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Justice and the Press

WASHINGTON—In offering to "negotiate" with the news media for a "compromise" about how much unpublished information on the Black Panthers they would be forced to surrender to the courts, Atty. Gen. John Mitchell offered an unusual confession of error and expression of sympathy for the "peculiar problems" that a subpoena to testify raises for reporters.

According to other officials at the Justice Department, the attorney general also recognized that he might not fare so well if the courts were asked by the press to weigh those peculiar problems and to give reporters some peculiar privileges against subpoena.

But the issue has not been significantly tested in the courts because many news organizations have been equally unwilling to risk defeat. There has thus developed a tradition of mutual nonaggression and a pattern for cloudy law, leaving the government and the media to work out specific cases as they develop.

The "peculiar" problems usually raised by the news media, and acknowledged by the government, arise from the special arrangements that reporters and cameramen must make in the pursuit of information.

Even at public events, they are given special access to persons in the news, special permission to pass through police lines and often special entry to places barred even to the police. They can see and hear things not intended for the public eye or ear.

In private dealings with persons who figure in the news, reporters obtain not only on-the-record comments but confidential judgments and facts that they then use to appraise the accuracy and meaning of other men's words and deeds.

Without that access and without such confidential relationships, much important infor-

mation would have to be gathered by remote means and much could never be subjected to cross-examination.

Politicians who weigh their words, officials who fear their superiors, citizens who fear persecution or prosecution would refuse to talk with reporters or admit them to their circles if they felt that confidences would be betrayed at the behest of the government.

That, at least, is the view of highly experienced newsmen and they have treated their reputation for respecting a confidence as one of the most precious and essential tools of their craft.

In recent years, as social tensions rose, reporters have encountered special problems in following the activities of radical youth and other military organizations and such race-conscious groups as the Black Panther party. White radicals have demanded a special degree of "trust" in the reporters they would admit to their councils. Organizations of blacks have refused to deal with white reporters, either out of fear of betrayal or simply ideological conviction.

Even black reporters working for the so-called "white press" have been regarded with suspicion by the Panthers and other groups, and have gained a measure of acceptance only slowly, by individual demonstrations of a combination of sympathy and objectivity.

In the view of most newsmen, the government's broad demand for the divulgence of tape-recorded conversations and notebook jottings on the Panthers by Negro reporters, such as Earl Caldwell of The New York Times, is itself injurious to the relations they have developed with news sources, even if the demand is firmly resisted.

Traditionally, therefore, reporters have been willing to testify only to the accuracy of their published materials, attesting that they witnessed what

they described or heard what they quoted. But the government has taken the view that reporters in most cases and places enjoy no special immunity from testifying to other observations that may pertain to criminal acts.

Government attorneys say that they have turned to the news media for testimony only when other sources of necessary information had been exhausted. If denied, they say, they have often retreated. If shown some cooperation, they have at times served subpoenas to demonstrate that the reporter was testifying under duress.

In still other cases, subpoenas have been served but ignored, with no further attempt to enforce them, officials say. In recent memory, the federal government has never dragged a newsmen into court to force him to testify against his will.

But in recent years also, notably in civil rights cases in the South and the case against Chicago policemen arising out of the riots at the 1968 Democratic National Convention, reporters are said to have agreed in informal discussion with federal attorneys to supply unpublished film and notes under narrowly drawn subpoenas that protected the names of their sources and other confidential material.

Mitchell contends that the recent round of subpoenas served on The New York Times, CBS, Time and Newsweek, were meant to be in that pattern. His department erred, he said, in neglecting to "negotiate" informally before serving the demand.

Before Mitchell's retreat, some newsmen and executives suspected an effort to breach tradition as part of the energetic effort to prosecute leading members of the Panther party. Some even received reports that the government wished deliberately to disrupt reporters' access to the Panthers, so as to cut off some of their publicity.

Some government officials, in turn, privately charged that some newsmen were departing from their own custom, having offered cooperation when it suited them in civil rights cases and resisting it now out of partial sympathy for the Panthers in their contest with the police.

There is now evident on both sides, however, a desire to

avoid confrontation in the courts, to reaffirm the tradition of special ad hoc handling of reporters and to leave unresolved some of the difficult questions of law: What is the duty of a reporter when he hears a confidential threat of crime or is permitted to witness a criminal act or is given private information that contradicts public testimony?

What is his duty to his source, to his craft, to the public that relies on his free access to news and the public that wants justice served in the courts?

Attorneys have acquired a special immunity for themselves in common law, but physicians, clergymen, psychiatrists and newsmen have been given only partial exemptions by statute or custom or both and most legal experts have opposed the proliferation of special claims.

(C. 1970, New York Times Service)