Newsmen's Privilege by Federal Legislation: Within Congressional Power?

By ROBERT G. DIXON, JR.*

CONGRESS currently has under consideration a number of bills that would in various ways and degrees establish a testimonial privilege for newsmen.[1] At issue is the proper accommodation of the important interests of society in a vigorous and effective press zealously pursuing and publishing information and opinion, and the equally important interests of society in the fair administration of justice. Success lies in producing a workable formula that encompasses, balances, and protects both of these interests.

As is evident from recently promulgated regulations designed to foster the free flow of information from sources to newsmen for print or transmission,[2] the Department of Justice has always been sympathetic to the interests of the press in this area, including the interest in protecting confidential sources. We fully recognize the protections conferred on the press by the First Amendment and judicial interpre-

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1. At the time these materials were presented to the Senate, over thirty bills had been introduced in Congress dealing with a privilege for newsmen. A House Judiciary Subcommittee has since reached general agreement with a majority of news media organizations on one bill that would take a dichotomous approach in creating a newsmen's privilege. The bill, H.R. 5928, 92d Cong., 1st Sess. (1973), as amended, would create an absolute privilege applicable in pretrial proceedings and a qualified privilege applicable during the actual trial. In any pretrial action, including a grand jury proceeding, a newsman could not be required to disclose a confidential communication or its source. At trial, a newsman could not be compelled to testify unless the party seeking the information satisfied the court that (1) the information was indispensable to the prosecution or defense, (2) the information could not be obtained from any other source and (3) a compelling public interest required disclosure. The bill would make the privilege applicable in state as well as federal proceedings.

2. See Appendix B and text accompanying note 8, *infra*.

tations thereof.[3] A dynamic and diverse press has served our nation well, fostering the vigorous debate of public issues that is the hallmark of a democracy. Unfortunately, there are occasions when information gathered by the media may occasionally be vital in establishing the guilt or innocence of a person in a criminal proceeding. Justice in a judicial proceeding, or a well-informed judgment on the part of the legislature, may also depend on the availability of information. The interests of the media, like the interests of anyone else with business or personal secrets, on occasion must give way when in direct conflict with an overriding public interest in eliciting information vital to the truth in judicial and legislative proceedings.

An analogous problem regarding public access to needed information arises under the Fifth Amendment's guarantee against compulsory self-incrimination, which grants a right of secrecy to any person who may be incriminated by what he says. Yet not even the Fifth Amendment is an absolute bar to disclosure. Where the obstacle to the truth is a proper claim of this Fifth Amendment privilege, a grant of statutory immunity permits forced disclosure of the publicly-needed information.

The Supreme Court has never recognized a general First Amendment privilege on the part of the press to refuse to divulge secret information or sources.[4] In seeking an absolute statutory privilege against the compulsory disclosure of information and sources in an area where a general constitutional right of secrecy is not recognized, the press is asking for a greater shield against disclosure of publicly-needed information than our system of justice has accorded even to a person who properly pleads the privilege against compulsory self-incrimination.

The Department of Justice, as the chief law enforcement agency of the federal government, opposes the creation of a privilege for newsmen that would be absolute in character. We do this not merely because it seems conceptually inconsistent with the privilege against compulsory self-incrimination, but because we believe that an absolute privilege for newsmen in judicial or legislative proceedings would unduly subordinate the vital national interest in the fair and effective administration of justice. There is no justification for the statutory creation of a new testimonial privilege that would, in every instance, permit a newsman, but not another witness, to refuse to testi-

3. *See* U.S.C.A. Const. amend. I, § 154 [annots.].

4. Branzburg v. Hayes, 408 U.S. 665 (1972).

fy about criminal activity he has observed. The label of "newsman" should not serve as a shibboleth, allowing the reporter who witnesses a bank robbery or receives notice of a bombing to conceal vital information relevant to the prevention or detection of a crime.

Individual Rights v. Newsmen's Privilege— Some Examples

Consider the plight of the judge faced with a situation in which a newsman knowingly prints material in violation of court-ordered limitations on publicity. Here the issue of newsmen's privilege is intertwined with the issue of the proper restraints on publicity surrounding a criminal trial. There must be a balancing of the First Amendment right of the press and the Sixth Amendment right of the accused to a fair trial.

In another context, consider the frustrations of a community unable to obtain corroboration of unverified newspaper charges alleging public corruption or graft. Or consider the even greater frustration of a community which is unable to obtain the testimony vital to conviction of the corrupt office holders.

While the question of a testimonial privilege for newsmen frequently arises within the context of attempts by prosecutors to obtain information, we must also remember that such a privilege may have a great impact on the ability of a defendant to prepare his defense. Besides the public interest in effective law enforcement, additional issues are created when a criminal defendant seeks to adduce evidence to establish his innocence. The application of a newsmen's privilege statute in this context may indeed violate the command of the Sixth Amendment that a criminal defendant is entitled to compulsory process in his own behalf.

The inappropriateness, even danger, of creating an absolute right of secrecy for newsmen takes on added force when placed in juxtaposition with *New York Times v. Sullivan*.[5] The doctrine of that case, and subsequent extensions of it, goes a long way toward removing press accountability for libelous statements concerning public officials. Imagine the situation of a public official who is eggregiously libeled by the press, virtually destroying his public career. In a resultant libel suit against the offending members of the press, the aggrieved public official may attempt to recover, under the severe constraints of the *New York Times* doctrine, if he can prove "that the statement was

5. 376 U.S. 254 (1964).

made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[6] If the notes of journalists were shielded by an absolute privilege law (or even by a qualified privilege allowing full press secrecy regarding civil actions), how could the aggrieved public official obtain the evidence needed to subject the press to even the limited accountability of a libel suit?

