THE NEW YORKER
FACT

ANNALS OF LAW

NAME THAT SOURCE

by JEFFREY TOOBIN

Why are the courts leaning on journalists?

Issue of 2006-01-16
Posted 2006-01-09

On December 16th, the *Times*, citing anonymous government officials, reported that the National Security Agency has engaged in extensive, warrantless wiretapping of American citizens in a secret program authorized by President Bush in 2002. At a press conference three days later, the President defended the eavesdropping. "We're at war, and we must protect America's secrets," he said, adding that the *Times*' sources, by disclosing the program, had committed a "shameful act" that had undermined American security. By the end of December, the Justice Department had begun a criminal investigation of possible leaks of classified information to the *Times*. As part of the inquiry, the leader of the investigation will almost certainly seek to interview the reporters who wrote the story, James Risen and Eric Lichtblau. The reporters may receive grand-jury subpoenas demanding their coöperatic and may face contempt charges and jail time if they refuse to comply. Thus the N.S.A. leak investigation may join a growing list of cases in which journalists, under threat of legal sanction, are being asked to identify their sources.

In the best known of these cases, Patrick J. Fitzgerald, the special counsel investigating the leak of the name of Valerie Plame Wilson, a former C.I.A. agent, subpoenaed at least six Washington journalists appear before a grand jury last year; one, Judith Miller, who was then a reporter for the *Times*, was jailed on contempt charges for eighty-five days before agreeing to testify. Reporters are also being subpoenaed to testify in civil cases. Wen Ho Lee, a nuclear physicist who formerly worked at the Los Alamos National Laboratory, in New Mexico, has sued the government for improperly disclosing his name and other confidential information in the course of an espionage investigation in 1999, and in th past two years the judges in the case have issued contempt findings against Risen and Jeff Gerth, of th *Times;* Walter Pincus, of the Washington *Post;* Bob Drogin, of the Los Angeles *Times;* Pierre Thomas formerly of CNN and now with ABC News; and H. Josef Hebert, of the Associated Press, all of whom have refused to testify, and ordered them to pay fines of five hundred dollars a day. An appeals court affirmed the judgment against all the reporters except Gerth, who was found to be too peripherally involved to be cited, and the journalists have asked the Supreme Court to intervene. (The fines are stayed pending the appeals.)

Steven J. Hatfill, a former government scientist who was identified in the press as a possible suspect i the anthrax investigation, has filed a similar lawsuit against the government, in connection with leaks his case, and in December, 2004, his lawyers subpoenaed thirteen news organizations for testimony. The lawyers have since withdrawn the subpoenas, while they interview government officials they suspect could be responsible for the leaks, but the subpoenas are widely expected to be reissued.

In October, Patrick Fitzgerald charged I. Lewis (Scooter) Libby, Vice-President Cheney's chief of staf with lying to the grand jury about his conversations with reporters, including Miller, Tim Russert, of NBC, and Matthew Cooper, of *Time*. (Libby immediately resigned.) As Libby's lawyers prepare for h trial, which will probably take place this year, they are expected to ask to see the journalists' notes, an they may subpoena other reporters who covered the investigation. At the trial, Libby's team will try to undermine the journalists' credibility by challenging them on everything from sloppy note-taking to evidence of bias. "This guy is on trial for his freedom, and it's not his job to be worried about the right of the witnesses against him," a person close to Libby's defense team said. "There are going to be figh over access to the reporters' notes, their prior history and credibility, and their interviews with other people. By the time this trial is over, the press is going to regret that this case was ever brought."

Media lawyers and journalism advocacy groups are alarmed by the increase in demands for reporter

testimony. “Thirty-five years or so ago, reporters started getting a lot of subpoenas, and then there was a long lull,” Lucy Dalglish, the executive director of the Reporters Committee for Freedom of the Press, told me. “But starting about two years ago we got this sudden pop. There are more grand-jury leak investigations, not just with Fitzgerald but in Rhode Island and other places.” (Last year, Jim Taricani, a local television reporter in Providence, served four months under house arrest for failing to reveal a source of a leak in a criminal investigation.) “The civil cases are maybe the scariest of all,” Dalglish continued. “You’re talking about daily fines for contempt that last the length of a case, which could be years. That’s what’s really giving editors and publishers indigestion.”

