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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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IN RE: C. A. NO. 01-47
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SPECIAL PROCEEDING DECEMBER 9, 2004
*
* 10:00 A.M.
* PROVIDENCE, RI
* * * * *

BEFORE THE HONORABLE ERNEST C. TORRES
CHIEF DISTRICT JUDGE
(SENTENCING HEARING EXCERPT)

APPEARANCES:

SPECIAL PROSECUTOR: DESISTO LAW OFFICES
BY: MARC DESISTO, ESQUIRE
BY: JOAN MCPHEE, ESQUIRE
211 ANGELL STREET
PROVIDENCE, RI 02903

FOR MR. TARIANI: BINGHAM MCCUTCHEN, LLP
BY: MARTIN MURPHY, ESQUIRE
ONE FINANCIAL CENTER
BOSTON, MA 02110
- AND -
EDWARDS & ANGELL
BY: DEMING SHERMAN, ESQUIRE
ONE FINANCIAL CENTER
PROVIDENCE, RI 02903
- AND -
SUSAN WEINER, ESQUIRE
NBC, INC.
30 ROCKEFELLER PLAZA
10TH FLOOR EAST
NEW YORK, NY 10112

1 9 DECEMBER 2004 - 3:40 P.M. - SENTENCING EXCERPT

2 THE COURT: AS I'VE SAID FROM THE BEGINNING OF
3 THIS PROCEEDING, I THINK THERE'S SOME VERY IMPORTANT
4 ISSUES RAISED IN THIS CASE, AND I THINK IT'S IMPORTANT
5 THAT THE PUBLIC UNDERSTAND ACCURATELY WHAT THOSE ISSUES
6 ARE AND WHAT THE FACTS OF THIS CASE ARE, AND BECAUSE OF
7 THAT, I HAVE BEEN POSTING THE COURT'S DECISIONS ON THE
8 COURT'S WEBSITE, SO THAT ANYONE WHO IS INTERESTED MAY
9 REFER TO IT. I THINK THAT HELPS, HOPEFULLY, REPORTERS
10 WHO HAVE A DIFFICULT JOB OF TRYING TO TAKE NOTES AND
11 WATCH WHAT'S GOING ON AT THE SAME TIME, AND I THINK IT
12 HELPS MEMBERS OF THE PUBLIC WHO MAY WANT TO GET THE
13 OTHER SIDE OF THE STORY SOMETIMES. AND I'M GOING TO DO
14 THAT WITH THIS, THE DECISION I'M ABOUT TO GIVE HERE.
15 IT WILL BE POSTED, UNFORTUNATELY BECAUSE OF THE HOUR,
16 IT'S NOT GOING TO BE AVAILABLE TODAY, BUT THE COURT
17 REPORTER WILL POST THE TRANSCRIPT OF MY DECISION
18 TOMORROW MORNING, AND THOSE OF YOU IN THE MEDIA WHO ARE
19 TRULY INTERESTED IN SEEING THAT YOUR VIEWERS,
20 LISTENERS, AND READERS ARE FULLY INFORMED WITH RESPECT
21 TO ALL OF THE FACTS AND ALL OF THE ISSUES ON BOTH SIDES
22 OF THE ISSUES, I WOULD ENCOURAGE AND INVITE YOU TO LET
23 YOUR READERS, VIEWERS AND LISTENERS KNOW THAT THEY CAN
24 GET ACCESS TO THE DECISION AT WWW.RID.USCOURTS.GOV.
25 ALL YOU HAVE TO DO IS GO TO THE WEBSITE, GO TO THE

3

1 BULLETIN BOARD, AND ALL OF THE DECISIONS RENDERED IN
2 THIS CASE, WHICH IS UNDER THE HEADING "SPECIAL
3 PROCEEDINGS" ARE THERE IN THEIR ENTIRETY FOR ANYONE TO
4 READ.

5 AND I THINK THAT'S IMPORTANT, BECAUSE BASED ON
6 WHAT I HAVE SEEN AND HEARD, THE ISSUES IN THIS CASE
7 HAVE BEEN OBSCURED AND DISTORTED BY A NUMBER OF MYTHS
8 THAT HAVE BEEN CREATED BY SPIN AND MEDIA HYPE, AND I'M
9 GOING TO TAKE A FEW MOMENTS NOW TO ADDRESS THESE MYTHS
10 AND ATTEMPT TO DISPEL THEM ORDINARILY I DON'T DO
11 THIS, I WON'T SAY MUCH, USUALLY, AT SENTENCINGS, BUT
12 I'M GOING TO MAKE AN EXCEPTION IN THIS CASE.

13 THERE ARE FIVE MYTHS BASICALLY THAT HAVE BEEN
14 PROPAGATED IN THIS CASE. I'M VERY AWARE OF THE ADVICE
15 THAT I THINK WAS GIVEN, I BELIEVE IT WAS BY FORMER
16 MAYOR CIANCI, IRONICALLY ENOUGH, WHO SAYS, "YOU SHOULD
17 NEVER ARGUE WITH ANYONE WHO BUYS INK BY THE BARREL, "
18 AND I THINK HE SHOULD ALSO AGREE, OR ANYONE WHO OWNS A
19 T. V. OR RADIO STATION, AND THAT'S GENERALLY GOOD
20 ADVICE, BUT THERE ARE TIMES WHEN ONE HAS TO ARGUE WITH
21 PEOPLE WHO OWN STATIONS AND BUY INK BY THE BARREL. AND
22 IN THIS CASE I THINK I HAVE AN OBLIGATION TO TRY TO
23 STATE THE CASE, MAYBE I HAVEN'T STATED IT WELL ENOUGH
24 IN THE PAST, SO THAT PEOPLE TRULY UNDERSTAND THE REAL
25 ISSUES.

4

1 THE FIRST MYTH IS THE MYTH THAT THE PROMISE OF
2 CONFIDENTIALITY THAT WAS MADE IN THIS CASE ENABLED
3 MR. TARICANI TO UNCOVER CORRUPTION IN CITY HALL THAT
4 OTHERWISE WOULD HAVE GONE UNPUNISHED OR THE PUBLIC
5 WOULDN'T HAVE KNOWN ABOUT. AND IT IS VERY CLEAR THAT
6 IN THIS CASE NEITHER THE SOURCE NOR MR. TARICANI
7 UNCOVERED ANY EVIDENCE OF CORRUPTION. THE TAPE THAT
8 WAS BROADCAST ON CHANNEL 10 WAS MADE BY THE FBI, NOT BY

9 THE SOURCE, NOT BY MR. TARICANI. THE TAPE WAS ALSO KEY
10 EVIDENCE IN THE PROSECUTION THAT ALREADY WAS WELL
11 UNDERWAY. MR. CORRENTE AND SEVERAL OTHER DEFENDANTS
12 ALREADY HAD BEEN INDICTED AND WERE SCHEDULED FOR TRIAL
13 IN ABOUT TWO MONTHS FROM THE TIME THAT THE TAPE WAS
14 OBTAINED. NOW THAT TRIAL, IT'S TRUE, WAS LATER
15 POSTPONED.

16 AT THE SAME TIME, THE GRAND JURY WAS CONTINUING
17 ITS INVESTIGATION OF MAYOR CIANCI, THAT INVESTIGATION
18 WAS NEARING ITS COMPLETION, AND THE TAPE WAS GOING TO
19 BE PLAYED AT THE UPCOMING TRIAL, AND MR. TARICANI,
20 HIMSELF, ACKNOWLEDGES KNOWING THIS. TO THE EXTENT THAT
21 THE PROMISE OF CONFIDENTIALITY ENABLED MR. TARICANI TO
22 OBTAIN THE TAPE, ALL THAT IT ACCOMPLISHED BESIDES
23 CREATING THIS SAD STATE OF AFFAIRS IN WHICH WE FIND
24 OURSELVES TODAY, WAS TO PROVIDE MR. TARICANI AND HIS
25 STATION WITH A SCOOP DURING SWEEPS WEEK, AND THERE'S

5

1 NOTHING WRONG WITH THAT, THERE'S NOTHING WRONG WITH
2 GETTING A SCOOP, AS MR. TARICANI SAID. IT PROVIDED A
3 SCOOP DURING SWEEPS WEEK BY GIVING VIEWERS A PREVIEW OF
4 EVIDENCE THAT SOON WOULD BE PRESENTED AT THE UPCOMING
5 TRIAL.

6 BUT AT THE SAME TIME, IT DID SO AT THE COST OF
7 THREATENING TO COMPROMISE THE ONGOING GRAND JURY
8 INVESTIGATION AND THREATENING TO DEPRIVE THE DEFENDANTS
9 OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY
10 POISONING THE PROSPECTIVE JURY POOL.

11 NOW, IT'S TRUE THAT THE CORRENTE TRIAL THEN HAD
12 BEEN POSTPONED, BUT EVIDENCE LIKE WAS ON THIS TAPE

13 WOULD BE AWFULLY HARD TO ERASE FROM THE MINDS OF
14 PROSPECTIVE JURORS, I THINK.

15 I WISH I COULD BELIEVE THAT THE TWO- TO
16 THREE- MONTH DELAY BETWEEN THE TIME THAT THE TAPE WAS
17 OBTAINED AND THE TIME THE TAPE WAS AIRED HAD NOTHING TO
18 DO WITH THIS, BUT IT SEEMS TO ME TOO COINCIDENTAL THAT
19 THE TAPE WAS AIRED DURING SWEEPS WEEK.

