid., p. 347.

operators," Novak said.¹⁷

According to that same CNN story, *the Washington Post* quoted a "senior administration official" (another anonymous source) revealed that two other senior officials gave Plame's identity away to at least six reporters. Novak, however, was the only reporter that decided to leak the identity.¹⁸

By this time, the Justice Department, at the behest of the CIA, had already started conducting its investigation of the White House, led by Special Counsel Patrick Fitzgerald. Whoever had sprung the leak could be guilty of a felony under the Intelligence Identities Protection Act of 1982.¹⁹

Meanwhile, Novak continued to rationalize his decision in revealing the name of Valerie Plame in his Oct. 1, 2003 column, titled "The CIA Leak." In this column, Novak again used the argument that while the CIA did tell him not to use her name, the CIA official did not *specifically* tell him that Valerie Plame would be endangered if her identity was revealed.²⁰ Moreover, Novak further reasoned that the identity of Valerie Plame was not much of a secret around Washington in the first place, although he cited only two circumstantial sources: a column by Republican lobbyist Clifford May that stated he himself knew of Plame's identity from a non-government source, and her husband's own *Who's Who in America* entry.²¹

¹⁷ "Novak: 'No great crime' with leak." CNN. Oct. 1, 2003.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Novak, Robert. "The CIA Leak." *Chicago Sun-Times*. Syndicated. Oct. 1, 2003.

²¹ Ibid.

Wilson called Novak “not so much a scrupulous journalist as he is a confirmed purveyor of the right-wing party line, whether it’s touting the truth, or – as it all too often is, unfortunately – promoting the big lie.”²²

As the investigations continued, Robert Novak published another column, “My Role in the Valerie Plame Leak Story,” on July 12, 2006. Novak stated that the only reason he mentioned the names of Karl Rove, the president’s top adviser, and Bill Harlow, the CIA public information officer, is that both of those parties had waived Novak from his pledge of anonymity. It should be noted that Fitzgerald had most likely long since discovered the identities of these two men in the leak. Novak, however, still did not reveal the name of his primary source, who did not reveal himself at the time. Later, this primary source was discovered to be Deputy Secretary of State Richard Armitage by Newsweek investigative journalist Michael Isikoff.²³

Novak may have escaped legal trouble for keeping his sources’ anonymity (until those sources became revealed), but his irresponsible action of revealing the name of Valerie Plame Wilson caught two other journalists in the aftermath that was Fitzgerald’s investigation and set a precedent that spread even beyond the CIA leak scandal itself.

A Threatened Journalist Saved by a Waiver

Matthew Cooper, Massimo Calabresi and John F. Dickerson coauthored *Time Magazine* article titled “A War on Wilson?” that was published on July 17, 2003, three days after Novak’s column went to the presses. The second paragraph makes mention of

²² Wilson, Joseph. *The Politics of Truth*. New York: Carroll and Graf, 2005. p. 348.

²³ Isikoff, Michael. “The Man Who Said Too Much.” *Newsweek*. Sept. 4, 2006.

the anonymous sources that sprung the identity leak, which the *Time* journalists decided to reference in their article:

And some government officials have noted to *Time* in interviews, (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction. These officials have suggested that she was involved in her husband's being dispatched Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore, sometimes referred to as yellow cake, which is used to build nuclear devices.

The article also continuously referred to these sources in terms such as “a source close to the matter,” or generic references such as “government officials” or “administration officials.”²⁴

The article, which explored the possibility that the White House twisted or altogether ignored the findings of Wilson's Niger report and New York Times column, caught the attention of Special Counsel Fitzgerald. Or more specifically, one of its authors caught Fitzgerald's eye.

