NEWSMEN'S PRIVILEGE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 215

NEWSMEN'S PRIVILEGE

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NEWSMEN'S PRIVILEGE

WEDNESDAY, APRIL 23, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, and Railsback.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel

Mr. KASTENMEIER. The hearing will come to order.

Our subcommittee has convened this morning for the first of 2 days of public hearings on H.R. 215, sponsored by myself, Mr. Railsback, and Mr. Cohen of this committee, to protect news sources and information from compulsory disclosure by newsmen. Other bills relating to newsmen's privilege are H.R. 172 by Ms. Abzug, and H.R. 562 by Mr. Koch. All three measures will be inserted in the record at this point.

94TH CONGRESS
1ST SESSION

H. R. 215

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. KASTENMEIER (for himself, Mr. RAILSBACK, and Mr. COHEN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To protect news sources and information from compulsory disclosure by newsmen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "News Source and Information Protection Act of 1975".

SEC. 2. As used in this Act—

(1) the term "newsman" means any man or woman who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual (including partnership, corporation, association, or other legal entity existing under or authorized by the laws of the United States or any State) engaged

in obtaining, writing, reviewing, editing, or otherwise preparing information in any form for any medium of communication to the public;

(2) the term "State" means any of the several States, territories, or possessions of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

SEC. 3. Except as qualified by sections 4 and 7 of this Act, in any Federal or State proceeding (including a grand jury or pretrial proceeding, no individual called to testify or provide other information (by subpena or otherwise) shall be required to disclose information or the identity of a source of information received or obtained by him in his capacity as a newsman.

SEC. 4. At the trial of any civil or criminal action in any court of the United States (as defined in section 6001 (4) of title 18, United States Code) or of any State, a newsman may be required to disclose the identity of a source of information or any other information if—

(1) the identity or information was not received or obtained by him in express or implied confidence in his capacity as a newsman, or

(2) the court finds that the party seeking the identity or information has established by clear and convincing evidence—

(A) that disclosure of such identity or information is indispensable to the establishment of the offense charged, the cause of the action pleaded, or the defense interposed in such action;

(B) that such identity or information cannot be obtained by alternative means; and

(C) that there is a compelling and overriding public interest in requiring disclosure of the identity or the information.

SEC. 5 (a) Any order of a court of the United States or of any State granting, modifying, or refusing a claim of privilege on the part of a newsman shall be subject to judicial review and shall be stayed by the issuing court for a reasonable time to permit judicial review.

(b) Section 1292 (a) of title 28 of the United States Code (relating to appeal of interlocutory decisions) is amended by striking out the period at the end of paragraph (4) and inserting in lieu thereof a semicolon and by adding at the end thereof the following new paragraph:

"(5) Orders of such district courts or the judges thereof granting, modifying, or refusing a claim of a newsman's privilege of nondisclosure. Such appeals shall be given preference and expedited and shall be heard at the earliest practicable date.".

SEC. 6. Nothing in this Act shall be construed to impair

or preempt the enactment or application of any State law which secures the minimum privileges established by this Act.

SEC. 7. Sections 3 and 4 of this Act shall not be available to a defendant in a defamation suit with respect to the source of any allegedly defamatory information when such defendant asserts a defense based on such source. Such defendant need testify only if plaintiff demonstrates that identification of the source will lead to persuasive evidence on the issue of malice.

SEC. 8. This Act shall apply only to individuals required, after the date of the enactment of this Act, to testify or provide other evidence.

SEC. 9. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

H.R. 215 involves the balancing of vital but sometimes conflicting principles. The first is the well-known rule that the Government has the right to secure the testimony of its citizens. The second is the equally urgent proposition that the public should have the greatest possible access to the news and other information and that members of the press shall not be cut off from their sources. It is persuasively argued that this will happen if newsmen can be forced to reveal information given to them in confidence.

This marks the third occasion on which we have taken testimony on so-called newsmen's privilege issue. Five days of hearings were held in the 92d Congress, and 10 days in the 93d. H.R. 215 is the successor to H.R. 5928 of the last Congress, which in amended form was reported to and discussed by the full committee in 1974. However, due to extraordinary demands upon the committee's time, and for other reasons, it was not acted upon.

It may be recalled that the issue of newsmen's privilege was fanned into life by the Supreme Court's 5-to-4 decision in *Branzburg* v. *Hayes*, decided June 29, 1972. In that case, to the surprise of many, the High Court held that the first amendment to the Federal Constitution does not, in and of itself, require that newsmen be accorded a privilege to withhold information and the sources of information received by them in confidence. But the Court also held that the Congress and the State legislatures have ample powers to implement existing first amendment rights by statute.

Past deliberations have disclosed a considerable difference of opinion between the administration and the media organizations as to the need for a privilege, and considerable differences among those in news communications themselves as to the kind of privilege that should be provided. Our hearings today and tomorrow are not intended necessarily to signal immediate legislative efforts. Rather, they are designed to update the subcommittee's perceptions of the issues involved, to learn how the Justice Department now feels about the matter, and to observe where we are on this issue at this particular time in history.

The Chair is very pleased to welcome, as our first witness, Antonin Scalia, who is the Assistant Attorney General representing the Office of Legal Counsel in the Department of Justice, who appears before us and other subcommittees in other capacities. He is former chairman of the Administrative Conference. We are most pleased to welcome Mr. Scalia. Mr. Scalia?

Mr. SCALIA. Thank you, Mr. Chairman. If I may begin my remarks with an off-the-record comment to you and the committee.

[Discussion off the record.]

TESTIMONY OF ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY DAVID MARBLESTONE

Mr. SCALIA. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to testify on behalf of the Department of Justice with regard to H.R. 215, a bill which would create a privilege for newsmen, enabling them to withhold information in both Federal and State proceedings. I have with me today David Marblestone, who is a

staff attorney in the Office of Legal Counsel. The Department opposes enactment of this legislation. I can most forcefully indicate the reasons for our opposition by describing at the outset its effect upon several common law enforcement situations.

First, assume the occurrence of a kidnaping or a series of bombings in a particular city. A local newspaper receives a letter purporting to come from the kidnaper, setting forth ransom demands; or purporting to come from the bomber, making threats with respect to his future activities. This letter obviously might be of great assistance to law enforcement authorities in determining the identity of the criminal and preventing his infliction of further harm upon the kidnap victim or upon the society at large. Under present law, there is no question that the newspaper can be compelled to turn the material over to Federal law enforcement authorities. Under H.R. 215, the information would be beyond the reach of the law, at least until the criminal has already been identified, captured, indicted, and placed on trial.

Next, assume the attempted assassination of a prominent political figure, or a protest demonstration in which it is alleged that State law enforcement officers have used unnecessary force and violated the civil rights of the demonstrators. A local television station has filmed the events, and has indeed shown the film on the evening news. Under present law, there is no doubt that Federal law enforcement officers would have the power to obtain the film in order to prevent the indictment of individuals who are not guilty and have been wrongly accused. Under H.R. 215, the film would not be obtainable on a mandatory basis for that purpose.

Finally, assume a situation in which a newspaper has published the verbatim transcript of a portion of grand jury proceedings, irreparably injuring the reputation of a prominent individual so that he will remain under a cloud even if the grand jury fails to indict; or suppose the newspaper has published a national defense secret which is of the highest importance and has been judicially determined to be properly classified as secret pursuant to law. At present, the reporter responsible for the story can be required to identify the individual who provided this information—and who, in the course of providing it, committed a crime—so that the grand jury process or the national security can be protected against a repetition of the incident. Under H.R. 215, the reporter would not only be excused from disclosing the identity of the criminal to a grand jury, but even if law enforcement officers should in some other fashion identify him, the reporter might be under no obligation—assuming the information was provided in confidence—to disclose the correctness or incorrectness of that identification in a criminal trial.

The foregoing examples, Mr. Chairman, are fictitious but not fanciful. The first two, which incidentally involve no relationship of confidentiality between the newsman and the news source, are in fact examples of the most common situations in which subpenas against newsmen are now employed. In the view of the Department of Justice, an effective and fair law enforcement system cannot operate under the unrealistic limitations which the examples suggest; and the public's respect for law and abhorrence of crime cannot be maintained if such apparent lack of concern is displayed by the Government itself.

In addition to the harmful effect of the proposed legislation, I question the benefits that are to be purchased at such a cost. If one were to adopt an absolute, ironclad immunity, it would seem theoretically likely that the willingness of informants to provide information to newsmen might be increased. But once any substantial doubt is cast upon the certainty of that immunity, it seems to me the effect upon potential informants is reduced to the level where it is almost negligible. Under this proposed bill, the newsman will not be able to say to his source:

> I will not reveal your identity to anyone.

He will only be able to say precisely what he can say at present, which is:

> I will not reveal your identity to anyone, unless compelled to do so by force of law.

Of course, I suppose the newsman could go on to expand on the last statement by saying:

> Moreover, under the recently enacted Federal statute, such legal compulsion can only be applied should there be a civil or criminal trial, and should your information be indispensable to the establishment of the offense charged, and so forth, or should there be a suit against me for defamation in which I use your information as a defense.

But it seems to me highly unlikely that the potential informant will listen to or much understand these relative refinements. The point is, he runs the risk of exposure under this bill just as he does under existing law, and it seems to me improbable that the difference in degree between the two will have any effect upon his willingness to speak.

To indicate how the above-described results are produced, and to raise some other problems as well, I proceed to a section-by-section analysis of the bill. The first operative section, section 2, contains the definition of a newsman. It is not limited to persons who are employed on a regular or full-time basis by newspapers, magazines, radio or television stations, or other media. Rather, it encompasses any person who is engaged in "obtaining, writing, reviewing, editing, or otherwise preparing information in any form for any medium of communication to the public." It would be easy to suggest to you how to revise section 2 if I simply thought the definition was wrong for purposes of the first amendment interests the bill seeks to protect. Unfortunately, I do not. The term "freedom of the press" in the Constitution does not use the term "press" in the institutional sense. It does not mean freedom for newspapers and publishing houses, but rather freedom to publish. Thus, I think section 2 is an accurate description of its scope. But in thus extending the sweep of this legislation to all of those whom the first amendment is designed to protect, the impracticality of what is sought to be achieved becomes all the more strikingly apparent.

It is indeed desirable for law enforcement agencies, as a matter of their discretion and without rigid statutory constraints, to give special consideration to that category of the citizenry which might be called the professional press, who can be uniquely inconvenienced by excessive use of the subpena power—just as it is desirable for law enforcement officers to give special attention to those areas of a city that are most vulnerable to crime. But if one is to design, on the basis of the first

amendment, a categorical exemption from the duty of every citizen to protect the common good by providing such evidence of crime—or of innocence—as may be in his possession, I see no reason for requiring a press card or employment by an established institution in order to qualify. In a very real sense, freedom for the nonestablishment publicist, the maverick, the intellectual rebel, calls for greater rather than lesser protection. In my view, however, there is no way to remain loyal to this theoretical truth in the context of the present legislation without yielding an absurd result. By reason of the definition of section 2, applied to the remaining substantive provisions of this legislation, it is not merely the respectable journalist who would be able to obtain and publish defense secrets without being compelled to identify his source, but any individual who sets out to obtain such information for the purpose of publishing it. A member of a radical, violent organization who has no responsibility within the organization other than the issuance of propaganda would be able to publish a weekly newsletter concerning the past and proposed future criminal activities of that organization without being compelled to disclose his source.

Section 3 of the bill says much more than it appears to. First, it extends the legislation beyond the Federal sphere into the evidentiary practices of States and localities. That is a matter I will address specifically later on. What I want to call attention to at present is the fact that the scope of the privilege conferred by section 3 does not extend merely to confidential information or confidential sources. The information can have been obtained by the newsman without any express or implicit understanding of confidentiality; it can even have been publicly disclosed. Yet he will still have no obligation to provide it to lawfully constituted investigative authorities.

Another significant feature of section 3 is the scope of governmental activities which it covers. I have been speaking about law enforcement activities, but that term is not technically broad enough to cover all of the areas to which the privilege extends. It includes not merely court trials—with the slight exceptions contained in sections 4 and 7—and grand jury proceedings—with no exceptions—but also all legislative and administrative investigations. Several years ago, the Federal Communications Commission made an investigation into a program aired by a licensed television station which purported to be an actual film of a marihuana party on a college campus. It was alleged and established that the party had in fact been staged at the express request of the reporter in question. It seems to me that investigation was reasonably necessary for the FCC to fulfill its mandate of making sure that only responsible licensees are accorded the benefits of the public licenses it issues. Yet the present bill would render such an investigation exceedingly difficult, if not impossible. I might add that in the same case, there was a congressional inquiry by the Committee on Interstate and Foreign Commerce of the House of Representatives. Such inquiry would also be impaired by this legislation.

Clearly, however, the major area covered by the bill is that of law enforcement. I confess that I am unable to conceive of any valid reason for the distinction which the legislation would draw—by reason of section 4—between law enforcement at the trial stage and law enforcement prior to that, at the grand jury stage. Our criminal process is a

unitary one. The right to a grand jury determination, based upon all available information which the grand jury believes it needs, is guaranteed by the fifth amendment of the Constitution in Federal cases involving "a capital, or otherwise infamous crime." The theory is that an innocent person should not even be exposed to the obloquy and expense of public trial if his innocence can be clearly established beforehand. Testimony by a newsman that could assure this would in some cases be rendered unobtainable by the present bill.

Even more frequent, however, will be the situation in which the newsman's testimony is necessary not to exculpate but to indict. The limited exceptions of section 4, which relate only to the trial state of a civil or criminal proceeding, are in fact not as much an accommodation to the society's interest in law enforcement as they appear to be. With respect to all crimes, one does not have a trial until one catches the culprit, and with respect to the most serious crimes, one needs in addition a grand jury indictment. Section 3 absolutely prohibits, without any qualification, the use of the newsman's testimony in order to discover who has committed the crime and obtain his indictment.

It would appear that the only way to obtain the testimony needed for such purposes is to indict the wrong person and then compel the testimony of the newsman at that trial under section 4. This is surely an odd disposition. There should be no mistake on this point: The disabling effect of section 3 upon law enforcement—extending not merely to professional newsmen but to all persons gathering material for publication, and extending not merely to confidential data but to all information obtained—is not substantially reduced by section 4. Law enforcement authorities are still not able to subpena the note making a bomb threat until after someone has already been indicted and placed on trial.

Turning now to the terms of section 4: These do provide some relaxing of absolute privilege in civil trials and in the law enforcement context if society is fortunate enough to identify the criminal and obtain an indictment without use of the newsman's information. In such situations, the extension of the privilege to nonconfidential information—or a nonconfidential source—is eliminated entirely. With respect to confidential information, or the identity of a confidential source, the exemption is eliminated only if all three of the conditions set forth in subsection 2 are established "by clear and convincing evidence." On the face of the matter, that would seem an exceedingly difficult task. The first two of the conditions require the establishing of a negative, that the prosecution, civil action or defense cannot be successful without the evidence, and that the evidence cannot be obtained by alternative means. Any lawyer knows the difficulty of establishing negative propositions. It requires disproving the existence or application of all conceivable affirmatives. To establish such tests as the absolute criteria which may govern the conviction of an innocent person, or the release of a criminal upon society, seems to me highly inadvisable.

As for the third of the tests, I find it puzzling, at least as applied to some of the cases covered by the exemption. Assuming that a defendant in a criminal action establishes "by clear and convincing evidence" the incredibly difficult propositions that the newsman's testimony is

"indispensable" to the establishment of his defense, and that the information "cannot be obtained by alternative means," he must still go on to establish "that there is a compelling and overriding public interest in requiring" the testimony. Evidently, the conviction of a guilty criminal or even the acquittal of an innocent defendant is not regarded as sufficient in itself to justify invasion of the newsman's privilege. As so applied, I think the third test is plainly unreasonable. It is in any case my opinion that any one of these three tests may well be unconstitutional as applied to a subpena sought by the defendant in a criminal case, since the sixth amendment guarantees him the right to compulsory process. The result will be mandatory dismissal of the prosecution.

Section 5 of the bill permits immediate appeal of decisions with respect to the claim of newsmen's privilege. It seems to me that the phrase, "subject to judicial review" is peculiar as applied to a determination of a lower court; the phrase "subject to immediate appeal" would be more apt. I may also note that the provision for giving priority to such appeals is becoming a commonplace in new legislation. If the practice is continued, it will of course eventually be self-defeating.

Section 6 is intended to preserve State laws. Section 7 is intended to carve out another exception to the absolute privilege for defamation suits against newsmen. I do not believe the exemption in section 7 is broad enough. It only applies when the defendant "asserts a defense based on" the news source. Presumably, this would be a defense of good faith, bringing the defendant within the protection accorded by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) or perhaps a defense of truth which can only be established by the informant in question. The exemption would not, however, cover the situation in which the defendant does not base his defense on the news source, but to the contrary, the plaintiff seeks to rely upon that source as demonstrating that the defendant was advised of and knew of the falsity of the story; in other words, negating the *New York Times* v. *Sullivan* defense. It seems to me the plaintiff must be able to establish knowledge by whatever means available, including confidential sources. In the situation I just described, he would not be able to do so.

Sections 8 and 9 provide, respectively, for prospective application of the legislation and for severability of any of its provisions held to be invalid.

The foregoing comments relate to application of this proposed legislation at all levels of Government. I would now like to direct a few remarks specifically to its application to the States. I do not intend to raise for your consideration the horror that the bill is unconstitutional. The Supreme Court has, to be sure, given clear indication in recent years that there are limits to the incursions upon State prerogatives which are permissible by virtue of the Federal Government's authority to regulate commerce, and that the power of the Federal Government to enact legislation under section 5 of the 14th amendment, in order to protect constitutional rights, is similarly not absolute.

The constitutionality of the present proposal is questionable, but given the current makeup of the Supreme Court, I would estimate that if the Congress were to make a determination that the provisions of

this bill are constitutional, the Supreme Court would not reverse that judgment.

In considering this legislation, however, Congress itself has the serious obligation to consider whether it is consistent not only with the letter of the Constitution but also with the spirit of federalism which that document embodies. It seems to me that this is clearly not the kind of displacement of State authority which should be approved. What is essentially at issue is the matter of evidentiary rules before State legislatures, administrative agencies, grand juries, and courts. To my knowledge, Congress has never attempted to interfere in this area during the nearly 200 years of our national history. All of you, as legislators, are well aware that the power to obtain the facts is at the heart of the governmental process. To restrict the exercise of that power by the States is to cut deeply into their governmental autonomy. Extraordinary assertions of Federal preemption have sometimes been justified on the ground that the matters in question simply were not being given appropriate attention by the States. Such an argument can surely not apply in the present case. Twenty-six States have enacted newsmen's privilege statutes of one sort or another, some very recently; many others have considered such action but consciously rejected it. This is not an area of State neglect or inattention, but to the contrary, one in which any Federal statute will override the deliberate decisions of many States in an area that bears closely upon their governmental power.

Mr. Chairman, despite the Department's opposition to the provisions of this proposed legislation, I think you are aware that we acknowledge the need for particular care in subpenaing the work product of newsmen. Their profession is a particularly important one in our society, and should assuredly not be perverted into doing the work which law enforcement officers should do on their own. Every effort should be devoted to obtaining the information necessary for effective law enforcement in a fashion that does not impair the free flow of information necessary to a free society. As my earlier comments indicate, however, I do not think such a result can best be achieved by any form of rigid legislative proscription. The variables are too many, the competing social interests too imponderable. In my view, the only satisfactory protection is constant advertence to the particular sensitivity of this area by law enforcement agencies themselves. At the Federal level, this has been assured by Justice Department guidelines issued in August 1970, and reissued in modified form in October 1973. A copy of these guidelines in their current form is attached to my printed statement.

The basic requirements of the guidelines may be summarized as follows: First, before considering any subpena of a newsman, all reasonable efforts must be made to obtain the information in question from nonmedia sources. Second, in any case in which a subpena to a newsman is contemplated, negotiations with the newsman are to be pursued. If the negotiations fail and a subpena is desired, the Department official must request the explicit authorization of the Attorney General. No subpena to any member of the news media may be obtained by the Department without such authorization.

Regarding requests for the Attorney General's authorization, the following principles apply: There should be reasonable ground, based

on information from nonmedia sources, to believe that a crime has occurred, and reasonable ground to believe that the information sought is essential to a successful investigation. Except in "exigent circumstances," subpenas to newsmen should be limited to verification of the accuracy of published information. Even with regard to publicly disclosed information, subpena requests should be treated with care to avoid the appearance of harassment. Wherever possible, subpenas to newsmen should be directed at material information regarding a limited subject matter.

It is my belief that experience under these guidelines demonstrates that there is no need for statutory proscription at the Federal level. In March 1973, in connection with testimony before the Senate Judiciary Committee on newsmen's privilege bills then pending, the Department provided to that committee a memorandum describing activity under its guidelines from August 10, to March 1, 1973.

I have with me a copy of that memorandum and will provide it to the reporter for inclusion in the record of these hearings if you wish. It shows that in that period of approximately 2½ years, the Department requested issuance of subpenas to newsmen in 13 situations. In 11 of those 13, the newsmen voluntarily agreed to provide the information, but asked that a subpena be issued. In only two of the 13 situations did the request involve information from a confidential source, and neither of those two was an involuntary subpena.

In the brief time available to prepare the present testimony, we have not been able to bring the March 1973 memorandum down to date. We are in the process of doing so, and as soon as our work is complete, I will provide its results to the committee.

On the basis of preliminary information, however, I have reason to believe that data from the past 2 years will similarly show that the vast majority of subpenas were requested by a newsman who was willing to provide the information, and that the vast majority of them, indeed almost all, did not involve confidential sources.

I might add—and I do not want to get into too much detail on the update of that study because I do not want to misinform you about matters that are still being checked upon—but I think I should advise you at the present time that I believe the number, the absolute number, of subpenas has increased from the 2-year period covered by the earlier memorandum.

Mr. DRINAN. By how much?

Mr. SCALIA. I believe that there were in the 2-year period since March 1973, approximately 46.

Mr. DRINAN. In the last 2 years, there have been 46?

Mr. SCALIA. Yes, sir.

Mr. DRINAN. In relation to what in the previous years?

Mr. SCALIA. In the previous 2½ years, there were only 13.

Mr. DRINAN. There have been 46, huh? That is the most important thing you have said today. That is news. Tell us about the 46 right now.

Mr. SCALIA. I do not know all I would like to know about them.

Mr. DRINAN. I do not either, but that is the essence of your testimony. If you say these guidelines are OK, you have the burden of showing that these 46 are all right, and I do not believe a thing that you have

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said here that they are all right, now that you have made this explosive bombshell of 46 subpenas in 2 years.

Mr. SCALIA. I do not know upon what basis you do not believe it.

Mr. DRINAN. You have to explain. They have tripled.

Mr. RAILSBACK. Mr. Chairman, can we just proceed to hear his statement?

Mr. KASTENMEIER. You may conclude your statement, Mr. Scalia.

Mr. SCALIA. Yes, sir.

By my opposition to the present legislation, I by no means intend to minimize the importance of the issues which it addresses. They pertain to the central problem of a free society: Balancing the interest in domestic tranquility against constitutional freedoms that are no less important. In this particular area, I think the balancing can best be achieved by wise exercise of administrative discretion under the constant guidance and prodding, if necessary, of legislative inquiries such as this.

The professional press, among all interests of society, is best able to assure such guidance and prodding, and to direct the searchlight of public attention to the areas in which abuse exists. This is true no less at the State level than at the Federal.

Moreover, the Supreme Court has given some indication in the Branzburg opinions that the worst abuses, which constitute harassment of the press, will be prevented by the Court itself.

For these reasons, my concern for the problem does not bring me to support this legislation. I would like to close, as I began, with an example. If categorical legislation such as the present bill is passed, it would be entirely possible for you to watch on your television screens in the near future a face-to-face interview with Patricia Hearst and other alleged members of the SLA now fugitives from justice and under indictment in connection with several crimes. Law enforcement officers would in no way be able to learn from the newsman the location at which the interview was taped, nor would they be able to obtain a copy of the tape itself for the purpose of identifying the location from intrinsic evidence, or even for the purpose of circulating the most recent photographs of the fugitives.

In my view, even the possibility of such a situation, permitted by the present bill—assuming that the interview with Patricia Hearst was confidential, which I assume it would be—would make a mockery of the criminal justice process. It would be bad not merely because it would prevent the apprehension of the fugitives in question, but more importantly, because it would demonstrate in stark fashion our lack of earnestness in the matter of law enforcement. The public would in effect be told: Establishing the conditions which make such a program possible is more important than the relatively inconsequential interest of capturing individuals who may have violated our laws and who may injure our citizens again in the future.