The subpoenas are coming at a time when the legal status of reporters is as unsettled as it has been in more than two decades. Public esteem for the media is low, and neither Congress nor the courts seem inclined to grant special protection to journalists. As Robin Bierstedt, the chief lawyer for *Time*, put it, “There is certainly an atmosphere out there that says it’s O.K. to subpoena journalists.” As a legal matter, the question is whether a reporter should be treated like any other citizen who is asked to testify.

The last time journalists received subpoenas in significant numbers was during the early seventies. Protests against the Vietnam War were at a peak, and government officials were increasingly anxious about domestic unrest and national security. In 1972, for the first time, the Supreme Court addressed the right of journalists to protect their sources, when it decided Branzburg v. Hayes, a combination of four cases in which reporters had received grand-jury subpoenas. (Two of the cases involved the Black Panthers; the two others concerned drug dealers.)

Justice Byron White’s opinion for the five-to-four majority began, “The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of the press guaranteed by the First Amendment. We hold that it does not.” White’s opinion was a scathing dismissal of the journalists’ position. “The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection,” he wrote. In short, he held for the Court that the First Amendment provides no “exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function.” In a brief concurring opinion, Justice Lewis Powell suggested that under certain circumstances—which he defined vaguely as criminal investigations that were “not being conducted in good faith”—journalists might be justified in refusing to testify.

The reaction of lower-court judges to Branzburg was unprecedented in American legal history. Many federal courts simply ignored the Supreme Court’s opinion. “There were some extremely capable First Amendment and mass-media lawyers who were able to spin a win out of a loss, by persuading courts to follow Powell’s concurring opinion instead of White’s majority opinion,” Rodney Smolla, the dean of the University of Richmond School of Law and the author of “Free Speech in an Open Society,” said. “Instead of citing White’s rejection of the privilege, many lower courts used the Powell opinion to create a balancing test. These judges would evaluate, on a case-by-case basis, whether they thought a subpoena to a journalist was legitimate, and they wound up quashing a lot of them.”

Branzburg was decided only a few months before Bob Woodward and Carl Bernstein, in breaking the story of the Watergate scandal, demonstrated the importance of protecting government whistle-blowers, and judges became reluctant to impose limits on journalists. “After Branzburg, you had the romance of Woodward and Bernstein, and judges saw how important confidential sources had been to uncovering Watergate,” Smolla said. “They were just a lot more sympathetic to the press.” Many states created shield laws, which ban or restrict subpoenas to journalists for information about their confidential sources. (The District of Columbia and all states except Wyoming now have shield laws or some form of protection for reporters, but these don’t apply in federal criminal investigations or in civil lawsuits filed under federal law.) In the three decades

after Branzburg, on the rare occasions when journalists were called into court, their lawyers, brandishing their peculiar readings of Branzburg, typically managed to protect them from testifying.

In 2003, however, an opinion by Judge Richard A. Posner transformed the debate over the so-called "reporter's privilege." A prolific scholar and perhaps the nation's best-known federal appeals-court judge, Posner wields singular authority from his chambers, in Chicago. In McKevitt v. Pallasch, a case that grew out of the prosecution in Ireland of an alleged I.R.A. terrorist named Michael McKevitt, Posner took a fresh look at the Supreme Court's decision in Branzburg. A key government witness in the case was David Rupert, an F.B.I. informant who was widely reviled among supporters of the I.R.A.'s cause. Abdon Pallasch, a reporter for the Chicago *Sun-Times*, and several colleagues were writing a biography of Rupert, and they had tape-recorded interviews with him. McKevitt wanted his lawyers to have access to the tapes, and Rupert did not object. But the reporters wanted to keep the tapes secret, because, as Posner put it, "the biography of him that they are planning to write will be less marketable the more information in it that has already been made public."