20 THE STATED CONCERN FOR NOT JEOPARDIZING
21 MR. CORRENTE' S RIGHTS WHICH WAS THE PROFFERED
22 EXPLANATION FOR THE DELAY, DOESN' T SEEM TO SQUARE WITH
23 THE DECISION TO AIR IT ANYWAY, EVEN THOUGH IT WAS
24 SOMETIME BEFORE THE POSTPONE DATE FOR THE TRIAL. AND
25 THAT' S ESPECIALLY TRUE SINCE THE TAPE CONTAINED NOTHING

6

1 THAT THE PUBLIC EVENTUALLY WOULDN' T BE ABLE TO SEE,
2 BECAUSE IT WAS GOING TO BE PLAYED AT THE TRIAL.

3 THE SECOND MYTH IN THIS CASE IS THE MYTH THAT
4 REQUIRING DISCLOSURE OF MR. TARICANI' S SOURCE IN THIS
5 CASE WILL DETER FUTURE SOURCES FROM COMING FORWARD WITH
6 INFORMATION THAT THE PUBLIC OUGHT TO KNOW AND WILL
7 CHILL REPORTERS FROM USING CONFIDENTIAL SOURCES.
8 FIRST, THAT CLAIM GREATLY DISTORTS THE PRINCIPAL ISSUE
9 IN THIS CASE. THE ISSUE IN THIS CASE IS NOT WHETHER
10 THE CONFIDENTIALITY OF A REPORTER' S SOURCE EVER MAY BE
11 PROTECTED. COURTS HAVE CONSISTENTLY SAID THAT THERE
12 ARE CIRCUMSTANCES UNDER WHICH A REPORTER SHOULD NOT BE
13 REQUIRED TO REVEAL THE IDENTITY OF THE SOURCE. THE
14 ISSUE IN THIS CASE IS WHETHER A REPORTER HAS A RIGHT TO
15 CONCEAL THE IDENTITY OF A SOURCE WHO COMMITTED A
16 CRIMINAL ACT IN PROVIDING MATERIAL TO THE REPORTER,

17 ESPECIALLY WHEN, AS APPEARS TO BE THE CASE HERE, THAT
18 THE REPORTER KNEW AT THE TIME THAT THE SOURCE WAS
19 ACTING UNLAWFULLY AND ACTUALLY ENCOURAGED THE SOURCE BY
20 MAKING A PROMISE OF CONFIDENTIALITY AND AIDED AND
21 ABETTED THE SOURCE BY PUBLISHING OR AIRING THE TAPE
22 WITH THAT KNOWLEDGE. NOW, IT MAY BE THAT REQUIRING A
23 REPORTER TO IDENTIFY THE, PRESUMABLY AND HOPEFULLY,
24 RARE SOURCE WHO VIOLATES THE LAW IN PROVIDING
25 INFORMATION TO A REPORTER, MAY MAKE IT SLIGHTLY MORE

7

1 DIFFICULT FOR A REPORTER TO DO HIS JOB OF GATHERING AND
2 DISSEMINATING WHAT THE REPORTER VIEWS AS NEWS. BUT A
3 REPORTER'S JOB ALSO IS MADE MORE DIFFICULT BY LAWS THAT
4 PROHIBITED REPORTERS, LIKE ANYONE ELSE, FROM BREAKING
5 INTO PEOPLE'S HOMES IN ORDER TO OBTAIN NEWSWORTHY
6 DOCUMENTS OR ILLEGALLY TAPPING PEOPLE'S TELEPHONES IN
7 ORDER TO OBTAIN EVIDENCE OF PUBLIC CORRUPTION OR ANY
8 OTHER NEWSWORTHY INFORMATION. AND I HOPE THAT WE CAN
9 ALL AGREE THAT REPORTERS HAVE NO PRIVILEGE TO ENGAGE IN
10 SUCH CONDUCT UNDER THE FIRST AMENDMENT, AND IT'S
11 DIFFICULT TO JUSTIFY OR SEE HOW ONE CAN JUSTIFY ANY
12 SUCH PRIVILEGE ON THE PART OF A REPORTER TO ENCOURAGE
13 OR ASSIST OTHERS IN ENGAGING IN THAT KIND OF CONDUCT.

14 SUCH DIFFICULTIES IN PERFORMING ONE'S JOB, THE
15 DIFFICULTIES OF COMPLYING WITH LEGAL CONSTRAINTS, ARE
16 THE PRICE THAT WE PAY FOR LIVING IN THE SOCIETY
17 GOVERNED BY THE RULE OF LAW, AND I SUGGEST THAT IT'S A
18 SMALL PRICE TO PAY.

19 IF SOMEONE VIOLATES THE LAW BY REVEALING TO A
20 REPORTER THE IDENTITY OF AN UNDERCOVER INTELLIGENCE OR

21 LAW ENFORCEMENT OFFICER, THEREBY JUSTIFYING THE
22 OFFICER' S LIFE, THAT PERSON OUGHT TO BE PUNISHED AND
23 OTHERS TEMPTED TO DO THE SAME OUGHT TO BE DETERRED AND
24 A REPORTER UNDER THOSE CIRCUMSTANCE SHOULD HAVE NO
25 RIGHT TO CONCEAL THE IDENTITY OF THAT PERSON.

8

1 SIMILARLY, IF AS IN THIS CASE, THE SOURCE VIOLATES THE
2 LAW BY PROVIDING THE REPORTER WITH TAPES, PUBLICATION
3 OF WHICH THREATEN TO COMPROMISE A GRAND JURY
4 INVESTIGATION OF SERIOUS CRIME OR TO DEPRIVE DEFENDANTS
5 ACCUSED OF THOSE CRIMES OF THEIR CONSTITUTIONAL RIGHT
6 TO A FAIR TRIAL, THAT PERSON OUGHT TO BE PUNISHED AND
7 OTHERS TEMPTED TO DO THE SAME OUGHT TO BE DETERRED, AND
8 A REPORTER HAS NO RIGHT TO CONCEAL THE IDENTITY OF THAT
9 PERSON.

10 AND I WOULD SUBMIT THAT A REPORTER SHOULD BE
11 CHILLED FROM VIOLATING THE LAW IN ORDER TO GET A STORY,
12 AND I' M NOT SAYING THAT MR. TARICANI DID THAT HERE,
13 FROM MAKING ILL- ADVISED PROMISES OF CONFIDENTIALITY
14 THAT ENCOURAGE OTHERS TO DO SO, AND FROM AIDING AND
15 ABETTING THEM THE SOURCE SHOULD BE CHILLED FROM
16 ENGAGING IN THAT KIND OF CONDUCT, AND I THINK IT' S
17 PROPER IN THOSE CIRCUMSTANCE, TO CHILL THE REPORTER
18 FROM ASSISTING OR ENCOURAGING THAT KIND OF CONDUCT.

19 THE FACT THAT A REPORTER MAY HAVE MADE WHAT
20 TURNS OUT TO HAVE BEEN RECKLESS OR ILL- ADVISED PROMISE
21 OF CONFIDENTIALITY MAY CREATE A DILEMMA FOR THE
22 REPORTER, BUT IT DOESN' T PROVIDE ANY LEGAL
23 JUSTIFICATION FOR CONCEALING THE PERPETRATOR' S
24 IDENTITY. THAT' S AN ISSUE THAT THE REPORTER OUGHT TO

25 CONFRONT AND DEAL WITH AND RESOLVE BEFORE MAKING THE

9

1 PROMISE.

2 THE THIRD MYTH IS THE MYTH THAT MR. TARICANI IS
3 BEING PUNISHED FOR JUST DOING HIS JOB. THERE IS NO
4 QUESTION THAT A REPORTER'S JOB IS A VERY IMPORTANT AND
5 HONORABLE JOB, BUT THIS IS STILL A MYTH UNLESS ONE
6 DEFINES A REPORTER'S JOB BY GATHERING NEWS OBTAINED BY
7 OTHERS BY ILLEGAL MEANS AND EVEN ENCOURAGING AND
8 ASSISTING OTHERS IN DOING SO, AND THEN CONCEALING THE
9 IDENTITY OF THE INDIVIDUAL WHO VIOLATED THE LAW IN
10 ORDER TO PROVIDE THE INFORMATION.

11 MR. TARICANI WAS NOT FOUND GUILTY OF CRIMINAL
12 CONTEMPT IN THIS CASE FOR AIRING THIS TAPE. WHAT HE
13 WAS FOUND GUILTY OF CONTEMPT FOR WAS REFUSING TO COMPLY
14 WITH A LAWFUL COURT ORDER THAT HE HAD THE OPPORTUNITY
15 TO APPEAL, AND IT WAS AFFIRMED ON APPEAL, THAT DIRECTED
16 HIM TO IDENTIFY THE PERSON WHO COMMITTED THE UNLAWFUL
17 ACT THAT THREATENED TO DEPRIVE VARIOUS DEFENDANTS OF
18 THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL, WHICH IS
19 THE VERY HEART OF OUR CRIMINAL JUSTICE SYSTEM, AND THAT
20 SHOULD BE OF CONCERN TO EVERYONE, INCLUDING REPORTERS.