The Government cannot display an attitude of this sort towards the enforcement of its laws without soon causing all of its citizens to take those laws and their enforcement less seriously. The freedom of the press is important, but it must be protected in a way that does not bring the law enforcement process into contempt.

Thank you. I would be pleased to answer any questions you may have.

[The memorandum referred to follows:]

MARCH 1, 1973.

DEPARTMENT OF JUSTICE—MEMORANDUM

Re Department of Justice Requests for Subpoenas to Newsmen Since the Issuance of the Attorney General's Guidelines in August 1970.

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 media 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 newsman 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 news 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 paragraphs 9 and 10.

1. During a grand jury investigation of alleged manipulations of egg future prices on the commodity exchange, the United States 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 videotaped 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 subpoena, 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 Gen-

eral on May 19, 1972 a request for the issuance of subpoenas 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 investigation, 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 a 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 ground 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 Attorney 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* 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 and materials 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.

Mr. KASTENMEIER. Thank you Mr. Scalia.

I had not planned to mention the fact that this committee did not receive your statement before this morning. Normally, in 19 out of 20 cases, or even 49 out of 50, it would not have mattered. It is a matter that witnesses are not always able to do, and it does not matter.

In this case, however, it does matter, unfortunately. Your failure to make this statement available to us in advance makes it extremely difficult for us to conduct a dialog with you on the question. I would observe that the thesis that a bill such as this or a law which would grant a privilege, whether qualified or not, would create a situation in which law enforcement is obstructed is not established from even the case you cite in closing. The mere fact that Patty Hearst is interviewed—and that is the case that you cite for dramatic purpose—why does that in and of itself hamper law enforcement?

Presumably, I gather you are saying she would not otherwise be interviewed. But if there were a law such as this, she could appear on a television interview or some news interview.

Mr. SCALIA. No, sir.

Mr. KASTENMEIER. Why does that in itself hamper law enforcement?

Mr. SCALIA. My point is not that an interview with Patty Hearst would hamper law enforcement. My point is twofold.

No. 1, it would hamper law enforcement not to be able to get available information concerning where Patty Hearst is, which may be obtained from the person who made the interview or from the film itself, which has been shown on public television but which newsmen would not be able to obtain. That is my first point.

My second point, about which I really feel more strongly, is the effect such a situation will have upon the public's regard for the seri-

ousness of our efforts at enforcing the law. We would have said, as the Supreme Court put it in the *Branzburg* case, that reporting a crime is more important than doing something about it. I just do not think it is a healthy attitude on the part of the Government to convey to its citizens that yes, here is a film of these people who are fugitives of justice, and it is a great film and makes great news viewing. It is interesting and we are making this available to you by agreeing not to find out where Patty Hearst and the other fugitives are.

I think that has to bring the entire law enforcement process into some disrepute.

Mr. KASTENMEIER. I suggest that if one is to discuss the Patty Hearst case, what brings the Justice Department into disrepute is the breaking in in this very community into young women's apartments late at night without any justifiable reason. That, it seems to me, is much more harmful to the cause of law enforcement than even the hypothetical case you cite, which, I would suggest, might aid law enforcement. It cannot really hamper law enforcement. Newsmen do cooperate voluntarily with law enforcement officers and if they were not able to proceed in confidence in some cases, the public and law enforcement would not have other information and evidence available upon which people, in fact, could be brought to justice.

But, that is a point of view about which different people differ.

Mr. SCALIA. Mr. Chairman, on the break-in, I am not familiar with the facts of that incident, except what has been reported in the press. But I would suggest that the persons involved in that did not have as much time to think about it as I hope the Congress has to think about this legislation.

My point is that whatever the rights and wrongs were of the earlier situation, maybe this is an unfortunate result which can be avoided by careful deliberation.

Mr. KASTENMEIER. In the Branzburg cases, of course you are aware that the court invited Congress or State legislators to legislate in the field. They certainly did not think it inappropriate for us to do so. I am wondering whether you agree in that regard; whether you think it inappropriate for Congress to legislate in the field of newsmen's privilege?

Mr. SCALIA. Well, depending upon what you mean by inappropriate, I do not question the power, certainly, at the Federal level, and as I indicated, I even think it is constitutional for you to extend it to the State level, although the last is something of a horse race.

But as my statement indicated, I do not think it is the best way to go. I think that the problems are too imponderable; the interests are too shifting; and the best way for it to be handled is by the law enforcement agencies themselves under the supervision and prodding of the Congress, which we have had, and I am sure, will continue to have.

Mr. KASTENMEIER. Are there not other policy considerations involved other than law enforcement?

Why should the people of this country, why should the news community, Congress, people of this country, as well as law enforcement officials feel that only law enforcement officers should set rules and regulations. They can be changed at any time. John Mitchell can devise them for us all, and they are subject to change. But why should we

just rely on executive fiat here? Why is there so much more wisdom in that than there is in Congress passing a law?

Mr. SCALIA. No. 1, it is not as though the agencies are untrammeled. As I indicated in my statement, I do think the courts will exercise a degree of control, even after Branzburg, and some of the circuits have so indicated. I think the opinions in Branzburg permit it. I think the worst abuses are within the reach of the judiciary to supervise administrative action.

Secondly, I do not think it can accurately be called executive fiat as long as interested and informed committees of Congress are very closely aware of what the executive is doing, and particularly when you are dealing with a field such as this, where the press is not helpless in its ability to bring forcefully to the attention of Congress any abuses which may occur.

I can think of no field in which it is safer to provide a degree of administrative discretion than this field dealing with the special treatment to be accorded to the press.

Mr. KASTENMEIER. I am not aware of any input Congress has had with respect to Mr. Mitchell's earliest set of guidelines, or even Mr. Richardson's restatement of them in 1973. He certainly did not consult with the House Judiciary Committee, and I am not aware that any other committee was consulted.

What I am concerned about, and it is in part what Mr. Drinan was getting at, is that we really do not know what experience we have had lately. From 1973 to the present time, you indicate perhaps 46 cases, which suggests a strong upward swing in terms of subpenas of the press. What implications can be drawn, I am not sure. But we will at a later time have to assess that, however.

I am suggesting that an area such as this ought not necessarily be left to guidelines by a law enforcement official alone. If indeed 26 States have legislated in the field, I fail to see why the Federal Government and Congress is unable to, why the Justice Department cannot find, if not H.R. 215, some other appropriate legislative vehicle to support affirmatively to resolve what is still, I think, an unresolved question.

Mr. SCALIA. May I discuss a couple of the practical problems that I see in putting it into legislation?

One I mentioned in my testimony is that I do think the approach is sound if you are going the legislative route, whereby you grant categorical exemptions; that you ought to extend the privilege not just to the professional press, which is what we tend to think about when we are discussing these matters, but to anyone who is scratching for information in order to publish it.

Now your comment earlier, for example, that newsmen do indeed cooperate with law enforcement officials—that is generally true about the professional press, but it cannot be said of everyone who goes out to obtain information in order to make it public. That is one practical problem that I can justify as a matter of on-going administrative discretion—a police force patrolling certain sections of the city more than others. But it would seem a strange statute which would say the police force shall put X number of patrols in this section of the city. That is what I think a statute applying only to professional newsmen would look like. It just seems to me inappropriate.

A second practical problem in enacting the legislation is the degree of flexibility that is contained. I think that the Department guidelines are reasonable, responsible, and effective in preventing abuse. I do not really believe that the allegations of substantial abuse from newsmen deal to a substantial degree with Federal law enforcement efforts. Yet I think that the degree of flexibility contained in those guidelines is greater than that which is normally contained in a statute.

Mr. KASTENMEIER. I am going to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Scalia, do you believe that there are abuses of protection for the press as far as the use of guidelines to obtain information is concerned which may or may not be relevant to any particular act? I mean, are you aware of allegations of abuse, mismanagement, fishing expeditions, etc, are you aware of any such charges which have been made?

Mr. SCALIA. Sir, I can only answer with respect to the Justice Department's law enforcement activities.

Mr. RAILSBACK. Yes.

Mr. SCALIA. One of the criteria of the guidelines is that the information must be relevant and not just tangential, and to the best of my knowledge that requirement has been complied with.

Mr. RAILSBACK. But surely, like all of us you have heard of other instances—you have read of abuse—let me give you one specific example. We have had testimony that it became almost a common practice following a riot, that a prosecutor would want the films taken of that demonstration in their first attempt to determine who committed a particular offense. Many times that resulted in nothing being learned at all. Nothing. But it put, for instance, the people who had covered that riot, in the position of having to produce films that were never shown, that were outakes at some expense to that company.

You are certainly aware of those charges.

Mr. SCALIA. I think I am aware of some of those; but I must say that those are not the situations that arouse the most sympathy in me. That is a nonconfidential type of situation.

I think the strongest case is where the newsman has acquired a confidential source and that confidential relationship is necessary to the obtaining of it. I see no overwhelming first amendment interest when the newsman is simply an observer of a public event and has recorded that public event, particularly when it is shown on television, and even when it is not shown on television.

Mr. RAILSBACK. Except if it could result, as has been suggested—in harassment to the companies themselves and to the reporters. Perhaps if that practice continues, in the future which they would characterize as haressment, intimidation, expense that they have been put to, instead of news coverage of events, they will find ways to do it differently so that they will not be subject to that kind of criminal discovery.

Mr. SCALIA. That is possible, although if there are important events, I really doubt whether that would deter them.

The interest on the other side is, of course, let us assume that the kind of instance I gave in my testimony, where there is an allegation of police brutality, and it is vehemently denied. The Federal Government, in order to enforce the civil rights laws, wants evidence as to whether this is true or not.

Mr. RAILSBACK. I am talking about the showing of fact. I do not like to use that word because I think it is kind of over-used. But, there is substantial testimony that if you start subjecting them to continuing fishing expeditions, they will have to find another means of protecting themselves in order to avoid that kind of intimidation.

Let me ask you this. I agree with you that there is a need to strike a balance. In the quote on page 19 of your prepared testimony, you talk about the Branzburg decision. You say that the Supreme Court indicated that if the abuses continue, it is going to do something about them.

Am I right?

Let me be more specific. You say: "This is true no less at the State level than at the Federal. Moreover, the Supreme Court has given some indication in the Branzburg opinions, that the worst abuses which constitute harassment of the press will be prevented by the Court itself."

In addition to that, as Chairman Kastenmeier suggested, the Court in its opinion went one step further. "At the Federal level," I am quoting from the Branzburg decision, "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable, and to fashion standards and rules as experience from time to time may dictate."

Was not the majority in Branzburg, saying that it is proper for Congress to determine if perhaps a balance should be struck to encourage free press?

Mr. SCALIA. I think, Mr. Railsback, it would be a distortion to say that that statement in the plurality opinion in Branzburg was a call for Federal legislation. I think many of the points made in the earlier portions of the opinion, made in order to show the inappropriateness of judicial action, apply just as well to legislative action. The only point the court was making was, anyway, if we are wrong, the Congress can patch it up.

Mr. RAILSBACK. Let's say you have a five-three-one split, as was the case in the Branzburg decision. I believe eight judges agreed there is no first amendment protection: and then the other three dissenters said that there should be only qualified protection, that is, where there are other alternative means. They also pointed out that any such privilege must give way to any over-riding and compelling interests.

But let me ask you one other thing.

I disagree with what you are saying there, because I think the Court is encouraging Congress to take a look at the problem. But even more important, do you think that an investigative reporter on occasions has served a useful purpose in disclosing evidence of corruption or mismanagement, and in some cases crimes that are occurring in some mental institutions? Do you agree with that, that these newsmen have performed a most worthwhile service?

Mr. SCALIA. There is no question, sir. That is what makes the problem a difficult one.

Mr. RAILSBACK. Take a hypothetical case of a mental institution where some administrators in that institution have actually perpetrated crimes on the inmates, abused them and physically mistreated

them. Some reporters have suggested that were it not for the willingness of an employee to come forward and reveal that mistreatment, that story which probably led to remedial action never would have happened.

Are you aware of that?

Mr. SCALIA. Yes, sir. Now you are getting into the area where I do sympathize; where you have an investigative reporter and a confidential relationship.

Mr. RAILSBACK. What would you do to help them?

Mr. SCALIA. I would have the Attorney General's guidelines.

Mr. RAILSBACK. They do not even apply to the States, and they do not even bind the Federal Government.

Mr. SCALIA. Where there is an abuse at the States, while they do not yet have guidelines, they do have legislatures; and if the abuse exists, I see no reason why the Federal Government has to take it upon itself to severely restrict a fundamental power of State government, the power to obtain information.

Mr. DRINAN. Would the gentleman yield for the moment?

Mr. RAILSBACK. Yes.

Mr. DRINAN. You have praised the State level, the 26 States that have them; and at the Federal level, you say there are the Attorney General's guidelines. So there is a basic contradiction.

Mr. SCALIA. I did not praise the legislature at the State level.

Mr. DRINAN. You certainly did. You said the legislature should move in if there is an abuse in those States that do not have shield laws. Yet, at the Federal level you say we have no need at all because the Attorney General and the Federal branch is going to take care of it. Why do you not recommend that the attorneys general in all of the 50 States should do it?

Mr. SCALIA. I did not say that the States should. I said that the States can, if they feel that way about it, they can. I simply state that there is no need for the Federal Government to do it, if indeed, it is desirable to do, which my testimony amply indicates I do not believe.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

In my role as an usher I will notify the folks in the back of the room that there are a lot of chairs up here in the front pew. You might want to sit down.

I want to thank you for your presentation, Mr. Scalia.

I think your statement here is to me very understandable, logical, and pertinent, and whether or not I agree with all the points you made is another thing; but I want to commend you for at least giving us something which is of substantial assistance to me and the work we will have to do here.

I want to ask a question. I have not read the Federal, Civil and Criminal Rules for quite a little while. But is there not still a provision in both sets of rules which would permit the district court to issue an order to modify, to quash, or to otherwise give a protective order with respect to a subpena which is burdensome or repressive in its nature?

Mr. SCALIA. Yes.

Mr. DANIELSON. Let me state it another way.

There used to be in the rules a provision that the district court could, on application of the person to whom a subpena has been issued, issue a protective order which would prevent an abusive subpena.

Mr. SCALIA. What we are talking about in this legislation, at least in the trial context, is a limitation upon the court's powers to determine——

Mr. DANIELSON. I understand that, but that was not my question.

Mr. SCALIA. The courts do not have to issue the subpenas, that is correct. They do have some issued.

Mr. DANIELSON. Let me know when you are done because I want to ask you my question.

Mr. SCALIA. I thought I understood your question.

Mr. DANIELSON. No; you did not.

My question is, is there not, in the Federal, Civil and Criminal Rules, a provision that the court may, on an application of a person subpenaed, issue a protective order which would modify or quash that subpena?

Mr. SCALIA. Yes; there is.

Mr. DANIELSON. I would submit, then, that so long as that provision is still available in the rules, a person subpenaed, be he a newsman or anyone else, would have the right to avoid harassment through an affirmative action on his own part, simply going into court and asking the court to issue a protective order. That tends to support your position.

I had a little trouble getting it out of you, but that is on your side.

Mr. SCALIA. I certainly did not intend to hinder you in your effort.

Mr. DANIELSON. That is all right.

As to your Justice policy, issued by former Attorney General Richardson, the question has been raised as to whether it is binding on anybody else. If I understand the meaning of the word policy, it is only internal; it is binding upon the representatives of the Department of Justice, but on no one else, and as policy, can of course be changed at any time the Attorney General sees fit.

Am I not right in that regard?

Mr. SCALIA. Yes, sir, I think that is correct. But it would be a highly visible change. It would have to be a change which is published in the Federal Register, and I have the fullest confidence that you would know about it immediately.

Mr. DANIELSON. Sir, you are much too defensive I am simply trying to get the facts out here before us. I would not expect policy to go any further than policy should go, namely, it is a guideline for the employees, the agents, the representatives of the Department of Justice, and that reaches all the way up to the United States attorneys, it is my understanding.

Mr. SCALIA. That is correct.

Mr. DANIELSON. So I do not believe that you intended to confuse any of us into thinking that it was binding upon States, counties, cities, or anyone other than the Department of Justice.

Mr. SCALIA. No, sir.

Mr. DANIELSON. My inference from the issuance of that policy a few years ago and as continuing on the books is that it was an effort to dispel any unnecessary concern or worry that people might have that

the Department of Justice intended to abuse or harass news people by the issuance of subpenas; and it was to set forth some guidelines which were to guide you as attorneys, and everybody else.

Am I right in that regard?

Mr. SCALIA. That is correct.

Mr. DANIELSON. Thank you.

That is all I have. I just wanted to established a couple of points here.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. I'm afraid, sir, I must say that the Department of Justice seems to be regressing. The person who testified 2 years ago took a position which was better than the position you have taken. He at least admitted that there was a problem. He was a defender of the Attorney General's guidelines. But you, as I take it, say there is no problem, that the Congress should recognize. And yet you tell us that there have been 46 subpenas; they have more than tripled in the past 2 years, and that is a key thing in your testimony, yet you do not tell us anything about it.

Would you have any idea how many journalists now are involved in legal proceedings which could lead to jail over this question of the shield?

Mr. SCALIA. I have no idea, sir.

May I refer you to page 19 of my testimony where I do refer to a problem, and I believe I do so elsewhere. I by no means say that this is an easy question.

Mr. DRINAN. You say that there is a problem; but the Federal level is taking care of it by the guidelines of the Attorney General. And you do not tell us a thing about these 46 people who have been subpenaed over the last 2 years. Furthermore there is evidence that the guidelines have not been followed; that the Justice Department has violated its own rules. The president of NBC, Mr. Richard Wald, has said in testimony submitted to us, the Justice Department has not always complied with its own guidelines. He cites the case at Wounded Knee.

Would you tell me this. Who at the Justice Department thinks about this in the last 2 years? Who has been in charge of the shield law?

Mr. SCALIA. Ultimately the Attorney General.

Mr. DRINAN. Well, we have had so many. [General laughter.]

Has Mr. Levi seen your testimony?

Mr. SCALIA. Mr. Levi has approved the substance of my testimony. He has not seen it verbatim.

Mr. DRINAN. Do you think under *Branzburg*, the first amendment does give some protection to journalists and the press, under the majority view?

Mr. SCALIA. Both under the four-man plurality decision and the one-man swing vote that went with the four, there is clear indication that the courts and the Federal courts as against the States, have some clear authority to prevent abuse of the subpena power.

Mr. DRINAN. But you say it is all being done very well; that *Branzburg* protects all of the journalists who need protection under the first amendment; that we do not need any more guidelines, any more laws.

Mr. SCALIA. No, sir, I did not say that.

I said that at the State level, if the States wish there can be legislation, or there can be guidelines for State law enforcement.

Mr. DRINAN. If you knew anything about the people who might go to jail, if you had been reading the literature under the Freedom of Information Committee of the journalists, you would know that a large number of people are involved in proceedings. You would know also that State laws do not always protect them. State laws are very inadequate. California law just was made stronger; but under a Federal judge, for example, he may refuse to apply a shield in a State in which a case is being tried in a situation where Federal law counts.

So, you can not cop out by saying that the 26 States have it, and there is no Federal problem.

Mr. SCALIA. I do not cop out by saying that at all. What I say is that I presume the people of California think that the balance is best struck that way. I find it difficult to believe that the matter has not been brought to their attention.

Mr. DRINAN. Do you find it strange—and I assume you are in favor of the attorney-client privilege and that of the husband-wife and that withholds information that often is desperately needed in various situations; but it is an absolute privilege—do you find it anomalous that the very first amendment that guarantees freedom of the press, guarantees a freedom that is really almost absolute or tends to be absolute? Do you find it anomalous that the position of the attorney-client and the husband and the wife have this privilege as a matter of evidentiary law, and yet the journalist has no privilege?

Mr. SCALIA. Mr. Drinan, I am not a great fan of the husband and wife evidentiary privilege. About every prominent scholar in the field of evidence, as a matter of fact, abhors all categorical privileges, including the husband and wife privilege.

Mr. DRINAN. How about the attorney-client—you take that on, too, huh?

Mr. SCALIA. On an absolute basis, I think there is abhorrence for that.

Mr. DRINAN. Your first norm seems to be whatever is good for law enforcement is good for the country. That is the way it comes out to me.

Whatever evidence that allows us to prosecute the hoods is good, and that you should start from my point of view, from the first amendment, and say let us maximize the rights. They are consistent with other rights.

Now you are saying that the right of the State is superior even in husband and wife. And now you want to qualify the attorney's privilege. Well that is your privilege, but it is not the position the Department of Justice should take.

Mr. SCALIA. Mr. Drinan, my problem is this. I do not see any great first amendment problems, any great societal interests. When entirely uninvited, without any confidential relationship whatever, a newspaper gets a handwritten letter from a mad bomber saying I am going to do thus and so, I have done thus and so and will do thus and so in the future.

Mr. DRINAN. That is a distortion of the bill that you are talking about because confidentiality is essential to that bill.

Mr. SCALIA. No, sir, it is not. It is only essential at the trial stage. There is no way to get any information, confidential or nonconfidential before the trial stage.

Mr. RAILSBACK. Will the gentleman yield?

Mr. DRINAN. Maybe you would be in favor of the bill that I have filed, which would give an absolute privilege, which is not qualified, to any professional disseminator of information?

Mr. SCALIA. I will acknowledge, Mr. Drinan, that it is more logical.

Mr. DRINAN. Thank you so much. Would you endorse it? Would you endorse something?

You just want us to go on nagging you every once in a while so that somehow you people will be honest. That is what you are telling me—no more regulations; the Attorney General's list is perfect; no more Federal law; just keep nagging us.

Mr. SCALIA. I am not encouraging that, Mr. Drinan. I am just observing that it is going to happen, and I think that it is good that it should happen.

Mr. DRINAN. Well, nothing much results from it, except that—Mr. Chairman, may I ask once again for some information about the 46?

Mr. KASTENMEIER. We would like information on that. I think possibly we should ask you for it by letter so that our request can be more precise. I would hope that you would——

Mr. DRINAN. One last question.

May we have a time on that? And under the Freedom of Information Act journalists have a right to have that. In other words, if a journalist applied today, could he, within the 10 days get all of the information about all of the circumstances of the 36 or 46 subpenas?

Mr. KASTENMEIER. In that regard, how long would it take, Mr. Scalia? [Pause.]

Mr. DANIELSON. Mr. Chairman, may I inquire. Would you yield to a question?

Mr. KASTENMEIER. Yes, I have already asked him a question.

Mr. SCALIA. Mr. Chairman, I think we can do it within 3 weeks. I could have come up with partial information. I wanted to be very careful not to give you any information that turned out to be wrong, and the only way to be sure about some of it is to double check it, and even to go back to the divisions from where some of the requests originated in order to verify some information. I believe that that can be done within 3 weeks.

I also want to clarify one other question.

Mr. DANIELSON. I would like to ask a question.

Mr. KASTENMEIER. I yield to the gentleman from California.

Mr. DANIELSON. I would like to make an observation or ask a question.

If my recollection is correct, subpenas are issued by courts, not by U.S. attorneys. I think it might be necessary for the Attorney General's Office—I am trying to help out here in figuring the time frame—to inquire of all the 96 different U.S. attorneys—there were 96 different judicial districts not long ago at least, and there are some divisions within that. So I would say that 3 weeks is a very short time if the gentleman is going to be able to make that inquiry.

Mr. SCALIA. I will stay on the limb, Mr. Danielson. We have realized that you would be interested in continuing information on this; so after the last memorandum we did establish some accounting procedures that would enable us to run down all of the requests for sub-

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penas that can be made. I think that I can come up with it, but I want time to make sure that it is accurate.

I would like to add one other thing on whether the information is adequate. Mr. Drinan mentioned 46 people who were subpenaed. I do not want to give you a misimpression that there were 46 requests for subpenas. I do not know how many individuals each of the subpena requests involved. Some of the requests, I suspect, involved more than one subpena in the context of a particular trial. That is the kind of thing I want to be able to run down.

Mr. DRINAN. In how many cases were the rules violated as in Wounded Knee? I would like that information, too.

Mr. SCALIA. I do not know how to answer that question.

Mr. DRINAN. Well, in the information you are going to hopefully supply, I would like to have that.

Mr. SCALIA. Yes, sir. That is another one of the things I want to find out. Our records do not indicate those instances in which a subpena should have been requested, or a request for a subpena should have been asked of the Attorney General and was not. I want to go to the divisions and ask.

Mr. DRINAN. Mr. Richard Wald, the president of NBC said—let me read:

> The U.S. Attorney obtained the subpena without the approval of then-Attorney General William Saxbe; and after that was quashed, obtained a second subpena, this one authorized by tde Attorney General, even though there had been no attempt at negotiation, as required by the guidelines.

Thank you, Mr. Chairman.