In the view of Justice Fortas, the *New York Times* doctrine, even without the added force of a shield law, had been extended to the point of making the First Amendment a "shelter for the character assassinator." He expostulated that the "occupation of public office-holder does not forfeit one's membership in the human race."[7] With the added force of a shield law, it would be not only difficult but perhaps impossible for a public official or public figure to vindicate his libelled character or regain his reputation. Plenary power, that is, power without accountability, is always dangerous, whether it be of the government, business, labor, or the press.

Recognizing that compulsory process in some circumstances may have an inhibiting effect on the ability of a newsman to gather news, the Department of Justice does not oppose, in principle, the search for a viable formula for a *qualified* newsmen's privilege. We share the concern of those who propose bills to create such a qualified privilege. The department, however, believes that the successful experience under the attorney general's "Guidelines for Subpoenas to the News Media"[8] demonstrates that legislation governing federal proceedings is unncecessary at this time.

The Attorney General's Guidelines

The guidelines are a clear statement of the department's policy of negotiation, mediation, and restraint in the area of subpoenas to the press. They embody procedures designed to require careful consideration of the individual case by the prosecutor, extensive negotiation with the newsman and his organization, and a request for issuance of a subpoena after formal authorization by the attorney general if the negotiations fail or the newsman requests a subpoena before producing documents.

6. *Id.* at 279-80.

7. St. Amant v. Thompson, 390 U.S. 731, 734 (1968) (Fortas, J., dissenting).

8. Appendix A, *infra.* Further policy with regard to issuance of subpoenas will be found in Department of Justice Order Number 544-73, Appendix B, *infra.*

The safeguards required by the guidelines correspond to those suggested by Justice Stewart, dissenting in *Branzburg v. Hayes*,[9] and are similar to those provided in several bills introduced in this Congress. Under the guidelines, the attorney general will not authorize a request for a subpoena unless: (1) the information sought is essential to a sucessful investigation of a serious crime, (2) the information is unavailable from non-press sources, and (3) the subpoena is limited and reasonable in time and scope, especially when unpublished or confidential information is sought and First Amendment rights are at stake.[10]

In the *Branzburg* case, Justice White, speaking for the Court, referred to the department's guidelines as a seemingly satisfactory solution to the problem:

> These rules are a major step in the direction the reporters herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.[11]

This indeed has been the case. It has been our experience since the guidelines were announced in August 1970 that the vast majority of situations of potential conflict between the department and the press have been satisfactorily resolved by negotiation.

Since August 1970, the department has requested the issuance of subpoenas to newsmen in only thirteen situations. In eleven of the thirteen instances, the newsmen agreed to testify or to produce documents but preferred the formal issuance of a subpoena. In only two situations not involving a negotiated agreement did the attorney general, on request, approve issuance of subpoenas. The department has denied seven requests for issuance of subpoenas against newsmen because of non-compliance with the guidelines. Data is unavailable concerning the number of preliminary determinations by federal prosecutors not to request disclosure of information by a newsman.[12]

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9. "Government officials must, therefore, demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties." 408 U.S. at 740 (Stewart, J., dissenting).

10. *See* Appendix A, *infra.*

11. 408 U.S. at 707.

12. Since March 1973, the department has requested the issuance of subpoenas to newsmen in four more situations. In each of these instances, however, the newsman was willing to testify or produce photographs but preferred the formal issuance of a subpoena. One of the subpoenas was requested to obtain photographs taken by

To the best of our knowledge, no abuses have occurred regarding subpoenas authorized under the guidelines.[13] Nearly all of the situations involved either photographs or recordings of the actual commission of serious crimes, or unsolicited admissions of guilt received by a news organization. Do not the interests of law enforcement predominate over the interests of the press when government seeks a newsman's photo of an alleged incident of police brutality, or a letter sent to a newspaper by a person who claims to be responsible for the bombing of a federal building? In neither of these situations is a confidential source involved nor is the free flow of information to the public impeded in any way. In only two of the thirteen situations in which subpoenas have been requested against newsmen was a confidential source involved, and in both of these situations the information was supplied on the basis of an agreement with the newsman.

We believe that the Guidelines have successfully operated at the prosecutorial level to alleviate any friction between the press and the federal government and that they encompass, balance and protect the interests in both a free press and the fair administration of justice.[14]

Judicial Protection

It should be remembered that the newsman is accorded judicial protection under existing law. A United States district court can issue an appropriate protective order on a motion to quash a subpoena if a grand jury investigation is not being conducted in good faith or if it improperly interferes with First Amendment rights. As Justice Powell said in *Branzburg*:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with

news photographers at the scene of the shooting of Senator Stennis. The other subpoenas were approved to obtain testimony concerning observations by a newsman of criminal activity, an individual's statements to newsmen relating to a plan to assault law enforcement officers, and a news interview in which it was disclosed that various police officers were involved in bribery and graft. A statement summarizing the experience of the Department of Justice under the Guidelines from the date of their adoption is appended to this article.