Matthew Cooper had been subpoenaed by Fitzgerald to reveal his sources to the grand jury. Cooper initially refused and was facing jail time for his decision to defy the order of U.S. District Judge Thomas Hogan to testify about his anonymous sources.²⁵

But as Cooper told Hogan that he had hugged his son goodbye in the face of possible jail time the previous night, he said he received “in somewhat dramatic fashion” a direct personal communication from the source to free his commitment to anonymity. In his July 25, 2005 *Time* article, “What I Told the Grand Jury,” and presumably in court, Cooper revealed that source to be none other than presidential aide Karl Rove. And apparently, it had to be a dramatic and personal communication on Rove's part, since

²⁴ Cooper, Matthew, et al. “A War on Wilson?” *Time*. July 17, 2003.

²⁵ “Cooper Agrees to Testify to Plame Grand Jury, Avoids Jail.” *Associated Press*. July 6, 2005.

Cooper did not trust the general waiver of confidentiality Rove and his lawyer signed, which was the same waiver Novak used to justify his own revelation of Karl Rove as one of his sources.²⁶

Rove's attorney, Robert Luskin, accused Cooper of "burning" Rove by writing his "War on Wilson?" story in what Luskin deemed a negative light.²⁷

Another Journalist Refuses to Talk

New York Times reporter Judith Miller is yet another journalist who suffered from the aftermath of Novak's irresponsibility. Like Cooper, Miller had refused to take general waivers of confidentiality from administrative officials at face value.²⁸ Unlike Cooper, Miller had never written an article concerning the Valerie Plame leak, although she was one of the journalists to whom the administration revealed Plame's identity.

On July 6, 2005, Miller refused to reveal the name of the source that told her the identity of Plame, and Judge Hogan immediately held her in contempt of court and sentenced her to 12 weeks in jail.²⁹

"We have to follow the law," U.S. District Judge Thomas Hogan said.³⁰ "If she were given a pass today, then the next person could say as a matter of principle, 'I will not obey the law because of the abortion issue,' or the election of a president or whatever. They could claim the moral high ground, and then we could descend into anarchy."

²⁶ "Cooper Agrees to Testify to Plame Grand Jury, Avoids Jail." *Associated Press*. July 6, 2005.

²⁷ York, Byron. "Lawyer: Cooper 'burned' Karl Rove." *National Review*. July 12, 2005.

²⁸ Ibid.

²⁹ "New York Times reporter jailed." CNN. July 6, 2005.

³⁰ Ibid.

In the same story, Floyd Abrams, a lawyer for Miller and the newspaper she worked for, said Miller “should be honored” for her time in jail.³¹

"What Judy has done is, as I've said, in the tradition of journalists throughout our history," Abrams said. "And I'll say another part of that tradition has often been that journalists were punished for their position."³²

An Associated Press story from the same day quoted Miller as saying, “If journalists cannot be trusted to keep confidences, then journalists cannot function and there cannot be a free press.”³³

Miller’s 86-day stay in jail ended on September 29, 2005. Ten days earlier, she received a personal phone call from her source, later revealed to be Lewis “Scooter” Libby, chief of staff for Vice President Dick Cheney.³⁴ In addition, Libby had sent Miller a letter reaffirming that he released Miller from the confidentiality agreement. After her release, Miller agreed to testify before Fitzgerald’s grand jury and reveal her source in court.³⁵

Miller also commented that she hoped her long jail stay “will serve to strengthen the bond between reporters and their sources.”³⁶ Miller testified twice before the grand jury, and on October 28, 2005, Libby was indicted by the grand jury on five charges related to the Valerie Plame scandal: one count of obstruction of justice, two counts of perjury and two counts of making false statements. Libby also resigned from his position on the day of his indictment.³⁷ Libby pled not guilty, but on March 6, 2007, he was

³¹ “New York Times reporter jailed.” CNN. July 6, 2005.

³² Ibid.

³³ “Cooper Agrees to Testify to Plame Grand Jury, Avoids Jail.” *Associated Press*. July 6, 2005.

³⁴ “Jailed reporter reaches deal in CIA leak probe.” CNN. Oct. 28, 2005.

³⁵ Ibid.

³⁶ Ibid.