21 IT'S VERY DISTURBING TO HEAR THOUGHTFUL PEOPLE
22 IN POSITIONS OF RESPONSIBILITY SAY THAT IT DOESN'T
23 MATTER THAT THE SOURCE'S CONDUCT THREATENED TO DEPRIVE
24 THE DEFENDANTS OF THEIR RIGHT TO A FAIR TRIAL, BECAUSE
25 AS THINGS TURNED OUT, THE DEFENDANTS APPARENTLY DID GET

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1 A FAIR TRIAL. AS I HAVE SAID BEFORE, IF AN INDIVIDUAL
2 ATTEMPTS TO COMMIT A MURDER AND THAT INDIVIDUAL IS THEN
3 APPREHENDED, WE DON'T EXCUSE THE ATTEMPT ON THE GROUND
4 THAT THE ATTEMPT WAS UNSUCCESSFUL.

5 IN THIS CASE, MR. TARICANI IS NOT BEING PUNISHED
6 FOR JUST DOING HIS JOB, BECAUSE IF THE SOURCE HAD
7 PROVIDED THE TAPE LAWFULLY, WE WOULDN'T BE HERE,
8 REGARDLESS OF HOW IRRESPONSIBLE THE COURT MIGHT HAVE
9 THOUGHT THAT IT WAS TO AIR THIS TAPE BEFORE
10 MR. CORRENTE'S TRIAL AND WHILE THE GRAND JURY WAS
11 INVESTIGATING THE CASE AGAINST THE MAYOR. AS I SAID
12 EARLIER THIS MORNING, AIRING THE TAPE UNDER THOSE
13 CIRCUMSTANCES WOULD BE PROTECTED BY THE FIRST
14 AMENDMENT, AND THE IDENTITY OF MR. TARICANI'S SOURCE
15 WOULD NOT BE AN ISSUE HERE.

16 THE FINAL TWO MYTHS ARE, PERHAPS, THE MOST
17 TROUBLING BECAUSE THEY DISPLAY WHAT, IN MY VIEW AT
18 LEAST, IS EITHER A COMPLETE MISUNDERSTANDING OF SOME OF
19 THE MOST FUNDAMENTAL PRINCIPLES OF OUR CONSTITUTION AND
20 CRIMINAL JUSTICE SYSTEM, OR AN ATTEMPT TO SPIN THIS
21 MATTER IN A WAY THAT DISTORTS THOSE PRINCIPLES, AND I
22 DON'T KNOW WHICH OF THOSE WOULD BE OF MORE CONCERN.

23 THE FOURTH MYTH IS THAT EVERY REPORTER HAS AN
24 ABSOLUTE RIGHT TO BE THE SOLE ARBITER OF WHETHER AND
25 UNDER WHAT CIRCUMSTANCES THE IDENTITY OF THE SOURCE

11

1 SHOULD REMAIN CONFIDENTIAL NO MATTER WHAT THE LAW OR
2 THE COURT MAY SAY. NOW, THIS MYTH HAS NOT BEEN
3 PROPAGATED IN THOSE TERMS, THE OTHERS HAVE BEEN, PRETTY

4 MUCH. THIS MYTH HAS NOT BEEN PROPAGATED IN THOSE
5 TERMS. ON THE CONTRARY, SINCE MR. TARICANI AND HIS
6 ADVOCATES, AND I'M NOT REFERRING TO COUNSEL HERE, I'M
7 REFERRING TO HIS COLLEAGUES, OR SOME OF HIS COLLEAGUES,
8 SINCE THEY APPARENTLY RECOGNIZE THAT THAT PROPOSITION
9 IS COMPLETELY INDEFENSIBLE, IT HAS BEEN DISCLAIMED.
10 THEY PURPORT TO RECOGNIZE THAT THERE MAY BE
11 CIRCUMSTANCES UNDER WHICH A REPORTER SHOULD REVEAL THE
12 IDENTITY OF THE SOURCE, AND THEY SUGGEST OR IMPLY THAT
13 THOSE CIRCUMSTANCES MIGHT INCLUDE CASES IN WHICH
14 NATIONAL SECURITY IS INVOLVED OR LIVES ARE AT STAKE.
15 BUT THAT DOESN'T ALTER THE FACT THAT WHAT THEY ARE
16 REALLY CLAIMING IS THAT A REPORTER HAS A RIGHT TO
17 UNILATERALLY DECIDE WHAT THOSE CIRCUMSTANCES ARE.

18 THEY CONCEDE THAT THOSE CIRCUMSTANCES MIGHT
19 INCLUDE CASES, AS I'VE SAID, IN WHICH NATIONAL SECURITY
20 IS INVOLVED OR LIVES ARE AT STAKE, BUT THEY CLAIM TO BE
21 THE SOLE ARBITER OF WHEN THOSE CIRCUMSTANCES EXIST.
22 AND APPARENTLY SOME OF THEIR COLLEAGUES DO NOT BELIEVE
23 THAT NATIONAL SECURITY WAS INVOLVED OR LIVES WERE AT
24 STAKE IN THE VALERIE PLAME CASE, FOR EXAMPLE, WHERE IT
25 WAS ALLEGED THAT THE LIFE OF AN UNDERCOVER CIA AGENT

12

1 WAS THREATENED WHEN A CONFIDENTIAL SOURCE ILLEGALLY
2 REVEALED HER IDENTITY TO REPORTERS AS A MEANS OF
3 GETTING BACK AT HER HUSBAND. AND, OBVIOUSLY, AS THIS
4 CASE DEMONSTRATES, THEY DO NOT BELIEVE THAT PUNISHING
5 AND DETERRING CRIMINAL ACTS THAT THREATEN THE
6 FUNDAMENTAL CONSTITUTIONAL RIGHTS OF OTHERS PROVIDE A
7 SUFFICIENT REASON FOR REVEALING THE IDENTITY OF A

8 SOURCE. AND I THINK THAT PROVIDES AN APT ILLUSTRATION
9 OF WHY IT IS CONTRARY TO THE PUBLIC INTEREST TO VEST
10 SUCH EXCLUSIVE AND UNREVIEWABLE AUTHORITY IN INDIVIDUAL
11 REPORTERS. OUR SYSTEM OF CONSTITUTIONAL GOVERNMENT
12 ULTIMATELY VESTS THAT AUTHORITY IN THE COURTS, JUST AS
13 IT DOES WITH EVERY OTHER LEGAL ISSUE OF PUBLIC
14 IMPORTANCE. DESPITE THE GREAT RESPECT THAT I HAVE FOR
15 THOSE MANY REPORTERS WHO CONSCIENTIOUSLY SEEK TO GATHER
16 THE NEWS AND REPORT IT FAIRLY AND ACCURATELY, IT IS NOT
17 AND SHOULD NOT BE UP TO INDIVIDUAL REPORTERS TO MAKE
18 THE ULTIMATE DECISION IN CASES WHERE IT BECOMES AN
19 ISSUE FOR A NUMBER OF REASONS; ONE IS THAT NOT ALL
20 REPORTERS LIVE UP TO THOSE STANDARDS. FORTUNATELY,
21 MOST DO, BUT THERE'S SOME WHO DON'T. AND IF THE
22 ULTIMATE DECISION IS MADE BY EACH INDIVIDUAL REPORTER,
23 WE WOULD HAVE AS MANY STANDARDS AS THERE ARE REPORTERS.
24 ALSO, IT'S A BAD IDEA BECAUSE REPORTERS ARE REQUIRED TO
25 ACT ON THE SPUR OF THE MOMENT, THEY'RE UNDER

13

1 COMPETITIVE PRESSURE TO GET A STORY OR A SCOOP, AND
2 THEY MIGHT NOT KNOW ALL OF THE RELEVANT FACTS. IT
3 DEFIES LOGIC AND COMMON SENSE, AS WELL THE LAW, TO SAY
4 THAT A PROMISE OF CONFIDENTIALITY MADE UNDER SUCH
5 CIRCUMSTANCES SHOULD BE ABSOLUTE AND UNREVIEWABLE BY A
6 COURT OR ANYONE ELSE. IN CASES WHERE THE ISSUE ARISES,
7 THE QUESTION OF CONFIDENTIALITY IS ONE THAT MUST BE
8 REVIEWABLE BY A COURT. THE COURT IS IN THE POSITION TO
9 HEAR ALL OF THE FACTS. THE COURT IS IN A POSITION TO
10 DETERMINE THE APPLICABLE LAW AND TO BALANCE ANY
11 COMPETING PUBLIC INTERESTS THAT WOULD BE IMPLICATED BY

12 DISCLOSURE VERSUS NONDISCLOSURE. AND A COURT'S
13 DECISION IS REVIEWABLE, IN TURN, BY A HIGHER COURT.

14 SO JUST AS I AM ILL-EQUIPPED TO GATHER AND
15 REPORT THE NEWS, SO IS AN INDIVIDUAL REPORTER
16 ILL-EQUIPPED TO MAKE THE ULTIMATE DECISION AS TO
17 WHETHER A SOURCE IS ENTITLED TO ANONYMITY, ESPECIALLY
18 WHERE, AS HERE, THE SOURCE COMMITTED A CRIMINAL ACT.

19 I WANT TO MAKE IT CLEAR THAT I'M NOT SAYING OR
20 SUGGESTING THAT IT IS NEVER APPROPRIATE TO ACCORD
21 CONFIDENTIALITY TO A REPORTER'S SOURCE. I THINK I'VE
22 SAID THAT COURTS HAVE CONSISTENTLY SAID THAT THERE ARE
23 CASES WHERE THAT IS APPROPRIATE. THE ISSUE HERE IS WHO
24 DECIDES THAT AND UNDER WHAT CIRCUMSTANCE.