13. See Appendix C, *infra.*

14. On October 16, 1973, Attorney General Richardson issued regulations that accord newsmen further protection. 28 C.F.R. § 50.10, Appendix B *infra.* Under these regulations, no newsman shall be questioned about any offense which he is suspected of having committed in the course of covering a news story nor shall he be arrested or indicted without the attorney general's prior authorization. No request for authorization has yet been made.

> respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.[15]

As previously mentioned, a testimonial privilege for newsmen could adversely affect the Sixth Amendment-protected right of confrontation, that is, a defendant's right to compel disclosure of information needed for his defense. Case by case adjudication will ensure that the proper balance can be struck between the interests of the press and the Sixth Amendment right of the accused.

We also cannot ignore the effect of a newsmen's privilege in the context of civil litigation. Here again the courts are capable of protecting the interests of the press. In *Baker v. F & F Investment*,[16] for example, the Second Circuit held that in a civil case, absent an overriding and compelling need for disclosure, the preferred freedoms of the First Amendment and the closely related interest of the public in nondisclosure of a journalist's confidential sources outweigh the public and private interest in compelled testimony. The court distinguished *Branzburg* by emphasizing the overriding interest of that case in the investigation of criminal activity by state and federal grand juries.[17]

To recapitulate, we oppose an absolute privilege because it would not begin to balance the competing and legitimate interest in open disclosure, so vital to the public, the government, and the criminal and civil defendant against the blanket claim of total press secrecy. We also believe that a qualified privilege statute is unneeded, and would pose problems of its own. We can achieve the benefits of qualified privilege by other means.

At present the Department of Justice Guidelines, and the protective measures available in the federal courts, appear to be sufficient to protect the legitimate interests of the press. Moreover, the definition and scope of a qualified privilege has not yet been satisfactorily resolved and presents difficult problems of inclusion and exclusion that

15. 408 U.S. at 710 (Powell, J. concurring).

16. 470 F.2d 778 (2d Cir. 1972).

17. *Id.* at 784. The district court in Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973), reached a similar conclusion. The court ruled that in a civil proceeding, absent either a showing that alternative sources of evidence had been exhausted or approached, or a positive showing of the materiality of the documents or other materials sought, a qualified privilege under the First Amendment protected the disclosure of journalistic sources. *See also* Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

may give rise to litigation and problems of judicial administration. It is doubtful whether a statute providing a qualified privilege would have any additional effect, not already accomplished by the guidelines in ensuring the free flow of confidential information to the press. Because the privilege is qualified depending on the particular facts of the case, the newsman and his source will always run the risk that the privilege may be outweighed in the individual case by a compelling and overriding interest of the public in disclosure of information.

The president has indicated that he would reconsider his position on the need for federal legislation "[s]hould it ever become apparent that the federal guidelines fail to maintain a proper balance between the newsman's privileges and his responsibilities of citizenship . . . ."[18] Such legislation should be adopted, however, only after the necessity for it becomes apparent.

Federal Regulation of State Proceedings

The Department of Justice would in any event continue to oppose federal legislation that would create a testimonial privilege for newsmen which would be binding on state proceedings. As a matter of policy, it would be unwise for Congress to hamstring the states in the operation of their own judicial, administrative and legislative proceedings, areas that have traditionally and properly been left to their control. While I would urge every state attorney general to establish policies and procedures for his state similar to the guidelines, I do not think such requirements should be mandated by a federal statute.

It is tempting to impose a uniform standard. But we must not forget that we have chosen a federal system. Respect for federalism requires respect for state policy in balancing the interests of the administration of justice and of the press, and a tolerance of procedural diversity. It has often been said that one of the great strengths of our federal system is that we have, in the fifty states, fifty experimental laboratories. This virtue of experimentation is particularly compelling here where changes are sought in a complex area which involves a number of anciliary societal issues and difficult problems of definition. If a state errs in its judgment, the resulting danger is confined. If Congress errs with respect to exclusive standards, the danger will pervade the nation.

18. Letter from Richard M. Nixon to Robert Fichenberg, Chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, Nov. 4, 1972.

It should be remembered that newsmen's privilege is essentially a question of evidentiary procedure. To our knowledge, Congress has never attempted to legislate general rules of civil or ciminal procedure, or general rules of evidence for the states, nor has it attempted to impose federal administrative procedure on state government. Such matters have traditionally and properly been left to the individual states. It is true that in order to make congressional witnesses more cooperative, Congress may immunize them against state prosecution,[19] but that is simply a conventional use of the traditional federal supremacy principle to protect legitimate federal interests.[20] It is also true that many states have used federal models in formulating their own procedures, particularly the Federal Rules of Civil and Criminal Procedure. In such cases, however, the states have adopted the federal model of their own volition and have been free to make changes consistent with local practice and local conditions. A federal statute imposing a testimonial privilege on the states breaks with this tradition.

Legislation imposing a testimonial privilege on the states is likely to pose problems of comity between federal and state courts and to strain their delicate interrelationship. Questions are bound to arise arise concerning the role of the federal courts in supervising the administration and enforcement of the privilege by the states. Do proceedings in state courts involving newsmen's privilege raise a question of a federally protected "civil right" that warrants removal to a federal court? Can a federal court enjoin a state judicial or legislative proceeding involving newsmen's privilege, or quash a state subpoena? If the protection of a newsmen's privilege is premised on a constitutional right as defined by Congress, is a state judge or legislator civilly liable under Federal Civil Rights Laws[21] for deprivation of a right under color of law when he issues a subpoena to a newman? Such questions are inevitably raise by legislation in this area.