Posner ruled that the journalists had to turn the tapes over to the defense. Reviewing interpretations of the law since 1972, Posner wrote, "A large number of cases conclude, rather surprisingly, that there is a reporter's privilege." He added dryly, "These courts may be skating on thin ice." According to Dalglish, of the Reporters Committee for Freedom of the Press, "Prosecutors and civil litigants who want reporters to testify have really felt empowered, largely, I think, because of Judge Posner. He said, 'Everybody go back and reread this case. Branzburg is just not there as a decision that helps the press.' "

Judicial conservatives like Posner have never held the press in especially high regard; witness his essay in the *Times Book Review* in July, in which he argued that the news media have become "more sensational, more prone to scandal and possibly less accurate." But the Fitzgerald investigation revealed a less obvious corollary: a festering hostility toward the traditional news media from the left. The role of the press in the events preceding the investigation amounted to an almost precise inversion of the whistle-blower model. In a column on July 14, 2003, the conservative commentator Robert Novak revealed that Valerie Plame was a C.I.A. operative, citing as his sources "senior administration officials." The leak may have been a politically motivated attack on Plame's husband, Joseph C. Wilson IV, who had published an Op-Ed piece in the *Times* a week earlier questioning the Bush Administration's assertion that Saddam Hussein's government had tried to buy uranium for nuclear weapons in Africa. As the investigation has unfolded, it has come to seem likely that several senior Administration officials, including Libby and Karl Rove, the President's top political aide, disclosed Plame's status to reporters. To some liberal critics of the Administration, and of the journalists who reported the White House officials' charges, this kind of transaction between reporter and source deserves little protection from the First Amendment.

"What I am concerned about is the way in which the powerful have learned to game the system," Martin Kaplan, the associate dean of the Annenberg School for Communication, at the University of Southern California, said. "What they did in the Plame case was to use the press's requirements for observing ground rules with sources as a way of making reporters enablers of a smear campaign. Anonymous sourcing in Washington exists today much more to protect government spinners than it does actual whistle-blowers. It's reasonable to separate the whistle-blower from the garden-variety attempt to float anonymous charges." The fact that the Plame leaks followed the general failure of the press to uncover the Bush Administration's misstatements about weapons of mass destruction in Iraq—and that some of the Plame leaks went to reporters like Miller, of the *Times*, who had been especially credulous of the Administration's claims—has given complaints from the left a special intensity.

But criticism from the left and the right may not be the worst problem for reporters at the moment. Their loss of public esteem has been accompanied by the rise of a new and potentially lucrative kind of lawsuit, which is also based on news leaks. In these cases, the subject of the leak

sues the federal government, and journalists are forced to testify as witnesses. So it may not be just good politics to pick fights with journalists these days; there may be money in it, too.

The greatest threat to journalists' ability to protect their sources may be a legacy of Linda Tripp, Monica Lewinsky's former confidante. Shortly after the Lewinsky scandal broke, in 1998, there were reports in news publications (including two articles in *The New Yorker,* by Jane Mayer) about Tripp's background. In one of the lesser-known tangents of the Lewinsky saga, Tripp sued the Pentagon, where she then worked, arguing that the release of information about her violated an obscure federal statute known as the Privacy Act. That law, which was passed in 1974, was designed to prevent the unauthorized disclosure of government records, but it is an unusually vague and complex statute. "To bring a case under the Privacy Act, there are complicated requirements like showing that the records were part of a 'system of records,' and that the disclosures were 'willful,' so the law hadn't really been used to bring many cases," David Colapinto, Tripp's lawyer, told me. In 2003, the government decided to settle with her on favorable terms, which included a payment of five hundred and ninety-five thousand dollars. (Tripp, who is recovering from breast cancer, now runs a year-round Christmas shop, called the Christmas Sleigh, in Middleburg, Virginia.)