³⁷ “Cheney’s top aide indicted; CIA leak probe continues.” CNN. Oct. 29, 2005.

convicted of four of the five charges against him – all except one count of making false statements. Libby's sentence could be as much as 25 years in prison and a \$1 million fine. Sentencing hearings were expected to start in June 2007.³⁸

However, while Miller's situation and Libby's verdict appear to be resolved, the problem that floats over the head of investigative journalism is far from over, according to Don Wycliff, chair of the American Society of Newspaper Editors Ethics and Values Committee.³⁹ As the Miller situation came to a head, Wycliff conferred with ASNE president Rick Rodriguez, who Wycliff said had a commitment to reviving watchdog journalism. Rodriguez had commissioned Wycliff with organizing a conference to discuss the ethics of anonymous sourcing. On Nov. 1, 2005, a group of 36 reporters, editors and scholars gathered near Chicago, in the former estate of Chicago Tribune editor-publisher Robert R. McCormick to discuss anonymous sourcing from every possible angle, especially in light of the Judith Miller situation and the Libby indictment, which took place only three days earlier.⁴⁰ (AS p. 8)

Trouble Over Confidentiality Hits the Sports World

But almost a year after that ASNE meeting, another case involving potentially jailed reporters reared its ugly head, this time on the opposite side of the country from Washington and in a whole different arena from the political arena: the sports arena. This very recent case of anonymous sources getting reporters in trouble with the law is proof that investigative journalism and its use of anonymous sourcing is far from safe.

³⁸ "Libby found guilty of perjury, obstruction." CNN. March 6, 2007.

³⁹ *Anonymous Sources: Pathways and Pitfalls*. ASNE Foundation, 2006. p. 8

⁴⁰ *Ibid.* p. 8.

Lance Williams and Mark Fainaru-Wada, two reporters for the San Francisco Chronicle, were sent to jail on Sept. 20, 2006 for a maximum of 18 months for refusing to spill the names of the sources that leaked them secret grand jury testimony from baseball players Barry Bonds and Jason Giambi, sprinter Tim Montgomery and other elite athletes in the investigation of the Bay Area Laboratory Co-Operative, a nutritional supplement-based company in the San Francisco Bay area that was exposed as a steroid ring in 2004.⁴¹ Williams and Fainaru-Wada had published a series of articles and books based partially on the transcripts of the grand jury testimonies of Bonds, Giambi and others.⁴²

U.S. District Judge Jeffrey White said that he hoped incarceration would persuade these two journalists to cooperate with the court, but Williams and Fainaru-Wada had repeatedly stated that they would go to jail to preserve their sources' anonymity. Williams even declared that no one will want to talk to reporters if they consistently violate the trust that sources put in them.⁴³

"These decisions are perhaps even more disturbing than the Miller case. The underlying investigations here do not purport to involve weighty issues of national security," commented San Francisco-based blogger Joshua Wolf.⁴⁴

Fainaru-Wada's and Williams' official statements to the court were published in *The San Francisco Chronicle* on the same day as they had been indicted with contempt, an indictment neither of them denied, but rather accepted as a price for keeping the trust of sources.⁴⁵

⁴¹ "Reporters who refused to reveal BALCO leak get prison." *Associated Press*. Sept. 20, 2006.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ Wolf, Joshua. "In re Grand Jury Subpoena," No.6-16403, 2006 U.S. App. LEXIS 23315 (9th Cir. Sept 8, 2006); In re Grand Jury Subpoenas to Mark Fainaru-Wada and Lance Williams, 438. F.Supp. 2d 1111 (N.D.Cal.2006)

⁴⁵ "Reporters who refused to reveal BALCO leak get prison." *Associated Press*. Sept. 20, 2006.

