

STEVEN HATFILL'S LAWYER ASKS SOME QUESTIONS

I have very mixed feelings about Steven Hatfill's suit against those who leaked that he was a person of interest in the anthrax investigation. Unlike his lawyer, I'm not sure the federal officials who spoke to reporters broke the law (indeed, you could argue that some of them were trying to tamp down suspicion about Hatfill). Further, I disagree with Judge Walton that there's not a scintilla of evidence against Hatfill. Nevertheless, I think Hatfill's lawyer, Mark Grannis, asks some worthwhile questions.

First, should people like Steven Hatfill – that is, people injured by government leaks – have a remedy at law, and if so, what? It is not clear how victims like Dr. Hatfill can ever be made whole, if leakers and reporters join in a conspiracy of silence. Senators should expect a better explanation on this point before they make it impossible for courts to enforce the federal Privacy Act.

Second, how can the arguments and behavior of journalists in a case such as this be reconciled with the profession's self-image as the public watchdog, bringing accountability to government? The public officials who leaked investigative information to Ms. Locy broke the law, ruined an innocent man, and violated the public trust. Shouldn't our watchdog bark or something?

The leakers should be fired, prosecuted, or both – and reporters who care about government accountability should be racing each other to tell us who these miscreants are. The fact that they shut

their mouths tight and run the other way suggests that the image of reporter-as-watchdog does not reflect the current place of journalism in society, whatever may have been true in the past.

Third, if the law prevents courts from ordering reporters to identify anonymous sources, what will prevent government officials from using the private information they keep on us for personal or political score-settling? What will prevent them from simply lying? What will prevent reporters from inventing anonymous sources who don't actually exist?

Fourth, how is a senator who votes for a shield law to convince his constituents that it is anything but a special favor for an influential lobby? When news of Judge Walton's ruling hit the Internet, ordinary people lionized him. A commenter on one Web site asked whether Judge Walton could become a traveling judge, because it "looks he could be used all over the country." [my emphasis]

We need to find a middle ground, where journalists can protect real journalism, but where officials cannot hide behind journalist's privilege to ruin the lives of people like Wen Ho Lee, Valerie Wilson, and (arguably) Steven Hatfill—or even to use legitimate legal inquiries into people like Eliot Spitzer to score political points. Anything less turns the press into a witting tool of government abuse of power.

And while we're asking questions, I've got one for Toni Locy, the journalist being held in contempt by Judge Walton. Locy is currently a journalism professor at West Virginia University. You'd think she'd get hired there because she's an example of what we'd like to encourage among budding journalists. Yet her

excuse for not revealing her sources is that she can't remember who told her what.

During Tuesday's hearing, Bernius also argued that Locy could not remember who gave her information specifically about Hatfill and that she should not be forced to disclose the names of roughly 10 FBI and Justice Department officials who spoke to her generally about the anthrax investigation.

That immediately drew a skeptical response from Walton.

"I'm not suggesting that Ms. Locy would not be truthful, but it would be convenient for reporters in this type of situation to say 'I don't remember' and then be off the hook," Walton said.

"That would be one way to avoid the serious consequences of the law."

Now maybe it's solely because I use so many fewer anonymous sources (or use them solely as background), but when I do use them, I try to keep straight what I get where. But Locy—like several of the journalists interviewed by Fitzgerald in the Scooter Libby case (Judy, Novak, Cooper, Russert, and Viveca Novak)—seems to have pretty slack standards for keeping notes.

Of course, the subpoenaing of journalists is likely to make this worse, not better, since the best way to shield your sources is to keep no notes and forget who told you what.

But it does concern me that we continue to see really damaging stories on people based on shoddy or no note-taking. So I'd add one question to Grannis: at what point does note-taking become a part of good journalistic standards again?