"I followed the Tripp case very closely," Brian Sun, a Los Angeles attorney who represents Wen Ho Lee, said. The first account of a potential scandal at the Los Alamos laboratory appeared in the *Wall Street Journal* on January 7, 1999, and Walter Pincus, of the Washington *Post*, published his first piece about the case on February 17th. In the article, headlined "U.S. CRACKING DOWN ON CHINESE DESIGNS ON NUCLEAR DATA," Pincus wrote that an F.B.I. investigation had come "to focus on an Asian American scientist at Los Alamos who had contacts with the Chinese and has since been transferred to a job outside the national security area." In a story on March 9th, Pincus identified Lee by name, as the "weapons designer . . . who was under suspicion of handing nuclear secrets to China." As with the other reporters subpoenaed in the case, Pincus's references to Lee were attributed to unidentified sources. (The *Times* also identified Lee by name in a story the same day.)

In December, 1999, Lee filed his case against the federal government, making an argument analogous to Tripp's—and seeking similar damages—that the leaks to Pincus and the others constituted repeated violations by government officials of Lee's rights under the Privacy Act. In such a case, the plaintiff must establish that government officials improperly disclosed information. At the time, the District of Columbia was one of the jurisdictions in which judges had interpreted the Branzburg case in a way favorable to journalists. Based on a 1981 ruling, plaintiffs in D.C. had an "obligation to exhaust possible alternative sources" of information—in other words, to interview possible leakers—before they could subpoena a reporter. In the past, this requirement has discouraged some litigants from pursuing journalists, or even from filing cases.

But Lee's lawyers were dogged. "We made every effort to find out the leakers without going to the journalists," Sun said. He took depositions from six employees of the Department of Energy (including Bill Richardson, the former Secretary), eight F.B.I. officials (including the former director Louis Freeh), and six officials at the Justice Department. "We came up with bubkes," Sun said. In August, 2002, he started issuing subpoenas to the reporters.

Lawyers for the journalists moved to overturn the subpoenas, and, in a decision rendered on October 9, 2003, Judge Thomas Penfield Jackson issued what amounted to a cry of revulsion at cozy journalistic-source relationships in Washington: "The deposition transcripts [of the government officials] generally reveal a pattern of denials, vague or evasive answers, and stonewalling. None of the deponents, plaintiff says, has admitted to having personal knowledge of the source of any disclosures. Thus, in the absence of the serendipitous, last-minute appearance of a willing independent witness with personal knowledge of the facts, at the moment only the journalists can testify as to whether defendants were the sources for the various news stories."

Jackson ordered the journalists to testify, and last June his ruling was upheld by the D.C. Circuit

Court of Appeals, in a decision that was even more dismissive of the journalists' concerns. Accusing lawyers for the *Times* reporters of being "inaccurate to a point approaching deceptiveness," the appeals court ordered the journalists (except Jeff Gerth) to identify their sources or start paying the fines. (For procedural reasons, the contempt proceedings against Pincus trailed some months behind those of the other reporters, but the ruling in his case was the same.) Steven Hatfill's lawyers are pursuing a strategy similar to Lee's, first deposing the government officials who are suspected leakers in his case, and then, presumably, going after the reporters. The best hope for the subpoenaed journalists in both cases is that the government settles the lawsuits before the contempt rulings are affirmed.

The First Amendment instructs Congress to "make no law . . . abridging the freedom of speech, or of the press," but the Supreme Court historically has been reluctant to treat the press clause as meaningfully distinct from the speech clause. As Rodney Smolla says, "The Court has generally been unwilling to say that journalists have more rights than other citizens. Whenever the Court has had cases about access to courtrooms or disaster sites, it talks about the right of the public to be there, and journalists are just part of the public. The idea behind the cases is that everyone should be treated the same."

This principle has made it difficult for journalists to persuade courts to recognize a special privilege to protect them from testifying. "When you look at other privileges, like attorney-client or doctor-patient, they arise out of confidential relationships that have a formal quality to them, and there is a powerful and ancient interest in promoting candor," Smolla said. "If you have a journalistic privilege, it might apply to everyone a journalist meets in reporting a story, even if he has no preëxisting relationship with them. The journalist can make the promise of confidentiality on the spot, as needed. The courts are loath to hand that kind of power to journalists to put information off limits."

