

On the question of privilege: Newsmen may have little to gain

By VINCE BLASI

A legal scholar re-examines the subpoena controversy. His findings shed new light on the relationship between reporters and their sources.

IF JOURNALISTS, why not social workers? Guidance counsellors? Psychiatrists? Bankers? Sociologists? Ombudsmen? Parents? Close friends?

This question is frequently asked of those journalists who say they do not have to reveal information received in confidence from their sources. The question deserves consideration. After all, the principle is well established in the common law that courts are generally entitled to *everyone's* evidence no matter what the consequences to the witness.

There are, however, some much-criticized exceptions

to this principle of total disclosure. Lawyers and spouses have common-law privileges against compulsory disclosure. Statutes in two-thirds of the states give doctors and priests a similar immunity from subpoenas. In some circumstances, police officers cannot be compelled to reveal the identity of their informers. Military and diplomatic "secrets of state" are privileged. There is a trend toward a statutory privilege for psychoanalysts.

Newsmen have maintained for years that they too need privilege against subpoenas. In the current ses-

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sion, the Supreme Court will hear three cases in which journalists claim that at least a partial immunity against subpoenas is implicit in the First Amendment.

Is a privilege for newsmen really important? Has news coverage been adversely affected to any significant degree since the dramatic increase in the volume of subpoenas approximately two years ago? Seeking answers to these and related questions, I personally interviewed about 50 editors and reporters across the country. Also, with the assistance of Prof. Richard Baker of the Columbia University Graduate School of Journalism, I surveyed a cross-section of about 1,000 working journalists. Here are some of the findings.

MOST OF THE newsmen I interviewed believe that the profession relies way too much on "off-the-record" information and not-for-attribution quotes. They offer several reasons for thinking that the reliance on this type of information is, in many ways, a bad journalistic habit.

For one thing, reporters can get caught up in a gossip syndrome. They could become more concerned with getting the inside story for themselves than with getting as much information as possible to the reader. Many newsmen feel that reporters could get a great deal more information on-the-record if they were tougher with sources and less concerned about being on the inside.

In addition, regular confidential sources can co-opt a reporter, particularly if the reporter's career is interrelated with the source's career. This danger is probably greatest in political reporting, but it is also possible in covering radicals and minority groups.

Another danger with confidential sources is that the sources tend to lie more readily when the discussion is off-the-record, knowing their deceit will not be exposed.

On the other hand, a relationship of trust with sources can be important to reporters in assessing information. Also, it is often important to get sources out of the interview room and into a relaxing atmosphere where they can speak expansively and where their daily routine can be observed. By associating freely with the source, the reporter can improve his reporting. So this kind of confidence usually means an unspoken sense of trust — a trust that the reporter will understand the information he is getting and will know what to use — not an explicit agreement of what is off the record.

There are, of course, instances in which important stories are acquired from sources who demand elaborate assurances that their anonymity will be protected, such as interviews with fugitives and exposés of government corruption. By and large, however, the informal confidential or trust relationship is more common and more important.

Sources "dry up" for a number of reasons. The most common is the source's disillusionment with the reporter's stories. For many news sources, particularly dissident groups and individuals, the reporter must convince them that he is "on their side." The prevalent attitude, by no means limited to radicals and minority

groups, is summed up, "If you're not for me, you are against me."

This sensitivity of sources can have some interesting effects on the competition for stories. Reporters for the news weeklies sometimes are able to placate angry sources by placing all the blame on the writers and editors in New York. Earl Caldwell of the New York *Times* says that he has an easier time covering the Black Panthers in the Bay Area than do reporters with the San Francisco *Chronicle* because the Panthers don't regularly read the *Times*. Jack Nelson of the Los Angeles *Times* once appeared at a Students for a Democratic Society (SDS) convention with a scrapbook of his stories on radical groups. He found this a remarkably effective device to acquire sources.

Most reporters deny that there is pressure to write favorably about regular sources. Few would ever admit to tempering a story to please a source. Many newsmen, on the other hand, concede that they sympathize with their sources. In my interviewing I encountered a common self-description: "I don't pretend to be neutral, only fair." Editors are especially worried about the tendency of young reporters to identify too closely with their sources. (At the same time, however, these editors say the newest generation of journalists is superior to any that has come before.)

There appears to be one other common phenomenon in source relationships. Threats to cut the reporter off are made much more frequently than carried out. Source disenchantment with a reporter has a way of subsiding after a while. Some reporters say that most sources will quietly acknowledge the "inherent fairness" of a critical story, even while they go through the motions of ranting and raving. If the reporter is cut off, it is usually only temporary and symbolic.

