The Justice Department's Guidelines and Privileged Communication

In a move to allay fears about encroachments by the Department of Justice on freedom of the press, Attorney General John N. Mitchell, speaking before the House of Delegates at the American Bar Association's Annual Convention in St. Louis in August, announced that he had issued guidelines to the Justice Department to limit the discretion of government lawyers to subpoena newsmen to testify in criminal cases.

The guidelines provide that reporters and photographers will not be subpoenaed unless the information they allegedly possess is deemed crucial and cannot reasonably be obtained elsewhere.

Affirming that the Department of Justice does not consider the press "an investigative arm of the government," the guidelines provide at the outset:

> 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.

The guidelines call for "negotiations with the press in all cases in which a subpoena is contemplated." The negotiations are designed 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 Government 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."

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Comforting though the Attorney General's words may have been by comparison with the previous policy under which notes and testimony of newsmen had been summarily subpoenaed in investigations of the activities of militant groups, the guidelines are still far removed from assertion or recognition of the inviolability of the First Amendment.

For the scholar, at least as much as for the newspaper reporter, the danger remains real that he may find himself an unwitting or unwilling investigator for the Department of Justice.

Most of us involved in teaching, practice, or research bearing on law and the social sciences are aware of and pleased by the progress in empirical research. One need no longer invoke prayer or hyperbole in order to affirm that the progress has been steady and the outputs significant, especially in the pages of this journal. Methodologies have become more sophisticated, and there has been growing receptivity by judges, lawyers, and laymen alike to research projects focusing on the interrelationships of law and society. Indeed, a major pattern of recent judicial action consists of the reexamination of legal norms so as to enhance their congruence with social reality. The Attorney General himself recognized the importance of examining legal norms in light of their behavioral consequences when he asked the American Bar Association, in the course of his address, to undertake a major study that would examine and, hopefully, resolve the conflict between newsmen's contentions that their sources of information would dry up if they had to testify against their informants and the government's contention that it needed the evidence allegedly in the newsmen's possession in order to be efficient in the administration of justice.

If we are to enhance our understanding about relationships between human behavior and legal norms, we must be able to assure prospective informants that the data and opinions they express will remain confidential. Professional newsmen and professional scholars should not be compelled to divulge information provided them in confidence. Informants are hardly likely to divulge data other than those that support prevailing and accepted norms if the danger persists that what they say will ultimately turn out to have been self-incriminatory.

The guidelines conclude with the caveat that "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." Even if the provisions were otherwise acceptable, the caveat makes it clear that the guidelines are entirely discretionary with the Department of Justice, and that the Attorney General's authority is deemed final.

Under the circumstances, it would be wiser not to accept the guidelines at all as a solution to the problem of confidentiality of informants' data, but rather to press on with challenges in the courts to the government's subpoenas. The judges, more than the Attorney General, are suited by institutional function and Constitutional role to define the scope of the Bill of Rights.

—**VICTOR G. ROSENBLUM**
PRESIDENT

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