In his statement to the district court, Fainaru-Wada defended the importance of his work on the BALCO case. Even “more rewarding” than the praise and awards he received from other journalists was “the gratification of seeing our reporting provoke change and national debate on a public health issue that resonates with millions of Americans, particularly the parents of young athletes.”⁴⁶ And in addition to the worries his possible jail time may cause his family, one steep price of his investigative work was “a steady stream of sometimes-vile invective from disappointed sports fans who would prefer that we not expose the harsh realities behind of their heroes' greatest achievements.”⁴⁷

And to have done the work of exposing the fraud clouding the judgments of sports fans and the youth that aspire to take the places of the current sports stars, Fainaru-Wada said he was required to pledge anonymity to his sources. To break the identity of these sources who made possible the work that has garnered much adulation – “from the parents of young men who committed suicide after taking steroids to the President of the United States” – would mean violating the very professional code and integrity of a journalist.⁴⁸

The reporters on the BALCO case had been placed under a microscope from the beginning of the investigation, with many outside observers calling it a “witch hunt” or “an effort to profit off the big names,” Fainaru-Wada said.⁴⁹ But he closed his statement by declaring that the BALCO case was simply an attempt at uncovering the truth, and to

⁴⁶ Fainaru-Wada, Mark. “Statement by Chronicle reporter Mark Fainaru-Wada.” *The San Francisco Chronicle*. Sept. 20, 2006.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

punish him for a vital component of his job would impact honest journalism everywhere.⁵⁰

Williams, a reporter since 1973, mentioned in his statement that the goals of the courts and journalism are both to seek the truth, and he considered it “ironic” that he found himself a defendant, even having to defend his own work from being labeled frivolous by the prosecution.⁵¹

Just as his colleague Fainaru-Wada stated to the court, for Williams to betray his sources would be to give up his career and livelihood, to “throw over some of (his) most deeply held ethical and moral beliefs, both as a journalist and as a person.” It would also betray those who, thanks to such a promise – a journalist’s word – decided to help him with his work.⁵²

This work, Williams said, the prosecutor derided as a “tittilation,” and Williams, like Fainaru-Wada, cited the praises of President Bush himself for emphasizing the dangers steroids have on the youth of America, particularly those that wish to excel in sports. Williams also offered to speak of the praises of a woman who lost her son to steroid use.⁵³

Williams also found a potential betrayal of the First Amendment – had he complied with the prosecutor’s demands – to be a particularly disturbing consequence. He did not appreciate American prosecutors’ recent trend of trampling on the First Amendment, either:

⁵⁰ Fainaru-Wada, Mark. “Statement by Chronicle reporter Mark Fainaru-Wada.” *The San Francisco Chronicle*. Sept. 20, 2006.

⁵¹ Williams, Lance. “Statement by Chronicle reporter Lance Williams.” *The San Francisco Chronicle*. Sept. 20, 2006.

⁵² Ibid.

⁵³ Ibid.

I have been taught the First Amendment guarantees the people not only the right to voice their opinions about our government, but also the right to inquire into the workings of the government, and to have a Free Press that will inquire into the government's workings on their behalf.

And now we have reached a time in our country when the prosecutors say they have the power whenever they choose to subpoena reporters and make them government witnesses, and that they are going to exercise that power. Judge, I despair for our Free Press if we go very far down this road. Whistleblowers won't come forward. Injustices will never see the light of day. Our people will be less informed and worse off.⁵⁴

In addition, around a month later, *The San Francisco Chronicle* itself was also charged with contempt of court for refusing to divulge the names of the sources of the BALCO leak. The newspaper faced a fine of up to \$1,000 a day for the next 18 months, for a total of around \$550,000, for contempt of court. The prosecution also held the right to argue for an increase in the fine.⁵⁵

The paper accepted the charge of contempt, and *Chronicle* editor Phil Bronstein spoke on his decision for the paper to accept the contempt order as a vote of confidence in the work of the journalists under fire.⁵⁶

“While this latest filing is largely about legal procedure, it again speaks to our unqualified support for these two great journalists, their work and their commitment to standing by the confidentiality of their sources,” Bronstein said.⁵⁷

Bronstein had also earlier spoken about the need for a federal shield law to allow journalists to do their jobs without getting in trouble and allowing them to keep their integrity to their anonymous sources.⁵⁸

⁵⁴ Williams, Lance. “Statement by Chronicle reporter Lance Williams.” *The San Francisco Chronicle*. Sept. 20, 2006.