Mr. SCALIA. Mr. Chairman, having leaked out a little bit about the absolute number of the thing, I want to add on the point of the gross number that I believe that some of them are bunched. For example, I think there were a total of eight in the whole Wounded Knee episode, so I think that that phenomenon partially accounts for the increased number.

Mr. KASTENMEIER. The factual information you will in several weeks be able to supply us, will speak for itself.

Mr. SCALIA. Yes, sir.

Mr. DANIELSON. I would like to state, Mr. Chairman, that I certainly do want this information. But I do not think we should set up some unreasonable schedule which would be impossible to comply with. With 96 different judicial districts—and I know a little bit about how U.S. Attorneys Offices operate—it may be tough to get this here in 3 weeks. I hope you can.

Mr. SCALIA. I will give you the best read we can give you on the basis of our departmental records which we believe are accurate, within 3 weeks.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I just have one question.

I guess I would like your comment on it. It seems to me that all of your arguments apply equally well to the other confidential relationships. I am now addressing myself only to the confidential part. On the nonconfidential part I think you make some good points. But certainly in terms of discovering crime, you could get a lot more crime, the law enforcement agencies could get a lot more evidence of crime if they could subpena priests. I mean, I do not know. He [indicating] has

more information about that than I do. But certainly confessions—that is the very nature of what you do with a priest, is to confess certain things—in terms of the amount of crime that has actually been committed, certainly the information that is given to a priest under the confidential relationship, which is only a common law privilege and does not have the dignity of constitutional protection at all, or to an attorney, and forgetting the husband and wife, or doctor-patient relationship; certainly your arguments apply to those things. Therefore it seems to me that that relationship has worked out fairly well in our society. It has not hindered our law enforcement procedures in our society.

My question is, if that is the case, does that not make your arguments sort of not very relevant? Obviously it is true, if you could subpena every newsman every time you wanted to, guidelines or not, you would discover a lot of crimes that were occurring. I suppose the same thing is true if you could subpena every priest. Show me why the priest thing should be done away with and I will listen to you.

Mr. SCALIA. I suppose that the issue goes to a large degree to the centrality of the confidential relationship to the institution that you are talking about.

Now the confidential seal of confession in those religions where that is a part of the practice, is a very important portion of it, and thus, the incursion would be a deep incursion into the practice of freedom of religion. Whereas I do not believe that newspapers would be irreparably damaged by the continuation of the common law practice that has existed for many years.

Mr. PATTISON. I am not saying whether the newspapers are going to be damaged. I am talking about the public good. I do not think it is a question of whether we are damaging newspapers, priests, or lawyers.

Mr. SCALIA. It is a very limited relationship between a priest and the person confessing, and a husband and wife. But you are talking about a relationship between anybody who tells anything in confidence to anybody else who is getting that information so he can publish it in some way. That is an enormously broad privilege, especially since it is much more interesting to get something from someone who happens to be a criminal or know of criminal activities. That is good news; it is big news; where it is not particularly interesting or desirable to marry someone who is a criminal—right—or to confess such people, I presume.

I think that a significant difference upon the impact upon the institutions involved can be drawn between a privilege for the marital state, a privilege in particular religions which have confessions, and a privilege for the press.

Mr. PATTISON. Would you not say to some extent the de facto practice of newsmen which is relied upon without any, perhaps, sanction of law, does produce information which would not otherwise be produced by newsmen? In other words, people even rely on newsmen, if necessary, to go to jail, for that matter, rather than reveal his confidential sources.

Is it not true that that is one of the reasons one would go to certain newsmen who are known to feel that strongly about it? In other words, you have a protection yourself because you know, not based upon law but based upon the fact that they are not going to reveal their sources

under any circumstances, subpena or not. Is not that why we get a certain amount of information?

Mr. SCALIA. I honestly do not know. The Supreme Court in *Branzburg*, at least, felt that the evidence did not support the proposition. They have a statement to that effect, that if there is any significant restriction on the flow of information to the public by reason of the common law rule. Yes, you have a lot of statements to the effect that there is. But they are episodic; they are partial; and they come from persons who generally have a vested interest in one point of view on the thing, as the Supreme Court in *Branzburg* observed.

I suppose on a theoretical level, I cannot speak to the practice, whether it really works out that way. As I said in my testimony, in theory one would expect there would be more disclosures to the press if you had an absolute privilege.

But an absolute privilege really goes awfully far, and unless you render it absolute, then as a practical matter, it will have no effect, because the person receiving the confidence can say no more than what he can say now. I promise I will not reveal it unless they make me.

Mr. PATTISON. Thank you.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. If there are no further questions, on behalf of the subcommittee, Mr. Scalia, I would like to thank you for your appearance this morning. We will actually write you a letter in terms of precisely what we would like to have relating to the requests for subpenas.

Mr. SCALIA. Fine.

Mr. KASTENMEIER. Thank you.

[Subsequently on April 20, 1975, Chairman Kastenmeier sent the following letter to Mr. Scalia:]

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND ADMINISTRATION OF JUSTICE,
Washington, D.C., April 29, 1975.

HON. ANTONIN SCALIA,
Assistant Attorney General, Office of Legal Counsel,
Department of Justice, Washington, D.C.

DEAR MR. SCALIA: At the April 23, 1975 hearing on H.R. 215 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, you stated that your staff was in the process of updating the March 1973 memorandum on experience under the Attorney General's guidelines for seeking subpoenas of newsmen. I confirm our request that such material be provided to the Subcommittee.

Specifically, for the period since March 1, 1973, please inform us of the total number of requests for Attorney General approval of subpoenas to newsmen and the number of such requests which were approved. Provide a description of each request, including the nature of the case, the purpose for which the newsprint testimony was sought, the number of newsmen involved, and whether the newsmen had agreed to issuance of the subpoena.

There have been allegations of noncompliance with the guidelines. Please inform us of any noncompliance of which you are aware with regard to the period since March 1, 1973. Include an appropriate explanation regarding each.

Representatives of the Reporters Committee for Freedom of the Press have stated that, during the past year, Department of Justice subpoenas to newsmen were litigated in three cases.

Please inform us of all instances occurring since March 1, 1973, in which a newsman has moved to quash a subpoena obtained by the Department of Justice, and describe the results of such motions.

We would of course be pleased to receive any additional pertinent information concerning these matters which you are able to provide. On the basis of the assur-

ances you provided in your testimony, may we expect your response by May 14, 1975?

Sincerely,

ROBERT W. KASTENMEIER,
Chairman.

[On May 23, 1975 in response to Mr. Kastenmeier's letter Mr. Scalia submitted the following letter and materials:]

DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, D.C., May 23, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and Administration of Justice, Committee on the Judiciary, House of Representatives, Rayburn Building, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of April 29, 1975, I am enclosing material regarding subpoenas to newsmen sought by the Department of Justice from March 1, 1973, to May 8, 1975. It consists of a memorandum summarizing the Department's experience, with attached descriptions of each case in which authority to obtain a subpoena was sought from the Attorney General.

It is important to note that the absolute number of subpoenas approved during this period (54) has no necessary correlation to the number of instances in which newsmen were forced to provide information against their will—much less to the number of instances in which confidential news sources were involved. It is becoming a common professional practice for newsmen who are willing to testify to request prior issuance of a subpoena. The enclosed material shows that the instances were relatively infrequent in which the Attorney General approved the issuance of a subpoena without indication of the newsmen's willingness to provide the information sought—less than 13 in the 26-month period covered. Moreover, in only one such case did the information pertain to a confidential news source (not including in that category unsolicited letters claiming credit for criminal acts).

While we are convinced that the Attorney General's Guidelines, when applied, assure a proper degree of deference for the First Amendment considerations involved in the subpoena of newsmen, we have frankly been disturbed by the relatively high number of instances disclosed by our study in which the Guidelines were not initially followed, and subpoenas were sought without explicit Attorney General approval. The large majority of these instances occurred at the United States Attorney level; and most appear to have been caused by a lack of appreciation that Attorney General approval is required even when the newsman has consented to the subpoena. While at most three of these instances may possibly have resulted in the actual use of a subpoena, sought without Attorney General approval, against a newsman who was not willing to testify, it is nonetheless apparent that strict compliance with the Guidelines needs continuing reinforcement. The Attorney General is addressing a letter to all United States Attorneys expressing his concern that the Guidelines be scrupulously observed; and, in order to maintain the continuing personal supervision which appears necessary, requesting in the future a quarterly report of all newsmen's subpoenas actually sought.

Sincerely,

ANTONIN SCALIA,
Assistant Attorney General.

Enclosures.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 23, 1975.

The Department of Justice reported today that 54 requests to the Attorney General for approval of subpoenas to newsmen had been approved during the last 26 months.

In a covering letter accompanying the report to Congress, Antonin G. Scalia, Assistant Attorney General in charge of the Office of Legal Counsel, which prepared the report, wrote: "It is important to note that the absolute number of subpoenas approved during this period has no necessary correlation to the number of instances in which newsmen were forced to provide information against their will—much less to the number of instances in which confidential news sources were involved."

The report explains that at the time that 42 of the 54 instances were approved—about four out of five—the newsmen had agreed to appear or provide the information. In six instances the newsmen, despite prior agreement to comply with the subpoena; later opposed it. In five of those the subpoenas were dropped.

Of the remaining 12 requests approved without prior agreement, Mr. Scalia wrote: "In only one such case did the information pertain to a confidential news source." The report indicates that particular subpoena was never served.

The report was made to Chairman Robert W. Kastenmeier, (D-Wis.) of the Subcommittee on Courts, Civil Liberties, and Administration of Justice of the House Committee on the Judiciary.

The report sent to the Congress today covered the period from March 1, 1973, to May 8, 1975, and indicated that in that time 57 requests were made for subpoenas to newsmen, but three were refused by Attorney General Edward H. Levi.

An earlier memorandum made public in 1973 covered the period from August 10, 1970, to March 1, 1973, and disclosed that during that time eight requests were made to the Attorney General and all eight were granted.

Former Attorney General John N. Mitchell issued the original order requiring that no newsmen could be subpoenaed without the approval of the Attorney General.

Mr. Scalia noted in today's report that in addition to the 57 requests and 54 approvals in the recent period, 22 instances of subpoenas to newsmen were uncovered where no request to the Attorney General for approval had been made—either before or after issuance of the subpoena. Only a few of the 22 involved an unwilling newsman.

Fourteen of those instances involved subpoenas issuing from offices of United States Attorneys, of which there are 94 around the country.

Of the 54 approvals in the recent period, five involved approval after the fact—either approval of a subpoena already issued, or else approval for a new subpoena after an outstanding unapproved subpoena had been quashed.

In the earlier period—before March 1, 1973—a total of five instances were found where approval of the Attorney General was not sought. For that report there was no separate survey of the 94 offices of United States Attorneys.

Mr. Scalia expressed particular concern over the number of instances in which the Attorney General's approval was not requested and indicated that Attorney General Levi would institute a quarterly reporting system to assure that these did not recur.

As he put it in his letter:

> While we are convinced that the Attorney General's Guidelines, when applied, assure a proper degree of deference for the First Amendment considerations involved in the subpoena of newsmen, we have frankly been disturbed by the relatively high number of instances disclosed by our study in which the Guidelines were not initially followed, and subpoenas were sought without explicit Attorney General approval.
>
> The large majority of these instances occurred at the United States Attorney level; and most appear to have been caused by a lack of appreciation that Attorney General approval is required even when the newsman has consented to the subpoena.
>
> While at most three of these instances may possibly have resulted in the actual use of a subpoena, sought without Attorney General approval, against a newsman who was not willing to testify, it is nonetheless apparent that strict compliance with the Guidelines needs continuing reinforcement.
>
> The Attorney General is addressing a letter to all United States Attorneys expressing his concern that the Guidelines be scrupulously observed; and, in order to maintain the continuing personal supervision which appears necessary, requesting in the future a quarterly report of all newsmen's subpoenas actually sought.

NOTE: Copies of the covering letter, the report, and summaries of the subpoenas involved are available on request.

DEPARTMENT OF JUSTICE SUBPOENAS TO NEWSMEN MARCH 1, 1973 TO MAY 8, 1975

INTRODUCTION

Information on subpoenas to newsmen issued by the Department of Justice since March 1, 1973 (the date of the prior Department memorandum on subpoenas to

newsmen) was requested from all pertinent divisions and agencies of the Department and also, separately, from United States Attorneys. Responses indicating the issuance of one or more subpoenas to newsmen were received from the Antitrust, Civil, Civil Rights, Criminal and Tax Divisions and from the Watergate Special Prosecution Force. Responses were received with regard to all 94 United States Attorney offices except three.[1] (It should be noted that ordinarily when a United States Attorney seeks permission to subpoena a newsman, the matter is handled by one of the divisions.)

The survey indicates that during the period March 1, 1973 to May 8, 1975, 57 requests for permission to subpoena newsmen were submitted to the Attorney General. Many of the requests related to the subpoenaing of more than one person (e.g., the manager of and attorney for a radio station) and, in some cases, the request pertained to several news organizations (e.g., several newspapers which had photographed the same event). Attached are sheets which briefly summarize each of the requests.

REQUESTS SUBMITTED TO THE ATTORNEY GENERAL

Two of the 57 requests were denied by the Attorney General, another was denied in part and a third was withdrawn by the submitting division. All other requests submitted to the Attorney General were granted. It should be noted, however, that in some 16 instances approved subpoenas were never served or were withdrawn or became moot after service.[2]

A significant aspect of the requests approved by the Attorney General is that a large majority—36½ of the 54 requests[3]—were based on negotiated agreements. That is, with regard to a large majority of the requests the newsman was willing to testify or to provide photographs or other material, but wished to do so only pursuant to subpoena. Moreover, six of the remaining requests involved situations in which the newsman before being subpoenaed had indicated willingness to comply but, after being served, opposed the subpoena. In five of these six cases, the Department withdrew the subpoena. In the remaining case, the newsman filed a motion to quash which was granted by the district court.

Thus, there were only 14½ requests as to which prior negotiations had failed to indicate the newsman's willingness to comply with a subpoena. Two of these requests were denied by the Attorney General. Of the remaining 12½, only one involved what could properly be classified as a confidential source (excluding from that classification letters from extremist organizations, received without solicitation, claiming credit for criminal acts). Their disposition was as follows: In 1½ cases (including that which involved the confidential source), the subpoena was not served. In three others, it was formally withdrawn when the newsman moved to quash. In two cases, there was no opposition to the subpoena after its issuance. In only six such cases did the Department persist in the face of a motion to quash. Three of these involved a single individual; in all of them, the motion to quash was denied.

Another important factor disclosed by the attached summaries is that hardly any of the subpoenas approved—even including those which newsmen agreed to—dealt with confidential sources.[4] A substantial portion of the requests were for a subpoena duces tecum, i.e., a subpoena for the production of a document or photographs, and thus did not involve testimony. Of these, ten sought a document (often a letter from a group claiming responsibility for a bombing); twelve sought photographs or television film (e.g., photographs of the violence at Kent State University in May 1970); and three sought a tape recording. Most of the requests which sought testimony were for the purpose of authenticating photographs or film or verifying or explaining published information. Often, the newsman was an eyewitness to the events in question.

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[1] Three offices, Guam, Puerto Rico and the Virgin Islands, were not surveyed.

[2] In eight instances, because of mootness, the subpoenas were withdrawn or not pursued; in three cases, the subpoenas were withdrawn after the newsman changed his previous expression of willingness to comply; one subpoena was withdrawn after the filing of a motion to quash based on nonexistence of the document sought; in four instances, the subpoenas were not served for certain practical reasons, such as the newsman's absence from the country.

[3] The ½ results from the fact that one request related to two newsmen, one of whom was willing to testify.

[4] The matter of newsmen's subpoenas that were never submitted to the Attorney General is discussed below. A few of those subpoenas may have related to confidential sources.

Bombings or threatened bombings were the subject of ten requests. Another nine related to the events at Wounded Knee, South Dakota in early 1973. Other requests related to a variety of alleged criminal offenses including kidnapping, deprivation of rights by law enforcement officers, and violent demonstrations; and a few related to civil lawsuits.

SUBPOENAING OF NEWSMEN WITHOUT ATTORNEY GENERAL APPROVAL

Situations in which a Department employee subpoenaed a newsman without having the approval of the Attorney General fall into two categories—cases in which a subsequent request for Attorney General approval was made and cases in which there was never such a request. Usually, the failure to seek Attorney General approval was caused by the fact that the particular attorney was not familiar with the Attorney General's Guidelines or believed that Attorney General approval was not required where the newsman was willing to testify or produce the material in question if subpoenaed.

There were five instances in which (1) a subpoena was issued without Attorney General approval and then (2) a request was made to the Attorney General to ratify the preexisting subpoena or to approve issuance of a new subpoena.

The survey identified 22 instances in which no request (before or after issuance of the subpoena) was submitted to the Attorney General. Fourteen of these instances were reported by United States Attorneys and apparently, in most such cases, issuance of the subpoena was not coordinated with Department officials in Washington.[5] At least 14 of these cases of noncompliance with the Guidelines involved newsmen who were willing to testify or provide material but who requested issuance of a subpoena. Of the remaining cases, in three instances, the newsman complied with the subpoena; in two, the newsman was never called as a witness; and in three, the Department withdrew the subpoena.

NEWSMEN'S MOTIONS TO QUASH

The survey identified a total of ten instances in which the newsman or his employer filed a motion to quash a subpoena issued at the instance of the Department.[6] In one case, the motion was granted; in six cases, it was denied. (One appeal from denial of a newsman's motion is still pending.) In the remaining three cases, the subpoena was either withdrawn by the Department or became moot.

Newsmen's Subpoenas—Requests to the Attorney General March 1, 1973 to May 8, 1975

The attached sheets briefly describe each request for permission to subpoena a newsman submitted to the Attorney General during the period March 1, 1973 to May 8, 1975.

The sheets are arranged by Division and in reverse chronological order. The summaries indicate whether the newsman had agreed in advance to comply with a subpoena and, in cases where a subpoena was opposed, indicate the type of opposition (e.g., motion to quash) and the outcome.

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[5] Nine of these were cases in which the newsmen had not agreed to issuance of a subpoena. One was a case in which the newsman had indicated agreement, but subsequently changed his position.

Criminal Division Date of request May 5, 1975

Proceeding: ____ grand jury X trial ____ other

Offense: Assault

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 1 (television station)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A television station cameraman filmed the assault which is the subject of the trial.

The station's attorney stated the station was willing to provide the film, if it was subpoenaed.

Criminal Division Date of request May 2, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: investigation of a particular industry

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 1 (television station)

Subpoena for: ____ documents ____ photos ____ TV film

____ testimony X tape recording

Agreement to issuance of subpoena: ____ yes X no (see below)

Action: ____ Approved by Attorney General X other

Comment:

A Government witness called a television station and discussed matters related to the investigation. The conversation was tape recorded and portions were broadcast.

The Criminal Division sought permission to subpoena the entire recorded conversation in order to be able to meet the Government's obligations with regard to making material available to the defense.

The network's attorney stated that material not broadcast would not be released without a subpoena and that, if a subpoena were issued, the network would then decide whether to file a motion to quash.

The request was denied by the Attorney General.

Criminal Division Date of request April 25, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Obstruction of justice

Subpoena to: ____ newspaper ____ radio ____ TV

____ wire service X other

Number of persons subpoenaed: 1

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: ____ Approved by Attorney General X other

Comment:

The newsman provided certain significant information to the Department, but refused to reveal a confidential source.

The Criminal Division requested permission to subpoena the newsman in order to learn the identity of the source. The request was denied by the Attorney General.

Criminal Division Date of request April 18, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Offe ses arising from occupation of a building

Subpoena to: X newspaper ____ radio ____ TV

X wire service ____ other

Number of persons subpoenaed: 2 photographers

Subpoena for: ____ documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

Subpoenas for photographs of events related to the occupation of the building. Some, but not all, of the photographs had been previously published.

Officials of the newspaper and the wire service indicated their willingness to provide the photographs, if subpoenas were issued.

Criminal Division Date of request April 11, 1975

Proceeding: ____ grand jury X trial ____ other

Offense: Unlawful entry (demonstration at White House)

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 2 (TV station, TV news service)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The demonstration was filmed by a television station and a news service. The film clips were broadcast on the day of the demonstration. The prosecutor sought permission to subpoena the film clips. The station and the news service indicated that they had no objection to issuance of subpoenas.

A subpoena was served on the station, and it provided the film.

Criminal Division Date of request April 10,1975

Proceeding: ____ grand jury X trial ____ other

Offense: False declaration before grand jury.

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The defendant, who was charged with making false statements to a grand jury regarding the source of his knowledge of a murder, claimed that he had learned of the murder from articles in a Buffalo newspaper. The Criminal Division sought permission to subpoena the reporter who had written the articles so that he could verify the articles and explain the timing of the articles and the surrounding circumstances.

The reporter indicated willingness to testify.

The subpoena was served and was not opposed. The reporter testified at the trial.

Criminal Division Date of request April 4, 1975

Proceeding: ____ grand jury X trial ____ other

Offense: Assaulting federal officers

Subpoena to: ____ newspaper ____ radio ____ TV

X wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

While attempting to arrest the occupants of a van, two FBI agents were shot at. Shortly afterwards, a reporter saw the van and heard one of the occupants say that he had just shot an FBI agent. (The agents could not identify any of the occupants.)

The reporter was willing to testify regarding the events, but requested issuance of a subpoena.

The case is still in the pre-trial stage, and as of May 5, the subpoena had not yet been served.

Criminal Division Date of request March 24, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Three bombings and one attempted bombing of businesses

Subpoena to: ____ newspaper X radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 2 (station manager, attorney)

Subpoena for: X documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

On the day of the bombings, a radio station broadcast the contents of a letter allegedly sent by a radical group, claiming responsibility for the bombings. The station manager then gave the letter to the station's attorney.

The Criminal Division sought permission to subpoena the letter from the station manager and the attorney. The attorney had stated that the letter would be relinquished upon the service of a subpoena.

Criminal Division Date of request March 14, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Various unlawful activities of a radical organization

Subpoena to: ____ newspaper X radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 2(station manager, attorney)

Subpoena for: ____ documents ____ photos ____ TV film

X testimony X tape recording

Agreement to issuance of subpoena: ____ yes ____ no (see below)

Action: X Approved by Attorney General (in part) ____ other

Comment:

In March 1975, a radio station broadcast a tape recording purportedly made by three fugitives. The station's attorney provided a copy of the tape to the FBI and stated that, upon service of a subpoena, he would provide the original of the tape.

Initially, the Criminal Division sought permission to subpoena (1) the tape from the manager and the attorney and (2) the manager's testimony on how the station obtained the tape. However, the latter request was denied by the Attorney General.

The Criminal Division received permission to subpoena the tape. Then, the manager changed his position and moved to quash the subpoena. On April 14, the motion was granted by the district court.

Criminal Division Date of request March 19, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Three bombings

Subpoena to: ____ newspaper X radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 2 (station manager, attorney)

Subpoena for: X documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A letter, allegedly written by a radical organization, claiming responsibility for bombings was sent to a radio station. The station manager turned the letter over to the station's attorney. The Criminal Division sought permission to subpoena the letter from the manager and the attorney. The attorney had stated that, upon receipt of a subpoena, the letter would be relinquished.

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___ Criminal _____ Division Date of request March 11, 1975

Proceeding: _____ grand jury __X__ trial _____ other

Offense: Robbery _____ _____ _ _ _

Subpoena to: _____ newspaper _____ radio __X__ TV

_____ wire service _____ other

Number of persons subpoenaed: 1 photographer

Subpoena for: _____ documents _____ photos _____ TV film

__X__ testimony _____ tape recording

Agreement to issuance of subpoena: __X__ yes _____ no

Action: __X__ Approved by Attorney General _____ other

Comment:

In early 1973, a rancher was robbed. Soon afterwards, the person who was later charged with the robbery was filmed by a television network photographer. The defendant was holding a shotgun.

In connection with another trial, the film was given to the Government. The Criminal Division sought to subpoena the photographer to obtain testimony authenticating the film. The photographer was willing to testify, but requested that a subpoena be issued.

The subpoena was not served, because, by that time, the photographer had left for Southeast Asia.

Criminal Division Date of request Feb. 26, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Bombing of television station

Subpoena to: ____ newspaper X radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 2 (station manager, attorney)

Subpoena for: X documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A radio station received a letter, allegedly written by a radical organization, claiming responsibility for the bombing of the television station and for other bombings. The station manager turned the letter over to the station attorney. They refused to give the letter to the Department voluntarily, but the Criminal Division stated that it was expected that they would comply with a subpoena for the letter.

Criminal Division Date of request Feb. 13, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Bomb threat against the President

Subpoena to: ____ newspaper X radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 radio station

Subpoena for: X documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

A letter was sent to a radio station by a group which stated that it was going to bomb a hotel when the President was there.

