

***SOUNDBITES* Hot Sheet -- Breaking Developments in Media Law**

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Court of Appeals Rejects Reporters' Bid to Keep Sources Confidential

Efforts to gain federal recognition for a reporter's privilege against disclosing confidential sources were dealt a serious blow last week when an influential federal appeals court rejected any basis for one. The District of Columbia Circuit Court of Appeals decision in *In re Grand Jury Subpoena* upheld a trial court judge's rulings finding two reporters in contempt for their refusal to appear before a grand jury.

The case involves the special counsel investigation into who disclosed the name of a CIA agent, which was a potential violation of federal law. The disclosure came a week after the agent's husband, former Ambassador Joseph Wilson, wrote a *New York Times* op-ed piece alleging that President Bush misrepresented Iraq's nuclear program in his 2003 State of the Union Address. Robert Novak then wrote a column that said "two senior administration officials" identified Wilson's wife as a CIA agent and said she suggested sending her husband to investigate whether Iraq tried to buy yellow cake uranium from Niger. Later, the *Washington Post* reported that two White House officials had called "at least six Washington journalists" and disclosed the identity and occupation of the former ambassador's wife.

Although a federal law prohibits releasing the identity of a CIA agent, it is rarely invoked and may not even apply to the specific facts here. Nevertheless, the Justice Department designated a special counsel to investigate. The special counsel issued subpoenas to *TIME* magazine reporter Matthew Cooper, NBC Washington Bureau Chief Tim Russert and *New York Times* reporter Judith Miller, among others, to appear before the grand jury and testify regarding conversations they may have had with anyone who provided the agent's identity. When Mr. Cooper and Ms. Miller refused to testify, the court held them in contempt, sentenced Mr. Cooper and Ms. Miller to jail for up to 18 months, and fined *TIME* magazine \$1,000 per day. Cooper and *TIME* subsequently complied, and the court vacated the jail and fine. Cooper and *TIME*, however, refused to respond to a second subpoena, and the court held them in contempt again. Miller and Cooper then appealed to the D.C. Circuit Court.

The appeals court relied on a 1972 U.S. Supreme Court case, *Branzburg v. Hayes*, which was a 5-4 ruling that held reporters have no First Amendment right to refuse to testify before a grand jury and disclose confidential sources. Justice Byron White wrote, "We cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the

criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.”

Since *Branzburg*, 49 states and the District of Columbia have either enacted some form of a statutory shield law or their courts have ruled in favor of protection. Washington and Idaho did so by court decision, while Oregon and Alaska adopted statutes. Meanwhile, despite repeated efforts, Congress has never adopted a federal shield law, and the court decisions have been inconsistent.

The D.C. Circuit Court’s ruling in the Grand Jury case flatly rejected the reporters’ arguments for a First Amendment-based privilege saying that the facts in the case were identical to *Branzburg* and had to be followed since the Supreme Court had not overruled or modified *Branzburg* in the last 32 years. The appeals court also rejected the reporters’ claim for a common law reporter privilege, although the judges split on this question – one judge said there is no basis in common law, a second said there is, and a third said the issue did not have to be decided. Even the judge who supported a common law privilege ruled that the evidence, which was provided to the court under seal and without disclosure to the reporters, was sufficient to overcome any such privilege. The court also denied the reporters’ claims that a basis for privilege exists under the federal rules of evidence and Justice Department guidelines for subpoenas to the news media.

The reporters in Grand Jury Subpoena are likely to ask the full D.C. Circuit Court to consider the case. If the full court decides not to, or agrees with the original panel, the reporters would then have to ask the U.S. Supreme Court to take the case. In the meantime, it will be up to the original three judges to decide whether the reporters will stay out of jail while the appeals process continues.

What This Means to Reporters

The decision in *Grand Jury Subpoena* is the latest in a series of recent cases that seek to require reporters to disclose confidential sources. Because the D.C. Circuit Court is considered an influential court, others are likely to follow its clear message that neither the First Amendment nor the common law will shield reporters who refuse to comply with a grand jury subpoena. The case also could have an impact on courts that consider questions of reporter privilege in other contexts, such as civil cases in which information is sought from the news media as a third party source.

A copy of *In re Grand Jury Subpoena* can be found at:

<http://pacer.cadc.uscourts.gov/docs/common/opinions/20050204-3138a.pdf>

For more information, please contact Mike Nesteroff (nesteroffm@lanepowell.com) of the Media Law Practice Group at Lane Powell PC:

(206) 223-7000 Seattle
(503) 778-2100 Portland
lppc@lanepowell.com
www.lanepowell.com

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