25 THE FIFTH MYTH OR LAST MYTH IS THE MYTH THAT

14

1 ORDERING MR. TARICANI TO REVEAL HIS SOURCE IS AN
2 ASSAULT ON THE FIRST AMENDMENT, AND THAT IS, PERHAPS,
3 THE BIGGEST AND MOST MISLEADING MYTH OF ALL.

4 THE FIRST AMENDMENT PROTECTS THE RIGHT OF
5 REPORTERS AND THOSE WHO OWN MEDIA OUTLETS OR
6 NEWSPAPERS, TO PUBLISH WHAT THEY CHOOSE TO PUBLISH
7 WITHOUT CENSORSHIP BY THE GOVERNMENT. THE FIRST
8 AMENDMENT DOES NOT CONFER ON REPORTERS OR ANYONE ELSE
9 THE RIGHT TO VIOLATE THE LAW IN ORDER TO GET
10 INFORMATION THAT THEY MIGHT CONSIDER NEWSWORTHY, THE
11 RIGHT TO ENCOURAGE OTHERS TO DO SO, OR THE RIGHT TO
12 CONCEAL THE IDENTITY OF A SOURCE WHO COMMITTED A
13 CRIMINAL ACT IN PROVIDING THE INFORMATION BY REFUSING
14 TO COMPLY WITH A LAWFUL COURT ORDER DIRECTING THE
15 REPORTER TO IDENTIFY THE SOURCE.

16 TO SUGGEST THAT THESE THINGS ARE PROTECTED BY
17 THE FIRST AMENDMENT, DEMEANS THE FIRST AMENDMENT. AND
18 WHILE, AS I SAID, THAT COURTS HAVE AFFORDED PROTECTION
19 TO THE CONFIDENTIALITY OF REPORTER' S SOURCES IN CASES
20 WHERE THERE IS NO SUFFICIENT REASON TO REQUIRE
21 DISCLOSURE, THIS IS NOT ONE OF THOSE CASES. UNDER THE
22 CIRCUMSTANCES IN THIS CASE, IT' S CRYSTAL CLEAR THAT
23 MR. TARIANI HAD NO PRIVILEGE UNDER THE FIRST AMENDMENT
24 OR OTHERWISE, TO DISOBEY THE ORDER DIRECTING HIM TO
25 IDENTIFY THE SOURCE THAT PROVIDED HIM WITH THIS TAPE.

15

1 AS THE SUPREME COURT EXPRESSLY HELD IN THE
2 BRANZBURG CASE, "A REPORTER HAS NO PRIVILEGE UNDER THE
3 FIRST AMENDMENT OR OTHERWISE TO REFUSE TO DISCLOSE THE
4 IDENTITY OF A CONFIDENTIAL SOURCE TO A GRAND JURY
5 INVESTIGATING A CRIME WHEN THAT INFORMATION IS RELEVANT
6 TO THE INVESTIGATION, BECAUSE THE PUBLIC INTEREST AND
7 EFFECTIVE LAW ENFORCEMENT OVERRIDES ANY INCIDENTAL
8 BURDEN THAT DISCLOSURE MAY IMPOSE ON NEWS-GATHERING
9 ACTIVITIES." SO REPORTERS ARE FREE TO USE SOURCES, AND
10 IN MANY CASES, PRESERVE THE CONFIDENTIALITY OF THOSE
11 SOURCES, BUT THERE ARE EXCEPTIONS TO THAT, AND THIS IS
12 ONE OF THOSE EXCEPTIONS. AS THE SUPREME COURT ALSO NOTED
13 IN BRANZBURG, "NO OTHER CITIZEN ENJOYS SUCH A
14 PRIVILEGE." IF JOE CITIZEN HAS POSSESSION OF RECORDS
15 EVIDENCING BRIBERY OR EXTORTION BY PUBLIC OFFICIALS,
16 AND HE' S SUBPOENAED TO APPEAR BEFORE A GRAND JURY, JOE
17 CITIZEN HAS NO RIGHT TO REFUSE TO PRODUCE THE RECORDS
18 OR TO REFUSE TO IDENTIFY THE PERSON WHO GAVE HIM THE
19 RECORDS ON THE GROUND THAT JOE CITIZEN CONSIDERS THIS

20 INFORMATION TO BE CONFIDENTIAL OR HE PROMISED SOMEONE
21 THAT HE WOULDN'T TELL. IF THAT HAPPENED, JOE CITIZEN
22 WOULD BE IN JAIL IN SHORT ORDER.

23 IN THIS CASE, MR. TARICANI APPEALED THIS COURT'S
24 ORDER, AS HE HAD EVERY RIGHT TO DO, AND THE ORDER WAS
25 AFFIRMED BY THE COURT OF APPEALS. IT'S INTERESTING TO

16

1 NOTE THAT APPEAL FOCUSED MORE ON WHETHER IT WAS PROPER
2 TO REFER THIS MATTER TO A SPECIAL PROSECUTOR, RATHER
3 THAN ON ANY FIRST AMENDMENT ISSUE. IT ALSO APPEARS
4 THAT THERE WAS NO ATTEMPT MADE TO GET THE SUPREME COURT
5 TO REVIEW THE CASE. AND I SUSPECT THAT THE REASON FOR
6 THOSE DECISIONS, WHICH I BELIEVE WERE SOUND, WAS THAT
7 COUNSEL RECOGNIZED THAT UNDER THE FACTS OF THIS CASE,
8 THEY COULD NOT PREVAIL ON THE FIRST AMENDMENT CLAIM

9 I SUPPOSE ONE MIGHT ARGUE THAT EVEN UNDER THESE
10 CIRCUMSTANCES THE REPORTER SHOULD NOT HAVE TO REVEAL
11 THE SOURCE, BUT IT'S DISINGENUOUS TO CLAIM THAT
12 REQUIRING HIM TO DO SO UNDER THESE CIRCUMSTANCES
13 CONSTITUTES AN ASSAULT ON THE FIRST AMENDMENT. THOSE
14 ARE TWO ENTIRELY SEPARATE THINGS, WHETHER ONE THINKS
15 THAT A REPORTER SHOULD HAVE TO REVEAL SOURCES UNDER
16 THESE CIRCUMSTANCES AND WHETHER REQUIRING HIM TO DO SO,
17 AS THE LAW REQUIRES, CONSTITUTES AN ASSAULT ON THE
18 FIRST AMENDMENT.

19 THERE ARE SEVERAL ASSAULTS HERE, BUT NONE OF
20 THEM IS AN ASSAULT BY THE COURT ON THE FIRST AMENDMENT
21 OF. THE ASSAULTS WE HAVE HERE ARE ASSAULTS ON THE RULE
22 OF LAW, ASSAULT ON THE EFFECTIVE ADMINISTRATION OF
23 CRIMINAL JUSTICE, AND ASSAULT OF THE CONSTITUTIONAL

24 RIGHT OF A DEFENDANT TO A FAIR TRIAL. THERE' S AN
25 ASSAULT ON THE PRINCIPLE THAT LAWFUL COURT ORDERS MUST

17

1 BE OBEYED. AND THAT ASSAULT TAKES THE FORM OF EXPRESS
2 OR IMPLIED CLAIMS THAT IT WAS OKAY TO PROMISE
3 CONFIDENTIALITY TO THE SOURCE WHO PROVIDED INFORMATION
4 IN VIOLATION OF A PROTECTIVE ORDER, EVEN IF AT THE TIME
5 THE REPORTER KNEW THAT IT WAS A VIOLATION FOR THE
6 SOURCE TO HAVE PROVIDED THAT INFORMATION. IT IS ALSO
7 AN EXPRESS OR IMPLIED CLAIM HERE THAT THE FACT THAT THE
8 ORDER WAS VIOLATED IS NOT IMPORTANT ENOUGH TO WARRANT
9 PURSUING THE MATTER NOW THAT THE CASE IS OVER. THERE' S
10 THE IMPLICATION THAT IT WAS OKAY, EVEN LAUDABLE FOR
11 MR. TARICANI TO REFUSE TO COMPLY WITH THE ORDER BECAUSE
12 HE HAS WHAT HE THINKS IS A GOOD REASON. THERE' S AN
13 ASSAULT HERE ON THE PRINCIPLE THAT UNDER OUR SYSTEM OF
14 GOVERNMENT, LEGAL QUESTIONS AND QUESTIONS OF
15 CONSTITUTIONAL DIMENSION THAT AFFECT THE PUBLIC
16 INTEREST MUST BE DECIDED BY AN IMPARTIAL COURT AFTER
17 WEIGHING ALL OF THE RELEVANT FACTS AND NOT BY
18 INTERESTED INDIVIDUALS MAKING SPUR OF THE MOMENT
19 JUDGMENTS. JUST AS A POLICE OFFICER HAS NO RIGHT, AND
20 CERTAINLY NOT AN ABSOLUTE AND UNREVIEWABLE RIGHT, TO
21 DETERMINE WHETHER A SEARCH AND SEIZURE VIOLATES THE
22 PROVISIONS OF THE FOURTH AMENDMENT, NEITHER DOES A
23 REPORTER HAVE AN ABSOLUTE AND UNREVIEWABLE RIGHT TO
24 ULTIMATELY DETERMINE WHETHER A SOURCE IS ENTITLED TO
25 CONFIDENTIALITY. THOSE DECISIONS, ULTIMATELY, HAVE TO

18

1 BE MADE BY A COURT, AND THANKFULLY, DON'T COME UP
2 OFTEN. THEY DO COME UP IN CASES LIKE THIS WHERE
3 CRIMINAL INVESTIGATIONS ARE INVOLVED, THAT WAS THE
4 BRANZBURG CASE.