The U.S. Attorney's office sought permission to subpoena the letter from the station.

The station filed a motion to quash which was denied.

Criminal Division Date of request Jan. 24, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Bombing of office building

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 2 (newspaper reporter)

Subpoena for: X documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

After the bombing of the office building, an underground newspaper published an article on the bombing and included the text of a letter regarding the bombing, allegedly written by a radical organization claiming responsibility. Representatives of the newspaper stated that a reporter had the letter. The reporter's attorney stated that the original was no longer available. The Criminal Division sought and obtained permission to subpoena the letter from the newspaper and the reporter.

Then, a motion to quash the subpoena was filed by the reporter, based in part upon the allegation that the letter no longer existed. Prior to a hearing on the motion, the Department withdrew the subpoena.

Criminal Division Date of request Jan. 14, 1975

Proceeding: ____ grand jury X trial ____ other

Offense: Illegal transporting of explosives

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

A newspaper published an article attributing to the defendant statements contrary to the defense theory expected to be used at the trial. The Criminal Division sought permission to subpoena, for purposes of verification, the reporter who had written the article.

The newspaper's attorney had stated that the subpoena would be opposed.

After service of the subpoena, the reporter filed a motion to quash. However, the issue became moot due to the absence of the reporter at the time of the trial.

Criminal Division [illegible] Dec. 6, 1974

Proceeding: ____ grand jury __X__ trial ____ other

Offense: Kidnapping

Subpoena to: ____ newspaper ____ radio __X__ TV

____ wire service ____ other

Number of persons subpoenaed: 2 (television network, correspondent)

Subpoena for: ____ documents ____ photos __X__ TV film

__X__ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes __X__ no

Action: __X__ Approved by Attorney General ____ other

Comment:

The events that were the subject of the trial were filmed by a television network. At a pre-trial conference, the defense attorney stated that he wished to obtain portions of the film. The court asked the Government to join in the request, with the understanding that the subpoena would be dropped in the event that the network opposed it.

The subpoena was never served.

Criminal Division Date of request Nov. 29, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Possession of unregistered machine gun

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 1 (television network)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A television network filmed certain events and one of the films showed the defendant carrying the machine gun in question. The film had already been given to the Government, in connection with a prior trial.

An agreement had been reached, under which the Government would issue a subpoena and the film and a certificate of authenticity would be provided.

The subpoena was served, but it became unnecessary to obtain the film because the defendant agreed to stipulate the pertinent facts.

Criminal Division Date of request Nov. 27, 1974

Proceeding: ____ grand jury ____ trial X other

Offense: not indicated change of venue hearing/

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 2 (television station & its director)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A television station had filmed an interview with the principal defendant. The defendant sought a change of venue on the ground of adverse pre-trial publicity.

The court suggested that the Government obtain the films for use at the hearing. An official of the station was willing to provide the films, but requested that a subpoena be issued. The subpoena for the film was complied with.

Civil Rights Division Date of request March 17, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Assault and other offenses

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes ____ no

Action: X Approved by Attorney General ____ see below ____ other

Comment:

A newspaper reported witnessed several incidents of violence. He indicaced willingness to testify before a grand jury with regard to the incidents if it did not interfere with his work.

The Attorney General approved the request. The reporter was actually subpoenaed one day before the Attorney General's approval.

After the reporter received the subpoena, his attorney stated that the subpoena would be resisted. The Civil Rights Division then withdrew the subpoena.

Civil Rights Division Date of request March 5, 1975

Proceeding: ____ grand jury X trial ____ other

Offense: Violent interference with federally protected rights and with federal court order

Subpoena to: X newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 8

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A violent assault was filmed by three television stations. The films had been subpoenaed previously, but the testimony of the cameramen was needed to authenticate the films and perhaps to provide information on the stated intention of a crowd.

The Civil Rights Division's request also related to subpoenaing representatives of two newspapers and three television stations who would be asked to authenticate news clippings and television news scripts regarding court-ordered desegregation.

Each of the newsmen was willing to testify, but requested issuance of a subpoena.

Originally, two defendants were to be tried together, but after the start of the trial the two cases were severed. At the trial of the first defendant, because of evidentiary rulings, only four of the persons subpoenaed testified.

Three of the four, all television cameramen, were subpoeaned to testify at the second trial. Because Attorney General approval had been obtained for the original trial (which was to have been joint), no further request for Attorney General approval was made.

Civil Rights Division Date of request Oct. 17, 1974

Proceeding: X grand jury ____ trial ____ other

Offense: Deprivation of rights

Subpoena to: X newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 4 executives

Subpoena for: ____ documents X photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The incidents in question were filmed by several television stations and were photographed by newspapers. The Civil Rights Division sought permission to subpoena films from three television stations and photographs from one newspaper.

Each of the news organizations was willing to provide the material, but requested issuance of a subpoena.

Civil Rights Division Date of request Sept. 30, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Deprivation of rights (police brutality)

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 2 (TV station; a photographer)

Subpoena for: ____ documents X photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A prisoner was allegedly beaten by a police officer. The victim was photographed by a television station photographer. The request was to subpoena the photographs and the photographer so that he could identify them at the trial.

The station agreed to provide the photographs and the testimony, but requested that subpoenas be issued.

The subpoenas were served and were complied with.

Civil Rights Division Date of request Sept. 27, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Deprivation of rights (shootings at a university)

Subpoena to: X newspaper ____ radio ____ TV

X wire service X other university news service

Number of persons subpoenaed: 8 photographers

Subpoena for: ____ documents X photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

Many photographs were taken of the events surrounding the shootings. The Civil Rights Division sought to subpoena eight photographers in order to have them identify their photographs and testify regarding the events they observed.

Each of the photographers was willing to testify but requested issuance of a subpoena.

Eight subpoenas were served; six of the eight photographers were asked to testify.

Civil Rights Division Date of request Aug. 26, 1974

Proceeding: ____ grand jury ____ trial _X_ other juvenile delinquency proceeding/

Offense: Violent interference with fair housing rights

Subpoena to: ____ newspaper ____ radio _X_ TV

____ wire service ____ other

Number of persons subpoenaed: 1 photographer

Subpoena for: ____ documents ____ photos _X_ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: _X_ yes ____ no

Action: _X_ Approved by Attorney General ____ other

Comment:

Two juveniles were charged with throwing a Molotov cocktail at a home purchased by a black family and with painting racial epithets on the property. The property was filmed by a television station.

The station was willing to provide the film, but requested issuance of a subpoena.

The subpoena was served and was complied with.

Civil Rights Division Date of request June 1, 1973

Proceeding: ____ grand jury X trial ____ other

Offense: Violent deprivation of rights, kidnapping

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The reporter had interviewed one of the defendants several times and had obtained significant information which was provided to the Department. The Civil Rights Division sought permission to subpoena the reporter in order to obtain his testimony on key aspects of the case. He had indicated willingness to testify but requested issuance of a subpoena.

Prior to the Civil Rights Division's request, and without seeking the approval of the Attorney General, the U.S. Attorney's office had subpoenaed the reporter. The Civil Rights Division stated that a motion to quash that subpoena would be filed.

The second subpoena was served and was complied with.

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Antitrust Division Date of request Jan. 21, 1975

Proceeding: X grand jury ____ trial ____ other

Offense: Price fixing conspiracy among certain manufacturers

Subpoena to: ____ newspaper ____ radio ____ TV

____ wire service X other trade letter publisher

Number of persons subpoenaed: 2 (the company and its president)

Subpoena for: X documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

The purpose of the subpoenas was to determine whether the publishing company's activities (e.g., weekly price reports) were part of a conspiracy. Because of the possible involvement of the company in a conspiracy, waiver of the requirement of prior negotiation was sought by the Antitrust Division and was granted by the Attorney General.

Antitrust Division Date of request Jan. 15, 1975

Proceeding: ____ grand jury X trial ____ other

Subject: Unreasonable restraint of trade in the licensing of syndicated features to newspapers (civil cases)

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 13 editors and publishers

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The request pertained to testimony relating mainly to the business aspects of publishing newspapers. Each of the editors and publishers was willing to testify, but requested issuance of a subpoena.

None of the subpoenas was opposed. However, because the case was settled prior to trial, none of the newsmen testified.

Antitrust Division Date of request May 1, 1974

Proceeding: ____ grand jury ____ trial X other

Subject: Boycott by independent truckers

(civil investigation)

Subpoena to: ____ newspaper ____ radio ____ TV

____ wire service X other association

Number of persons subpoenaed: 1 company

Subpoena for: X documents ____ photos ____ TV fil

____ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

This civil investigative demand (CID) requested documents concerning a proposed boycott by independent truckers.

It was addressed to an incorporated association whose activities included publishing a magazine.

The association moved, in court, to modify or set aside the CID on the ground that it impaired the free association rights of its members. Prior to any court ruling, the boycott ended and the CID was withdrawn.

Criminal Division Date of request 11/15/74

Proceeding: ____ grand jury __x__ trial ____ other

Offense: Possession of unregistered machine gun

Subpoena to: ____ newspaper ____ radio ____ TV

__x__ wire service ____ other

Number of persons subpoenaed: 2 (photographer, executive)

Subpoena for: ____ documents ____ photos ____ TV film

__x__ testimony ____ tape recording

Agreement to issuance of subpoena: __x__ yes ____ no

Action: __x__ Approved by Attorney General ____ other

Comment:

A photograph showing the defendant holding a machine gun was published at the time of the events. The Government had already obtained the photograph, but sought to obtain the testimony of the photographer and a wire service executive regarding the chain of custody of the negative.

Both persons were willing to appear, but requested that subpoenas be issued.

The subpoenas were served, but it became unnecessary for the newsmen to testify because the defendant agreed to stipulate the pertinent facts.

Criminal Division Date of request 11/14/74

Proceeding: x grand jury ____ trial ____ other

Offense: Threatening the life of a foreign leader

Subpoena to: ____ newspaper ____ radio x TV

____ wire service ____ other

Number of persons subpoenaed: 2 (reporter, T.V. station)

Subpoena for: ____ documents ____ photos x TV film

x testimony ____ tape recording

Agreement to issuance of subpoena: x yes (see below) ____ no

Action: x Approved by Attorney General ____ other

Comment:

During an interview filmed by a television station, a member of a certain organization stated that his organization would assassinate a foreign leader. The Criminal Division sought permission to subpoena films of the interview (including portions not shown on television) and the reporter who conducted the interview. The reporter would be asked to authenticate the film and to provide information on the background of the interview.

The station was willing to provide the film, but requested issuance of a subpoena. The U.S. Attorney's Office anticipated that there would be no objection to subpoenaing the reporter.

Criminal Division Date of request 11/7/74

Proceeding: x grand jury ____ trial ____ other

Offense: Bombing of residence of corporation executive

Subpoena to: x newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 (newspaper)

Subpoena for: x documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: x yes ____ no

Action: x Approved by Attorney General ____ other

Comment:

An underground newspaper received a letter regarding the bombing. Purportedly, a radical organization claimed responsibility for the bombing.

The Criminal Division sought permission to subpoena the letter from the newspaper. The newspaper's attorney had stated that the letter would be provided, if a subpoena were issued.

Criminal Division Date of request 10/10/74

Proceeding: x grand jury ____ trial ____ other

Offense: Bombing of a hotel

Subpoena to: ____ newspaper x radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 station manager

Subpoena for: x documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes x no

Action: x Approved by Attorney General ____ other

Comment:

A radio station claimed to have received a letter from a radical group claiming responsibility for the bombing. The station's manager refused to provide the letter to the Government.

A subpoena was served. The manager filed a motion to quash which was denied by the district court. The manager refused to produce the letter. He was held in contempt by the district court. The matter is now on appeal.

Criminal Division Date of request 9/23/74

Proceeding: ____ grand jury __x__ trial ____ other

Offense: Dealing in firearms without a license; related offenses

Subpoena to: ____ newspaper ____ radio __x__ TV

____ wire service ____ other

Number of persons subpoenaed: 1 (station business manager)

Subpoena for: ____ documents ____ photos __x__ TV film

__x__ testimony ____ tape recording

Agreement to issuance of subpoena: __x__ yes ____ no

Action: __x__ Approved by Attorney General ____ other

Comment:

Federal agents permitted a television station to film an undercover purchase of firearms. The Criminal Division sought permission to subpoena the film and the person or persons who took it. The station business manager agreed to provide the film, but requested issuance of a subpoena.

A subpoena was served on the station and the film was obtained for use at the trial. No station employee was called to testify, because the defendants stipulated to the film's authenticity.

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Criminal Division Date of request 9/4/74

Proceeding: ____ grand jury __x__ trial ____ other

Offense: Assault on federal officers

Subpoena to: __x__ newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

__x__ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes ____ no See below.

Action: __x__ Approved by Attorney General ____ other

Comment:

One of the defendants was interviewed by telephone by a reporter from a college newspaper. Without seeking the approval of the Attorney General, the U.S. Attorney's Office subpoenaed the reporter. When the Criminal Division learned of the subpoena, it cause a motion to quash to be filed. That motion was granted.

Subsequently, the Criminal Division sought and obtained the Attorney General's permission to subpoena the reporter. Originally, the reporter had indicated that he would testify if subpoenaed.

After the second subpoena, the reporter changed his position. He was not called to testify, because the case was dismissed by the Government before it went to trial.

Criminal Division Date of request 8/27/74

Proceeding: ____ grand jury x trial ____ other

Offense: Assault on federal officers

Subpoena to: x newspaper ____ radio ____ TV

x wire service ____ other

Number of persons subpoenaed: 2 photographers

Subpoena for: ____ documents ____ photos ____ TV film

x testimony ____ tape recording

Agreement to issuance of subpoena: x yes ____ no

Action: x Approved by Attorney General ____ other

Comment:

Several weeks before the shootings upon which the charges are based, photographs were taken showing certain of the defendants with rifles. The photographs had been provided to the Government. The Criminal Division sought permission to subpoena the photographers to have them authenticate the pictures. Each was willing to testify, but requested that a subpoena be issued.

Subpoenas were issued. Each reporter gave authentication testimony at the trial.

Criminal Division Date of request 8/1/74

Proceeding: ____ grand jury x trial ____ other

Offense: Theft of cattle

Subpoena to: ____ newspaper ____ radio ____ TV

x wire service ____ other

Number of persons subpoenaed: 2 photographers

Subpoena for: ____ documents ____ photos ____ TV fil

x testimony ____ tape recording

Agreement to issuance of subpoena: x yes ____ no

Action: x Approved by Attorney General ____ other

Comment:

Evidence connecting the defendant with the theft could be supplied by two photographers, one of whom photographed the defendant herding the cattle.

Each of the photographers was willing to testify, but requested that a subpoena be issued.

Subpoenas were served. However, the case was dismissed before the trial began.

Criminal Division Date of request 7/2/74

Proceeding: x grand jury ____ trial ____ other

Offense: Mailing of bombs to embassies in foreign countries

Subpoena to: x newspaper ____ radio ____ TV

x wire service ____ other

Number of persons subpoenaed: 2 reporters

Subpoena for: ____ documents ____ photos ____ TV film

x testimony ____ tape recording

Agreement to issuance of subpoena: 1 yes 1 no See below

Action: x Approved by Attorney General ____ other

Comment:

A wire service dispatch described an interview with an unnamed member of an organization who claimed responsibility for mailing bombs to certain embassies. The wire service refused to permit the FBI to question the reporter who had conducted the interview.

Subsequently, a newspaper published an interview with a named person who claimed to be the leader of the organization responsible for the mailing of the bombs. The reporter was willing to testify, but requested issuance of a subpoena.

Issuance of the subpoenas was approved by the Attorney General, but neither reporter was served with a subpoena.

Criminal Division Date of request 6/11/74

Proceeding: x grand jury ____ trial ____ other

Offense: Bank robbery, other offenses

Subpoena to: ____ newspaper x radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 station manager

Subpoena for: ____ documents ____ photos ____ TV film

____ testimony x tape recording

Agreement to issuance of subpoena: ____ yes x no

Action: x Approved by Attorney General ____ other

Comment:

A radio station played a tape recording apparently made by a fugitive charged with bank robbery and other offenses and other persons who may have taken part in the robbery. The station manager refused to make the original of the tape available.

A subpoena was issued for the tape. The manager's motion to quash was denied. He refused to produce the tape and was held in contempt. The judgment of contempt was affirmed by the court of appeals, and the Supreme Court denied certiorari. [These proceedings also related to the subpoena resulting from the June 7, 1974 request of the Criminal Division.]

Criminal Division Date of request 6/10/74

Proceeding: x grand jury ____ trial ____ other

Offense: Kidnapping

Subpoena to: ____ newspaper ____ radio x TV

____ wire service ____ other

Number of persons subpoenaed: 1 correspondent

Subpoena for: ____ documents ____ photos ____ TV film

x testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes ____ no See below

Action: x Approved by Attorney General ____ other

Comment:

The alleged offense was witnessed and filmed by a television network news team. A subpoena for the film was approved previously. The Criminal Division sought permission to subpoena a correspondent who was an eyewitness and who could authenticate the film.

A network attorney stated that, if subpoenaed, the correspondent would cooperate and that the network would probably not litigate the subpoena issue.

After the subpoena was served, the network changed its position and advised the Department that it would file a motion to quash. The Department then withdrew the subpoena.

Criminal Division Date of request 6/7/74

Proceeding: x grand jury ____ trial ____ other

Offense: Bombing of office of state official

Subpoena to: ____ newspaper x radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 station manager

Subpoena for: x documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes x no

Action: x Approved by Attorney General ____ other

Comment: A radio station obtained a letter from a radical organization regarding the bombing. A subpoena for the letter was served upon the station's attorney, but he stated that the letter had been given to the station manager. The manager refused to produce the letter.

A subpoena was served on the manager. His motion to quash was denied. He refused to produce the letter and was held in contempt. The judgment of contempt was affirmed by the court of appeals, and the Supreme Court denied certiorari. [See the memorandum on the June 11 request of the Criminal Division.]

Criminal Division Date of request June 4, 1974

Proceeding: X grand jury ____ trial ____ other

Offense: Bombing of office of state official

Subpoena to: ____ newspaper X radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 station attorney

Subpoena for: X documents ____ photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

A radio station obtained a letter from a radical organization regarding the bombing. The letter was given to the station's attorney who stated that he would not surrender it without a subpoena.

An Assistant U.S. Attorney issued a subpoena, without securing the permission of the Attorney General. The station's attorney refused to produce the letter. On the following day, the Attorney General approved subpoenaing the attorney. The attorney stated that he no longer had the letter. [See memorandum on June 7, 1974 request.]

Criminal Division Date of request May 1974 (C)

Proceeding: X grand jury ____ trial ____ other

Offense: Demonstration in Washington, D. C.

Subpoena to: X newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 2 (newspaper, television station)

Subpoena for: ____ documents X photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

Pictures of the demonstration were taken by a newspaper and a television station. The Criminal Division sought permission to subpoena photographs and television film.

The newspaper and the station were willing to provide the material, but requested issuance of subpoenas.

Criminal Division Date of request April 3, 1974

Proceeding: X grand jury ____ trial ____ other

Offense: Activities of organized crime

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 2 reporters

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes (see below) ____ no

Action: X Approved by Attorney General ____ other

Comment:

Two reporters happened to be at a restaurant when a conversation occurred between a person under investigation by the grand jury and another person. One of the reporters overheard the latter persons discuss the grand jury. The conversation was material to the investigation. The reporter was willing to testify, but requested that a subpoena be issued.

The request regarding the other reporter was conditional and depended upon whether he had also witnessed the conversation. The Attorney General gave his approval with regard to both reporters.

The second reporter was reluctant to testify and was not served with a subpoena.

Criminal Division Date of request April 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Bribery

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

One of the defendants claimed that he had not been present at a particular event. A newspaper article written by a reporter who had attended the event stated that the defendant was present.

The U.S. Attorney's office sought permission to subpoena the reporter to obtain her testimony regarding the defendant's presence at the event.

A motion to quash the subpoena was filed and was denied. The reporter testified.

Criminal Division Date of request March 12, 1974

Proceeding: X grand jury ____ trial ____ other

Offense: Kidnapping

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 1 (television network)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The alleged kidnapping and related events were filmed by a television network and were later broadcast. Network officials stated that they would provide the films, but requested that a subpoena be issued.

Criminal Division Date of request Feb. 22, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Conspiracy to receive bribes (relating to award of federal contracts)

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: X documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no
~~see~~ below

Action: X Approved by Attorney General ____ other

Comment:

In 1971 a reporter had interviewed the defendant by telephone and had published an article based upon the interview. The interview related to the subject of the trial.

The Criminal Division sought permission to subpoena the reporter and his notes to obtain his testimony regarding the published information. The newspaper's attorney acknowledged that there was no basis for opposing a subpoena.

However, when the newspaper's attorney refused to permit the Department to interview the reporter before the trial, it was decided not to serve the subpoena and the reporter did not testify.

Criminal Division Date of request Feb. 12, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Unlawful entry, demonstration at a university hospital

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 1 (television station)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The demonstration was filmed by a television station. The station agreed to provide the film clips, but requested issuance of a subpoena.

The subpoena was served, and the film was produced at the trial.

Criminal Division Date of request Feb. 12, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Assault on federal officers

Subpoena to: ____ newspaper ____ radio ____ TV

X wire service ____ other

Number of persons subpoenaed: 3 (photographer, executive, editor)

Subpoena for: ____ documents X photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes ~~see below~~ no

Action: X Approved by Attorney General ____ other

Comment:

A wire service photographer took pictures of a coconspirator holding a machinegun during the events in question. The Criminal Division sought permission to subpoena 2 negatives from an executive of the wire service and also the photographer and an editor who could testify regarding the chain of custody of the negatives. The three newsmen had indicated willingness to testify, but requested that subpoenas be issued.

After the Attorney General had approved issuance of the subpoenas, the wire service changed its position regarding release of the negatives and stated that, if necessary, it would move to quash the subpoena. However, the wire service offered an alternative under which the FBI made prints in a darkroom of the wire service.

Because of the way the trial developed, neither the photographs nor the testimony was required.

Criminal Division Date of request Jan. 10, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: Mail fraud in the sale of cosmetics and self-improvement courses

Subpoena to: ____ newspaper ____ radio ____ TV

X wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes X no

Action: X Approved by Attorney General ____ other

Comment:

A reporter was present at a meeting at which the principal defendant discussed plans relevant to the prosecution. This was described in a news story.

The reporter was willing to testify, but her employer opposed it.

The employer filed a motion to quash that was denied by the district court. The reporter testified at the trial.

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Criminal Division Date of request Dec. 18, 1973

Proceeding: ____ grand jury X trial ____ other

Offense: Assault and receipt of stolen documents

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

When federal agents sought to serve a search warrant, one of the defendants used a shotgun in an effort to drive the agents away. A newspaper reporter witnessed the events and described them in a published article.

The Criminal Division sought permission to subpoena the reporter to obtain his testimony regarding the events. The reporter was willing to testify, but requested issuance of a subpoena.

The subpoena was served, and the reporter testified at the trial.

Criminal Division Date of request Sept. 26, 1973

Proceeding: ____ grand jury X trial ____ other

Offense: Assault with a deadly weapon

Subpoena to: ____ newspaper ____ radio ____ TV

X wire service ____ other

Number of persons subpoenaed: 1

Subpoena for: ____ documents X photos ____ TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A wire service photographer took pictures of the scene of the crime. The U.S. Attorney's office subpoenaed the photographs, without obtaining the approval of the Attorney General. That subpoena was quashed, and a request was made for the Attorney General's approval.

The wire service was willing to provide the photographs, but requested issuance of a subpoena.

The second subpoena was served, and the photographs were produced at the trial.

Criminal Division Date of request Aug. 15, 1973

Proceeding: ____ grand jury X trial ____ other

Offense: Assault on federal officers (resulting from a "shoot out" with members of an extremist organization)

Subpoena to: X newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 2 reporters

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

Several days before the "shoot out", each reporter interviewed the leader of the extremist organization. The leader made statements regarding such matters as prior plans to shoot policemen.

Each of the newsmen was willing to testify, but requested that a subpoena be issued.

Each was served with a subpoena and testified at the trial.

Criminal Division Date of request Aug. 7, 1973

Proceeding: ____ grand jury ____ trial X other change of venue

Offense: Bribery, mail fraud and other offenses on the part of a state official and other persons

Subpoena to: X newspaper ____ radio X TV X wire service ____ other

Number of persons subpoenaed: number not specified

Subpoena for: X documents ____ photos ____ TV film X testimony ____ tape recording

Agreement to issuance of subpoena: ____ yes ____ no see below

Action: ____ Approved by Attorney General X other

Comment:

In seeking a change of venue, the defendants raised the issue of prejudicial pre-trial publicity. For its response, the Criminal Division wished to obtain from newspapers and television stations, etc. information regarding news coverage and circulation. A request was submitted to the Attorney General, but, based on the belief that the guidelines did not apply to such information, the request was then withdrawn. The Criminal Division wrote the U.S. Attorney that he could proceed with the subpoenas.

