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PRESS

A NEW ROUND?

Government vs. Press

By Nat Hentoff

In April, the Board of the New York Civil Liberties Union – after, as I can testify, considerable debate – announced a new policy concerning government subpoenas of news material, printed and broadcast. I draw the attention of other affiliates and of journalists in all media to this decision because it does *not* have to do with unpublished material or tapes not actually broadcast or television out-takes (not shown on the air).

It has long been the Union's policy with regard to governmental subpoenas of the press, to oppose governmental review of what editors have decided not to print or not to broadcast. The Union has also supported protecting the anonymity of all journalists' sources from government inquiry.

The new NYCLU policy opposes the subpoenaing even of those news items which have been previously published or broadcast "unless radical changes are made in the way subpoenas are presently granted."

New York Times Photo
Edwin Goodman, WBAI

Voice

It is difficult, as I have discovered, for even some civil libertarians to understand the need for this additional protection. Why, once an article or document has been published, should not the original – and nothing else – be turned over to the government on subpoena? Why, once a tape has been broadcast, should not that tape – and nothing else – be given to a governmental agency that goes into court to request it?

Let us examine three cases, currently in the courts on appeal. The *Village Voice* had published an article by a prisoner, with his by-line. (The same man was later indicted for his alleged role in the 1970 riots at the Manhattan House of Detention.) The New York City District Attorney wants the original manuscript. The *Voice* is resisting the D.A.'s subpoena. It has lost its first court test.

The District Attorney wants the original manuscript, as Lesley Oelsner has pointed out in *The New York Times*, "because it would be far better evidence [against the prisoner] than the printed article."

Under present procedures of granting subpoenas, the burden of proof to show the government's need for the original manuscript was *not* on the government. The newspaper and the reporter who obtained the manuscript bear the burden of proving that the District Attorney ought not to have it.

Once news of the *Voice's* defeat in the lower court was publicized, there was a marked decrease in the number of letters that I, a *Voice* writer, receive from inmates of city jails. I used to get an average of five to six such letters each month. I've only received one in the four months since the lower court decision. When prisoners realize that the original of a letter they send to a reporter may be obtained by a government agency and used to put them in jeopardy, they are "chilled" as sources for the press and the public concerning prison conditions.

WBAI

A second case involves [illegible] station WBAI, a listener-[illegible] known in the area for providing [illegible] all manner of people [illegible] whom regular access [illegible] decidedly limited (divers[illegible] ers, homosexuals, etc.). [illegible] torney has subpoenaed [illegible] tapes concerning the [illegible] Manhattan House of Det[illegible] had been broadcast. The [illegible] the subpoena, and it [illegible] court test. Again, the burden [illegible] the station as to why [illegible] over the tapes.

But since this material has already been broadcast, what's the issue? First of all, the tapes include the voices of prisoners who, if the D.A. obtain this material, they can be identified by voice prints. Secondly, many of those – both prisoners and outside sources of information – who did identify themselves are not likely again to provide material to the station if they see that a governmental agency can readily subpoena their words and voices. The primary value of WBAI as a news source for the public has come about through the trust it has established with its listener-informants, both anonymous and self-identified. That trust will become seriously eroded at the prospect of the government being able, practically at will, to interfere in these processes of communication. The "chilling effect" of governmental subpoena is indeed such interference.

Free Press

A third, though different kind of case, involves the *Los Angeles Free Press*. In August, 1969, that newspaper published a confidential roster, with names and addresses, of 80 civil service employees who work as undercover agents. This roster, in the form of a report, had been stolen from the office of the Attorney General of California. Ten days after the list was published, the *Los Angeles Free Press* returned the original roster to the State Attorney General. (On the basis of what has since happened, the *L.A. Free Press* would not again be so cooperative; the original report would now have to be sought by the government through a subpoena.)

At the time, the newspaper gave as reason why giving the Attorney General the original report would jeopardize itself or anyone else, however, although that document had been handled by many people, the government was after only fingerprints on the roster, to find the mail clerk in the Attorney General's office who had given the roster to the newspaper.

Policy

In such cases as that involving the *L.A. Free Press,* my view is that the government has no more right to subpoena such material than the Justice Department had to subpoena the Pentagon Papers. But the *Village Voice* and WBAI cases are not concerned with stolen government documents and represent a much wider range of possible future intereference with the press by government agencies through the power of subpoena.

Therefore, the new policy of the New York Civil Liberties Union could become an important buttress of the First Amendment if widely adopted by CLU affiliates and other civil liberties groups throughout the country with the intent, of course, of making this policy the practice of the courts.

The NYCLU position now is:

"Whenever the government subpoenas non-anonymous material that has been published or broadcast, there must, prior to the issuance of the subpoena, be a full adversary hearing before the appropriate court, including prior notice to the station or publication.

"The government must bear the burden of showing that the tape or manuscript is evidence material to the subject of the inquiry or action, that there is no less drastic way of acquiring the evidence, and that the evidence is not merely cumulative.

"The subject of the inquiry or proceeding and the evidence sought must be of compelling state interest and the court should weigh the state's interest – and whether the state had demonstrated a need for obtaining the evidence – against possible erosion of the First Amendment, and the chilling effect on free exchange of information and ideas that granting the subpoena might produce."

Burden of Proof

As Ira Glasser, executive director of the NYCLU emphasizes: "If implemented, this policy will, first of all, shift the burden of proof from the subpoenaed person to the government, where it belongs. Instead of allowing the government to obtain subpoenas at an *ex parte* hearing, and then forcing the publisher or station manager to move to quash the subpoena, under threat of contempt and jail, under our policy the government would be forced to initiate the move for subpoena by notice to the newspaper or station and would be further required to justify its request in an adversary proceeding. We believe that the present system, which places the entire burden of proof on the person subpoenaed, and which requires that person to litigate for his constitutional rights under threat of jail, is unfair and offensive to the First Amendment."

This new policy does not go as far as some journalists might like, but if implemented, it can be of substantial aid to the press and the public in the face of accelerating governmental pressures on the press, including "fishing expeditions" by subpoena.

If any other affiliates are engaged in similar review of policy on this issue, I would appreciate being informed.

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newspaper for possessing Government information taken without authorization is to place a broad censorship right in the Government which has never existed before. (In fact, the Justice Department tried to argue that *The New York Times* could be banned from publishing the Pentagon Papers because the information was 'purloined.' The Supreme Court rejected this argument.)"

Information Control

You may or may not agree with this position, but I cite this case to indicate yet another illustration of how giving the government access to the original of a printed story can bring about government interference with the free flow of information. The *L.A. Free Press* gave the California Attorney General nothing else but that document; but as a result, the First Amendment, not only in California, may be seriously threatened. As the Reporters Committee for Freedom of the Press notes: ". . . if California can prosecute the *L.A. Free Press* for receiving these stolen documents . . . then there is not a State Department, Justice Department, or HEW report that can be published with immunity – unless, of course, it is a Government handout which the Government wants to be published."

I hope that I have sufficiently indicated why it is necessary for civil liberties groups to take a position concerning access by government to originals *even* of news materials already published or broadcast.

UPI Photo

Earl Caldwell