5 THERE'S AN ASSAULT IN THIS CASE ON THE ABILITY
6 OF GRAND JURIES AND OTHER DULY AUTHORIZED INVESTIGATIVE
7 BODIES TO EFFECTIVELY INVESTIGATE CRIMES AND ON THE
8 ABILITY OF PROSECUTORS TO EFFECTIVELY PROSECUTE THEM
9 IF INDIVIDUALS SUBPOENAED TO TESTIFY PRODUCE DOCUMENTS
10 BEFORE A GRAND JURY OR AT TRIAL DON'T HAVE TO COMPLY
11 EVEN AFTER BEING ORDERED BY A COURT, IT'S PRETTY
12 OBVIOUS THAT THE ABILITY OF GRAND JURIES AND
13 PROSECUTORS TO INVESTIGATE AND PROSECUTE CRIMES WOULD
14 BE SEVERELY COMPROMISED, TO SAY THE LEAST.

15 AND, FINALLY, THIS IS AN ASSAULT ON THE
16 CONSTITUTIONAL RIGHT OF CRIMINAL DEFENDANTS TO A FAIR
17 TRIAL. IN CLAIMING THAT IT'S OKAY IF SOURCES
18 UNLAWFULLY LEAK EVIDENCE THAT THREATENS A DEFENDANT'S
19 CONSTITUTIONAL RIGHT TO A FAIR TRIAL WITHOUT FEAR OF
20 BEING IDENTIFIED BY THE ONLY PERSON WHO KNOWS WHO THAT
21 INDIVIDUAL IS. IT'S VERY UNFORTUNATE, IN MY VIEW, THAT
22 SOME WHO HAVE NEVER EXPERIENCED THE TRAUMA OF BEING
23 ACCUSED OF A CRIME HAVE DIFFICULTY UNDERSTANDING THAT A
24 FAIR TRIAL BEFORE AN IMPARTIAL JURY IS A VERY PRECIOUS
25 RIGHT TO HAVE.

19

1 NOW THAT I'VE HAD MY SAY ON THOSE POINTS, WE'RE
2 GOING TO PROCEED TO THE SENTENCING ASPECT OF THIS CASE.

3 I'M VERY SADDENED AND DISAPPOINTED BY WHAT'S

4 HAPPENED IN THIS CASE FOR A NUMBER OF REASONS. I' M
5 SORRY FOR THE PARTIES AND THE IMPACT THAT THIS HAS HAD
6 AND WILL CONTINUE TO HAVE ON THEIR LIVES AND THEIR
7 FAMILIES. AND I' M SORRY THAT I NOW FACE THE VERY
8 UNPLEASANT TASK OF SENTENCING A REPORTER WHO I HAVE
9 ADMIRERD AND RESPECTED FOR MANY YEARS AND WHO SUFFERS
10 FROM A SERIOUS HEALTH CONDITION. IT' S ALSO GOING TO BE
11 UNPLEASANT TO FACE THE POSSIBILITY OF SENTENCING A
12 LONG-TIME MEMBER OF THE BAR, WHO, AT LEAST IN HIS
13 DEALINGS WITH THIS COURT, HAS ALWAYS CONDUCTED HIMSELF
14 IN A VERY PROFESSIONAL MANNER AND WHO HAS HEALTH
15 PROBLEMS IN HIS OWN FAMILY.

16 BUT WHAT' S AT STAKE HERE IS THE RULE OF LAW AND
17 THE CONSTITUTIONAL RIGHT OF A PERSON CHARGED WITH A
18 CRIME TO RECEIVE A FAIR TRIAL, AND I HAVE AN OBLIGATION
19 TO DEFEND BOTH.

20 NO ONE IS ABOVE THE LAW, NOT PRESIDENTS, NOT
21 REPORTERS. LIKE ALL CITIZENS, A REPORTER MUST ABIDE BY
22 WHAT THE CONSTITUTION AND THE LAWS SAY AND NOT BY WHAT
23 THEY THINK THEY SAY OR THINK THEY SHOULD SAY.

24 YOU' VE SAID THAT YOU BELIEVE YOU WERE JUST DOING
25 YOUR JOB, MR. TARICANI, AND NOW I HAVE TO TRY AND DO MY

20

1 JOB.

2 IN DETERMINING WHAT SENTENCES IS JUST IN THIS
3 CASE, THE FIRST PLACE ORDINARILY THAT I WOULD LOOK
4 WOULD BE AT THE GUIDELINES, BUT AS COUNSEL HAVE POINTED
5 OUT, THERE ARE NO GUIDELINES, NO FEDERAL SENTENCING
6 GUIDELINES FOR THE CRIME OF CRIMINAL CONTEMPT. THE
7 GUIDELINES SIMPLY SAY THAT THE COURT OUGHT TO REFER TO

8 THE GUIDELINE FOR THE MOST ANALOGOUS OFFENSE, WHICH
9 GENERALLY HAS BEEN CONSIDERED OBSTRUCTION OF JUSTICE.
10 I WAS AWARE OF THAT AT THE TIME THAT I FOUND YOU IN
11 CRIMINAL CONTEMPT, AND I REJECTED THE OBSTRUCTION
12 GUIDELINE. THAT WOULD CALL FOR A RANGE OF 15 TO 21
13 MONTHS, AND I THOUGHT AT THE TIME THAT WAS EXCESSIVE
14 AND THAT'S ONE OF THE REASONS THAT I DECIDED TO LIMIT
15 THE SENTENCE TO 6 MONTHS.

16 THE FACTORS, THEN, THAT THE COURT MUST CONSIDER
17 ARE SPELLED OUT IN THE STATUTE, SECTION 3553 OF TITLE
18 18, AND I'M NOT GOING TO REPEAT EVERYTHING COUNSEL HAVE
19 SAID. ONE OF THE FACTORS IS THE NATURE AND
20 CIRCUMSTANCES OF THE OFFENSE. AS WE ALREADY KNOW, THE
21 OFFENSE IS A WILLFUL VIOLATION OF A COURT ORDER. I'VE
22 INDICATED HOW SERIOUS THAT IS. I DON'T THINK ANYONE
23 DISPUTES, AT LEAST HASN'T DISPUTED DURING THIS
24 PROCEEDING THAT IT'S SERIOUS. IT STRIKES AT THE HEART
25 OF THE RULE OF LAW, AND IN THIS CASE IT OBSTRUCTED AND

21

1 GREATLY INCREASED THE COST OF A CRIMINAL INVESTIGATION
2 INTO THE VIOLATION OF STILL ANOTHER ORDER.

3 ANOTHER FACTOR IS THE HISTORY AND
4 CHARACTERISTICS OF THE DEFENDANT. AND IN YOUR CASE
5 THOSE WEIGH, CERTAINLY, IN YOUR FAVOR. YOU'VE LED AN
6 EXEMPLARY LIFE; YOU'VE HAD NO PRIOR CONTACT WITH THE
7 LAW; THIS IS YOUR FIRST OFFENSE. YOU'VE DONE A GREAT
8 DEAL OF GOOD IN THE COMMUNITY, BOTH THROUGH YOUR WORK
9 AND YOUR CHARITABLE ACTIVITIES. YOU APPARENTLY HAVE
10 BEEN VERY ACTIVE IN THE HEART ASSOCIATION, THE FOOD
11 BANK AND AMOS HOUSE, AND PROBABLY OTHER THINGS AS WELL.

12 AS COUNSEL HAVE MENTIONED, YOU HAVE A SERIOUS HEALTH
13 CONDITION. YOU ARE THE RECIPIENT OF A HEART
14 TRANSPLANT, AND YOU HAVE A MULTITUDE OF RELATED
15 PROBLEMS, AND I'LL GET INTO THOSE A LITTLE BIT LATER.