⁵⁵ Egelko, Bob. “Paper to be held in contempt, pending appeal.” *The San Francisco Chronicle*. October 21, 2006.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ “Reporters who refused to reveal BALCO leak get prison.” *Associated Press*. Sept. 20, 2006.

"It's a tragedy that the government seeks to put reporters in jail for doing their job," said Bronstein.⁵⁹

Both the fine to the *Chronicle* itself and the jail terms of Williams and Fainaru-Wada were put on stay pending an appeal to the Ninth U.S. Circuit Court of Appeals.⁶⁰ However, just as Rove, Libby, et al, saved the likes of Cooper, Miller and Novak, the anonymous source who leaked the BALCO grand jury testimony rescued the *Chronicle* and its reporters. On Feb. 16, 2007, Colorado attorney Troy Ellerman pleaded guilty to leaking the testimony to Williams and Fainaru-Wada, and the prosecution, in turn, dropped its case against the two reporters and the paper.⁶¹

The ASNE Conference

The ASNE conference on anonymous sources had been planned with the nightmares of the Valerie Plame Wilson scandal in mind. However, on the morning of Nov. 2, 2005, Dana Priest of the *Washington Post* published a story detailing the CIA's bevy of prisons to detain captured Al-Qaeda operatives around the world. The story was, understandably, full of anonymous sources.⁶²

Thus, the beginning of the conference's second day, instead of focusing entirely on the journalistic doom and gloom of the CIA leak, the conference had two contrasting stories to refer to when discussing the use of anonymous sources, whether shield laws should be established, or whether one should be established federally.

⁵⁹ "Reporters who refused to reveal BALCO leak get prison." *Associated Press*. Sept. 20, 2006.

⁶⁰ Egelko, Bob. "Paper to be held in contempt, pending appeal." *The San Francisco Chronicle*. October 21, 2006.

⁶¹ "Attorney pleads guilty to BALCO leaks." *Associated Press*. Feb. 16, 2007.

⁶² *Anonymous Sources: Pathways and Pitfalls*. ASNE Foundation, 2006. Permission granted for use by Scott Bosley, Executive Director of ASNE on May 7, 2007. p. 9

One of the first fundamental points all in attendance at the conference agreed upon was that anonymity, for journalists working for the publications and companies that allow it, was abused and handed out like candy. In the words of the ASNE book, “given much too freely by journalists, often in situations where it’s not warranted, required or even requested by a source.”⁶³

Roberta Baskin, executive director of the Center for Public Integrity, commented that many journalists may think something “sexier” exists behind stories with a touch of anonymity to it.⁶⁴

Another key point agreed upon in the conference is that editors have as much of a responsibility in restricting the promiscuous use of anonymous sources (or any use of them as the case of the paper’s policy may be). Editors must ask the tough questions of the reporters, and the journalists must learn to distinguish the types of sources and the reasons for giving anonymity to help curb abuse of such.⁶⁵

Former journalist David Axelrod urged the importance of distinguishing between “legitimate” sources who supply a reporter with “classified information or documents that aren’t public ... that may lead to legitimate news,” and “frivolous” sources that request anonymity because they’re blaming someone, and they want they blame printed in the media but not their names attached to it.⁶⁶

Washington Post ombudsman Deborah Howell distinguished between what she felt was a more legit use of anonymity – that of national security and military sources

⁶³ *Anonymous Sources: Pathways and Pitfalls*. ASNE Foundation, 2006. p. 9

⁶⁴ *Ibid.* p. 10

⁶⁵ *Ibid.* p. 11

⁶⁶ *Ibid.* p. 11

which are much more difficult to get on the record, and the “routine political back-and-forth,” or people taking shots at each other anonymously.⁶⁷

Unfortunately, the journalists in attendance at the conference were not at all united on the issue of a shield law. The lawyers in attendance argued that any shield law would be better than the current state journalists suffer under *Branzburg v. Hayes* and like Supreme Court decisions fleshing out the First Amendment protections. However, Tim J. McGuire of Arizona State University argued that a bad law would still be a bad law. He would like to see *his* version of the shield law, but not anyone else’s, especially one that would disagree fundamentally with his preferred version.⁶⁸