Subpoenas were issued, and there was opposition by a wire service due to non-compliance with the guidelines. The Department did not attempt to enforce the subpoenas; there was no testimony by the press.

Criminal Division Date of request March 23, 1973

Proceeding: X grand jury ____ trial ____ other

Offense: Various offenses

Subpoena to: ____ newspaper ____ radio X TV

____ wire service ____ other

Number of persons subpoenaed: 3 (television networks)

Subpoena for: ____ documents ____ photos X TV film

____ testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

The networks had broadcast films showing some of the events in question. The Criminal Division sought permission to subpoena films that were broadcast.

Each of the networks was willing to provide its films, but requested issuance of a subpoena.

Criminal Division Date of request March 6, 1973

Proceeding: ____ grand jury X trial ____ other

Offense: Perjury on the part of a policeman

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A woman who was a Government witness had told a reporter that she had seen her husband, a gambler, make payments to certain policemen. The Criminal Division sought to subpoena the reporter to obtain testimony to support the woman's testimony.

The reporter was willing to testify, but only under subpoena.

He was served with a subpoena and testified at the trial.

Special Prosecutor ~~Division~~ Date of request May 6, 1974

Proceeding: ____ grand jury X trial ____ other

Offense: False testimony before a Senate committee

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: X documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

One month before the Senate hearing at which the alleged false testimony was given, the defendant was interviewed by a reporter regarding the subject of the testimony. Information published in an article based on the interview was contrary to the defendant's subsequent testimony.

The reporter had a transcript of relevant portions of the interview. The Special Prosecutor's Office requested authorization to subpoena the reporter in order to obtain (1) his testimony regarding published information and (2) the transcript of the interview.

The reporter stated that he would testify and produce the transcript, only under subpoena.

Tax Division Date of request Apr. 28, 1975

Proceeding: ____ grand jury X trial ____ other

Offense: Tax evasion

Subpoena to: X newspaper ____ radio ____ TV

____ wire service ____ other

Number of persons subpoenaed: 1 reporter

Subpoena for: ____ documents ____ photos ____ TV film

X testimony ____ tape recording

Agreement to issuance of subpoena: X yes ____ no

Action: X Approved by Attorney General ____ other

Comment:

A local official was charged with diverting to his own use funds which he had solicited for the municipality. During the time of the solicitation, the official was interviewed by a newspaper reporter regarding alleged diversion of the funds. The Tax Division sought to subpoena the reporter in order to obtain testimony regarding notice to the official of the alleged diversion and the official's response.

The reporter was willing to testify, but requested issuance of a subpoena. The trial has not yet taken place.

Mr. KASTENMEIER. Next, the Chair would like to call Mr. Jack Nelson and Mr. Fred Graham, who are representing the Reporters Committee for Freedom of the Press, they bring members of the Executive Committee of that organization.

TESTIMONY OF JACK NELSON AND FRED GRAHAM, MEMBERS OF THE EXECUTIVE COMMITTEE, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Mr. GRAHAM. Good morning, Mr. Chairman.

Mr. KASTENMEIER. Mr. Graham, Mr. Nelson, you have a brief statement. You may read it for us if you would.

Mr. NELSON. Yes, we do have a brief statement. I think in addition to that we might like to address a few of the remarks that Mr. Scalia made in his opening statement at the end of this, if it is all right with the committee.

Mr. KASTENMEIER. Yes.

Mr. NELSON. The Reporters Committee is the only legal research and defense fund organization in the Nation exclusively devoted to protecting the first amendment and freedom of information interests of the working press.

The organizational premise of the committee was that the constitutional interests of the working press may be different from the interests of media owners or groups with an interest in preserving first amendment rights. The committee was formed at an open meeting at Georgetown University in March, 1970, in response to the threat posed by the Justice Department's subpena policies. It has been funded by personal donations from steering committee members, by contributions from firms, organizations and individuals in the news media, and by modest foundation grants.

On behalf of the reporters committee and of the working press as a class whom our committee represents in court and in other ways we appreciate the opportunity to testify before this subcommittee on a subject which is of critical importance to the Nation.

Because we have faith that the Congress wishes to protect an encourage first amendment guarantees, we believe that the Congress should pass an absolute and preemptive privilege statute, protecting journalists from being ordered to disclose unpublished information before any executive, legislative or judicial body of Federal, State or local government.

We strongly oppose any limitation on this privilege. We would also strongly oppose any legislation that is not preemptive, that is, which does not extend the Federal protection to journalists involved in State court proceedings.

This is the position that the reporters committee has taken in previous testimony in Congress. We have spelled out our reasons in detail on those occasions. Briefly, they are that courts have tended to stretch qualifications that have been written into State shield laws, and we fear that a qualified Federal law would weaken the rights of journalists to protect their sources, and could encourage prosecutors and others to subpena reporters.

We believe that the first amendment protects journalists from being compelled to testify under circumstances that impair their capacity to

collect and publish news. Despite the Supreme Court's adverse decision in *Branzburg* v. *Hayes*, lower courts have quashed subpenas against journalists in a number of cases since Branzburg. Also, journalists have generally demonstrated a determination to resist compelled testimony that seems to have discouraged some efforts to subpena reporters.

In short, the Branzburg case has not proved to be the disaster that some feared it would be, and we fear that reporters might be inviting a worse result if they supported a qualified shield bill simply to get a law on the books.

This is not to say that subpenas are not a problem, they are. Both of us, for instance, have been subpenaed since Branzburg. Perhaps significantly, both avoided testifying. Even if a reporter manages to avoid testifying about confidential matters, as both of us did, being subpenaed is unpleasant, distracting, and expensive.

The Reporters Committee constantly hears complaints from small publications and underground and student papers that they would go under if they have to bear the full financial brunt of resisting subpenas. We help them if we can, but obviously a better aid would be an unqualified, airtight shield law that would preclude the subpenaing in the first place.

We appreciate the interest of this Subcommittee, and its Chairman, in the problems of journalists in the wake of Branzburg. But we feel that a qualified shield law might make the situation worse, and so we oppose H.R. 215.

We did not go into a section by section analysis of H.R. 215, because we oppose any qualification. But I would like to make a couple of comments, and maybe Fred Graham would, too, concerning some of Mr. Scalia's statement.

Number one, he mentioned in the past 2 years the Justice Department has had 46 subpenas, I believe. Well, in the past year alone the reporters committee has chronicled cases of 46, actually 46 cases in which subpenas have been litigated, and only three of these were Justice Department cases. There were all together 26 Federal cases and 20 State cases, and that was in the last year alone. There is no question about the increasing costs of fighting these. Last year, for example, the "Boston Globe" had to pay out $38,000 in one case. The Bill Farr case in Los Angeles has already cost over $100,000, and the Case of the "Los Angeles Times" and the Baldwin tapes cost over $20,000, and is still costing money because the L.A. Times is now trying to recover those tapes because they still may hold some investigative value. Yet they have been in the hands of the court for over 2 years. The case has been concluded and we still cannot get our own information back.

Another thing concerning the Justice Department subpenas, the Newsletter staff of the Reporters Committee has tried for the past year to get the Justice Department to tell us about those subpenas, who were subpenaed. After all, I think they are a matter of public record, and we have been able to get no information on that.

I did want to just make one other comment, too, on what Mr. Scalia said concerning a hypothetical situation involving the *Patty Hearst* case. I would think that if a reporter could find Patty Hearst, and there have been about 15,000 FBI agents, I think, looking for her as well as several thousand State policemen, but if a reporter could find her and interview her, whether or not he told law enforcement officers

where she was, it seems to me he would add some information to the case that the Government did not previously have. If he could not guarantee an interview in confidence, he could not get the interview in the first place.

Mr. Chairman, I think that is all I have in my opening remarks.

Mr. KASTENMEIER. Mr. Graham.

Mr. GRAHAM. I would like to elaborate on the reasons for our group taking the position we have taken.

I think they are essentially four and one you have probably heard before. That is the theoretical one that a qualified bill violates the first amendment to the extent that it does or could infringe on the information gathering potential of journalists. I might say, of course, that not all of us believe all of these; but I think various members believe one or the other, and that is the reason they feel the way they do about an absolute bill and qualified bill. I think that some journalists feel that following that, what Congress could give in terms of protection in a statute, Congress could take away, and if there were a cause celebre later, Congress might be tempted and might in fact quickly pass through a bill containing far less protection.

There has been disappointment with current shield laws. I think some of you may have been the news articles yesterday about the "Fresno Bee" reporters. California has a shield law, and despite that judges seem to have read that off the statute books, in fact, in cases which seem to affect the judicial process.

Finally, I think there is some fear, maybe considerable fear among reporters, that if a qualified bill gets out of the committee and gets to the floor of Congress, that it might be substantially watered down and weakened at that stage, a stage where it might be too late to bell the cat.

Those are the four reasons.

I must say, Mr. Chairman, that there is much to admire in this bill, and we certainly appreciate the efforts of all of those who have worked on it. We do appreciate the fact that it is a preemptive bill, and I would like to speak in just a moment about some of the things that Mr. Scalia had to say about that.

I do not consider in my own mind that it is a qualification, although it is listed under qualification; the provision of section 4(1) that limits the application to information obtained in expressed or implied confidence.

Mr. Chairman, it seems to me that that probably is designed to cover the classic case of the journalist walking down the street in the performance of his duty and seeing a bank robbery, and so forth, and obviously no journalist would ever withhold that. He would report it. I do not think that bothers journalists.

But Mr. Scalia's lists of horribles here, that some of you gentlemen mentioned, do seem inappropriate since he, of course, does have an absolute privilege as an attorney, Representative Drinan has one as a priest under most circumstances. In fact, the last time we testified we research the State shield laws and discovered to our surprise, Mr. Chairman, that a lot of them are absolute. They are absolute to the extent of their coverage.

Now, as we all know, the coverage is quite narrow. A lot of them only cover the identity of the source and not information. But starting with a New York law and going through, more than a majority of the State laws, the last time we checked the extent of their coverage, they

are not absolute to the material they cover. They cannot be waived. There is no provision for it, and none of these horribles have occurred. You can conjure them up in your mind, but in fact they do not occur. These men want to cover news, and they report it and they have no—they do not try to conceal evidence of crimes. I must say in the particular horrible he suggested at the end with regard to Patricia Hearst, it sounds very much like a situation that in fact happened on CBS News, when Walter Cronkite did interview Daniel Ellsberg at a time when there was a warrant out for his arrest for release of the Pentagon papers. The FBI was looking for him, and I must say that the most chilling horror that this suggests to me is, Mr. Scalia dragging Walter Cronkite into a grand jury room and locking him up because he would not tell the circumstances of that interview. I assume that he would not have under that circumstance.

So, I do not think that those instances cited by him, and we could think of others, are very persuasive.

Finally, on the preemption point that he made, I accept his legal research that there are no statutes at this point that specifically apply to State rules of evidence. But, of course, there are many, many court decisions from the Federal courts—the *Miranda* decision, the *Mapp* decision, the *Wade* decision—that in great detail amount to State rules of evidence. The Federal system has survived that very nicely, and of course, it could survive this.

On the 46 subpenas, we have tried to get those, the ones that the Justice Department has issued, and have encountered difficulties, just as you gentlemen seem to be encountering today. We are surprised because the Attorney General is supposed to approve each Federal subpena. We would presume he would keep a list of the ones he has approved, and I think it does suggest the need, as one of the members mentioned, for someone to be in charge of this at the Justice Department and to be riding herd on it on a continuing basis.

Thank you, sir.

Mr. KASTENMEIER. Thank you, Mr. Graham.

Mr. Nelson—I did want to clarify the figures Mr. Nelson used. Did you say there are 46 cases?

Mr. NELSON. That is recorded by the Reporters Committee in the past year alone, and these are cases which were litigated. There were 20 state cases, 26 Federal. That does not mean we have them all. Those were the ones we managed to record, and only three of those Federal cases involved Justice Department subpenas that we know about.

Mr. KASTENMEIER. Yes, I am interested in the other 23 Federal cases. What is the general nature of those cases?

Mr. NELSON. Well, I do not have a breakdown on them, Mr. Chairman, so I am not sure that I could tell you that.

Mr. KASTENMEIER. What general characteristic do they have? These are cases in which subpenas issued federally, which did not require Justice Department——

Mr. NELSON. In a number of cases, they have been civil cases.

Mr. KASTENMEIER. Federal grand juries and the like?

Mr. GRAHAM. Sir, I know of some that were either civil cases or were requested by the defendants.

Mr. KASTENMEIER. These are mostly civil cases in a Federal forum?

Mr. GRAHAM. Yes, sir.

Mr. NELSON. Or defendants in criminal cases.

Mr. KASTENMEIER. I see.

The defendants in the criminal cases—The Justice Department would have had to have approved the subpenas in advance under their own guidelines, would they not?

Mr. NELSON. I do not believe that is so.

Mr. GRAHAM. Not for a defendant, no, sir. That is fairly common; that is the defendant's lawyer. Of course, that is what happened to Jack Nelson.

Mr. KASTENMEIER. Exactly.

Mr. NELSON. Of course, the Justice Department could oppose the subpena.

Mr. KASTENMEIER. Yes, yes.

I appreciate your reservations, your opposition to H.R. 215, and I understand your reasons for it. Your organization has taken that position before.

Is there any legislation introduced that you are aware of that you support?

Mr. GRAHAM. Sir, yes. We have testified in support of—and I am sorry I can only give you the Senate bill because I have not testified on the House side previously—we testified in support of the Cranston bill, S. 158. I presume that there are counterparts of that bill on this side, ano I just do not know the numbers.

Mr. KASTENMEIER. Yes, I did refer to two other bills, that of Mrs. Abzug, H.R. 172, and that of Mr. Koch, H.R. 562. I think the Abzug bill is—perhaps I will read it because the text is short. The Koch bill is a Federal only bill and is not preemptive. H.R. 172 is as follows: "That no person connected with or employed by the news media or press or otherwise engaged in gathering material for publication or broadcast can be required by the Congress or any court, grand jury or administrative body to disclose any information or the source of any information procured for publication or broacast, whether or not such information is actually published or broadcast."

Would you support that?

Mr. NELSON. I believe the Reporters Committee would support. We have not, but I believe we would because it sounds unqualified. I think we could support H.R. 215 without sections 4 and 7.

Mr. KASTENMEIER. One of the reasons of the hearing is to determine whether or not there is a sense of urgency felt by the news community and by others in this country with respect to this question, and I think in your own statement you suggest that perhaps there is not by saying, in short, the *Branzburg* case has not proved to be the disaster some feared it would be. I note that this year there are only three bills introduced with totally five members of Congress and the House of Representatives. Two years ago there were scores of bills and people supporting various bills.

Do I sense correctly that there is less of a sense of urgency to attempt to legislatively resolve this question today than in the past?

Mr. NELSON. I think my own answer to that would be the problem has not diminished; but perhaps it has not increased quite as rapidly as we thought it might. Nevertheless, it still is an increasing problem, and you can see the number of subpenas and costs incurred by the various reporters and news organizations.

I think that what happened—in our statement, I think it is a reflection, though, of the fact that the committee does feel strongly that if

you are going to pass any bill at all and it is qualified, we would rather you pass no bill.

Now Mr. Scalia said, for example, that reporters would be in a position under this bill of only saying we will protect you as a source unless compelled by law. Well, Mr. Scalia is wrong. Reporters now say we will protect you, period; and I think that is what we would do even if you passed this bill.

I think having what I would consider a loophole or qualifications in the bill would at least make some people hesitate to cooperate with us on a confidential basis.

Mr. KASTENMEIER. One point you make, and I think it has been made before, that I am not real sanguine about, is that should we pass such a bill as H.R. 215, hypothetically, that not only is it not absolute and is in part minimally qualified; but also that it might be subject to later amendment to satisfy the vagaries of the moment; and that newsmen might find themselves very disadvantaged if it were amended in years to come.

But, is not the same thing true of any bill we pass, even your bill, an absolute bill, one that you could design, if enacted into statute would be as amendable as H.R. 215?

Mr. NELSON. I think you make a good point, and that is one reason a number of reporters have hesitated to support any bill, and quite a few reporters and news organizations feel there should be no bill. But I think, after a careful study of the situation, that the Reporters Committee has unanimously reached the decision that an unqualified bill, with the sense of Congress being that it should not be qualified, would not be likely to be amended.

Mr. GRAHAM. Sir, can I say I think an unqualified bill would be very, very helpful, and I am not one of those who feel just on a theoretical basis that that would be undesirable. The reason is that I hear around the country of rather casual subpenaing of news organizations. For instance, in Texas they are having quite a bit of removal these days of cases, because of alleged prejudicial publicity. Remember they moved the mass murder cases down there out of Houston, and so forth. That is done quite a bit now; and apparently a practice has grown up of rather routine subpenaing of defense attorneys of all of the newspaper files in order to file that as an exhibit and make a case for removal. That sort of rather casual subpenaing of journalists—and of course, you may win that on a motion to quash—it is very expensive, and it really is more than a lot of these small newspapers can stand. A preemptive, absolute bill would knock that in the head. The subpenas would never be sought and issued, and people would think through other ways to make their cases, which they should be doing.

Mr. KASTENMEIER. I appreciate that.

I would like to yield now to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I want to thank you, first of all.

Shortly after your group was formed, I think you decided to hire a first-rate scholar to investigate and report to you, the reporters. You hired Professor Blasi. I remember when he came before our committee. I personally was extremely impressed with his testimony and his reasoning. I just pulled out his report that was given to you, called "A Study Report," and I note that in that report this statement

was made by your group: "The conclusions reached in this report are those of Professor Blasi, and his alone. While many of us agree with his observations and conclusions in a general way, we do not present them as representing a position of the committee or of its members. We offer them simply in the hope that they will aid newsmen, litigants, and judges in grappling with the difficult and vital issues presented by press subpenas."

I mention this because his ultimate position really influenced some of us to draft what we believe made sense. Blasi himself, commissioned by your group, came out with a two tier approach that would exempt completely reporters from the so-called pretrial level, but not from a trial, in the event that there was a very important need established to have a reporter testify. Blasi actually said this, and this is from our earlier hearings: "To disagree with the proposition that is endorsed by Byron White and William Douglas and Earl Caldwell, and Roger Crampton together can give one pause, I suppose; but I do not believe a qualified privilege cannot do the job, or that a qualified privilege is worse than nothing, which I think Jack Landau said a couple of days ago."

Then he goes on to explain that.

Let me ask you this. Are there some of your members who do agree with Blasi in his report?

Mr. NELSON. Not on the Reporters Committee, no, sir.

Mr. RAILSBACK. No?

Mr. NELSON. No, sir.

Mr. RAILSBACK. In your preface to his report, it is indicated that at least some of you agree with his general conclusions about that. And I notice that you distinguished reporters are among the signatories, and there are very many, about 12.

Mr. NELSON. Yes, that is true.

Mr. RAILSBACK. How do you feel about Mr. Blasi's report?

Mr. GRAHAM. Well, of course, when we commissioned Professor Blasi to do that report, we intended to let the chips fall where they might.

Mr. RAILSBACK. And they fell differently?

Mr. GRAHAM. That is right, and we are not embarrassed by that, because we wanted the facts and he got them for us, and we appreciated his work.

Now, of course, we do not thereby have to accept his conclusion.

Mr. RAILSBACK. But you do not have to agree with him?

Mr. NELSON. We point out to you he is not a journalist.

Mr. GRAHAM. I do not think we ever assumed that we would agree with his legal conclusions. As a result it was an empirical study that we commissioned and accepted. Obviously there are shades of opinion among reporters.

Mr. RAILSBACK. Among everybody.

Mr. GRAHAM. That is right, and that is all I can say with regard to that.

Mr. RAILSBACK. Let me just agree with what I think Jack Nelson said, that having a conditional privilege would probably not make much of a difference in what an ultimate would have to be; that is, a reporter would still probably have to say to a source, I will honor your request for confidentiality, and if necessary, I will refuse to testify. But I want to suggest this to you. What in my judgment our bill

would do is this—it would make it much less likely that a reporter would have to end up going to jail. It is as simple as that.

If you care to, you may comment on that.

Mr. GRAHAM. I just want to repeat to you, sir, that we very much appreciate the thoughtful work you and others have done on this.

Mr. RAILSBACK. We appreciate that. Thank you.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. Thank you gentlemen, and thank you, Mr. Chairman.

I will go fast because we have a vote.

I appreciate your appearance and your statement and I think that I understand it. In very substantial respects we are in agreement. I personally think that if you are going to have a qualified bill, you should have no bill at all because you would have nothing but an illusion.

I cannot imagine that anyone is going to give you information under the guise of confidentiality if you can remove the confidentiality as soon as you get to court. So, as far as I am concerned, I will not vote for a newsman's privilege bill unless it is unqualified.

I think you make one mistake here. You want it to apply to all information you receive. I think that if there is to be a bill, it should apply only to information you receive in confidence, either express or implied. When you try to broaden the scope to cover everything that could come into your attention and then have an unqualified privilege, I think you are setting yourselves apart. Newspeople would be some sort of super species having privileges that no one else gets. I do not think that that is constitutionally sound, and I do not think that it is societally sound. So I would oppose that.

I see that you have a question, and I will try to get back real fast.

The other point I want to make is there is a constitutional problem. I do not think that you can have privileges so far as a defendant is concerned. I do not see how you can. He has a right to compulsory process, and that would be meaningless if you could not be compelled to testify; insofar as a prosecutional plaintiff, yes; but in a criminal case the defendant has his constitutional right. An amendment: I do not see how you will ever be able to reach it. Preemption: I am not sure that we can preempt; maybe we can. There is nothing like trying if we are going to.

I would suggest that if you wanted to have a newsmen's privilege that might work and might be meaningful, you should, as to the aspect of the scope of the material, restrict it to material that comes to you in confidence, express or implied. But then it should be absolute and go all of the way through; that even the Supreme Court could not touch. Otherwise it is meaningless. I think that you might be well off to trade narrowing the scope for the information that you really need protection on, and then holding out for a total privilege within that limited scope.

Now I will yield to any comments.

Mr. GRAHAM. I just very quickly wanted to answer that, sir.

I think we are in agreement because I did intend to say that I accept section 4(1). I do not believe that that is a qualification. I do not believe that most journalists would say that they think a privilege should extend beyond information that is obtained, either expressed or implied, under a situation of confidentiality.

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Mr. NELSON. That is correct.

Mr. DANIELSON. I do not think they would either, if they stop to think about it. But so often I hear these off-the-cuff remarks by people who are in responsible positions, who talk about wanting an unqualified privilege. But they do not stop to think long enough to find out what they are talking about.

On that kind of ground I have spent a lot of time thinking about this. I think we should narrow the scope to things, information you receive in confidence, and then hold out for unqualified all the way. It is not a privilege if it is not a privilege all the way; it is a quasi-privilege, and that is nothing as far as I am concerned.

I would like to make a little distinction here if I can.

My dear colleague here, Mr. Pattison, mentioned the physician-patient privilege and other of those. Some of those are, I think, illusory, and some I think have a constitutional basis. The priest and confessor, I think, is constitutional. It is a part of the practice of religion; and even if it is not constitutional, it goes back so far in public policy that it was deemed essential for people to get their souls up to heaven to purge themselves now and again; and public policy prevailed and now we have the privilege. Physician and patient—I see no constitutional basis there, except that at one time it was deemed evil, I guess, to be sick; and the only way you could get to see a doctor was to have it held in confidence. The attorney-client only goes to those items which are confided to the attorney by the client as a part of his legal problem, and that is a part of due process of law, so it is constitutional. Husband and wife is based upon public policy almost entirely, namely, the family is still deemed to be the building block of our society; and in order to protect the family, you must protect the integrity of communications. If you go back far enough you will find that husbands and wives were deemed to be one entity; there was a unity of husband and wife. I know that the National Organization of Women would not subscribe to it, but that was the law of the realm for about 1,500 years. You could not testify against yourself, so therefore you could not testify against your husband or wife.

Mr. NELSON. Has not the reporter also been a common practice?

Mr. DANIELSON. There has been a privilege granted of this particular type. You can go back to Zenger, or whatever his name was. He had a right to publish. He did not have a right to keep his sources confidential. I think you have a point.

Mr. KASTENMEIER. There is a vote.

Mr. DANIELSON. I know. I cannot talk any faster than that.

Thank you anyway.