16 AMONG THE OTHER FACTORS THE COURT HAS TO
17 CONSIDER, THE NEED FOR THE SENTENCE TO REFLECT THE
18 SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE
19 LAW, TO PROVIDE JUST PUNISHMENT FOR THE OFFENSE, AND TO
20 AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT. AND
21 I'M NOT GOING TO REPEAT ALL THAT'S BEEN SAID, I'LL JUST
22 SAY THAT, AS I'VE ALREADY INDICATED, I THINK IT'S VERY
23 IMPORTANT THAT THE SENTENCE REFLECT THE SERIOUSNESS OF
24 OFFENSE, PROMOTE RESPECT FOR THE LAW, AND DETER OTHERS
25 FROM BEING TEMPTED TO ENGAGE IN SIMILAR CONDUCT IN THE

22

1 FUTURE.

2 THERE ARE SOME OTHER FACTORS THAT AREN'T
3 RELEVANT; PROTECTING THE PUBLIC, I DON'T THINK THE
4 PUBLIC HAS TO BE PROTECTED FROM YOU. TO AVOID
5 UNWARRANTED SENTENCING DISPARITIES; COUNSEL HAVE
6 PROVIDED THE COURT WITH A LISTING OF THE SENTENCES THAT
7 WERE IMPOSED IN CRIMINAL CONTEMPT CASES, BUT THE
8 PROBLEM WITH THAT IS THAT THE CASES ARE ALL SO
9 DIFFERENT EACH ONE TURNS ON ITS FACTS, AND I DON'T
10 THINK THAT ANY OF THOSE CASES ARE HELPFUL IN THAT
11 REGARD. COUNSEL DID MAKE A POINT, WHICH I THOUGHT WAS
12 A VERY LEGITIMATE POINT ABOUT THE SANCTION THAT WAS
13 IMPOSED ON THE ASSISTANT UNITED STATES ATTORNEY IN THIS
14 CASE WHO VIOLATED THE PROTECTIVE ORDER BY SHOWING THE
15 VERY SAME TAPE TO A COUPLE OF FRIENDS AND A MEMBER OF

16 HIS FAMILY, I BELIEVE IN THE PRIVACY OF HIS HOME. AND
17 IN HINDSIGHT, I WOULD AGREE THAT I WAS TOO LENIENT IN
18 THAT CASE. THAT INDIVIDUAL WAS NEVER PROSECUTED. I
19 SANCTIONED HIM SUMMARILY. AND AS I SAY, AS I LOOK BACK
20 ON IT, IT WAS TOO LENIENT, I DON'T WANT TO OFFER
21 EXCUSES, BUT I WILL SAY ONLY THAT I WAS ONLY SWAYED BY
22 WHAT I WAS CONVINCED WAS A SPUR OF THE MOMENT LAPSE IN
23 JUDGMENT ON HIS PART IN AN ATTEMPT TO SHOW-OFF FOR TO A
24 FEW FRIENDS. IT DIDN'T APPEAR TO ME TO BE TO BE A
25 PREMEDICATED ACT THAT THREATENED TO POISON THE JURY

23

1 POOL OR DEPRIVE ANY OF THE DEFENDANTS OF THEIR RIGHT TO
2 A FAIR TRIAL OR GIVE ANYONE AN UNFAIR ADVANTAGE IN THAT
3 TRIAL. AS I SAID AT THE TIME, THE DISCLOSURE WAS VERY
4 LIMITED; IT CREATED LITTLE RISK OF AFFECTING THE
5 FAIRNESS OF THE TRIAL THAT THE PROTECTIVE ORDER WAS
6 DESIGNED TO PROTECT. AND I MADE IT CLEAR AT THAT TIME
7 THAT THE SITUATION WOULD BE MUCH DIFFERENT IF AND WHEN
8 THE INDIVIDUAL WHO PROVIDED YOU WITH THE TAPE THAT WAS
9 AIRED TO THOUSANDS OF VIEWERS WAS DISCOVERED.

10 SO ALTHOUGH I DON'T CLAIM TO JUSTIFY THE
11 LENIENCY SHOWN ON THE PREVIOUS OCCASION -- THE OTHER
12 FACTOR THAT INFLUENCED ME AT THE TIME WAS I ASSUMED
13 THAT THE JUSTICE DEPARTMENT WOULD TAKE SOME
14 DISCIPLINARY ACTION. I DON'T KNOW WHETHER THEY EVER
15 DID. I DON'T KNOW IF THOSE THINGS ARE MADE PUBLIC,
16 I'VE NEVER INQUIRED. I'VE CERTAINLY SEEN NO EVIDENCE
17 OF IT.

18 BUT HOWEVER LENIENT THAT MAY HAVE BEEN, THIS
19 SITUATION, I THINK, IS DISTINGUISHABLE FOR THE REASONS

20 THAT I HAVE MENTIONED. THIS WAS NOT A SPUR OF THE
21 MOMENT LAPSE IN JUDGMENT BY THE INDIVIDUAL WHO VIOLATED
22 THAT PROTECTIVE ORDER. THE MOTIVE -- WELL, THE MOTIVE
23 REMAINS UNCLEAR. IT CERTAINLY DIDN'T CREATE A RISK OF
24 JEOPARDIZING THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

25 AND, FINALLY, WHAT YOU'RE BEING SENTENCED FOR IS

24

1 NOT VIOLATING THE PROTECTIVE ORDER, AS I'VE SAID, BUT
2 RATHER VIOLATING THE ORDER REQUIRING YOU TO IDENTIFY
3 THE PERSON WHO DID VIOLATE THE PROTECTIVE ORDER.

4 ONE OTHER FACTOR THAT'S MENTIONED IN THE STATUTE
5 IS THE NEED FOR RESTITUTION, AND I THINK THAT NEEDS TO
6 BE ADDRESSED. I DID ASK COUNSEL TO PROVIDE MEMORANDA
7 TO THE COURT ON WHETHER OR NOT RESTITUTION SHOULD BE
8 ORDERED IN CONNECTION WITH MR. TARICANI'S SENTENCE. I
9 HAVE CONCLUDED THAT IT SHOULD NOT BE, THAT IT WOULD BE
10 INAPPROPRIATE. BUT I REACHED THAT CONCLUSION FOR
11 REASONS DIFFERENT FROM THOSE EXPRESSED IN THE DEFENSE
12 COUNSELS' MEMORANDUM

13 IT'S MY OPINION THAT WHEN AN INDIVIDUAL COMMITS
14 AN ACT OF CRIMINAL CONTEMPT, THAT INDIVIDUAL MAY
15 PROPERLY BE REQUIRED TO PAY RESTITUTION FOR ANY LOSS OR
16 EXPENSE INCURRED BY ANOTHER INDIVIDUAL OR A GOVERNMENT
17 ENTITY AS A RESULT OF THE CRIMINAL ACT. THAT WAS THE
18 BASIS FOR THE THIRD CIRCUIT'S DECISION IN THE HAND CASE
19 WHERE THE COURT REQUIRED A JUROR, WHO WAS HELD IN
20 CONTEMPT FOR IMPROPERLY HAVING CONTACT WITH A CRIMINAL
21 DEFENDANT, WHICH RESULTED IN A MISTRIAL, TO PAY
22 RESTITUTION FOR THE PRORATED SALARIES OF TWO
23 PROSECUTORS AND THE EXPENSES OF TWO GOVERNMENT

24 WITNESSES THAT WERE INCURRED DURING THE TRIAL. BUT
25 THAT' S NOT THIS CASE. IT SEEMS ALSO CLEAR TO ME THAT

25

1 IT' S NOT PROPER TO REQUIRE A DEFENDANT TO PAY
2 RESTITUTION FOR EXPENSES INCURRED IN PROSECUTING HIM,
3 EXCEPT TO THE EXTENT THAT THOSE EXPENSES CONSTITUTE
4 RECOVERABLE COSTS THAT ARE SPECIFIED IN SECTION 1920 OF
5 TITLE 28, WHICH A DEFENDANT, EVEN A CRIMINAL DEFENDANT
6 IS REQUIRED TO PAY UNDER SECTION 1918 OF TITLE 28.

7 AND IN THIS CASE, IN DETERMINING WHICH OF THOSE
8 MODELS FITS, IN THIS CASE IT SEEMS PRETTY CLEAR THAT
9 THE AMOUNTS PAID TO THE SPECIAL PROSECUTOR HAD BEEN
10 INCURRED IN TRACKING DOWN THE SOURCE, OR IF THEY HAD
11 BEEN INCURRED IN TRACKING DOWN THE SOURCE AFTER
12 MR. TARICANI HAD BEEN HELD IN CONTEMPT AND BECAUSE OF
13 HIS REFUSAL TO COMPLY WITH THE COURT' S ORDER, I THINK
14 RESTITUTION WOULD BE APPROPRIATE. BUT IN THIS CASE THE
15 FACT IS THAT ALL OF THE EXPENSES INCURRED AFTER
16 MR. TARICANI WAS HELD IN CONTEMPT APPEAR TO BE RELATED
17 TO HIS PROSECUTION FOR THAT CONTEMPT. THE EXPENSES
18 INCURRED IN TRYING TO TRACK DOWN THE SOURCE BY OTHER
19 MEANS WERE INCURRED BEFORE MR. TARICANI WAS HELD IN
20 CONTEMPT, AND EVEN THOUGH THOSE EFFORTS WERE MADE IN AN
21 EFFORT TO AVOID HAVING TO ASK HIM FOR HIS SOURCE, I
22 DON' T BELIEVE THAT RESTITUTION IS PROPER. SO I' M NOT
23 GOING TO ORDER RESTITUTION.