The journalists in attendance did agree that any prospect for a shield law is slim to none at this point, as it is not a congressional priority. The attendees also developed a list of “action steps” editors and reporters should take to ensure the proper use of anonymous sources and minimize the potential trouble that promiscuous or careless use of them may cause.⁶⁹

These action steps were divided into what could be done in the newsroom, toward the public and at the industry.⁷⁰

What could be done in the newsroom:

- Every newsroom should have a set of standards for the use of anonymous sources and a process to follow in deciding whether those standards apply in a particular situation or whether an exception is warranted.

⁶⁷ *Anonymous Sources: Pathways and Pitfalls*. ASNE Foundation, 2006. p. 11

⁶⁸ Ibid. p. 12

⁶⁹ Ibid. p. 11

⁷⁰ Ibid. p. 39

- Before a promise of anonymity is made, be sure that everyone involved in the transaction – source, reporter, editor, lawyers if need be, and others – understand exactly what bargain is being made.
- At newspapers that are part of public companies, let editors, reporters and corporate representatives sit down and understand each other's roles and their legal limitations.
- Create a checklist for editors to follow when faced with a decision on using an anonymous source.
- More and better staff training on the continuum of choices/possibilities in anonymous source situations between testifying and refusing to do so at the risk of fines.
- Create a newsroom culture that gives reporters the support and guidance and trust they need from their editors, while giving editors the degree of control and the trust that they need in their reporters. A key element of this newsroom culture must be healthy interchange between editors and reporters on staff members' contacts with and relationships with sources.
- Find ways to reward reporters for quality work.

What could be done to the public:

- Create a secrecy beat.
- Have a conversation with your community on their attitudes on editorial standards, including anonymous sourcing.
- Consider writing in favor of a shield law.
- Create a marketing campaign on the importance of a free press.

What could be done aimed at the industry:

- Object formally to off-the-record or on-background briefings by public officials.
- Challenge wire services and syndicates to meet newspaper standards on anonymous sourcing.
- Let the American Journalism Review survey editors and lawyers to compile a list of legal dos and don'ts for journalists.

Supreme Court Precedent Weapon Against Journalists

The stories on the *San Francisco Chronicle* and the two reporters on the BALCO testimony mentioned that the prosecution sought to wield a 1972 U.S. Supreme Court decision against the paper, Williams and Fainaru-Wada.

That case, *Branzburg v. Hayes*, stemmed from three lower court decisions.⁷¹ One of those decisions involved Massachusetts television reporter Paul Pappas, who refused to testify before a state grand jury about what he saw at the Black Panthers headquarters during the race riots of the 1970s.⁷² Another decision involved *New York Times* reporter Earl Caldwell, who covered the Black Panthers for several years in San Francisco. He refused to testify to a federal grand jury what he saw during his coverage of the Black panthers. The district court took the First Amendment into account and ruled that Caldwell did not have to testify but he did have to appear. The U.S. Court of Appeals overturned that decision and said that Caldwell had to neither appeal nor testify.⁷³ The

⁷¹ Teeter, Dwight L. and Bill Loving. *Law of Mass Communications*, 11th ed. New York: Foundation Press, 2004. p. 645

⁷² Ibid., p. 645

⁷³ Ibid., p. 645

third decision addressed by the Supreme Court involved the titular Paul Branzburg, a reporter from the Louisville Courier Journal and Times who did a story on the distillation of cannabis in Kentucky's capital city, Frankfort. Facing subpoena from a state jury, Branzburg fled to Michigan.⁷⁴

Taking those three cases together under *Branzburg v. Hayes*, the Supreme Court ruled in a 5-4 majority that reporters, like all other citizens, must appear and testify before a grand jury when placed under subpoena.⁷⁵ Thus, under this decision, the First Amendment does not apply to journalists who wish to keep the confidentiality of their sources.

