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The Attorney General

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Subpoena of Press Materials in Grand Jury Investigations.

You have requested my opinion as to possible defenses that may be asserted by publishers or reporters to grand jury subpoenas calling for unpublished material which has been gathered in the course of ordinary newspaper activity. The question breaks down into three different categories: (1) constitutional right; (2) evidentiary privilege; and (3) vulnerability of subpoena to a motion to quash under the Federal Rules of Criminal Procedure. As indicated in the more detailed discussion below, I have concluded that, as a general rule, grand jury subpoenas in criminal cases are not vulnerable to successful attack on any of these three grounds. I append to this memorandum a memorandum prepared by Ted Garrett of our office, which ably discusses in greater detail, the cases and comments dealing with the problem. (Feb. 10, 1970)

(1) Constitutional Right. The Supreme Court of the United States has never passed on the question of whether a publisher or newspaper reporter has a constitutional right, presumably arising under the First Amendment, to refuse to produce notes of unpublished material or information supplied by a confidential informant in response to a grand jury subpoena. However, the Court of Appeals for the Second Circuit, in an opinion written by then Circuit Judge Potter Stewart, decided a /virtually identical/ question in the negative in Garland v. Torre, 2nd Cir., 259 F.2d 545, cert. denied, 358 U.S. 910 (1958). Two well-considered state cases have addressed themselves to the same question within the past few years, and reached a like result. State v. Buchanan, Ore. 436 Pac. 2d 729 (1968); In re Goodfader's Appeal (Hawaii), 367 Pac. 2d 472 (1961). The general tenor of the analysis in these

cases is that while the subpoena of material obtained from news sources may be something of a burden on the press, in this case the press must suffer that burden in order that the equally vital power of the court and the judicial process to compel testimony may be preserved. The following statement from Garland typifies the conclusion reached:

"But freedom of the press, precious and vital that it is to a free society, is not absolute. . . . If an additional First Amendment liberty--the freedom of the press--is here involved, we do not hesitate to conclude that it, too, must give place under the Constitution to a paramount public interest in the fair administration of justice." 259 F.2d at 548-49.

In Garland, supra, the Court pointed out that the information sought by the plaintiff was at the "very heart" of her case, impliedly reserving the question that would arise if wholesale disclosure of a newspaper's confidential sources of news were demanded where the information would be of doubtful relevance or materiality. However, in evaluating this aspect of Garland, it should be remembered that that was a civil case, where presumably the power to compel testimony is not as vital to the administration of the overall judicial system as it is in a criminal case; it should also be remembered that "relevance and materiality necessarily are terms of broader content in their uses to a grand jury investigation than in their uses to the evidence of a trial . . . some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." Schwimmer v. United States, 8th Cir., 232 F.2d 855, cert. denied, 352 U.S. 833 (1956).

(2) Evidentiary Privilege. Newsmen have also on occasion claimed a form of "informant-reporter" privilege, based not upon the Constitution but upon what they claim is an analogy to other common law evidentiary privileges--lawyer-client and penitent-priest. The uniform view of all courts which have considered this claim is that while such

a privilege may be created by legislative action, it does not exist in the absence of such action. State v. Buchanan, supra; In re Goodfader's Appeal, supra; Clein v. State, 50 So. 2d 117 (Fla. 1950); People ex rel Mooney v. New York County, 269 N.Y. 291, 199 N.E. 415 (1936).

Some 12 states have adopted some form of informant-reporter privilege by statute. Federal law is clear, however, that in federal criminal cases the federal court is not bound by any state law or rule of privilege, although federal courts may look to the law applied by state courts as a guide in applying the controlling provisions of Rule 26, F.R.C.P.:

"The admissibility of evidence and the competency and privileges of witnesses shall be governed, except where an act of Congress or these rules otherwise provide, by the principles of the common law as they might be interpreted by the courts of the United States in light of reason and experience."

It is conceivable under this rule that the Supreme Court of the United States, or one of the federal courts of appeal, could decide that sufficient policy considerations favor the establishment of the informant-reporter privilege so as to adopt it as a matter of evolving common law, even though there is no statutory authority for it. However, the overwhelming weight, not merely of case authority but of scholarly comment, opposes the establishment of such a principle not merely because it lacks precedent, but because it is bad in principle. Generally speaking, both the courts and the commentators feel that the public interest in administering justice outweighs any considerations of interference with valuable channels of information for the news-gathering media, and that the power to compel testimony is an indispensable requisite to the administration of justice. 9 Clev.-Mar. Law Review 311 (1960); 61 Mich. Law Review 184 (1962); 45 Yale Law Journal 357 (1935); 8 Wigmore on Evidence §2286 at note 9 (1961 edition, 1964 pocket supplement).

Justice Douglas dissented from the denial of certiorari in Garland v. Torre, supra (1958); no dissents from the denial

of certiorari in State v. Buchanan, supra (1968) were recorded. To the extent it is possible to analyze developing trends in the law, the notion of an informant-reporter privilege is by no means "an idea whose time has come." It is a claim that has been advanced by newsmen on numerous occasions, and a claim that has been rebuffed by both courts and commentators with considerable uniformity.

Finally, it should be pointed out that the establishment of the informant-reporter privilege would cover only information obtained from a confidential source by a newsmen, with the understanding that the confidentiality of the source be preserved. Such a privilege would under no circumstances embrace unpublished material which had been gained by the newsmen's own observations, or by interviews which were not conducted with any understanding that they would be held in confidence. Thus the most expansive claim of reporter-informant privilege would not embrace many of the materials which were involved in the recent subpoenas issued by the Department.

(3) F.R.C.P. 17(c) provides that the court on motion "may promptly quash or modify the subpoena if compliance would be unreasonable or oppressive." This rule affords a remedy for any person subpoenaed--be he newspaperman, truck driver, accountant, or any other individual--if the subpoena is unreasonably broad in its requirement of production, and at least part of the material sought is a very dubious materiality. However, the cases interpreting the rule accord the government a good deal of latitude in the investigational stage of a prosecution. The Court of Appeals for the Eighth Circuit has said:

"Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury."
Schwimmer v. United States, 232 F.2d 855 (1956).

Conclusion.

There is no legal reason whatever, based either on the Constitution, the law of evidentiary privilege, or the provisions of the Federal Rules of Criminal Procedure, which place newsmen in any position of special privilege as compared to ordinary individuals who may be subpoenaed before a grand jury. Neither their unpublished material, nor interviews they may have had with various informants, are protected by any rule of law from disclosure to the grand jury where relevant to its inquiry. It should be recognized by the Department, therefore, that any accommodations made with newsmen by way of negotiation, compromise, and the like are made for reasons other than any legal weakness in the government's case. The law clearly establishes the absolute necessity of testimonial compulsion in the administration of criminal justice, and newsmen are not excepted from that necessity.