24 NOW, THE DIFFICULT THING IN THIS CASE IS, AND
25 WHAT THE COURT' S DECISION COMES DOWN TO IS

26

1 MR. TARICANI'S HEALTH. EXCEPT FOR HIS HEALTH AND HIS
2 HISTORY AND GOOD RECORD, ALL OF THE FACTORS ENUMERATED
3 IN THE STATUTE WOULD CALL FOR A MEANINGFUL PRISON
4 SENTENCE. SO THE QUESTION HERE IS WHETHER IMPRISONMENT
5 WOULD POSE A RISK TO MR. TARICANI'S LIFE OR HEALTH THAT
6 IS REAL ENOUGH AND SERIOUS ENOUGH TO WARRANT SOME KIND
7 OF AN ALTERNATIVE SENTENCE. AND VERY FRANKLY ONE OF
8 THE REASONS, ONE OF THE THINGS THAT I FIND MOST
9 DIFFICULT TO DEAL WITH IN ATTEMPTING TO ANSWER THAT
10 QUESTION IS THAT MR. TARICANI FACES IMPRISONMENT
11 BECAUSE OF A SERIES OF CONSCIOUS DECISIONS THAT HE
12 VOLUNTARILY MADE WITH FULL KNOWLEDGE OF THE POTENTIAL
13 RISKS TO HIS HEALTH, BUT AT THE SAME TIME, HE'S ASKING
14 THE COURT TO MITIGATE THE SENTENCE BECAUSE OF THE RISKS
15 THAT HE CONSCIOUSLY AND VOLUNTARILY ASSUMED.

16 HE CHOSE TO PROMISE CONFIDENTIALITY TO
17 MR. BEVILACQUA KNOWING THAT IN PROVIDING THE TAPE,
18 MR. BEVILACQUA WAS VIOLATING A PROTECTIVE ORDER
19 DESIGNED TO PROTECT THE PARTIES RIGHT TO A FAIR TRIAL.
20 HE CHOSE, HE AND THE STATION CHOSE TO BROADCAST THE
21 TAPE TO PROSPECTIVE JURORS AFTER HAVING AMPLE
22 OPPORTUNITY TO CONSIDER THE POSSIBLE RAMIFICATIONS,
23 CONSULTING WITH COUNSEL, AND I HAVE TO THINK
24 RECOGNIZING THE VERY REAL POSSIBILITY THAT ONCE THE
25 TAPE WAS AIRED, A COURT MIGHT VERY WELL ORDER HIM TO

27

1 IDENTIFY THE PERSON WHO PROVIDED THE TAPE. AFTER BEING
2 HELD IN CIVIL CONTEMPT, MR. TARICANI MADE THE DECISION

3 NOT TO AVAIL HIMSELF OF ANY OF THE MANY OPPORTUNITIES
4 THAT THE COURT AFFORDED HIM TO PURGE HIMSELF OF THAT
5 CONTEMPT, EVEN AFTER THE COURT WARNED HIM THAT HE COULD
6 FACE IMPRISONMENT FOR CRIMINAL CONTEMPT, AND THAT IF
7 THAT HAPPENED, IF HE WAS CONVICTED OF CRIMINAL
8 CONTEMPT, IT WOULD BE TOO LATE TO PURGE HIMSELF. AND
9 HE MADE ALL OF THESE DECISIONS WITH FULL KNOWLEDGE
10 REGARDING THE STATE OF HIS HEALTH AND THE RISKS THAT
11 IMPRISONMENT MIGHT POSE, AND HE DECIDED TO ASSUME THOSE
12 RISKS.

13 SO, IN ESSENCE, MR. TERICANI IS NOW ASKING THIS
14 COURT TO SHOW MORE CONCERN FOR AND REGARD FOR HIS
15 HEALTH THAN HE HIMSELF HAS SHOWN, AND VERY CANDIDLY,
16 THAT'S SOMEWHAT DIFFICULT TO SWALLOW. BUT I ATTRIBUTE
17 THAT MORE TO THE FACT THAT MR. TERICANI IS A RISK-TAKER
18 THAN TO AN INDICATION THAT HE DOESN'T BELIEVE THAT
19 IMPRISONMENT WOULD PRESENT AS GREAT A RISK TO HIS
20 HEALTH AS HAS BEEN PORTRAYED HERE, AND I RECOGNIZE THAT
21 I HAVE TO PUT ASIDE THE FEELINGS OF BEING UNFAIRLY PUT
22 IN THIS POSITION OF HAVING TO BE MORE CONCERNED ABOUT
23 MR. TERICANI'S HEALTH THAN HE HAS INDICATED HE IS, AND
24 I'VE GOT TO IMPOSE A SENTENCE THAT IS SUFFICIENT TO
25 PROVIDE ADEQUATE PUNISHMENT FOR THE OFFENSE BUT DOES

28

1 NOT HAVE THE UNINTENDED OR UNWARRANTED CONSEQUENCE OF
2 ENDANGERING MR. TERICANI'S LIFE OR HEALTH. AND I'VE
3 TRIED VERY HARD TO DO THAT. I'VE AGONIZED LONG AND
4 HARD OVER THIS. AND I'VE LOOKED AT THE FACTS THAT BEAR
5 ON THIS QUESTION, AND THEY SEEM TO POINT IN TWO
6 DIFFERENT DIRECTIONS. ON THE ONE HAND, AS I'VE

7 PREVIOUSLY OBSERVED, MR. TARICANI LEADS AN ACTIVE LIFE.
8 HE VIGOROUSLY PURSUES HIS PROFESSION. HE HAS TRAVELED
9 ABROAD RECENTLY, AND HE HAS TRAVELED AT LEAST TO NEW
10 YORK RECENTLY TO BE ON THE TODAY SHOW. THE BUREAU OF
11 PRISONS HAS INDICATED THAT IT CAN PROVIDE PROPER CARE.
12 I KNOW THAT THEY HAVE FIRST-RATE MEDICAL FACILITIES,
13 I'VE TOURED DEVENS, AND I'VE SEEN FIRSTHAND THAT THEY
14 RUN A FIRST-RATE OPERATION. SO WE HAVE THOSE FACTORS
15 ON ONE SIDE OF THE EQUATION.

16 ON THE OTHER SIDE WE HAVE BASICALLY THE
17 AFFIDAVITS OF TWO OF MR. TARICANI'S DOCTORS, BOTH OF
18 WHOM ARE HIGHLY-QUALIFIED SPECIALISTS. AND I THINK
19 MR. MURPHY PRETTY ACCURATELY SUMMARIZED THE IMPORTANT
20 POINTS THAT WERE MADE IN THOSE AFFIDAVITS.
21 MR. TARICANI IS A HEART TRANSPLANT RECIPIENT, HE'S
22 SUFFERING FROM A REDUCED KIDNEY FUNCTION AS A RESULT OF
23 HIS PRIOR HEART PROBLEMS. HE HAS SEVERE HYPERTENSION,
24 WHICH IS A SIDE EFFECT OF THE MEDICATIONS THAT HE IS
25 TAKING. HE'S ON A REGIMEN OF MEDICATIONS THAT MUST BE

29

1 TAKEN ACCORDING TO A STRICT SCHEDULE AND CANNOT TAKE
2 GENERIC SUBSTITUTES. THAT AS A RESULT OF THE
3 IMMUNOSUPPRESSANT MEDICATION THAT HE'S BEING GIVEN TO
4 PREVENT REJECTION, HE'S UNUSUALLY SUSCEPTIBLE TO
5 INFECTION, WHICH IN HIS CASE COULD BE LIFE-THREATENING.
6 HIS CONDITION REQUIRES NUMEROUS PRECAUTIONS TO AVOID
7 BEING EXPOSED TO ANY TRANSMISSIBLE DISEASES. THOSE ARE
8 ENUMERATED IN THE AFFIDAVIT OF ONE OF THE DOCTORS.
9 THEY INCLUDE AVOIDING CONTACT WITH INDIVIDUALS WHO HAVE
10 COLDS, FLU OR THE COMMON VIRUSES, NOT TO SHARE PLATES,

11 GLASSES, CUPS OR SOAP WITH OTHERS, NOT TO USE GROUP
12 SHOWERS, TO AVOID POORLY-VENTILATED AREAS, TO AVOID
13 PROLONGED EXPOSURE TO COLD TEMPERATURES, AND, PERHAPS,
14 MOST OVERREACHING OF ALL, TO LIVE IN A FAIRLY GERM-FREE
15 ENVIRONMENT, A SANITARY ENVIRONMENT. THEY ALSO
16 INDICATE THAT MR. TARICANI'S CONDITION REQUIRES CLOSE
17 MONITORING AND SUPERVISION BY SPECIALISTS IN CARDIAC
18 TRANSPLANT MEDICINE, AND PREFERABLY THOSE WHO ARE
19 FAMILIAR WITH HIS CONDITION, AND THERE'S SOME QUESTION,
20 DESPITE THE EXCELLENT FACILITIES AT THE BUREAU OF
21 PRISONS AND THEIR WORKING RELATIONSHIP WITH THE
22 UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER, WHETHER
23 THAT CONDITION COULD BE SATISFIED, OR AT LEAST WHETHER
24 MR. TARICANI COULD GET THAT TYPE OF MEDICAL CARE ON
25 VERY SHORT NOTICE AND CERTAINLY BY PHYSICIANS FAMILIAR

30

1 WITH HIS CONDITION.

2 THE DOCTORS ALSO INDICATE THAT THE STRESS OF
3 IMPRISONMENT COULD ALTER WHAT THEY DESCRIBE AS THE
4 DELICATE BALANCE THAT THEY BELIEVE THEY HAVE ACHIEVED
5 BETWEEN THE SUPPRESSION OF ANY TENDENCY OF HIS BODY TO
6 REJECT THE TRANSPLANTED HEART AND HIS ABILITY TO FIGHT
7 INFECTION.