As a matter of constitutional law, federal legislation to create a newsmen's privilege applicable to state courts and proceedings would stretch the powers of Congress under Article I of the Constitution to their limits if not beyond them. I assume that one constitutional basis on which such legislation might be premised is the Commerce

19. Adams v. Maryland, 347 U.S. 179 (1954).

20. *See* Adams v. Maryland, 347 U.S. 179 (1954). Justice Black also indicated that the statute in question was in accord with the Fifth Amendment. *Id.* at 182.

21. 42 U.S.C. § 1983 (1970).

Clause.[22] The news media, it could be argued, are instrumentalities of interstate commerce. Congress can prevent states from imposing unreasonable burdens on the instrumentalities of commerce, state subpoenas of newsmen may be deemed an unreasonable burden, and therefore Congress can regulate state subpoenas of newsmen. On close examination, however, we think this reasoning is of questionable validity.

It is true that in defining the powers of Congress to regulate, the Supreme Court has held the media to be an instrumentality of commerce.[23] But this alone does not compel the conclusion that Congress can therefore regulate state courts and state legislatures with respect to the media. Only if these courts and legislatures impose an unreasonable burden on the media would a protection of commerce argument be warranted.

A state legislature, like the Congress, has a fundamental right to acquire the necessary information on which to base its legislative judgments. A state court, like a federal court, can compel from all persons information necessary to its adjudicatory functions.

Yet, before Congress can restrict the Tenth Amendment-protected subpoena power of state courts and legislatures on the basis of the Commerce Clause, it must make some determination that the subpoena is such a grave burden on interstate commerce as to necessitate the restriction on the states. The Supreme Court has traditionally limited the right of Congress to regulate the news media under the Commerce Clause to regulation of only the media's business activities. The Court has reached the conclusion that the news business is in interstate commerce for the purposes of being held subject to certain types of federal regulation of general business, for example, the National Labor Relations Act.[24] In the area of newsmen's privilege, Congress would be attempting to regulate the very functioning of state government in the name of protecting the interstate aspects of the media. Presumably this necessitates a finding that the functioning of state courts and legislatures unreasonably restricts the ability of the media to gather news on an interstate basis. But as the Court noted in *Branzburg*:

22. U.S. Const. art. I § 8, cl. 3.

23. Associated Press v. N.L.R.B., 301 U.S. 103 (1937).

24. 29 U.S.C. §§ 151 *et seq.* (1970). Associated Press v. N.L.R.B., 301 U.S. 103 (1937); *see also,* Associated Press v. United States, 326 U.S. 1 (1945) (news media subject to federal antitrust laws).

> [T]he evidence fails to demonstrate that there would be significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.[25]

If federal legislation premised on the Commerce Clause is open to question, it could be argued that such legislation be based upon section 5 of the Fourteenth Amendment as implementing its due process clause. While *Katzenbach v. Morgan*[26] suggests that the power of Congress to implement the equal protection clause of the Fourteenth Amendment is very broad, *Oregon v. Mitchell*[27] indicates such congressional power is not without limits.

To assert that Congress has the power to legislate a newsman's privilege binding on the states under section 5 as an implementation of the due process clause is to set the stage "to strip the States of their power . . . to govern themselves" to use the words of Justice Black.[28] The guarantees of life, liberty and property encompass the entire field of human activity and thus of potential legislative action. Any rule of evidence could be determined by Congress to impinge on that guarantee. Accordingly, under this theory, there would exist a basis for congressional action to enact legislation superseding every state rule of evidence. Certainly section 5 should not be read to confer such power on Congress, for such a reading would contravene the principle of federalism, the viability of which the Constitution was consciously intended to maintain. That *Katzenbach v. Morgan*[29] may have been the high-water mark of an expansive interpretation of section 5 has been recognized by Justice Stewart. "That case, as I now read it, gave congressional power under § 5 the furthest possible legitimate reach."[30]

While the *Branzburg* Court held that the First Amendment does not grant newsmen an absolute privilege to withhold confidential information as against a lawful subpoena, it had no occasion to reach the question of the federal authority to impose a statutory privilege upon the states as an implementation of the Fourteenth Amendment. It is noteworthy, however, that when the Court spoke of the authority of Congress to accomplish by legislation what it declined to do as a

25. 408 U.S. at 693.
26. 384 U.S. 641, 651 (1966).
27. 400 U.S. 112 (1970).
28. *Id.* at 127.
29. 384 U.S. 641 (1966).
30. Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, Blackman, J.J., Burger, C.J., concurring).

matter of constitutional interpretation, it prefaced its remarks with "[a]t the federal level."[31] The Court also noted that it is "powerless" to bar state legislatures from recognizing such a privilege by statute.[32]

Conclusion

The Department of Justice recognizes the legitimate interests of the press in gathering news and protecting confidential sources. We understand the concern of those who are proposing legislation to create a qualified testimonial privilege, but we are also mindful of the difficulties in drafting and administering such legislation. We believe that the successful experiences of the department's "Guidelines for Subpoenas to the News Media" demonstrates that such legislation is unnecessary at this time. The department opposes the enactment of an absolute privilege bill, that is, an absolute press secrecy bill, because it would sacrifice in every instance the search for truth in judicial and legislative proceedings to the interest of the press. For the reasons just discussed, we also oppose any federal legislation that would create a newsman's privilege applicable to state proceedings.