The subpoena controversy must be viewed against this background of reporter-source relationships. Reporters are not so much worried about being subpoenaed because they are privy to highly sensitive information that would send their sources to jail. Rather, the concern is that any cooperation with government investigation and prosecution is likely to cause deep source resentment. For a reporter who covers radicals, "the uncommitted" or the black community, an appearance before any gov-

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ernment tribunal (even if the appearance is an involuntary response to a subpoena) may well type-cast him in the minds of already-suspicious (and perhaps paranoid) sources as “one of them.”

Seldom will reporters possess information that is not either a matter of public record or else already in government hands from nonpress sources. There have been some interviews from the underground, but these are almost always arranged with such elaborate precautions that the reporter learns nothing that would assist a manhunt.

And, if a middle-level bureaucrat blows the whistle on government corruption, the reporter will seldom hold back vital information from his readers. Moreover, exposés of this sort hardly ever lead to subpoenas. The blue-ribbon commission assigned by city hall to white-wash the scandal will almost never want to attract the further public attention that comes with a subpoena controversy.

More often than not, reporters are subpoenaed not because they have information that is otherwise unattainable but because:

- the reporters are usually articulate on the stand,
- it would cost the government some expense and effort to gather the available information on its own,
- the government does not want to blow the cover on its paid informers or eavesdropping methods — or
- the government, some reporters feel, wants to discredit them with their sources in order to reduce the news coverage given those who “say only what's wrong with America.”

PROponents of a privilege for newsmen contend that no one could begin to justify the disruption that subpoenas cause the equally important newsgathering process. This argument takes on an added dimension when it is noted that reporters will often go to jail rather than make their modest contributions to factfinding efforts of government tribunals. In our survey, we asked the respondents if they would be willing to go to jail for up to six months to protect their sources. More than 90 per cent of those who answered said that they would accept a contempt citation. If press subpoenas will produce more martyrs than evidence, what is the point?

The point, say opponents of a newsman's privilege, is legitimacy. Even if reporters seldom possess fresh information, some of the other reasons for subpoenaing the press are perfectly legitimate. In this era of overburdened law enforcement resources and fiscal stringency, why shouldn't reporters and all other citizens be utilized whenever possible to save the police time and money? Many of the reporters who now view the subpoena issue as a matter of principle used to cooperate regularly with the prosecution. Why, the opponents of privilege ask, the change of attitude now?

Moreover, these opponents assert, the over-all quality of reporting has not been affected much by the subpoena threat. Our survey asked, “In the last 18 months, has your coverage of any story been adversely

affected by the possibility that you might be subpoenaed?” Of those who answered, only about eight per cent said “yes,” another 12 per cent said “I'm not sure.” Many of the reporters I interviewed stated that, in retrospect, their fears about sources drying up were excessive.

SOME MOVEMENT sources have become less accessible, it is true, but most reporters attribute this to general disenchantment with the establishment press rather than to any specific subpoena anxieties. John Kifner, who specializes in radical coverage for the *New York Times*, says that the subpoena controversy has even cemented some relationships with sources, placing the press unmistakably on “their side.” Caldwell also reports that his resistance to the government's subpoenas has made the Panthers more willing to trust him personally, although less willing to allow taped interviews. There are, however, some reporters who claim that a meaningful legal privilege against subpoenas would enable them to get some stories that are now unavailable — interviews with fugitives are mentioned most frequently. On the whole, it appears that the increased subpoena threat in the last two years has significantly hampered only a small, rather specialized segment of the journalism profession.

If the Supreme Court were to reject the newsman's bid for a privilege, the local prosecutors, defense lawyers and civil litigants would probably be less reluctant to subpoena the press if the prospect of a long constitutional fight were removed. Editorial writers could no longer rely on the First Amendment to rally public opinion behind their embattled brethren in the newsroom. Journalists accepting contempt citations might find judges more willing to impose stiff sentences. In such a climate, every reporter whom I queried believes that many source relationships would become more structured, more self-conscious, more riddled with suspicion and less conducive to quality reporting.

Newsmen have everything to lose and very little to gain from the pending Supreme Court cases. Should the justices establish a qualified privilege (an absolute privilege is out of the question given the Court's present make-up), they would only ratify the existing equilibrium. Should they, on the other hand, give their imprimatur to the practice of subpoenaing the press, they would unleash furies that are currently under control.

Because of this precarious state of government-press relations, a privilege for newsmen cannot be equated with a privilege for social workers or guidance counselors. The press subpoena issue has evolved into a highly visible symbolic confrontation which threatens to alter the balance of forces between government and the press which now keeps government subpoena power in check.

In some respects, the situation is analogous to the controversy over the Pentagon Papers, which many newsmen consider a Pyrrhic victory. As Jim Hoge, editor of the *Chicago Sun-Times*, puts it: “The First Amendment is never expanded by litigation.” ■