The converse argument—that journalists should be allowed to promise confidentiality to their sources, and the courts should honor those promises—was made by Justice William O. Douglas, in a dissenting opinion in the Branzburg case. "A reporter is no better than his source of information," Douglas wrote. "Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue." A modern version of this argument was elaborated in a series of editorials in the *Times* defending Judith Miller. "Inside sources trust reporters to protect their identities so they can reveal more than the official line," one of these editorials stated. "Without that agreement and that trust between reporter and source, the real news simply dries up, and the whole truth steadily recedes behind a wall of image-mongering, denial and even outright lies."

This argument didn't command a majority of the Supreme Court in 1972, and, in the current political and legal environment, the most the press can probably hope for is a compromise, like the one proposed last April by Judge David S. Tatel. A Clinton appointee to the D.C. Circuit, Tatel sat on the three-judge panel that rejected Judith Miller's appeal of the contempt order against her for refusing to testify before Fitzgerald's grand jury. Like Posner, Tatel recognized that the decision in Branzburg essentially foreclosed the claim that the First Amendment protects journalists from grand-jury subpoenas. But Tatel went on to note that the Federal Rules of Evidence give the courts broad latitude to develop evidentiary privileges "in the light of reason and experience." It was on the basis of these rules that federal courts came to recognize privileges for clergy and attorneys. Tatel sought to determine whether journalists were also entitled to a common-law privilege, as the D.C. Circuit had recently found for psychotherapists regarding their confidential communications with their patients. "In sum," he concluded, " 'reason and experience,' as evidenced by the laws of forty-nine states and the District of Columbia . . . support recognition of a privilege for reporters' confidential sources."

But what Tatel gave Judith Miller with one hand he took away with the other. He stressed that the privilege "cannot be absolute," and, based on the evidence in her case, she was not entitled to its protection. The leak of Valerie Plame's name was a "serious matter," he argued, but the disclosure "had marginal news value. . . . Considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." But Tatel did cite several examples of leaks that might justify a reporter in protecting his sources. One was a 2004 story in the Washington *Post* about a "budget controversy regarding a supersecret satellite program." The story was co-written by Walter Pincus.

Pincus joined the staff of the *Post* in 1966, and ten years ago he turned sixty-three, an age at which many people start contemplating retirement. "But both my parents lived to be ninety-five, and I thought I needed something to do when I turned seventy, so I went to law school part time," he told me. It took him six years, but in 2001 he graduated from the Georgetown University Law Center. Pincus has never practiced law, however, and he remains an investigative reporter in the national-security field. He has a full head of snow-white hair, bushy eyebrows, and a slightly distracted air that is common to investigative reporters. When he bought me a soda in the *Post*'*s* decrepit employee cafeteria, coffee from a broken machine was spewing onto the floor, but he stepped around the torrent without comment. When we sat down, I asked him why he had never practiced law. He replied that Katharine Graham, the longtime chairman of the Washington Post Company, had been a close friend. "She died right before the bar exam," he said. "I was with her and her family. I didn't study, so I failed."

Pincus has an idiosyncratic view of his legal predicament. He's skeptical of the notion that subpoenas to journalists necessarily have a chilling effect on sources. "My sources are not drying up," he told me. "It hasn't hurt me. There is a misconception generally about sources. When you talk about a leak, you are usually not talking about a single person handing you something. You get a little bit here, and a little bit there, and often you can't even identify the single source of a story. Anyway, most of my confidential sources are people I know extremely well. I've built up these sources over the years. Reporting in the intelligence field is talking to a lot of people. The idea that sources are people who come to you over the transom is not true in my case. And those people who come to you over the transom are often trying to plant things that turn out not to be true. My experience is that most sources you don't know personally will give you bad information."