The department will continue its policy of restraint and negotiation in the area of subpoenas to newsmen. A request for a subpoena will be authorized by the department only in those limited instances where the conditions of the guidelines are met and where the information is essential to the successful investigation or prosecution of a serious federal crime. The accommodation of the sometimes conflicting interests of a free and effective press and the fair and effective administration of justice can be achieved by pledging ourselves to an atmosphere of negotiation and restraint, in order that the basic values of a free press and a free society may be served.

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31. 408 U.S. at 706.
32. *Id.*

Appendix A

Department of Justice Guidelines for Subpoenas to the News Media August 10, 1970

FIRST: The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.

SECOND: The Department of Justice does not consider the press "an investigative arm of the government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

THIRD: It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media. In these negotiations, where the nature of the investigation permits, the givernment should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

FOURTH: If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General. If a subpoena is obtained under such circumstances without this authorization, the Department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

FIFTH: In requesting the Attorney General's authorization for a subpoena, the following principles will apply: A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations. B. There should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information. C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources. D. Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information. E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged. F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government. G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.

Appendix B

Policy with Regard to the Issuance of Subpoenas to, and the Interrogation, Indictment, or Arrest of, Members of the News Media[33]

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues.

In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department:

(a) In determining whether to request issuance of a subpoena to the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from non-media sources before there is any consideration of subpoenaing a representative of the news media.

(c) Negotiations with the media shall be pursued in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingeness to respond to particular problems of the media.

(d) If negotiations fail, no Justice Department official shall request, or make arrangements for, a subpoena to any member of the news media without the express authorization of the Attorney General. If a subpoena is obtained without authorization, the Department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

(e) In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

(1) There should be reasonable ground based on information obtained from non-media sources that a crime has occurred.

(2) There should be reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

(3) The government should have unsuccessfully attempted to obtain the information from alternative non-media sources.

33. 28 C.F.R. § 50.10 (1973) (issued by Attorney General Richardson).

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

(f) No member of the Department shall subject a member of the news media to questioning as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General: *Provided, however,* that where exigent circumstances preclude prior approval, the requirements of paragraph (j) shall be observed.

(g) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media.

(h) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General.

(i) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the Attorney General. A copy of the request will be sent to the Director of Public Information.

(j) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Information.

(k) Failure to obtain the prior approval of the Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

Appendix C

Department of Justice Requests for Subpoenas to Newsmen Since the Issuance of the Attorney General's Guidelines in August 1970[34]

This memorandum summarizes the actions of the Department of Justice with regard to requests for the issuance of subpoenas to newsmen since the issuance in August, 1970 of the Attorney General's "Guidelines for Subpoenas to the News Media." Following brief discussion of the general experience of the Department, the memorandum will outline the activities of the four divisions (Civil Rights, Criminal, Internal Security, Tax) which have been, or could likely have been, involved with subpoenas to newsmen during the more than two-year period since August 10, 1970.

Under the Guidelines there are several opportunities for a determination to be made that a request for a subpoena to a newsman is unnecessary or inappropriate. The prosecutor in charge of the investigation (usually a United States Attorney) must make a preliminary determination that the information possessed by the newsman is essential, cannot be obtained from other sources, and that in other respects the Guidelines are satisfied. No data is available concerning the number of occasions in which a federal prosecutor has made this preliminary determination in favor of not requesting disclosure of information by a newsman.

If the prosecutor has a strong interest in the production of testimony or documents possessed by newsmen, the initial step is negotiations with the newsman or news organization concerning the nature, importance and relevancy of the particular information to the pending criminal investigation. The Department does not possess information concerning the number of instances in which such negotiation has led a federal prosecutor to conclude that he should not request issuance of a subpoena to a newsman.

When negotiations with a newsman are undertaken, they frequently lead to an agreement concerning the nature and scope of the information that will be made available. Sometimes a newsman agrees to provide information voluntarily and without issuance of a subpoena. On other occasions a newsman agrees to provide the information but prefers the formal issuance of a subpoena either as a matter of personal convenience (*e.g.*, for his own records or to insure the payment of witness fees) or as a matter of professional conduct.

Since August, 1970 there have been eleven situations in which newsmen, while they were willing to testify or produce documents, preferred that a subpoena be issued. (In some of these situations, as the more detailed description indicates, more than one newsman or news organization was involved.) On five of these occasions (two in the Civil Rights Division and three in the Internal Security Division), divisions of the Department requested the issuance of subpoenas without referring the matter to the Attorney General. In the other six instances where there has been an agreement between the newsman and the Government, the Criminal Division has forwarded a request for issuance of a subpoena to the Attorney General, and in each case the request was approved.

The difference in practice indicated by this data was the result of an ambiguity in the Guidelines. The Department believes that the practice of the Criminal Division, under which all requests for subpoenas to news me-

34. Department of Justice, Memorandum (Mar. 1, 1973).

dia are referred to the Attorney General, is preferable. The Department has issued a directive that requires all requests for issuance of a subpoena to a newsman to be referred to the Attorney General, unless the newsman is willing to testify voluntarily without issuance of a subpoena. No subpoena to a newman has been requested since the issuance of this directive in October, 1972.

It should be noted that nearly all of the situations in which the Department of Justice has authorized a subpoena request to a newsman involved either photographs, recordings, actual commission of serious crimes, or unsolicited admissions of guilt received by a new organization. For example, a federal prosecutor may seek a newsman's photograph of an alleged incident of police brutality or a letter sent to a newspaper by a person who claims to be responsible for the bombing of a federal building. In neither of these situations is any confidential source involved, nor is there an impediment to the free flow of information to the public. In only two of the thirteen situations in which subpoenas have been requested of newsmen was a confidential source involved, and in both of those situations the information was supplied on the basis of an agreement with the newsman.