8 THE BOTTOM LINE IS THAT I'M REASONABLY CONFIDENT
9 THAT THE BUREAU OF PRISONS COULD PROVIDE APPROPRIATE
10 CARE, BUT I'M NOT SURE ENOUGH THAT I WANT TO SUBJECT
11 YOU, MR. TARICANI, TO THE RISK TO YOUR HEALTH OR LIFE,
12 THAT THEY MAY BE JEOPARDIZED BY IMPRISONING YOU. AND
13 APPARENTLY THE SPECIAL PROSECUTOR AGREES BASED ON HIS
14 RECOMMENDATION.

15 SO, THEREFORE, INSTEAD OF PLACING YOU IN PRISON,
16 I' M GOING TO SENTENCE YOU TO SIX MONTHS OF HOME
17 CONFINEMENT WITH VERY STRICT CONDITIONS DESIGNED TO
18 MIRROR AS CLOSELY AS POSSIBLE THE CONDITIONS THAT YOU
19 WOULD BE SUBJECT TO IF YOU WERE INCARCERATED.

20 I DON' T CONSIDER THE RECOMMENDATION MADE BY
21 MR. MURPHY TO BE ANYWHERE NEAR ADEQUATE TO ACHIEVE THE
22 PURPOSES THAT I' VE MENTIONED. AND THE ONLY REASON THAT
23 THE PRISON SENTENCE IS NOT BEING IMPOSED IS OUT OF
24 CONCERN FOR YOUR HEALTH. YOU DON' T DESERVE TO SUFFER
25 ADVERSE CONSEQUENCES TO YOUR HEALTH OR TO HAVE YOUR

31

1 LIFE JEOPARDIZED.

2 I WANT TO MAKE IT CLEAR THAT, IF I HAVEN' T
3 ALREADY DONE SO, THAT HOME CONFINEMENT IN THIS CASE IS
4 A SUBSTITUTE FOR INCARCERATION. IT' S NOT A STEP DOWN
5 THE ROAD TO REHABILITATION, YOU DON' T NEED ANY
6 REHABILITATION. THE POINT HERE IS TO IMPOSE A PENALTY
7 FOR THE CONDUCT IN WHICH YOU' VE ENGAGED. IT WOULD BE
8 IMPOSSIBLE FOR ME TO ENUMERATE EVERY CONDITION
9 NECESSARY TO ACHIEVE THAT OBJECTIVE. I WILL IN A FEW
10 MOMENTS STATE SOME OF THE CONDITIONS THAT READILY
11 OCCUR, MANY OF WHICH, I MIGHT ADD, ARE TAKEN DIRECTLY
12 FROM THE RULES AND REGULATIONS IN PLACE AT DEVENS, THE
13 INSTITUTION TO WHICH YOU MOST LIKELY WOULD HAVE BEEN
14 ASSIGNED. IF YOU VIOLATE ANY OF THOSE CONDITIONS OR
15 ANY OTHER CONDITIONS OF YOUR PROBATION OR HOME
16 CONFINEMENT, YOU COULD, AND I ASSURE YOU THAT YOU WILL
17 BE INCARCERATED. I HOPE THAT YOU UNDERSTAND THAT AT
18 THIS POINT. THERE' S ONLY SO MUCH CONSIDERATION THAT

19 THE COURT CAN EXTEND AND SO MUCH CONCERN THAT THE COURT
20 CAN HAVE FOR YOUR CONDITION IF YOU DON'T SHARE THAT
21 CONCERN.

22 I'M SURE THAT IF YOU ARE INCLINED TO REWARD THE
23 LENIENCY THAT IS BEING SHOWN BY CONDUCTING YOURSELF IN
24 A WAY THAT CIRCUMVENTS THE PURPOSE THAT I HAVE STATED
25 WITHOUT TECHNICALLY VIOLATING THE CONDITIONS I'M ABOUT

32

1 TO DESCRIBE, I'M SURE YOU COULD DO THAT WITH THE
2 RESOURCES AVAILABLE TO YOU. THERE'S NO DOUBT IN MY
3 MIND THAT YOU COULD PROBABLY DO THAT.

4 I HOPE AND EXPECT THAT YOU WON'T. FIRST OF ALL,
5 BECAUSE I HOPE YOU'RE NOT THAT TYPE OF A PERSON, AND
6 SECONDLY, BECAUSE AN INDIVIDUAL WHO TREADS TOO CLOSE TO
7 THE EDGE OF A CLIFF RUNS THE RISK THAT THEY MIGHT FALL
8 OVER. SO, TECHNICALLY, I GUESS THE WAY TO PUT THIS IS
9 THAT I HEREBY -- WOULD YOU STAND UP, PLEASE,
10 MR. TARICANI, WHILE I IMPOSE THE SENTENCE -- I HEREBY
11 SENTENCE YOU TO A PERIOD OF PROBATION FOR SIX MONTHS ON
12 THE CONDITION THAT YOU SPEND THE SIX MONTHS IN HOME
13 CONFINEMENT WITH THE FOLLOWING SPECIAL CONDITIONS:

14 FIRST OF ALL, YOU MAY NOT LEAVE YOUR HOME FOR
15 ANY REASON WHATSOEVER OTHER THAN TO SEEK AND OBTAIN
16 MEDICAL CARE AND TREATMENT. AND BEFORE LEAVING FOR
17 THAT PURPOSE, YOU MUST CLEAR IT WITH YOUR PROBATION
18 OFFICER UNLESS IT'S AN EMERGENCY SITUATION. IF IT'S AN
19 EMERGENCY AND YOU CAN'T DO THAT, THAT'S UNDERSTANDABLE,
20 BUT YOU ARE TO NOTIFY THE PROBATION OFFICER AS SOON AS
21 PRACTICABLE AFTER DOING THAT.

22 FURTHER CONDITION IS THAT YOU MAY NOT ENGAGE IN

23 ANY BUSINESS OR PROFESSION DURING THE TIME OF YOUR HOME
24 CONFINEMENT. YOU MAY NOT HAVE ANY INTERNET ACCESS,
25 JUST AS INDIVIDUALS IN PRISON MAY NOT HAVE ANY INTERNET

33

1 ACCESS. YOU MAY NOT PARTICIPATE IN ANY APPEARANCES ON
2 RADIO OR TELEVISION. AND YOU MAY NOT HAVE VISITORS
3 EXCEPT DURING THE HOURS OF 2 TO 4 IN THE AFTERNOON AND
4 6 TO 8 IN THE EVENING.

5 NOW, JUST AS PRISONS PROVIDE INMATES WITH AN
6 INCENTIVE NOT TO GET TOO CLOSE TO THE EDGE OF A CLIFF
7 BY GIVING THEM GOOD TIME CREDIT, I'M GOING TO GIVE YOU
8 AN INCENTIVE TO ADHERE TO BOTH THE LETTER AND THE
9 SPIRIT OF THE CONDITIONS OF YOUR HOME CONFINEMENT BY
10 INVITING YOU TO PETITION THE COURT FOR EARLY
11 TERMINATION OF YOUR HOME CONFINEMENT, IF AFTER FOUR
12 MONTHS HAVE GONE BY, YOU HAVE CONDUCTED YOURSELF IN THE
13 MANNER I HAVE ATTEMPTED TO DESCRIBE, BOTH BY STATING
14 THE PURPOSE OF THE HOME CONFINEMENT AND DESCRIBING THE
15 CONDITIONS OF YOUR HOME CONFINEMENT. IF YOU'VE DONE
16 THAT, I INVITE YOU TO PETITION AT THAT TIME FOR EARLY
17 TERMINATION.

18 IF YOU HAVEN'T DONE THAT, YOU CAN PETITION, I
19 GUESS, BUT I THINK IT WOULD BE A WASTE OF TIME.

20 YOU MAY BE SEATED, MR. TARIANI.

21 DO COUNSEL HAVE ANYTHING FURTHER? DO YOU HAVE
22 ANYTHING FURTHER, MR. DESISTO?

23 MR. DESISTO: I DO NOT.

24 MR. MURPHY: AS TO THE DATE OF COMMENCEMENT,
25 YOUR HONOR?

34

1 THE COURT: RIGHT NOW. AS OF TODAY.
2 COURT WILL BE ADJOURNED. I NEGLECTED TO MENTION
3 THAT THE HOME CONFINEMENT WILL BE WITH ELECTRONIC
4 MONITORING. THERE MAY BE SOME PROBLEMS, SINCE I
5 UNDERSTAND YOU HAVE A PACEMAKER, MR. TARIANI, I DON'T
6 KNOW WHAT KIND OF A PROBLEM THAT CREATES WITH THE
7 ELECTRONIC MONITORING, BUT I'M SURE IT CAN BE WORKED
8 OUT. MR. WEINER WILL WORK WITH YOU.
9 MR. TARIANI, IT WAS BROUGHT TO MY ATTENTION
10 THAT I NEGLECTED TO INFORM YOU THAT YOU HAVE A RIGHT TO
11 APPEAL YOUR CONVICTION AND YOUR SENTENCE. IF YOU DO
12 WISH TO APPEAL, YOU MUST FILE YOUR NOTICE OF APPEAL
13 WITHIN TEN DAYS.
14 COURT WILL BE IN RECESS.
15 (ADJOURNED 4:45 P.M.)
16

35

C E R T I F I C A T I O N

I, ANGELA M GALLOGLY, RPR-FCRR, DO HEREBY
CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND
ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE
ABOVE-ENTITLED CASE.

ANGELA M GALLOGLY, RPR-FCRR

DATE