Mr. KASTENMEIER. You may revise and extend your remarks.

I want to thank both Jack Nelson and Fred Graham for their appearance on behalf of the Reporters Committee on Freedom of the Press this morning.

I would like to also announce that tomorrow the American Newspaper Publishers Association and CBS will have witnesses for us in this room at 10 o'clock.

Until that time this committee stands adjourned.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 10 a.m. on Thursday, April 24, 1975.]

NEWSMEN'S PRIVILEGE

THURSDAY, APRIL 24, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, and Railsback.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

The Chair is delighted and surprised to see so many members here this morning, under the circumstances of last night.

Mr. DRINAN. Why are you surprised?

Mr. KASTENMEIER. We are convened today for the second and concluding day in our hearings on newsmen's privilege on H.R. 215 and other legislation, and we are very pleased to have before us two sets of witnesses whose organizations have been crucially involved and concerned about the questions of newsmen's privilege.

I am very pleased to greet this morning Mr. Len Small, who is the secretary of the American Newspaper Publishers Association, and Mr. Arthur Hansen, counsel of that association.

We would be very pleased to hear what you have to say, gentlemen.

TESTIMONY OF LEN H. SMALL, MEMBER OF THE BOARD AND TREASURER OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CHAIRMAN OF ITS GOVERNMENT RELATIONS COMMITTEE, EDITOR AND PUBLISHER OF THE DAILY JOURNAL, KANKAKEE, ILL.; ACCOMPANIED BY ARTHUR HANSON, COUNSEL

Mr. SMALL. Thank you. It is a privilege for me to be here today, accompanied by Mr. Hanson, to discuss with you the position of the ANPA as it relates to H.R. 215 introduced by you, Mr. Chairman, and by Mr. Railsback and Mr. Cohen on January 14, 1975.

I have enjoyed working on this matter with you, Mr. Chairman. And, as you know, this is after 2 years of a lot of thought and discussion among all of us. And what I have today is a prepared document which is not very long. I would like to read it, and if there are ques-

tions, I would be happy to answer them fully. I am the treasurer, not the secretary, but that is just for the record.

Mr. KASTENMEIER. Technically that is correct. You are a member of the board, and treasurer of the American Newspaper Publishers Association.

Mr. SMALL. That is right.

The American Newspaper Publishers Association is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of approximately 1,130 daily newspapers and represents more than 90 percent of the total daily and Sunday newspaper circulation in the United States.

The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. In that regard, the ANPA acts as a clearinghouse of information for its members by disseminating bulletins and research reports on all significant phases and developments of the newspaper business. Frequently ANPA has taken positions on public matters which affect the interests of its members.

As we all know, this bill represents the distillation of several years of considered information gathering, both through the process of extensive hearings in the House and the Senate and many conferences with newspaper organizations and public bodies country-wide.

I am pleased to state that we can support H.R. 215 in its present form and would urge that the committee report it for action to the House at the earliest possible time so that the Senate may resume a course of action in this field.

We recognize that this bill will not satisfy all. No bill would—particularly in this field. We would like to recall your attention to the testimony offered by Mr. Stanford Smith, then president and general manager of ANPA before this subcommittee on March 5, 1973.

We think that that testimony and the documents accompanying it form an important part of the historical record in these matters. We would also point out that we have all learned something by undertaking this exercise on this subject.

As was pointed out in Mr. Smith's statement, at that time, there were 18 States which had shield laws of one sort or another. Today, 26 States have such laws. We would remind the committee, however, that these laws and the interpretation thereof vary from State to State.

Thus, this makes it all the more important that the Federal Congress lead the way in a preemptive statute establishing a standard on this subject.

We think it will serve to review where we find ourselves today. As we all know, the decision of the Supreme Court of the United States in the Branzburg, Pappas, and Caldwell cases dated June 29, 1972, set up an urgent outcry from all sectors of the media to achieve some type of legislative protection, Federal or State or both, which would give newspaper reporters and news persons from other media the privilege of confidentiality as to their source material.

The first such bill was introduced by Senator Alan Cranston of California. This bill called for an "absolute privilege" a delineation

which we believe to be confusing in that it has devolved into a discussion of "absolute" and "qualified" privileges, a constitutional misnomer.

In truth and in fact, there is no constitutional concept of an "absolute privilege." Nor is there any concept of a "qualified privilege" under the law in the pure philosophical sense.

What is meant by these terms under the law is that certain factual circumstances evolve which meet qualifications dictating that source or subject matter should be privileged as a matter of right in the sense of being kept confidential.

Under certain circumstances conditions dictate that the source or the subject matter should be revealed to only a limited number of people, and this has come to be known as a "qualified privilege." Notwithstanding this terminology, such a privilege, from a court standpoint, is absolute within the qualification.

It appears to us that what you have achieved in H.R. 215 which is termed the "News Source and Information Protection Act of 1975" is the establishment of those qualifying factual situations wherein a newsman does not have to disclose his confidential sources. Clearly this bill is for the protection of the public and in no way does it reflect a personal privilege to any individual.

It appears to us that it is nonproductive to take the position that it would be better to have no bill than a "qualified bill." Our reasons for stating this are pragmatic.

The Supreme Court decision in Branzburg was actually established by a 8 to 1 vote rather than a 5 to 4 vote in terms of the position of "all or nothing" under the first amendment.

James J. Kilpatrick of the Washington Star-News Syndicate is one of the most vocal for the "all or nothing" position under the first amendment. As we understand his position, he would be content to fight the subject out on a case-by-case basis in the courts.

We respect Mr. Kilpatrick as a very capable newspaperman, particularly in the field of law. We have agreed on many things in the past, but on this question we must disagree with him.

It is our view that the Supreme Court bluntly rejected this viewpoint to the effect that the first amendment provides a privilege. In light of this, we have to face facts. We do not think it reasonable to expect a favorable review by the Court on this subject.

Looking at its present make-up, Mr. Justice Douglas is the only real libertarian who supports this concept. It would appear to be in the realm of common sense to expect him to be the next Justice to retire from the Court.

Justice Stewart and his two supporters in Branzburg accepted the qualifications advanced by Professor Amsterdam, the attorney for Caldwell. These qualifications fall far short of the Kilpatrick position of "all or nothing."

We believe that H.R. 215 does better than the dissent and comes closer to the libertarian position than did Justice Stewart and his two colleagues.

We would remind the committee that, whether we like it or not, the preferred constitutional viewpoint as accepted by most constitutional authorities and by the majority of the Supreme Court as now consti-

tuted, and as constituted in the past throughout our history, is that every amendment to the Constitution is subject to the interplay of the social and political forces which exist at the time that a given fact situation arises for the Court's determination.

In some instances, first amendment considerations will prevail. In other instances, sixth amendment considerations will prevail. And, still in others, fifth amendment considerations may prevail.

The Constitution of the United States is not a document of fixed absolutes. It is a document of compromise as the mores of the people dictate in the times, and in accordance with the views of the nine justices interpreting the Constitution in light of those mores at that time. This is one of the reasons that the Constitution is referred to as a "living document".

We are pleased to support H.R. 215 as being what we believe to be an effective adjustment to the views expressed by many people over the past several years and as representative of a good piece of legislation which we all know will be subject to review in the courts to see whether or not something further need be done.

We thank you for this opportunity of being heard, and Mr. Hanson and I will be glad to answer any questions which you may desire to put to us.

Before I finish, I would like to comment briefly on Mr. Fred Graham's testimony of yesterday. I was not present, but I have read it. I am familiar with what he has been doing, and with what the reporter's committee has been doing. In fact, we have worked together from time to time.

Our first amendment guarantees are what the Supreme Court says they are. Graham and others want in "absolute" bill, because under the Branzburg case we do not have much. They want the "absolute" bill, or nothing.

H.R. 215 would give us a lot more than the Court says we have. We feel it is the best that can be obtained, and we are willing and ready to accept a compromise.

We cannot say, as he does, that the Branzburg case has not had a bad effect on the free flow of news. No one will ever know how many sources have dried up as a result of the Branzburg decision, or how many reporters have cooperated and testified rather than risk going to jail.

There is absolutely no one in the country that knows that. As you know, Mr. Chairman, our position was initially for an absolute bill. In fact, the ANPA took the lead in trying to get a common viewpoint among all of the media, and we had a meeting which we called at which the reporter's committee was represented, Sigma Delta Chi, AS&E, CBS, Mr. Bill Small was there, and many others.

And, at that time, this was discussed at great lengths. Of course we would prefer an "absolute" bill. We are trying to be realistic. We realize that that is almost impossible. And, after 2 years, we think that we had better get what we can get, if we can get that.

We do have to take issue with Mr. Graham on another matter when he says that the constitutional interest of the reporters, the working press, may be different from the publishers and owners in these first amendment matters.

As a matter of fact, owners, publishers, and editors have the same interest in preserving these first amendment rights as the reporters.

They, too, can be sent to jail under the authority of the *Branzburg* case.

We are not unaware of this. We have been conscious of this problem for a long time, from the very beginning, and we have admired and appreciated the work of the Reporters Committee. Actually, we have a common cause with them. As an example of this, our board of directors 3 weeks ago voted to extend them substantial financial assistance for the work they are doing. I just wanted to add that to clarify the matter.

Mr. HANSON. One other matter, Mr. Chairman. On January 8, 1974, at the chairman's request, we caused to be prepared under my signature an analysis of the bill in its then form. And, in that analysis, we pointed out things which raised many of the issues which have come through in H.R. 215.

We think for the completeness of the record, it might be well to submit that. I have copies—it was sent, incidentally, to all members of the subcommittee.

If I may, I would like to submit it as an exhibit to Mr. Small's testimony so that you folks will have it for the record.

Mr. KASTENMEIER. Without objection, that will be received.

[The prepared statement of Mr. Small, and exhibit thereto, follow:]

STATEMENT BY LEN H. SMALL, MEMBER OF THE BOARD AND TREASURER OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. Chairman and members of the subcommittee, it is a privilege for me to appear before you today, accompanied by Mr. Hanson, to discuss with you the position of the American Newspaper Publishers Association as it relates to H.R. 215 introduced by you, Mr. Chairman and by Mr. Railsback and Mr. Cohen on January 14, 1975.

The American Newsaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of approximately 1,130 daily newspapers and represents more than ninety percent of the total daily and Sunday newspaper circulation in the United States. The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. In that regard, the ANPA acts as a clearinghouse of information for its members by disseminating bulletins and research reports on all significant phases and developments of the newspaper business. Frequently, ANPA has taken positions on public matters which affect the interests of its members.

As we all know, this bill represents the distillation of several years of considered information gathering, both through the process of extensive hearings in the House and the Senate and many conferences with newspaper organizations and public bodies country-wide. I am pleased to state that we can support H.R. 215 in its present form and would urge that the committee report it for action to the House at the earliest possible time so that the Senate may resume a course of action in this field.

We recognize that this bill will not satisfy all. No bill would, particularly in this field. We would like to recall your attention to the testimony offered by Mr. Stanford Smith, then president and general manager of ANPA before this subcommittee on March 5, 1973. We think that that testimony and the documents accompanying it form an important part of the historical record in these matters. We would also point out that we have all learned something by undertaking this exercise on this subject. As was pointed out in Mr. Smith's statement, at that time, there were 18 states which had "shield" laws of one sort or another. Today 26 states have such laws. We would remind the committee, however, that these laws and the interpretation thereof vary from state to state. Thus, this makes it all the more important that the Federal Congress lead the way in a preemptive statute establishing a standard on this subject.

We think it will serve to review where we find ourselves today. As we all know, the decision of the Supreme Court of the United States in the *Branzburg, Pappas,* and *Caldwell* cases dated June 29, 1972, set up an urgent outcry from all sectors of the media to achieve some type of legislative protection, federal or state or both, which would give newspaper reporters and news persons from other media the privilege of confidentiality as to their source material. The first such bill was introduced by Senator Alan Cranston of California. This bill called for an "absolute privilege", a delineation which we believe to be confusing in that it has devolved into a discussion of "absolute" and "qualified" privileges, a constitutional misnomer. In truth and in fact, there is no constitutional *concept* of an "absolute privilege", nor is there any concept of a "qualified privilege" under the law in the pure philosophical sense.

What is meant by these terms under the law is that certain factual circumstances evolve which meet qualifications dictating that source or subject matter should be privileged as a matter of right in the sense of being kept confidential. Under certain circumstances conditions dictate that the source or the subject matter should be revealed to only a limited number of people, and this has come to be known as a "qualified privilege". Notwithstanding this terminology, such a privilege, from a court standpoint, is absolute within the qualification.

It appears to us that what you have achieved in H.R. 215, which is termed the "News Source and Information Protection Act of 1975", is the establishment of those qualifying factual situations wherein a newsman does not have to disclose his confidential sources. Clearly, this bill is for the protection of the public and in no way does it reflect a personal privilege to any individual.

It appears to us that it is nonproductive to take the position that it would be better to have no bill than a "qualified bill". Our reasons for stating this are pragmatic. The Supreme Court decision in *Branzburg* was actually established by an 8 to 1 vote rather than a 5 to 4 vote in terms of the position of "all or nothing" under the First Amendment. James J. Kilpatrick of the Washington Star-News Syndicate is one of the most vocal for the "all or nothing" position under the First Amendment. As we understand his position, he would be content to fight the subject out on a case by case basis in the courts. We respect Mr. Kilpatrick as a very capable newspaperman particularly in the field of the law. We have agreed on many things in the past, but on this question we must disagree with him. It is our view that the Supreme Court bluntly rejected this viewpoint to the effect that the First Amendment provides a privilege. In light of this we do not think it reasonable to expect a favorable review by the court on this subject. Looking at its present make-up, Mr. Justice Douglas is the only real libertarian who supports this concept. It would appear to be in the realm of common sense to expect him to be the next Justice to retire from the court. Justice Stewart and his two supporters in *Branzburg* accepted the qualifications advanced by Professor Amsterdam, the attorney for Caldwell. These qualifications fall far short of the Kilpatrick position of "all or nothing". We believe that H.R. 215 does better than the dissent and comes closer to the libertarian position than did Justice Stewart and his two colleagues.

We would remind the committee that, whether we like it or not, the preferred constitutional viewpoint as accepted by most constitutional authorities and by the majority of the Supreme Court as now constituted, and as constituted in the past throughout our history, is that every amendment to the Constitution is subject to the interplay of the social and political forces which exist at the time that a given fact situation arises for the Court's determination. In some instances, First Amendment considerations will prevail; in other instances Sixth Amendment considerations will prevail; and still in others Fifth Amendment considerations may prevail. The Constitution of the United States is not a document of fixed absolutes. It is a document of compromise as the mores of the people dictate in the times, and in accordance with the views of the nine Justices interpreting the Constitution in light of those mores at that time. This is one of the reasons that the Constitution is referred to as a "living document".

We are pleased to support H.R. 215 as being what we believe to be an effective adjustment to the views expressed by many people over the past several years and as representative of a good piece of legislation which we all know will be subject to review in the courts to see whether or not something further need be done. We thank you for this opportunity of being heard and Mr. Hanson and I will be glad to answer any questions which you may desire to put to us.

JANUARY 8, 1974.

The Honorable ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: As you know, under date of September 19, 1973, you and Congressman Railsback wrote me a letter in my capacity as General Counsel of the American Newspaper Publishers Association suggesting a possible means by which an amended H.R. 5928 could be supported by the various media groups. Subsequent to that time, a majority of the interested media groups attended a meeting called by the American Newspaper Publishers Association at which Mr. Fuchs and Mr. Mooney were in attendance.

Subsequent to that, under date of October 23, Messrs. Fuchs and Mooney addressed another letter to me outlining generally the proposed amendments to H.R. 5928 and soliciting views on same for consideration by you and your subcommittee members.

I am pleased to inform you that at its December Board meeting, the Board of Directors of the American Newspaper Publishers Association agreed in principal to offer support to H.R. 5928 as proposed to be amended. I was directed to send this letter to you, with copies to Congressmen Railsback and Cohen, to give you and your staff the benefit of additional comments we have concerning the proposed amendments. These are in no way to detract from the proposed support of the bill, but it is hoped that they may help in further solidifying support for same and that they will be of assistance to you and your staff in putting the best product possible before the Congress.

Our views with regard to the proposed amendments follow herewith:

1. *Title.*—The change of the title to "News Source and Information Protection Act of 1973" is an improvement to the present title. The change of the title of the bill to read "to provide protection to newsmen against the compelled disclosure of certain information and sources of information", as referred to in paragraph 7 of the Fuchs-Mooney letter, is not desirable because it emphasizes the protection of newsmen rather than the protection of the public's right to obtain information.

2. *Section 2(1).*—The expanded definition of "newsman" so as to include legal entities is a desirable change. The definition does not explicitly apply to persons "disseminating" information so that we would recommend that Section 2(1) read ". . . or otherwise preparing *or disseminating* information in any form . . ."

3. *Section 3.*—The effort to specify that grand jury or pre-trial proceedings are explicitly covered under Section 3 is desirable However, the draftsmanship of this proposed amendment could be improved upon. In the proposed form of Section 3 it is not clear whether the parenthetical exception applies to only pre-trial proceedings or whether it was intended that the exception would apply to grand jury proceedings as well. It is suggested that the language of Section 3 read as follows: "Except as qualified by Sections 4 and 7 of this Act, in any Federal or State proceedings (including a grand jury or other pre-trial proceeding), no individual called to testify . . ."

4. *Section 4.*—The contemplated Amendment to Section 4 contained in the Fuchs-Mooney letter is a substantial improvement. The phrase "in any court of the United States or of any State" could be shortened by use of the phrase "in any Federal or State court". We are pleased that the contemplated amendment states that "a newsman may be required to disclose . . ." This language permits the court to exercise its discretion in compelling disclosure, whereas in its present form Section 4 is mandatory by virtue of the word "shall".

Although the proposed Section 4(2) establishes which party has the burden of proof, Section 4(1) does not do so. It is not clear why the language "the court finds that" is not contained in Section 4(1). It would seem to be advantageous to establish the party which has the burden of proof and the procedure for determining proof of a confidential relationship.

We would prefer that a newsman not be required to establish confidentiality since this could result in the disclosure of a source of information itself and because there is justification for not requiring newsmen to reveal certain sources even when the information obtained is not acquired in confidence.

Section 4 represents a qualification to the protection of a newsman's sources and information, and any qualification will inevitably result in deterring potential sources of information from communicating with newsmen. Nevertheless, we

believe that this hindrance to the free flow of information will be out-weighed by the overall benefits of H.R. 5928 if the proposed amendments are adopted.

5. *Section 5.*—As ANPA noted to your Subcommittee by letter dated June 25, 1973, the last sentence of Section 5(b) should be amended to read "Such appeals shall be given preference and heard at the earliest practicable dates." A Notice of Appeal does not "expire".

6. *Section 7.*—With regard to the defamation qualification, we approve of the amendment to Section 7. However, I wish to restate our view that any qualification will deter potential sources of information from communicating with the news media. Nevertheless, we believe that the overall advantages of the bill will outweigh the adverse effect of a defamation qualification.

We trust that the foregoing will prove of use to you and your staff, and if there are any questions concerning same, please advise.

We expect to inform our members and request their support for this measure.

Respectfully yours,

ARTHUR B. HANSON,
General Counsel,
American Newspaper Publishers Association.

Mr. HANSON. Thank you, sir.

Mr. KASTENMEIER. Thank you very much, Mr. Small and Mr. Hanson. You anticipated in your extended remarks a question I was going to ask, which was, is there any distinguishable difference in the roles played by reporters or editors or publishers, with respect to first amendment rights in terms of protection, and in terms of what legislative solution might be acceptable or unacceptable?

And, you have indicated, really, that publishers and editors are susceptible of going to jail, as well as reporters.

Mr. SMALL. That is right.

Mr. KASTENMEIER. And in your view there is no distinguishing difference?

Mr. HANSON. I might add, if I may, Mr. Chairman, that Mr. Small is an editor and publisher, as is noted in the heading on his statement. And I would call to the attention of the subcommittee that Norman Chandler, the president of the Los Angeles Times went to jail in Los Angeles in 1941, long before *Branzburg* came along, in the famous case of the Los Angeles Times against a group of judges in the court of appeals out there. It was decided favorably to the publishers by the Supreme Court of the United States, releasing Chandler from jail on a contempt charge.

But, the contempt charge arose from a story that the publisher himself had written. And, Robert Taylor, the publisher of the Philadelphia Bulletin was arrested, along with his editor-in-chief and an investigative reporter in the 1950's, and convicted in the lower court in Philadelphia for contempt again on an investigative reporting job on the city politicians of Philadelphia. And the Supreme Court of Pennsylvania, by a divided vote, freed Mr. Taylor.

I participated as counsel in that case, and am well acquainted with it. So this did not just start with *Branzburg*. The *Branzburg*, *Pappas* and *Caldwell* cases merely brought it to a head. Publishers are subject to going to jail just as reporters. And in fact many publishers are editor-publishers and also are investigative reporters in their own right.

Mr. KASTENMEIER. Yes, as a matter of fact the case reporter only this week, the California case of the Fresno Bee involved more than reporters.

Mr. SMALL. That was the managing editor. Another example is a Los Angeles Times Washington bureau chief who ended up with the reporters notes. The reporters knew that they were in danger of going to jail, and they delivered them to him. And he was the one under the gun and he was the one about to go to jail. I have forgotten the circumstances. It did not develop. But, it very well might have.

Mr. KASTENMEIER. As a matter of statistics, I take it there would be a higher incidence of subpenas delivered to reporters, as opposed to others?

Mr. SMALL. Yes, in all likelihood, that would be the case. That is true.

Mr. HANSON. They are on the firing line. They are the "troops in the battle" so to speak.

Mr. KASTENMEIER. I have a question with respect to the workability of the Attorney General's guidelines, as enunciated in 1970 and modified in 1973. Have you heard testimony, or are you aware of the testimony of Mr. Scalia yesterday with regard to the guidelines, as well as his reaction to legislation before this committee?

Have those guidelines been, as far as members of the ANPA are concerned, workable? And do you have any criticism of them, or of the Justice Department in connection with the guidelines or the issuance and enforcement and application of the guidelines in terms of the issuance of subpenas?

Mr. SMALL. In the first place it applies only to Federal cases.

Mr. KASTENMEIER. Yes.

Mr. SMALL. The great bulk of the cases we are involved with are not Federal so much as State. The *Branzburg* case has gone way beyond what people thought it might do. It does not affect so many Federal matters as it has affected the attitude of local and State courts throughout the country.

To that extent, of course, they do not mean anything.

Mr. KASTENMEIER. The Reporter's Committee yesterday had analyzed 46 cases last year, 26 of which had a Federal nexus. They were not all in terms of subpenas issued at the behest of the Justice Department. Indeed, many of them were issued at the request of the defense.

But, nonetheless, a majority that they had analyzed apparently were in the Federal forums as opposed to State forums. But that would not necessarily apply, nationwide to the incidence of subpenas, or to the necessity of the news community's responding to local and State demands.

How would you, more or less, statistically analyze where your problems presently are? Are these Grand Jury proceedings on a State level? Where is the greatest problem in the last several years—at least since *Branzburg*?

Mr. HANSON. There are basically two positions you should be aware of. One is that the ANPA has always stated that any Attorney General's rules and guidelines are as good as the Attorney General involved.

Remember, these guidelines were originally issued by Mr. Mitchell and they have stayed in force, with minor modifications, through his several successors.

We do not believe that this is really the way this should be done. We think it should be done by statute, whether it be State or Federal. We would hope that it would be Federal.

Second, as to where your greatest danger lies at the moment, there has been some shift away from the grand jury subpenaing situation into the "gag rule" approach by judges.

We have had two recent cases which came to the attention of the Supreme Court of the United States. One was *Schiallo* v. *Ditter*. Ditter was a judge up in Philadelphia and he himself petitioned the Supreme Court to overrule the third circuit's ruling in favor of the newspaper which was the Philadelphia Enquirer, and Schiallo was a criminal, the reporter—I forgot his name.

In any event, the Supreme Court refused to take the case and let the third circuit's opinion stand. That was just done within the last several months. We amicused in that case.

The other is *Schulingkamp*. A judge down in New Orleans, a State judge, who brought an action against reporters for the Times-Picayune. In that one, Justice Powell issued a stay order last July which is the most interesting stay order which I am sure your Counsel would have available. But I will supply it if you would like it.

That case was dismissed by the Supreme Court just this last month as being moot. They did not address that question. But the gag order is sort of a carrying out of this particular field.

But, the big problem, from a working newsman's standpoint and from the publisher's and editor's standpoint, is the grand jury proceedings. And the biggest example is with the Chicago Tribune which over a period of several years had 300-and-some grand jury summons from some folks they felt did not appreciate what they were saying about the local mayor. And it was a very serious and oppressive thing to them to have to defend these things.