There have been only two instances since August, 1970 where negotiations with the newsman were unsuccessful and a division of the Department, believing that the information was essential to a successful investigation, forwarded its request for a subpoena to the Attorney General. In each of these two instances, one from the Criminal Division and one from the Internal Security Division, the Attorney General authorized the request for a subpoena as consistent with the Guidelines.

There have been seven other situations in which the Department determined that conditions set forth in the Guidelines were not satisfied and that subpoenas should not be requested. Four of these negative determinations involved the Criminal Division and three involved the Internal Security Division. In each instance the determination was made at the division level and the matter was not forwarded to the Attorney General for his consideration.

In summary, the Department of Justice has requested issuance of subpoenas to newsmen in thirteen situations since the Guidelines went into effect in August, 1970. In eleven of the thirteen situations the newsmen agreed to testify or to produce documents but preferred the formal issuance of a subpoena. In only two situations not involving a negotiated agreement was the Attorney General asked to approve the request for issuance of subpoenas; and in each case the request was approved. In seven situations the Department determined that the issuance of a subpoena to newsmen would not be in compliance with the Guidelines and no request for compulsory process was made.

The following pages contain a more detailed description of the Department's administration of the Guidelines by the four divisions that have or may have been involved with subpoenas to newsmen under the Guidelines. The narrative statement concerning each specific situation is cast in general terms in order not to prejudice the interests of the newsmen involved or of those persons who were under investigation. The records of the Department do not indicate in every case whether the investigation resulted in an indictment or a conviction and, if a trial was held, whether the newsman testified. But an effort has been made to provide information that is as complete as possible.

Criminal Division

The Criminal Division reports ten different instances of involvement with subpoenas to newsmen. On seven occasions, the Criminal Division has forwarded formal requests to the Attorney General seeking his authorization for a request for the issuance of a subpoena to a newsman; all seven requests have been authorized by the Attorney General. In six of those instances, the publications or newsmen involved indicated a willingness to provide information but requested issuance of a subpoena. On one occasion, a request from the FBI for the issuance of a subpoena was denied by the Division. The final instances dealt with unauthorized subpoenas issued to newsmen who had not agreed to appear voluntarily; the action of the Department in correcting the mistakes is described below in paragraph 9 and 10.

(1) During a grand jury investigation of alleged manipulations of egg future prices on the commodity exchange, the United State Attorney for the Southern District of New York sought a request for a subpoena to be issued to certain employees of two financial publications to produce information and copies of press releases by those publications which were related to the alleged manipulations. On September 3, 1971 a request for the issuance of subpoenas was forwarded to the Attorney General, and was subsequently approved by him. There is no indication in Department files whether the publications were willing to produce the requested information.

(2) On September 14, 1971, several co-defendants who had been charged with the theft of United States Government property held a news conference in San Francisco. At the news conference, various incriminating statements were made by some of the defendants. The news conference was video-taped and later televised by two broadcast media. Spokesmen for the broadcasters told government attorneys that it was the firm policy of their stations to provide information only upon issuance of a subponea, and that upon such issuance they would produce the video tapes. On November 2, 1971, the Attorney General approved a request for the issuance of subpoenas for production of the video tapes at the trial of the co-defendants, which was scheduled for November 15, 1971.

(3) In relation to the investigation of the attempted assassination of Governor George C. Wallace on May 15, 1972, there was forwarded to the Attorney General on May 19, 1972 a request for the issuance of subponeas to several television networks to produce at a grand jury investigation all films, published and unpublished, taken at the shopping center where Governor Wallace was shot. The Attorney General subsequently approved the requests for issuance of the subpoenas. Preliminary negotiations indicated that the networks were willing to produce the requested information for the investigation but requested that subpoenas be issued to them. Indictments were returned by the grand jury.

(4) On May 10, 1972 a newspaper photographer photographed a demonstration at the United States Post Office in Madison, Wisconsin, at which a Postal Service employee was assaulted. Production of the pictures taken by the photographer was sought at a subsequent grand jury investigation. He was willing to produce copies of published photographs for the investgation, but indicated that he would like to be issued a subpoena requiring production of unpublished photographs. On June 9, 1972, the Attorney General approved a request to subpoena the photographs.

(5) On July 6, 1972, a reporter and cameraman of a television station conducted an interview in the Arizona desert with certain members of

the "Sons of Liberty," a right-wing militant group. Certain portions of that interview were subsequently broadcast by the television station. The United States Attorney's office in Phoenix sought to have the station produce at a subsequent grand jury investigation 500 feet of film and tape recordings which were not used on the air and were believed to contain assassination threats against certain government officials. The station indicated in negotiations with government prosecutors that they would provide the information but requested the issuance of a subpoena. On August 2, 1972, the Attorney General approved a request for the issuance of a subpoena for the production of the film and the tape recordings.

(6) A federal grand jury was convened in mid-1972 to investigate certain irregularities that allegedly occurred at the polls in Chicago during the March 21, 1972 primary election. Prior to newspaper publication of a story on these irregularities, a reporter and his editor came to the U.S. Attorney and offered to make information available. The Attorney General approved a request, forwarded to him on August 19, 1972, for the issuance of a subpoena to the newspaper reporter to appear and testify before the grand jury investigating voting frauds. The grand jury investigation recently resulted in the indictment of approximately 40 persons for federal voting law violations.