Pincus believes that reporters are facing more subpoenas as much because of bad habits that the profession has acquired as because of an unsympathetic public and judiciary. He thinks, for example, that reporters are often too ready to grant confidentiality to their sources. "The whole subject of confidential sources has gotten mixed up between gossip, opinion, and fact," he said. "I cover intelligence, and people are really risking their jobs and perhaps their freedom by telling me information that they know is classified. That's very different from people going on background to tell you that Britney Spears is pregnant, or that Hillary Clinton shouldn't run for the Senate because it will hurt her chances of running for President. Just because someone asks for confidentiality doesn't mean you have to give it to them. And just because someone tells you something, even if it's true, doesn't mean you have to put it in the paper."

Two days before Novak revealed Valerie Plame's name in his column, an Administration official had discussed her husband's trip to Africa with Pincus. The official, to whom Pincus promised confidentiality, said that Wilson's trip had been arranged by his wife. (The official told Pincus that Wilson's wife worked at the C.I.A. but did not identify her by name.)

Miller chose to go to jail rather than coöperate with Fitzgerald; Pincus took a different tack. Rather than defy the prosecutors, as Miller did for so long, Pincus and his lawyers made a deal that would allow him both to honor his agreement with his source and to give Fitzgerald the information he requested. First, Pincus received a waiver from his source to talk to Fitzgerald, but only for the purpose of letting him answer Fitzgerald's questions. (Pincus will not identify the source publicly, except to say that it wasn't Lewis Libby.) Pincus's lawyers established that

Fitzgerald's team would ask a limited number of questions about the timing and content of his interview with the source, and Pincus testified with little fanfare. (Ultimately, Miller also accepted a waiver from her source, Libby, and testified before the grand jury.) "A lot of reporters are egomaniacs," Pincus said. "Some people want a confrontation. They want us to be above the law. We're not."

The risk, of course, is that successful subpoenas of reporters will lead to more such subpoenas. As the federal appeals court in New York observed in 1999, in upholding a privilege claim by reporters for NBC, "If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims." The burden of subpoenas on journalists' time, and on their employers' budgets, would be bad enough, but there would also be, as the New York court put it, "the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties."

Pincus's accommodating approach goes only so far. With one exception, his sources in the Wen Ho Lee case have not waived confidentiality, and Pincus will continue to honor his agreement with the remaining sources, the contempt order notwithstanding. (If Pincus and the other reporters continue to defy Judge Rosemary M. Collyer, who took over the case after Jackson retired, she could order them jailed.) Today, Lee is remembered by many as a victim, who served nine months in solitary confinement after his indictment on fifty-nine counts of mishandling classified information, and was the subject of a lengthy editor's note in the *Times*, apologizing for the paper's harsh coverage of his case. But Pincus has little sympathy for Lee, arguing that the Privacy Act does not cover the kind of information that was disclosed to him, and that the substance of what he was told was made public anyway when Lee was indicted. He maintains that Lee suffered no legal damage from the news reports; although the government eventually dropped most of the charges against him, Lee did plead guilty to a felony count of copying classified documents onto computer tapes without authorization. In an opinion by Judge Collyer on November 16th, she wrote that Pincus was free to make these arguments, but only after he answers questions from Lee's lawyers in a deposition.

Pincus might be able to avoid testifying if the D.C. Circuit created a common-law journalistic privilege along the lines suggested by Tatel. If the court applies Tatel's balancing test—weighing the public benefit of the leak against the harm that the leak caused—then Pincus might not have to name his sources. "Walter accurately reported news about an important espionage investigation, with major foreign-policy implications," Kevin Baine, Pincus's lawyer, said. "That's a major benefit to the country. And there's no harm, because all the information was released by the government in a matter of weeks anyway, when Lee was indicted."

Tatel's reasoning could also help Risen and Lichtblau protect the confidentiality of their sources in the N.S.A. wiretapping story. "In the current N.S.A. situation, I think Judge Tatel's test would clearly be struck in favor of our reporters," George Freeman, the assistant general counsel at the New York Times Company, said. "This was a leak to determine whether the law was broken, and that is something that ought to be brought to the public's attention, so there can be public debate about it." (Risen and Lichtblau declined to comment.) At the moment, however, Tatel's rule is not the law of the federal courts in Washington, D.C., much less of the United States, so the reporters have little reason to be optimistic. ✦