Now the fact that they were able to defend them successfully in nearly every instance was evidence of what the harassment was. But, on the other hand, some smaller paper in some more rural area, without the pocketbook of the Tribune might find this just too much for them. And this puts the business of moving you away from investigative reporting.

Now in southern Illinois, in Alden, we have an example of it, Mr. Railsback. I just went out there to help them overcome a spacious libel case which generated right out of this type of investigation.

Mr. KASTENMEIER. Yes, I appreciate that.

I have just one more question before I yield to my colleagues. Mr. Graham and Mr. Nelson yesterday expressed fears which I think are rife among many in the news community, if the Congress would act as the States have, that there would be two problems.

One is, how would one define newsmen or perhaps, even license newsmen thereby? And, two, would not the statute be subject to the vagaries and whims of change, with respect to the Congress and how the press is regarded, from one set of years to the next?

They expressed support for an absolute privilege bill, partly out of the fear or concern that it would be less susceptible to modification by succeeding Congresses than H.R. 215.

Apparently you do not share that apprehension?

Mr. SMALL. Well, let me answer that. Of course, as I said earlier, we would like to have an absolute bill. And I agree. But, on the other hand, looking at it from where we are now, we have nothing except what the *Branzburg* case did and what they might do in the future cases on a case-by-case basis.

But, basically, if Congress gives us something here, if your bill goes through for instance, it would be so much more than the *Branzburg* case provides that I do not see how we can help but be advantaged.

And it is true that what Congress gives Congress can take away. But, if we have nothing and we get something and it is taken away, we are no worse off than we are today. There is always the question of testing anything the Congress does in the courts.

The constitutional question, of course.

Mr. HANSON. I would add one thing to that. The constitution of the United States is a statute. It is one which takes even longer to get passed than does a congressional action.

But my point is that the Congress does not move swiftly in these fields, as we know. And this is good. It is a deliberative assembly and it seems to me that if this statute becomes law and then it has a chance through a period of 5 or 10 years to be worked with, tested in the courts, seeing what the problems are that arise under it, we would have a chance to come back.

But, this fear that because Congress does something about it it puts some anathema on this thing does not make sense to me. The constitution itself, the first amendment, is a statute. I doubt seriously that the first amendment would pass in the country today in its present form.

On the other hand, I thank Heaven it did pass when it did and was accepted. It seems to me that this is the route we should follow and continue the very process established in the Constitution.

Mr. KASTENMEIER. Yes, and I think yesterday's hearing demonstrates the difficulties of even a legislative group. I do not say this meaning to heap special criticism, but nonetheless to the extent that Mr. Scalia represented the Justice Department and the administration, it would appear that they would massively oppose legislation at this time in any form. Which suggests part of our dilemma and part of the difficulties confronting us.

Mr. HANSON. Of course Justice White in his minority opinion stated that the Congress should take action in the legislative field. It is an open invitation.

Mr. KASTENMEIER. And it is precisely for that reason that we are still looking at this question with the hope that perhaps something like that can be accomplished.

I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I think, that the first amendment might have more trouble passing than the Equal Rights Amendment, because of press problems.

Mr. HANSON. I suspect that is right.

Mr. RAILSBACK. I want to thank Mr. Small, who happens to be from Illinois and a friend. I believe part of your testimony appeared to recognize that the chairman's bill actually provides more protection than eight out of the nine Supreme Court Justices would have recognized. Is that right?

Mr. SMALL. That is right. There is no question about it.

Mr. RAILSBACK. The bill actually provides, as far as pretrial proceedings are concerned, an absolute protection. I do not think we stress that enough.

Let me ask you this. In your judgment, what has been the threat involved since the *Branzburg* decision, and what, if any, telling effect has it actually had?

Mr. SMALL. As I indicated, this is something which is hard to determine. No one knows. We have 1,100 and some members. I do not know that there is any way to find out how many reporters have pulled back, have not done their job the way they might have done it because of the *Branzburg* decision.

Before the *Branzburg* decision there was a general feeling in the country, in the press and among prospective witnesses that reporters did have a right to keep it confidential. And we operated that way for 150, 200 years.

Mr. RAILSBACK. You mentioned the Chicago Tribune and 300 requests for information. Do either of you have any idea what cost that was to the Tribune, to either comply with the subpena or discovery process, or whatever response they had to make?

Mr. HANSON. I will not speak for the Tribune, but if my office here in Washington had had to handle the hearings on those 300 and some cases, it would have cost them a minimum of $500 per case, just for the purpose of going to court and moving to quash the subpenas, just for that purpose. The court appearance alone, the preparation of the motion to quash, legal fees are not small, as anyone who watched ABC on Sunday night knows.

I hated to bring that in there, Bill. [General laughter.]

But, in any event, they had a program on lawyers which did not make us feel so well. In any event, the cost, I would imagine, was several hundred thousand dollars to them. And, you know, not everyone can bear that—and the Chicago Tribune should not have had to have borne it, on a harassing basis which is how it was used against them.

Mr. RAILSBACK. A reporter is even less able to defend, and many times cannot defend, and has to rely on his publisher.

Mr. HANSON. Yes, he must rely on his publisher, the ANPA, or the Reporter's Committee, or someone to step in and support him.

Mr. RAILSBACK. In the meantime, until there is first amendment protection afforded, of which we have absolutely no assurance, at least in the near future, these expenses will mount, and they do not just affect the owners. They affect editors, publishers, and newspaper reporters.

Mr. HANSON. They affect the gathering of the news, in this sense. I deal with lawyers for newspapers, countrywide, because I handle most of the functioning of the libel insurance work of this country, and these men are constantly talking to the editors, to reporters, and to publishers on the subject of what it is they can go to in investigative reporting, which is the thing that is causing the biggest problem here.

Nobody fusses too much about the story of John Jones hitting Suzy Smith's automobile at an intersection in an accident. That causes no problem. But, where you are investigating, which is what the fourth estate is about just as Justice Stewart said in his speech at Yale, when

you are there, really, as a fourth estate, trying to assist the people to a better understanding of Government—and, frankly, in many cases being an adversary to the then officials of Government—you have a real problem on your hands when those people have the power to put you in the front of a grand jury, on the basis of "let's hear where you got that story".

And this does have—I don't like the term "chilling effect," but it has been used and it does have a chilling effect on that man's carrying out his function. We have a case in Rockville, Md., where just this past week the judge put a gag order on something for no really useful reason.

I know all of the parties involved, including the judge, and I frankly have no excuse for what he did, but he did it.

Mr. RAILSBACK. Well, I want to thank you both very much.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman, and thank you, gentlemen. I have been going over the file of 2 years ago, and the media communicated with me and with the chairman to the effect that they disapproved of the two-tier approach, that it is not justifiable and that there is really no evidence that really suggests that this is a necessity in the administration of justice.

And I think that we should point out that it was a happenstance that this emerged.

Prof. Vincent Blasi wrote the definitive work on which he interviewed some 900 working newsmen on the importance of confidential sources. And then he proposed this dual level and it eventually cleared this committee by a vote of 5 to 4, or 5 to 3.

You people have given up on this, but I have not. And I think that we can just knock out section 4, because section 4 makes no sense—section 4 of the Kastenmeier-Railsback bill I will vote against, and I think that even in this subcommittee we might have the votes to vote against that.

This is a very dangerous thing. In going through the files of 2 years ago, I have important people here in the communications world who are writing to me, who wrote to me saying we would live to regret section 4.

Now some people theorize that we need it in the Criminal Act. That, perhaps, is defensible, but section 4—and I read—says "At the trial of any civil or criminal case in any Federal court" and so on.

You have to prove these usual things, that this disclosure is indispensible, but this would be far more chilling than the *Branzburg* decision. This would mean that any reporter would have to tell his informant at the trial level, even in the civil case, I would have to reveal.

So I urge you men that this could be disastrous. Yes?

Mr. SMALL. At the present time, under the *Branzburg* case, he has to tell them that he has to testify under any circumstances.

Mr. HANSON. That is correct, or go to jail.

Mr. DRINAN. Except in 26 States they have statutes better than that being proposed by this subcommittee.

Mr. HANSON. Congressman, I disagree that in 26 States they have one that is better. In several of them——

Mr. RAILSBACK. Would the gentleman yield?

Mr. DRINAN. You are right. They are very weak statutes in some cases. But why multiply the weaknesses and ambiguities in them by putting through, acquiescing in—and you people are obviously acquiescing, and you keep saying the votes are not there. Have you taken a head count lately? We have a new Congress, remember? And, these people like Mr. Pattison here are new to this, but they are going to see the light, but we do not want section 4. [Laughter.]

And we were operating in the days of the Nixon administration. We were intimidated ourselves, I am told. So, tell me, if you had the votes, if you did take a head count and the votes were there, would you say that we will not support this two-tier compromise version?

Mr. HANSON. We have already stated to you that we would prefer an absolute version. But we also live in a real world.

Mr. DRINAN. Well the real world is the Congress. I mean when have you taken a head count?

Mr. HANSON. My suggestion would be that if Mr. Phillip Burton told me the caucus was going to support an absolute bill, we would think that would be very interesting.

Mr. DRINAN. I will speak to Mr. Burton at noon. [Laughter.]

Tell me this. Do you see any reason for the inclusion of section 4, the two-tier approach? Do you see any plausibility in it?

Mr. HANSON. Yes, I see some plausibility in it. As a lawyer I think it is going to cause problems when it comes up for testing in the courts. I have a theory that it is constitutional, though, Congressman.

Mr. DRINAN. All right, in the history of the proceedings, in all of this [indicating], there was no evidence demonstrating this was necessary—no evidence.

Mr. HANSON. I have debated Mr. Blasi on it, and I disagree with his approach, but this is a compromise.

Mr. DRINAN. The burden is upon these people—the chairman and Mr. Railsback—to justify this and they have never justified it. There is no evidence. I will yield to the chairman, if he wants to debate that. This is the key question.

What evidence is there? We have never collected evidence that section 4 is necessary.

Mr. HANSON. Sir, I would not want to intervene in the discussion between you and the chairman. [Laughter.]

Mr. DRINAN. No, no, I want to get you on our side. I want you not to acquiesce in this, but to say that we are going to fight for the unqualified privilege of Senator Cranston's bill.

Mr. HANSON. We have gone through this bill very thoroughly, as you know, and the ANPA has gone through it thoroughly, and we spent not just "a" meeting, but, as Mr. Small knows, and you gentlemen know, we had many meetings of a conglomerate of the media group and the media representatives, and it was not very easy to get the conclusion that came out when we presented a bill to both this committee and the Senate side, which was an absolute bill.

What I would suggest to you is that no matter how absolute you make a bill, the courts are going to test it in light of the Supreme Court's views of the first amendment. And I would be just as satisfied if this compromise was enacted to let the courts take a look at it, as we

said in our testimony, to let the courts take a look at it and then come back 5 to 10 years from now, if it needed some further work on it.

I think, again, referring back to Kilpatrick and Graham and Nelson yesterday, when they come up and speak of absolute, I submit there is no constitutional absolute.

Mr. DRINAN. Sir, how would you react to a letter I had in the New York Times in February 1973? I said, the right of a journalist not to be subpenaed is obviously not a personal right, it is the right of the public to know, of which the newsman is a trustee. The essential question, therefore, comes to this.

Who, if anyone, can waive the right of the public to have media that cannot be made into a part of the law enforcement agencies of the Nation?

It is my conviction that no Federal or State statute should try to set forth those circumstances which would permit the Government to set aside the right of the public to know.

Mr. HANSON. I only submit that the Constitution itself is a statute adopted by the people, adopted by the necessary majority in the State houses of the original States. And, the first amendment "became" first. It started out as third. It became first because they did not adopt the first two amendments which were related to the pay of Congress and an apportionment bill.

So, basically, the first amendment itself is subject to amendment if someone wants to start down that road. It is not an absolute Constitution, really, so I would disagree with your statement on that, sir.

Mr. DRINAN. One last question. How recently, and how intensely, have all of the media caucused among themselves on this? The testimony you are giving now, you gave in effect 3 years ago, after the media got together and said, well, this is the best thing we can get.

But have you come together, prior to these hearings, and said "what shall we say in the year 1975, that is new?"

Mr. SMALL. No, we have not.

Mr. DRINAN. Thank you very much.

Mr. HANSON. I would like to add one item to that "no, we have not." We did not know these hearings were going to be held until we were called in New Orleans. We were in meeting assembled. We did, to the extent—that was on April 9 or 10—we did, to the extent possible, through our board and through our various committees, discuss this with groups and individuals, and we knew what the process was coming up and we have known that H.R. 215 was the bill, because we have known that since it was introduced.

Mr. DRINAN. There were a lot of other bills introduced, too, and I wish you would look at them and revise your opinions.

Mr. HANSON. We have looked at them, sir.

Mr. KASTENMEIER. The Chair would like to observe that contrary to what the gentleman from Massachusetts said, the principles in H.R. 215 have been debated within the subcommittee. Whether or not you have been present, sir, ad nauseam.

We have had a long series of open, markup meetings on this over a matter of years, as well as hearings themselves, and as far as reality goes, I am not saying whether H.R. 215 can succeed in the Congress at all, but I can state to you one thing. An absolute privilege absolutely

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cannot make it. And, I would say to the gentleman from Massachusetts, if we do have a legislative markup, he will be recognized for the purpose of putting forward an absolute bill, one which he has not introduced, incidentally, into this Congress thus far.

And, if he can carry a majority in the subcommittee or in the full committee, or in the Congress, he will be permitted to carry the ball. I have no particular opposition to an absolute privilege.

I personally would not vote on that question, but if he can put together any sort of coalition for a majority, he will have ample opportunity.

But I say to you that you are correct in your analysis. I say to the witnesses that I disagree with the gentleman from Massachusetts in this.

Mr. DRINAN. Would the gentleman yield?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. Would you give some justification for section 4? Am I correct in saying that throughout all of the hearings, there were never any prosecutors, there was never any district attorneys or Attorneys General coming in saying, oh, it is essential that we are able to, in exceptional cases, pierce the shield of journalists.

Mr. KASTENMEIER. We have had any number of people testify, and I give you these [indicating].

Mr. DRINAN. I have been through them. But I mean on this precise point. Is there any justification on the part of law enforcement officers, saying that in civil and criminal cases it is essential that it not be an unqualified privilege?

That is what I am asking, the precise question. I have been through these things and I find—no, it was I who brought up that point, saying that perhaps Mr. Blasi is right, perhaps the uniformed commissioners have a point. Go get some district attorneys or prosecutors who will say yes, in certain cases, that they could name, civil and criminal, we have to have the power to reach journalists.

And there was no evidence.

Mr. KASTENMEIER. Well, his own evidence was based on interviews with such people, and he himself came before us. We have had law enforcement people. We have even had the Department of Justice on that question.

The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman. Having defended a couple of free press cases before coming here, I think I understand the issues. I look forward to being romanced by my colleague from Massachusetts. [General laughter.]

I have no questions.

Mr. HANSON. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Illinois has a question.

Mr. RAILSBACK. Father, when you talk to King Caucus, you had better also have someone talk to the President. He is part of the process, too.

Mr. DRINAN. Which President?

Mr. RAILSBACK. Someone has to approve the bill. The Justice Department is adamantly against it.

Mr. KASTENMEIER. Thank you, both, Mr. Small, for your appearance again.

Mr. SMALL. Thank you for your attention.

Mr. KASTENMEIER. It is always good to have you here.

Next the Chair would like to call two individuals who have been long interested in this question, the vice president of Columbia Broadcasting System, Mr. Richard Jencks, and with Mr. Jencks today, Mr. Bill Small, also of CBS. The Chair should note that we are in receipt of a statement by Richard C. Wald of NBC, which we would like to receive for the record and which will appear immediately after the comments of Mr. Jencks. We are pleased to have Mr. Wald's statement and that of the National Broadcasting Co.

TESTIMONY OF RICHARD W. JENCKS, VICE PRESIDENT, COLUMBIA BROADCASTING SYSTEM, WASHINGTON, D.C.; ACCOMPANIED BY WILLIAM SMALL, SENIOR VICE PRESIDENT, COLUMBIA BROADCASTING SYSTEM NEWS, NEW YORK

Mr. JENCKS. Mr. Chairman, I am delighted to be accompanied here by Bill Small, who is presently senior vice president for CBS News in New York, but who when he was our bureau chief here in Washington for many years was, as you know, in the forefront of efforts to obtain adequate newsmen's shield legislation.

We welcome this opportunity to renew CBS' commitment to the prompt enactment of legislation which will protect journalists against the compulsory disclosure of their unpublished sources and information.

The News Source and Information Protection Act of 1975, H.R. 215—introduced by you, Mr. Chairman, together with Congressmen Railsback and Cohen—will advance the ability of journalists to carry out their responsibilities and thereby fulfill their public trust. We enthusiastically support its passage.

There are many well-intentioned persons who question whether we really need a statute, arguing that the first amendment offers better protection than any statute. Others question whether there is still a need for such legislation in light of the apparent ability of the press to withstand inappropriate Government pressures.

We do need a statute. In the light of events which are still fresh in memory we need it more urgently than ever. The hope that "some day" the Supreme Court will construe the first amendment as encompassing the interests we here seek to protect, should not blind us to the reality that today such constitutional protection is generally unrecognized by the courts.

And, if as I believe, there is merit to the contention that journalists are today impeded in their ability to gather and report news by the lack of such protection, it would be dangerous to deprive readers and viewers of information now because of the possibility that some future court may construe the first amendment more expansively.

Further, I submit there is little merit to the suggestion made by some critics of a Federal statute that any legislative action to protect the rights of the press is suspect—because what the legislature can give, it can take away. The fact is that for years States all over the country have had shield laws on the books—a recent ACLU study reports their enactment in 25 States.

If there really is some incompatibility between legislation and constitutional protection, I cannot understand why these critics have not been storming the statehouses to have these laws repealed.

That such legislation is not incompatible with the constitutional freedoms the press seeks to assert, is further evidenced by the fact that in the *Branzburg* case itself, reporter Branzburg relied in the Kentucky courts on both the Kentucky news privilege statute and the first amendment—a legal strategy commonly used by news organizations contesting subpenas.

Indeed, Mr. Chairman, I believe you dealt squarely with this argument in your Washington Post article of March 25, 1974, dealing with the need for legislation when you wrote:

> It would provide at both the State and Federal level more protection of confidential news sources and information than eight of the nine Supreme Court Justices in *Branzburg* v. *Hayes* were willing to grant. It would not set a dangerous precedent for future punitive legislation against the press. Half of the states have already enacted news shield laws, and in any case, Congress cannot legislate away press freedoms which the Supreme Court finds guaranteed by the Constitution.

Because of a growing concern by news organizations that strong legislation is necessary, much time and effort has been spent in the last 2 years by representatives of news organizations to produce a bill which they could support.

I would like to take this opportunity to take special note of the indispensible leadership that you, Mr. Chairman, and members of the committee have provided in connection with this effort. CBS believes that H.R. 215 will go far toward eliminating the most significant subpena problems facing the press today.

Under this bill, no longer will a reporter face jail if he refuses to testify before a grand jury about his undisclosed sources or his unpublished notes. Nor will a broadcast news organization have to risk being held in contempt for refusing to turn over its unpublished film or outtakes in connection with a congressional inquiry.

I might digress, for a moment, in connection with Mr. Graham's testimony of yesterday, to note that insofar as the electronic press is concerned, most subpenas are concerned to the corporation itself, and its executives, who have custody of the tape or film sought, and not against the reporter.

So that we are talking about one and the same protection. We are not talking about varying protections for different elements of the press.

While the bill is not absolute at the trial stage, it realistically requires that an adequate showing be made for disclosure—with a right of the journalist to promptly appeal an adverse ruling.

Finally, the bill is applicable to the States, which should make it possible for journalists to know their basic rights wherever they may gather news, publish, or broadcast.

The basic responsbility of the press is many faceted. It reports, editorializes, comments, and analyzes—all with the aim of providing the public with an informed understanding of public issues. But the common denominator of its responsibilities is to provide information to the public—not to serve as the fact finder for executive, congressional, and judicial agencies.

It is this vital independence that Mr. Justice Stewart recognized in his remarks recently on the occasion of the Yale Law School Sesquicentennial Convocation, and which I would like to leave with you today. The Justice said:

> It is quite possible to conceive of the survival of our Republic without an autonomous press. For openness and honesty in government, for an adequate flow of information between the people and their representatives, for a sufficient check on autocracy and despotism, the traditional competition between the three branches of government, supplemented by vigorous political activity, might be enough. * * *
>
> Such a constitution is possible; it might work reasonably well. But it is not the Constitution the Founders wrote. It is not the Constitution that has carried us through nearly two centuries of national life. Perhaps our liberties might survive without an independent established press. But the Founders doubted it, and, in the year 1974, I think we can all be thankful for their doubts.

We thank you for this opportunity to be heard, Mr. Chairman, and Mr. Small and I are ready to answer any questions you may have concerning the CBS testimony.

Mr. KASTENMEIER. I take it that the electronic media in news gathering and dissemination in this country would be as interested in a coherent national preemptive law, as are the print media?

Mr. JENCKS. Very much so.

Mr. KASTENMEIER. Yet at the present time you are left with really no Federal law except the guidelines of the Attorney General and a multiplicity of State laws, this must, I assume, make your job of legally understanding, in terms of newsmen's privilege, extremely difficult.

Mr. JENCKS. Yes; and I would point out, in that connection, that the other absolute bills—so-called absolute bills—which I have seen introduced in this session are not preemptive as to the States. So that the description of the act of absolute is not what it appears to be in comparing the pieces of legislation which have been offered.

Mr. KASTENMEIER. There are two other House bills, the bill introduced by Mr. Koch of New York, is not federally preemptive. It is a "Federal-only" statute. I think that the bill, however, by Ms. Abzug is preemptive and is meant to be absolute.

May I inquire as to what experience, if any, Columbia Broadcasting System, or the electronic media, has had with respect to the Department of Justice and Justice Department guidelines?

Has CBS been, or to your knowledge, the electronic media been involved with the Justice Department since *Branzburg*?

Mr. SMALL. Yes, Mr. Chairman, on a number of occasions we have been. And I might say that while the presence of the guidelines has been very helpful to us to seek legal remedies, to prevent the subpenaing of our various reporters and film, the basic flaw remains, as stated here earlier, that those guidelines are really at the whim of whoever is Attorney General at any given time.

And we find that very troublesome. I notice in the testimony given by the Justice Department yesterday it expresses a concern for the beginning newsman, or the poor entrepreneur, the beginning editor, the man who wants to start his own newspaper, and yet these are the very people that the guidelines effect most adversely.

A large company like CBS, when subpenaed, has legal resources and the money to provide outside legal counsel to fight troublesome subpenas. But a small editor or broadcaster does not. And, if you look at the early history of the guidelines, I have not seen the report which I understand will be available to you in a few weeks, over the last 2 years, of practices, but if you look at the early history you will find that some of the people they subpenaed were editors of underground and radical newspapers who would fall in the category of the very people they expressed concern about in their testimony yesterday.

Mr. KASTENMEIER. In terms of the urgency of legislating in the field, Mr. Jencks, you argue in your statement that we "need it more urgently than ever."

Can you expand upon that? What evidence do you have that we need it more urgently than let us say 2 years ago?

Mr. JENCKS. First of all, our own experience in terms of the number of subpenas we are receiving does not indicate any significant falling off from the level that was testified to 2 years ago.

Second, I think that the events of the recent past have impressed all of us with the paramount need for an independent press, and particularly one which is able to conduct investigative reporting.

I suppose one might say, theoretically, that the need for such a press and such reporting is always urgent and never less urgent than any other time. Yet, I think in view of events of the past 18 months, perhaps it is possible to say that we need to sustain and support that press, and to buttress its independence more now, perhaps, than at any time in our history, because we need such a press more now.

Mr. KASTENMEIER. Some observers are quick to say that the events of the last 18 months or so indicate that the press of the country is clearly unintimidated and has come through rather well.

While, perhaps, we should be grateful to them, it would not necessarily demonstrate that such a statute is necessary—and I play the devil's advocate here, for the purpose of saying that have not really the last 18 months demonstrated that the press in this country, the news community, operated quite well, even without the protection they think they ought to have?

Mr. JENCKS. I certainly believe that the news media have been exemplary and take great pride in the accomplishments of my own employer, CBS in that connection, and my colleagues in CBS news such as Mr. Small.

However, in the case of the previous witness, I can only speculate, and none of us can do more than speculate, as to the overall impact of a *Branzburg* and other such events, upon the press as a whole.

And, it may be that there are some elements of the press that have been inhibited. I cannot say for sure. I would like to avoid such an inhibition, and I would also like the independent activity of the press not to depend upon political courage, but rather proceed as a matter of quiet and assured right on principle.