(7) During a May 21, 1972 demonstration in Washington, D.C., several FBI agents were allegedly assaulted while attempting to arrest certain demonstrators. On September 13, 1972, the Attorney General approved a request for the issuance of subpoenas to two news-gathering organizations to produce negatives and photographs of the events of May 21, in connection with a grand jury investigation of the incidents of that day. The news organizations requested the issuance of the subpoenas prior to their production of the negatives and photographs.

(8) In 1971, the FBI requested attorneys in the Criminal Division to consider a request for a subpoena to certain broadcast media for unreleased film footage of the events surrounding an alleged attack on President Nixon during a visit to San Jose, California. It was determined by the Criminal Division at that time that a sufficient showing of a need for the issuance of a subpoena had not been made, and the request by the FBI was declined. The matter was not referred to the Attorney General for consideration.

(9) A Puerto Rican newspaper printed an article in 1972 which alleged that an employee of the National Labor Relations Board had accepted monies from one party to a labor dispute in exchange for siding with that party in the dispute. Without prior negotiations with or an expression of voluntary compliance by the reporters, the United States Attorney's office in Puerto Rico subpoenaed the reporters from the paper to appear at a grand jury investigation of the matter. The Criminal Division immediately informed the United States Attorney's office that the Attorney General's Guidelines had not been complied with, and the United States Attorney promptly postponed the investigation and notified the subpoenaed reporters that their attendance under the subpoena for the original date was no longer required; the reporters have not subsequently been re-subpoenaed.

(10) In November of 1972, the Criminal Division was contacted by the United States Attorney's office for the Eastern District of Illinois, which is conducting an investigation of gambling activities at a pocket billiard tournament in Illinois. The tournament was raided by the Internal Revenue Service and cameramen from a major TV network were present and filmed

the raid. A subpoena was issued by the United States Attorney's office to have the cameramen produce the film for a grand jury investigation of the matter. The Criminal Division directed the United States Attorney's office to quash the subpoena and to forward a request for formal authorization to the Department if the films were still desired for the investigation. The subpoena was quashed; a formal request for the authorization of the Attorney General has not yet been forwarded to the Department by the United States Attorney's office.

Internal Security Division

The Internal Security Division reports eight instances involving the issue of subpoenas to newsmen. On one occasion, the Division forwarded a formal request to the Attorney General seeking his authorization of a request for the issuance of a subpoena to a newsman; that request was authorized by the Attorney General. On four occasions, the Division decided that the issuance of a subpoena was not essential or sufficiently justified by the particular facts involved. On two occasions, the newsmen agreed to provide information but requested the issuance of a subpoena, which was then issued. On another occasion, certain newsmen agreed to provide information at trial, and subpoenas were subsequently issued.

(1) In 1970, a student publication at the University of Wisconsin published an article which indicated that certain persons had identified themselves as the bombers of the Army Mathematics Research Center on the campus. A subpoena was originally requested by a U.S. Attorney on the erroneous assumption that student publications were not included in the news media subject to the Guidelines. The subpoena was quashed and authorization from the Attorney General was sought and obtained in September, 1970 for a request for the issuance of a new subpoena to an editor of the newspaper to appear at a grand jury investigation of the matter. The editor was not called to testify because he had already been sentenced to jail for contempt for failing to testify before a local grand jury investigating the bombing.

(2) In April, 1971, in conjunction with an investigation of certain possible violations of federal law relating to the teaching of the use of explosives for use in a riot, the United States Attorney's office for the Southern District of Florida asked the Internal Security Division to consider a request for the issuance of subpoenas to eight newsmen who had on previous occasions interviewed possible individual defendants in the case in relation to the involvement of themselves and their organizations in certain criminal activities. The newsmen were employed by various news-gathering organizations. The Internal Security Division decided that a showing of necessity sufficient to satisfy the Guidelines had not been made and denied the request. The matter was not formally presented to the Attorney General for his consideration.

(3) In June, 1971 a grand jury in the Eastern District of New York was investigating a break-in at a federal building in that district. There were indications that a newspaper reporter had received a telephone call relating to facts surrounding the break-in. Deciding that the conditions of the Guidelines could not be satisfied at that time, the Internal Security Division decided not to seek authorization for a subpoena request. The matter was not presented to the Attorney General for his consideration.

(4) In early 1972, grand juries in New York, Illinois and California conducted investigations of certain bombings of banks and other violations of federal law that occurred on July 16, 1971 in New York, Chicago, and San Francisco. Eleven newsmen employed by various news-gathering organizations received correspondence containing information relating to the incidents. It was decided by the Internal Security Division that there was insufficient necessity at that time to justify subpoenas to the newsmen involved. The matter was not referred to the Attorney General for consideration.

(5) The Internal Security Division, in the course of an investigation of bombings in the Los Angeles area in July, 1971, and in April, 1972, had discussions with three Los Angeles newsmen who agreed to testify before a May, 1972 grand jury investigation of the bombings. Subpoenas were issued to the three newsmen for the purpose of assuring their expenses. The formal authorization of the Attorney General was not sought.

