

Reporters Privilege News

New York Times' Judith Miller Released After 85 Days; Dole Suggests Identities Law Not Violated

After spending 85 days in jail at the Alexandria Detention Center, New York Times reporter Judith Miller was released on Sept. 29, 2005. According to the Associated Press, her source, identified as Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff, had reportedly called Miller in prison and urged her to testify before a grand jury. Miller did testify to the grand jury on September 30, spending several hours doing so before going home.

Silha Center director and Silha Professor of Law Jane Kirtley told The New York Times, "The inescapable conclusion that some could draw here is that after a certain period of time, when the reporter is fed up with being in prison, she will make a concession. I'm not saying that's what happened here. But that's the appearance. The danger is that it will embolden others in more common garden-variety investigations to say to the judge, 'All you have to do is stick the reporter in jail, and we'll get what we want.'"

Miller was jailed for refusing to testify before a grand jury concerning the identity of confidential sources in the Valerie Plame controversy. The controversy began after The New York Times published an op-ed commentary by former U.S. diplomat and CIA envoy Joseph C. Wilson IV on July 6, 2003. Wilson's commentary criticized the assertion by the Bush administration that Iraq had tried to purchase uranium in Niger, a claim cited by the administration as a reason for going to war against Iraq. Wilson disputed the claim and said that the administration had relied on discredited intelligence.

But days after the commentary was published, the identity of Valerie Plame, Wilson's wife, who was an undercover agent working for the CIA, was made public in a column written by Robert Novak. Novak, a nationally-syndicated columnist for the Chicago Sun-Times and a CNN show co-host, claimed he received the information concerning Plame from two "senior . . . officials" within the Bush administration.

Subsequently, several other journalists reported receiving the same information. Because the intentional disclosure of an undercover agent's identity by a government official may be a felony under the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421 et seq., a special prosecutor, Patrick Fitzgerald, was appointed to conduct an investigation. Miller, along with other journalists, was subpoenaed in an effort to learn her sources.

The reporters moved to quash the subpoenas. Their cases eventually reached the U.S. Supreme Court, which declined to hear the appeal of Miller and Time magazine's Matt Cooper. At that point, Cooper's source decided to permit Cooper to testify (as had other reporters in the case), but Miller still refused to comply with the court order. On July 6, Judge Thomas Hogan of the U.S. Court of Appeals for the D.C. Circuit ordered Miller – who never published a story about the Plame controversy – to jail. (See "Reporters Privilege News: Supreme Court Denies Cert in Miller/Cooper Cases" in the Spring 2005 Silha Bulletin; see "In re: Grand Jury Subpoena, 397 F.3d. 964 (D.C. Cir.)" and "Plame Update: Journalists Miller and Cooper Appeal Their Sentences" in the Winter 2004 issue of the Silha Bulletin and "Reporters Privilege: In re: Special Counsel Investigation" and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue of the Silha Bulletin.)

According to The Washington Post, while in jail, Miller received a steady stream of visitors that includes "prominent government and media officials" during the 30 minutes she is allotted for visitors each day. The Washington Post reported that Miller's visitors have included Gonzalo Marroquin, the president of the Inter-American Press Society and director of the Guatemalan daily Prensa Libre, John R. Bolton, U.S. ambassador to the United Nations, former "NBC Nightly News" anchor Tom Brokaw, and former U.S. senator Bob Dole (R-Kan.). Following his visit, Dole wrote an opinion piece published by The New York Times on August 18.

Dole, who was one of the sponsors of the Intelligence Identities Protection Act, explained in his New York Times article that he believes that law may not have been violated in this case. "The [Intelligence Identities Protection Act] was intended to protect covert intelligence operatives whose lives would be endangered if their identities were publicly disclosed," Dole wrote. "One of the requirements is that the federal government must be taking 'affirmative measures' to conceal the agent's intelligence relationship with the United States. Yet we now know that [Plame] held a desk job at C.I.A. headquarters and could be seen traveling to and from work."

Dole further wrote that Miller should not be jailed for refusing to name her source because “she has never written a word about the C.I.A. flap.” Dole advocated the passage of a federal shield law, currently before Congress as the Lugar-Pence bill (named for Senator Richard G. Lugar (R-Ind.) and Representative Mike Pence (R.-Ind.)), saying, “As someone with a long record of government service, I must admit that I did not always appreciate the inquisitive nature of the press. But I do understand that the purpose of a reporter’s privilege is not to somehow elevate journalists above other segments of society. Instead, it is designed to help guarantee that the public continues to be well informed.” Dole also noted that the argument that granting a privilege could result in the loss of evidence relating to a criminal investigation, writing, “This argument ignores the dozens of whistle-blowers who would not share information about government wrongdoing . . . unless they felt reporters could protect their identities.” (See “Federal Shield Law Debated in Hearings Before Senate Judiciary Committee” on page 5 of this issue of the *Silha Bulletin*.) Dole concluded, “[T]he imprisonment of Judith Miller will be even more troubling if it turns out that no violation of the Intelligence Identities Protection Act has occurred. As she sits in jail, Congress can honor her commitment to principle and her courage, and that of all reporters who have helped to expose wrongdoing by protecting their sources, by passing the Lugar-Pence bill and creating a federal privilege for reporters.”

Although there are those who praise Miller, a writers group elected to reconsider its decision to give Miller its Conscience in Media Award in August 2005.

According to a posting on the Editor & Publisher Web site, the First Amendment Committee, a subgroup of the American Society of Journalists and Authors (ASJA) had “narrowly” voted to give Miller the award for her “dedication to protecting sources.” But the matter came before the board of the ASJA, which voted unanimously not to endorse the committee’s decision.

Editor & Publisher reported that ASJA’s president, Jack El-Hai, posted an explanation on an internal list serve, saying that there was opposition to giving Miller the award, and that there was “a feeling that Miller’s career, taken as a whole, did not make her the best candidate for the award,” and that there were “divided opinions on the board over whether her recent actions merit[ed] the award.”

Editor & Publisher cited one member, Anita Bartholomew, a freelance journalist, who wrote, “The First Amendment is designed to protect government interference with a free press. Miller, by shielding a government official or officials who attempted to use the press to retaliate against a whistleblower . . . has allied herself with government interference with, and censorship of, whistleblowers. When your source IS the government, and the government is attempting to use you to target a whistleblower, the notion of shielding a source must be reconsidered. To apply standard practices regarding sources to hiding wrongdoing at the highest levels of government perverts the intent of the First Amendment.” (Emphasis in the original.)

The Editor & Publisher story is available online at

http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1001008093.

—ELAINE HARGROVE

SILHA FELLOW AND *BULLETIN* EDITOR