Mr. KASTENMEIER. Thank you. I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much.

Mr. JENCKS. I have before me your testimony of October 4, 1972. Would you say that you have yielded from the position taken then to accept the qualification?

Mr. JENCKS. Yes. We know to support——

Mr. DRINAN. Is that on sheer pragmatic grounds, that the votes are not there for the unqualified?

Mr. JENCKS. I think that we are motivated chiefly by a feeling that this was a bill which, in our judgment, is achievable. We also, however, are mindful of the fact that the alternative absolute or so-called absolute bills have, at least in some respects, not been as satisfactory as the bill which we now support.

Mr. DRINAN. Not as satisfactory in what regard?

Mr. JENCKS. For example, the bill introduced by Senator Cranston—purportedly absolute—would apply only, as we read that bill, to information received in confidence. And that is not as good as a protection as is offered in this bill in any pretrial stage.

Mr. SMALL. Father Drinan, I wonder if I may comment upon that?

Mr. DRINAN. Yes.

Mr. SMALL. I am not here to acquiesce in terms of my personal support of this bill. I enthusiastically support this bill. I am not supporting it because it is the bill that will pass the Congress. I think any bill, including this one, will have a great deal of difficulty. And we know from the pattern of 2 years ago, that on the Senate side it had a great deal of difficulty and they never got as far as this subcommittee has gotten in refining their thinking on the Senate side.

Mr. DRINAN. Let me go back to the position of the Joint Media Committee in 1973, and I have a letter here from Mr. William Small, news director of CBS News. He wrote to me and said, "As you can see our membership is largely in the camp of those seeking an absolute privilege"—let me read what he says:

> Members of the Joint Media Committee meeting in Washington today, January 30, 1973, announced a change of position regarding legislation to protect newsmen from being ordered to reveal news sources. The group is now in favor of an absolute bill to prohibit governmental bodies from compelling testimony or ordering material from newsmen.

The committee previously endorsed a qualified bill.

As you know, this is made up of the Associated Press, Managing Editors, the American Society of Newspaper Editors, the National Press Photographers Association, and so on.

So where did they lose the faith since January 1973?

Mr. SMALL. That is absolutely correct. And, if you check the record on CBS, you will find that it, too, at one point was——

This letter was written as then chairman, as I once was, of the Joint Media Committee. The Joint Media Committee shifted back toward exactly the sort of bill that H.R. 215 is. You will find, without question, if you go into the journalistic community, including the five organizations represented there and including CBS News, as witnessed by the testimony of one of our correspondents just yesterday, that there is a divergence of thought; that there are many who want no bill at all, who feel that they can "get along" with the first amendment as their only protection.

Mr. DRINAN. But they are not an issue now. What I want to know is whether they are acquiescing for pragmatic reasons, that that is the best they can get? Or whether they really think, philosophically, that we ought to have two tracks in some cases as in section 4 here?

Mr. SMALL. Let me say that I cannot speak to the "they" whom you refer to, because they are not only several different groups, but within each there are people of divergent viewpoints.

My own personal feeling is that this is a proper bill. I am not troubled by section 4 at all. I find that this bill would solve fully all but the rarest of cases involving newsmen.

Mr. DRINAN. What has the Joint Media Committee said lately?

Mr. SMALL. I am no longer chairman of the Joint Media Committee. I became president of the Society of Professional Journalists, Sigma Delta Chi and stepped down in favor of Grant Dillman who is the Bureau Chief of United Press International.

Mr. DRINAN. Do you think I could waltz the Joint Media Committee just like I am waltzing Mr. Pattison?

Mr. SMALL. I think you would have less success with the Joint Media Committee.

Mr. DRINAN. You say you have no problem with section 4? You obviously could not mean that. It is obviously going to have a chilling effect here. [Pause]

Mr. DRINAN. I leave that question on the table.

Mr. Jencks, you said something that really struck me three years ago here in 1972, something which was really horrendous, and I wonder whether the situation has improved. You said this:

> During the 30 months period preceding the filing of our amicus brief in the Supreme Court in the *Branzburg* case, CBS and NBC alone received 121 subpenas calling for the production of news materials.

Has that substantially increased?

Mr. JENCKS. I can only say that during the past 12 months, CBS alone has received 26 subpenas. And I think that figure, for a single year, and for one news organization, is in the same ballpark as the figure you gave there for 3 years for two news organizations.

Mr. DRINAN. How many are Federal and how many are State, roughly?

Mr. JENCKS. Of the 26 in the last 12 months, 6 were federal.

Mr. DRINAN. Do they fall into any pattern, at the State level?

Mr. JENCKS. I do not know what you mean by "pattern".

Mr. DRINAN. In other words, is it related to organized crime, or what? Who are the people that they are subpenaing?

Mr. JENCKS. I cannot generalize about that at the moment, because the details of the information are not fresh in my mind. But, if you would like, I can submit that information.

Mr. DRINAN. It would be helpful to me, at least, to see who these people are, who want to get rid of the shield so to speak, who want to violate the confidential sources of journalists. In how many of these 26 cases is the material actually produced?

Mr. JENCKS. Of the 26, I can furnish that data as well, and I would be pleased to.

Mr. DRINAN. If this becomes law, do you think under section 4 a significant number of law enforcement people would somehow get a matter to trial and say we cannot reach this journalist who has this indispensable information until we get to trial? And, that in some States they can get an indictment or an information, or in a civil matter they can institute law suits of some nature, and then they can get at the journalists?

Mr. JENCKS. Yes, if relying upon their own information-gathering resources, and through effective law enforcement investigation, they can bring the suspect to trial, then they may if they can also meet the three conditions established by section 4, they may be able to compel the newsman to give up his source or his information.

But our experience is, and the obvious fact is, that the great majority of all subpenas addressed to newsmen are in the pretrial stage.

Mr. DRINAN. But you do see my point?

Mr. JENCKS. Yes, indeed.

Mr. DRINAN. It is quite easy for them to manipulate it so they can get it in. Do you have any idea what the words mean here in (c), the third condition, that the law enforcement person or the prosecution "has to prove that there is a compelling and overriding public interest in requiring disclosure of the identity or the information"?

Mr. JENCKS. I do not know that I can conjure up particular examples that would illustrate——

Mr. DRINAN. What does "overriding" mean? What is "overriding"—the right of the journalist, I suppose?

Mr. SMALL. Father Drinan, I think the chairman who is the author of this language can probably speak to it better than we can. But in all of the discussions over the last 2 years, the purpose of that language—at least as I understand it—was to prevent a frivolous use by the Justice Department, or anyone else, of subpena power; that you could not—and in this case it now takes place on the trial level—that you could not bring in a newsman to get, really, information which was not terribly important, but which might be important or helpful to a law enforcement agent.

It was my understanding—and I think, Mr. Chairman, that you could speak to this better than I—that the concern here was that it be a matter of consequence.

Mr. DRINAN. Well, I know that we talked about that before, but that is one of the things which bothers me. It is undefinable, in a certain sense, that the overriding public interest is as the law enforcement sees it.

And, then the term "compelling" was added. In other words, you say "not frivolous," but I am still not certain of a for instance when the judge would say, well he thinks that it is an overriding public interest, and this classic example is a kidnaping case. But you do not have them very often, and journalists would not be involved.

So I really do not know what (c) means. It was apparently designed to strike a balance between law enforcement and the rights of the defendant and public.

Thank you very much. I think my time has been consumed.

Mr. JENCKS. Let me say that it is, of course, not an exact test, nor a precise guideline. They would have to be interpreted by the courts as they come along. As you say, kidnaping is, because it offends people's sensibilities and excites their emotions, it is traditionally cited as a kind of case where you would want to see prosecution proceed effectively, if at all possible, and such a case might be involved and others can be imagined.

There is a difference in the importance to the public of prosecutions of different kinds of cases, and judges are sensitive to those differences.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. Actually, while I am not the author of that particular language, the language really comes out of the *Branzburg* case. The court, in the *Branzburg* case, lists examples in which the government had a "compelling and overiding" interest, and they went on to say that it included—and I quote them—"extirpating the traffic in illegal drugs, forestalling assassination attempts on the President, preventing the community from being disrupted by violent disorders, endangering both persons and property" et cetera. That is the genesis of it.

Mr. DRINAN. Mr. Chairman, would you yield on that? Do you have any example where you have this in a civil action? The criminal, I recall those, but in one version of Mr. Cohen's bill of this two-tier approach, we did not have the civil.

But I wonder, Mr. Chairman, if you would have any thoughts on the "overriding public interest" in a civil case?

Mr. KASTENMEIER. I do not have any examples, at the moment, but I am sure that they would equally apply in a matter which was not necessarily criminal in nature.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. I yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman. The notion has been expressed here that the reason that the ANPA, CBS and various others have changed their point of view from absolute to qualified is that this is achieveable legislation.

I am wondering if there is not another reason why this legislation might be acceptable? And that is, the notion that perhaps sometimes you can overprotect the privilege to the point where when those rare occasions come when the public is outraged, that the result of that, if there were no safety valve of this section 4, the result of that might be a whole reversal of the whole newsman's privilege; that you have a pragmatic reason for this legislation rather than just simply an achieveable kind of thing?

Mr. JENCKS. Yes, I hope I did not—I certainly did not want to sound superficial in making that remark. Obviously the achieveability is part and parcel of the equities of the situation. And it is because the Congress, as well as the public, is also sensitive to the importance of the sixth amendment, for example, and the fourth, that an absolute in this area which might offend the sensibilities or the sense of balancing of equities of either the Congress or the public at large, might as you say prove to be an unreliable resource, and might, as in the case of the overextension of any right, might prompt a retaliation.

Mr. PATTISON. I am interested in the problem that is particularly important to the electronic media, and that is the problem of outtakes, and the problem of not making those available.

The normal confidentiality privilege rules usually relate to some notion of confidentiaity. Outtakes, generally speaking, do not relate to that. You have taken a lot of pictures and then, in editing, you are no more or less than an observer, usually, on the scene. And, in that sense, perhaps no more than any citizen witness might be who happened to be there at the time.

I am curious if you would just sort of explore that whole area of outtakes where there is no confidentiality problem?

Mr. JENCKS. First of all, let me note that there can be a confidentiality problem on outtakes, just as there can be in a reporter interview, with any individual. He may put things in his notebook, or store them in his mind, which he understands and his interview understands are not to be published, so that they can be one and the same problem.

Mr. PATTISON. I understand.

Mr. JENCKS. In addition, of course, journalists in the electronic media shoot, as you indicated, a great deal more film than can be used. And some of it, much of it, is not confidential.

However, a couple of important things bear on this from the standpoint of the electronic media. First, they are a regulated media, so that you have, unfortunately, and have had from time to time in the case of Congress, attempts to get outtakes material not in connection with the prosecution of criminal activity, but from the standpoint of making a judgment about the media's reporting of news.

That is to say, an attempt to have the Congress or the Commission or whomever be an arbiter of official truth. And, something of that sort, we believe, happened in connection with "The Selling of the Pentagon." And there, Dr. Stanton, the president of CBS, was ready to go to jail. Fortunately, the Congress obviated that by deciding not to press the subpena.

So, that consideration applies to outtakes, insofar as the electronic press. There is also the fact that if they are on the scene of events which become of interest to police authority, what happens is that we become a regular repository of the first resort of law enforcement authorities, at all levels. And this is and has been a tremendous burden, even where it does not result in actual final subpenas.

It results in an enormous burden in time of newsmen, of objectives, and of costs, in the case of subpenas that are actually issued.

So these are at least some of the considerations for why we believe that the bill properly protects outtakes, at least in the pretrial stage.

Perhaps my colleague has, from a news standpoint, a supplement to that?

Mr. SMALL. We look upon H.R. 215 as protecting outtakes when it talks of information.

Mr. PATTISON. I understand that it does protect that, and my question is really how important is that?

Mr. SMALL. It is terribly important to us, because if you talk about intimidating, well it affects you on two levels. One, if you are out covering a story and you look at the history of the last 15 years or so, and you talk first about the civil rights movement and then the anti-Vietnam movement, if the reporters who cover for us or for newspapers speak up, in the minds of those taking part in these events we are simply an extension of the cop on the corner. And then we are in deep trouble because we can no longer become a part of that story, and no longer have a free flow of exchange with these sources.

It affects us in another way, once you have the material and the law enforcement people try to go after it, your reporters in many television stations, for example, after the flood of subpenas of a few

years ago, many stations and some still have this practice, do not keep a library. They destroy their film once they finish a story, which is a great natural resources disappearing.

But this has happened. And on more than one occasion people who work at CBS News, when dealing with a delicate story, have suggested that perhaps it would be wise to destroy the outtakes rather than go through the process which we went through with "The Selling of the Pentagon."

It may not have been an intimidating event, but it certainly was a debilitating one in that, as Dick Jencks suggests, thousands of man-hours were spent in responding to the criticisms within the Congress of that broadcast.

Mr. PATTISON. I am sympathetic with the notion that the newsmen would become identified with the law enforcement agencies, and I suppose the result of that is that if your newsmen are covering a story which deals with a lot of people, that people who may not want to have their pictures taken, though they may not be doing anything illegal, may make it very difficult for the newsmen to cover the story—like throwing rocks at him, for instance.

Mr. SMALL. Yes, and that has happened. There is no question that we have this recurring problem. But, if you look back at the original cases that brought this about, Earl was able to report on the Black Panthers, because he had developed a rapport with them which became impossible, once this proceeded through the courts, and I assume it is still impossible.

Mr. PATTISON. Thank you very much.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Mr. Jencks, I must say that I have been disappointed with CBS throughout the years, and I want to quote letters, when I wrote to Mr. Arthur Taylor, pursuant to his letter of December 10, 1973. And, in that letter, Mr. Taylor endorsed the qualified bill.

I wrote back and said that you people gave up rather early. And he wrote back, and I think, frankly, that you now have slipped back into the same position, and Mr. Arthur Taylor said categorically to me:

> We are certainly not abandoning our position that the unqualified bill is by far the best bill in terms of protecting a free and vigorous press. I certainly support you in your efforts to attain this legislation. We only wish that there were more members of Congress who shared your views as to the necessity of a full guarantee of the constitutional rights given to newsmen under the first amendment. Rest assured that CBS will surely support you in your efforts to remove all qualifications from this legislation.

What have you done to support me lately? [Laughter.]

Mr. JENCKS. Well, Mr. Drinan, as in the case of the ANPA, we would I believe prefer an absolute bill. Parenthetically, a bill more absolute and more broad than Senator Cranston's bill which, although named absolute is not, in our judgment, as good as this bill.

Now, Mr. Taylor needs no defense from me. He said he would support you in efforts to secure an absolute bill. And I understand you have not introduced a bill in this session.

Mr. DRINAN. I have, sir, and I thought I had it right here. A week ago I put it in and it is substantially the same as Jerome Waldie's and Cranston's, although I do say I do not restrict it to confidential sources—that is, all sources at all levels.

Mr. JENCKS. And preemptive of the State laws?

Mr. DRINAN. Yes.

Mr. JENCKS. I do not think it is his statement that he believes that an absolute bill was best and he would support you in that means that we have to attack or fail to support a bill such as the one at issue here before the committee, which we think can be enacted.

Mr. DRINAN. These bills are around. What have you done to support me? "CBS will fully support you in your efforts to remove all qualifications". I understand your fall-back position, but what have you done to support me?

Mr. JENCKS. For one thing, by saying in testimony before and today, as well, that we would prefer an absolute bill if it would be obtained.

Mr. DRINAN. All right, thank you very much.

Mr. KASTENMEIER. I must say I think the history since the Supreme Court decisions, organizations and individuals in the news community have had varied opinions, many times, as they assess what the problem is and what the urgency is.

In some cases, various organizations start out supporting what is called a qualified bill, then an absolute bill, and back to the qualified bill. Those terms have no meaning any longer, and I think you appropriately indicated that they do not necessarily have any absolute meaning.

So that is one of the reasons for this hearing, in fact, to ascertain what the views of the Columbia Broadcasting System, as a part of the electronic media, news community, ANPA, and others is, as of April 1975, including the administration.

And, to that end, and to the extent to which you have edified us on behalf of the committee we thank you, Mr. Jencks and Mr. Small, for your appearance this morning.

This concludes this brief, 2-day hearing. In addition to the statement of Richard C. Wald, president of NBC News, which will follow this testimony of CBS, we also receive for the record the statement of the Authors' League of America.

[The prepared statements of Mr. Wald and the Authors' League of America follows:]

STATEMENT OF RICHARD C. WALD, PRESIDENT, NBC NEWS, NATIONAL BROADCASTING CO., INC.

My name is Richard C. Wald. I am President of NBC News. Two years ago I was privileged to appear before this subcommittee to testify on the need for a federal shield law. I welcome the opportunity to assist again in your efforts.

The current position of NBC News can be stated briefly. We believe that a federal law to encourage free flow of information by limiting subpenas to newsmen is needed. We believe that H.R. 215 sponsored by Congressmen Kastenmeier, Railsback and Cohen substantially meets that need. Finally we believe that all of us seeking to reach this objective—legislators, press, and others—should now stop exploring alternative means and get behind this bill so that it may be enacted into law during the 94th Congress.

Congress has been considering legislation on this subject at intervals since 1929. Interest has waxed and waned with conditions not subject to Congress' direct control. Perhaps one of the reasons why none of the earlier efforts bore fruit is because often they were responses to specific situations. A newsman is held in contempt for refusing to testify about the confidential source of a published story revealing official corruption. He is jailed. Congress becomes concerned, the more so as the press and public demand congressional action. Bills are introduced and consideration begun. The newsman is released. Public atten-

tion turns elsewhere. With the termination of the specific cause, the sense of urgency in seeking a remedy naturally abates. The legislative drive in Congress loses its momentum, and pending bills are allowed to die quietly. But each time, after a longer or shorter period, a new set of circumstances has arisen once again focusing attention on the need for shield legislation. Always the new events, however much they may have differed in detail from those of the past, constitute a threat to a strong, free press.

We are happily once again in the more relaxed phase of this alternating pattern of tension and ease. But there is still an underlying tension. The Justice Department has not always complied with its own guidelines. In connection with prosecutions at Wounded Knee, a U.S. attorney obtained a subpena without the approval of then Attorney General William Saxbe and, after that was quashed, obtained a second subpena, this one authorized by the Attorney General even though there had been no attempt at negotiation as required by the guidelines. And, also in connection with Wounded Knee, the FBI used an Associated Press photographer, rather than one of its own agents, to spy on the persons in the village. And there are others. But the prosecutorial and administrative attitudes which gave rise to the extraordinary number of subpenas seeking to compel testimony by newsmen have changed. So we see fewer reporters in jail; we hear fewer charges of harassment; and we hear fewer claims that government enforcement agencies seek to pervert news organizations into serving as an enforcement arm.

But the lesson of history is, I think, clear. We should continue the effort until a federal law is enacted. The inherent tensions within our society are such that they must from time to time erupt in conflicts. These put at risk the ability of the press to perform its traditional function as a conduit to the general public of information and views without fear or favor of any individual group or institution. For example, one need not be a Cassandra to see the potential for such a flare-up in the provision on privilege in the recent revision of the Federal Rules of Evidence. The pertinent provision reads that: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (Pub. Law 93–595, 93d Cong., H.R. 5463, Jan. 2, 1975)

Just recently, the State of Oklahoma enacted a shield law, bringing to 26 the number of states having such legislation. And California, which has long had a shield law, amended it to make it stronger. Nevertheless, under the quoted new Federal Rule, a federal judge may refuse to apply the shield laws of the state in which the case is being tried in cases governed by federal law. No exception is made for facts subject to concurrent jurisdictions of state and federal governments. In this situation the federal judge may, if he chooses, look to the state law of privilege. But he need not. At least in these situations, the policy of the growing number of states which recognize the constraint that compulsory testimony may exert on the free flow of news is or may be frustrated by a single district court judge.

I would be less than candid if I, as a newsman, advocated H.R. 215 as my ideal. It falls short of providing the protection that an expansive view of the Constitution would afford. Some no doubt believe the press needs and is entitled to that larger measure under the Constitution. That goal, however right in theory, has proved to be unattainable in practice. H.R. 5928, the predecessor of H.R. 215, had after much debate and compromise been accepted by a concensus of those active in this field. The basis of that conclusion, in which we concur, is that the bill will afford a substantial measure of protection, it is workable, and it can be passed. We believe this conclusion applies equally to H.R. 215 and for this reason, as I stated at the outset, NBC News supports its enactment into law.

THE AUTHORS LEAGUE OF AMERICA, INC.,
New York, N.Y., April 24, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: The Authors League, the national society of professional writers and dramatists, submits this statement in support of H.R.

215—to Protect News Sources and Information from Compulsory Disclosure by Newsmen. We respectfully request that this statement be included in the record of your Committee's hearings on the Bill.

As you know, The Authors League has supported an "absolute" privilege in its previous testimony and statements to your Subcommittee (hearings of September and October, 1972; Serial No. 37—pp. 113–134; hearings of February and March 1973; Serial No. 5—pp. 583–584). But as we have pointed out, if Congress will not enact a complete prohibition against disclosure, we believe it should adopt a strong qualified privilege statute—which will give the press more protection by far than it now has. H.R. 215 would do that—indeed, would give more protection than the press would have enjoyed had Justice Stewart's minority (pro-privilege opinion) in *Caldwell* been adopted by the Court.

Our reasons for believing that Congress must protect journalists and authors against the compulsion to disclose news sources and information are set forth in detail in our 1972 statement and testimony. We submit that nothing since then has changed the compelling need for this protection. To recapitulate, briefly:

(i) The threat of compulsory disclosure deters sources from giving writers essential information, since potential informants are inhibited by the fear that subpenas will compel the disclosure of their identities or information they are willing to furnish. Much of this information does not come from criminals but rather from responsible individuals who wish to expose improper activities. Moreover, a grand jury's broad investigative powers allow it to compel writers to disclose informants who have not committed crimes and have no information about crime.

(ii) The threat of compulsory disclosure will deter writers from obtaining or publishing controversial information; many will not accept the choice of betraying confidences or serving jail sentences.

(iii) Compulsory disclosure converts the journalist or author into an investigative agent of the government, although the very concept of a free press requires that news media have autonomy and freedom to investigate without fear of government interference.

(iv) Ultimately compulsory disclosure will be self-defeating, drying up information from sources who would have never provided it to public officials and will cease providing it to a press that has lost the right to protect confidentiality.

Those who urge that Congress do nothing if it will not enact an absolute privilege, contend that it is better to "rely" on the First Amendment to protect against disclosure. But that is no alternative, for the majority opinion in *Caldwell* denies the press that protection. Unless Congress acts, journalists and authors will be compelled to disclose sources and information to federal authorities and those in states that do not have shield laws.

The Supreme Court is unlikely to change its ruling soon. And even if it shifted and adopted Justice Stewart's minority opinion, that would only give a partial privilege—journalists would still be compelled to disclose information relevant to probable violations of law, if not obtainable by alternative means and of "compelling and overriding interest". H.R. 215 gives much more protection. It affords an absolute privilege in grand jury and legislative committee proceedings, and similar investigations—where the protection is most needed because the hearings are not governed by the rules of evidence, and in the case of grand jury proceedings, are secret. The protection given for criminal and civil court actions is essentially the same as that provided under the Stewart formulation. Since court actions are open, this dispels the informants' uncertainties as to what their journalist confidants have disclosed; and the rules of evidence, particularly the hearsay evidence rule, limit the amount of information a reporter can give. These factors, coupled with the safeguards of H.R. 215, minimize the dangers of compulsory disclosure in this area.

If Congress does not establish even a strong, qualified privilege, the press will have no protection against compulsory disclosure. Some argue it can "protect" itself, if it "fights". But its only weapon is allowing reporters to go to jail; and grand juries and prosecutors have demonstrated their willingness to do that. On the other hand, reporters are not willing to be martyrs on a permanent basis; some have already refused to sacrifice 30 or 60 days in a cell. And potential informants are likely to realize they cannot be sure whether their reporter will withstand the pressure. The Watergate disclosures by the Washington POST are no evidence that grand juries will not pursue reporters who publish useful information in less publicized situations.

Adoption of H.R. 215 would not limit First Amendment protection. If a later Supreme Court interpretation gives greater protection to reporters under the Amendment, that protection would supersede any lesser safeguards previously enacted by Congress. As noted in our December, 1972 memorandum to the Subcommittee, Congress can give First Amendment freedoms more effective protection than the Court is willing to allow at a given time, but cannot reduce the scope of protection allowed by the Court.

Sincerely,

IRWIN KARP, *Counsel.*

Mr. KASTENMEIER. That concludes the hearing and the subcommittee stands adjourned.

[Whereupon, at 11:45 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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