(6) In connection with separate break-ins in October, 1971 at three federal buildings in New York State, two newsmen who had been contacted by persons who alleged that they were responsible for the break-ins agreed to appear before a March, 1972 grand jury investigating the incident. The newsmen requested the issuance of a subpoena prior to their appearance, and the subpoenas were issued. The formal authorization of the Attorney General was not sought.

(7) A grand jury in the District of Oregon returned an indictment on April, 1972 against a defendant for violation of the Gun Control Act of 1968. No newsmen were subpoenaed to appear before the grand jury, but four newspaper reporters agreed to testify at the trial concerning their receipt of letters claiming credit for a firebombing related to the gun charges. Subpoenas were issued to the newsmen; the formal authorization of the Attorney General was not sought. The defendant in the case pled guilty and the testimony of the newsmen was therefore not necessary.

(8) In October, 1972, the Assistant Attorney General in charge of the Internal Security Division denied a request by the United States Attorney in the Northern District of Ohio for authorization to subpoena a newsman employed by a radio station in Cleveland; the matter was not referred to the Attorney General. The newsman, who was also a local minister, had participated in an interview, a tape of which was broadcast in July, 1972, with four unnamed male persons in which the persons had claimed responsibility for a break-in earlier that month at a local draft board in Ohio. The minister-newsman had refused to informally provide information to the United States Attorney's office, claiming a "priest's privilege."

Civil Rights Division

The Civil Rights Division reports two instances dealing with the issuance of subpoenas to newsmen. In both instances, newsmen agreed to appear and testify concerning information in their possession, and subpoenas were subsequently issued.

(1) In 1971, a grand jury in Indiana was investigating alleged assaults by prison guards on prisoners at the Pendleton State Reformatory in September, 1969. An Indiana newspaper reporter contacted the Department of Justice and volunteered information concerning events surrounding the incident at the reformatory. A subpoena was issued to the newsman for appearance before the grand jury; the formal authorization of the At-

torney General was not sought. The grand jury returned indictments against nine persons in connection with the incident at the reformatory.

(2) In July, 1970, a federal grand jury investigation of the shootings the month before at Jackson State University (Miss.) was commenced. Two newsmen employed by a broadcast organization in Jackson agreed to appear before the grand jury to testify concerning the events at Jackson State and to provide certain films and tapes that were in their possession. Subpoenas were issued to the newsmen; the formal authorization of the Attorney General was not sought.

Tax Division

The Tax Division has not had occasion to request issuance of a subpoena to a newsman since the Guidelines were adopted.

The Reporters Committee for Freedom of the Press has compiled a list of 30 recent cases in which subpoenas, court orders or police action have allegedly threatened "the free flow of news to the public." As reported in the *New York Times* of February 18, 1973, the Committee lists nine instances where the federal courts have been involved in such action; the remaining cases involve state proceedings.

In two of the federal cases, Earl Caldwell of the *New York Times,* and Sherrie Bursey and Brenda Joyce Presley of the Black Panther newspaper were ordered by federal grand juries to provide information or sources concerning alleged criminal activity. Both of these instances occurred prior to the issuance by the Attorney General in August, 1970 of the Department of Justice's "Guidelines for Subpoenas to the News Media."

One case, involving Harvard Professor Samuel Popkin, concerned a subpoena from a federal grand jury in Boston to Dr. Popkin, who is not a newsman under the provisions of the Guidelines.

In another instance, Thomas L. Miller of the College Press Service was subpoenaed on July 27, 1971, to appear before a federal grand jury in Tucson. Upon a motion to quash by Mr. Miller, the Government's allegation that he was not a newsman was rejected by the district court and the Government was ordered to demonstrate a need for the testimony. The Government appealed, and the Ninth Circuit Court of Appeals withheld decision pending the decision by the Supreme Court in the *Caldwell*[35] case. By the time the Supreme Court decided *Caldwell* in June, 1972, the grand jury had adjourned; Mr. Miller was therefore not recalled and the issue became moot.

In three of the instances listed by the Committee, the Department of Justice was not involved.

Alfred Balk, of the *Saturday Evening Post,* was subpoenaed by private plaintiffs in a federal civil rights case to appear and give testimony before a federal court in New York. Benny Walsh of *Life* magazine was ordered by a federal court to identify sources in a civil action for defamation. In both of these instances involving civil actions, federal appellate courts decided that there was not sufficient justification to compel the testimony of the newsmen.

In the trial of seven persons charged with the break-in at Democratic headquarters at the Watergate, counsel for the defense subpoenaed tapes

35. Branzburg v. Hayes, 408 U.S. 665 (1972).

and material from the *Los Angeles Times* concerning interviews with a key prosecution witness. As the transcript of the hearing of the newspaper's motion to quash that subpoena indicates, the government was not involved in the subpoena request or issuance. Crim. No. 1827-72, U.S. District Court for the District of Columbia, pre-trial hearing of December 19, 1972.

Another listed instance involved investigative reporter Leslie H. Whitten who was arrested in Washington and charged with the unlawful possession of stolen Government documents. A federal grand jury refused to indict Mr. Whitten and charges were dropped. No question of newsman's privilege was presented by this situation of alleged criminal conduct on the part of a newsman.

The final instance involved Mark Knops, editor of a student publication at the University of Wisconsin, who was subpoenaed to appear before a federal grand jury in Wisconsin. Mr. Knops was not actually called to testify in the federal proceedings since he had already been incarcerated for contempt for failing to testify before a local grand jury conducting a similar investigation. Further details of this incident may be found at number 1 in the above description of the activities of the Criminal Division.