Speaking of the BALCO subpoenae case, James Goodale noted that the Second Circuit, generally one of the most press-friendly courts in the nation, held that a newspaper could not prevent third parties from providing information to a federal grand jury investigating a leak. The court recognized that the third parties would have the same rights as the reporters who have them in their network. By extension, this meant that the reporters had no privilege against subpoena.⁷⁶

However, Goodale also noted that despite the shaky state of protection for reporters in the federal grand jury context, as illustrated by the BALCO case, under many circumstances the reporter's privilege remains a viable protection for reporters. The press was protected in approximately 60 percent of the roughly 27 cases decided in the last year, which is consistent with the pattern over the last 30 years.⁷⁷

⁷⁴ Teeter, Dwight L. and Bill Loving. *Law of Mass Communications*, 11th ed. New York: Foundation Press, 2004. p. 645

⁷⁵ *Ibid.*, p. 645

⁷⁶ Goodale, James C., John S. Kiernan, Jeremy Feigelson, Betsy C. Judelson, "Reporter's Privilege 2005-2006," Chapter 12 in James C. Goodale, Chairman, *Communications Law 2006*, Vol. III, (New York: Practising Law Institute, 2006). p. 697

⁷⁷ *Ibid.*, p. 697

Conclusion

Nothing will guarantee the total safety of anonymous sourcing, both in the eyes of the public and of the law. But the ASNE conference agreed that these steps should minimize trouble, as well as make anonymous sourcing not seem as suspicious to the public. Used correctly, anonymous sourcing is a wonderful tool in an investigative journalist's best. Used unwisely, it is a blemish on the industry's face. And even in cases where the journalists' intentions were honorable, such as the BALCO case, the journalist can still get in trouble.

Moreover, even in the face of *Branzburg v. Hayes*, states have, more and more, recognized the need for reporter's privilege. The federal government seems to be behind the times, as federal grand juries still insist on using the *Branzburg* decision as a reason to deny reporter's privilege, while ignoring the growing amount of states that have established laws that shield, to whatever extent, reporters from court subpoenae. In fact, by 2006, 49 states and the District of Columbia give reporters some degree of protection.⁷⁸

Goodale quoted Judge Robert Sack, a dissenter in the 2006 Second Circuit court decision of *New York Times v. Gonzales* that refused to recognize journalists' privilege in the protection of their sources. Sack said: "It can no longer be controversial that to perform their critical function, journalists must be able to maintain the confidentiality of sources who seek to be so treated reliably, if not absolutely in each and every case."⁷⁹

⁷⁸ Goodale, James C., John S. Kiernan, Jeremy Feigelson, Betsy C. Judelson, "Reporter's Privilege 2005-2006," Chapter 12 in James C. Goodale, Chairman, Communications Law 2006, Vol. III, (New York: Practising Law Institute, 2006). p. 699

⁷⁹ Ibid., p. 699

1970s CBS reporter Daniel Schorr, who refused to testify how he got the CIA report that he broadcast in part and turned over to the *New York Village Voice* in entirety, had this to say in his testimony to the House Ethics Committee:

“For a journalist the most crucial kind of confidence is the identity of a source of information. To betray a confidential source would mean to dry up many future sources for many future reporters. The reporter and the news organization would be the immediate losers. The ultimate losers would be the American people and their free institutions.

"But, beyond all of that, to betray a source would be to betray myself, my career, and my life. It is not as simple as saying that I refuse to do it. I cannot do it.”⁸⁰

In short, a federal case is more likely to land a current journalist in trouble than a state case, as almost all states now afford some degree of protection. But if a journalist is willing to place himself or herself in jeopardy in a matter involving a federal grand jury – and for the sake of the profession backing out of trouble to reveal a source is not an option – he or she should first ask the self whether the use of the anonymous source is wise, necessary, and has the backing of the editor.

⁸⁰ Teeter, Dwight L. and Bill Loving. *Law of Mass Communications*, 11th ed. New York: Foundation Press, 2004. p. 641

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