

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL



November 21, 1979

TO: Robert Smith
Director, PIO

FROM: Merrick B. Garland

RE: Newsman Subpoenas

Attached is the "talking points"
paper you requested for your use on the
subject of "consensual subpoenas."



Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM FOR: Robert Smith
Director, PIO

FROM: Merrick B. Garland
Special Assistant to the
Attorney General

SUBJECT: Talking Point Paper -- Consensual Subpoenas

I. INTRODUCTION

The question at issue is whether DOJ should undertake any review of a "newsman subpoena" when the reporter indicates his willingness to voluntarily turn over documents if subpoenaed. The answer requires examination of two questions: (1) What are the concerns which prompted the institution of the DOJ guidelines in the first place, and (2) Do any of these concerns survive in the consensual situation?

II. PURPOSES OF DOJ REVIEW

A. The concerns which generated the review procedures fall into two categories:

1. Protection of individual newsmen and newspapers from personal harassment by overzealous law enforcement officers.

2. Protection of the newsgathering process and of the use of sources in general. Without such protection, that process would be measurably more difficult, sources would be far less forthcoming, and the informing function of newspapers would be severely restricted.

B. In certain individual cases these generalized First Amendment interests may be outweighed by a particularized need for specific information in the service of some other more compelling public policy. That is the function of the guidelines -- to make that balance in individual cases.

III. THE CONSENSUAL SITUATION

A. Voluntary Consent. If we assume for purposes of argument that the newsman's "consent" is informed and voluntary, then it is clear that the concern about personal harassment dissipates. Nonetheless, the second purpose of DOJ review remains relevant. This concern arises not out of a desire to protect an individual reporter's newsgathering process, but rather out of a desire to protect the process in general and to encourage "sources" to freely talk to newsmen. Sources may be as quickly discouraged by learning that newsmen voluntarily submit to government inquiries as by learning of enforced submission. After all, an individual source is not likely to know whether the recipient of his information will consent or resist. If he can rely on the forbearance of the Government, however, he is likely to be more forthcoming.

B. Involuntary Consent. An additional set of concerns becomes operative if we consider the possibility that a reporter's expressed willingness to "voluntarily" comply with a subpoena may not be voluntary.

1. A newsman may, for example, not know that a subpoena can be legally resisted; or, he may have been psychologically coerced. If either of these are the case, we are in exactly the same position as if no "consent" had been given, and both concerns motivating the guidelines -- protection from harassment and of the newsgathering process -- are operative. This is at least a possibility that must be considered in every case, as we are not about to require Miranda warnings before a newsman is asked if he will comply with a subpoena.

2. There should, therefore, be some procedure for coping with the "voluntariness" problem. One possible approach is to have DOJ's reviewing officer contact the newsman, or the law enforcement agents, to be sure "consent" has been knowingly and voluntarily given. That may be too unwieldy an approach however. If so, then there is yet another reason for applying the DOJ guidelines in "consent" cases. If we agree that consent must be knowing and voluntary before we would be willing to relax the guidelines, but also agree that these facts cannot be easily determined, then perhaps we should simply apply the guidelines and avoid the intractable problem of determining the voluntariness of consent.

IV. CONCLUSION

A. All of the above argues for some form of review, even in consent cases. (At a minimum, it suggests that even if there is to be no guidelines review, some determination of voluntariness is necessary.)

B. However, the presence of true consent is certainly an extremely relevant factor, both because it eliminates the harassment problem and because it indicates that at least someone (i.e., the reporter) may have already performed the First Amendment balancing that the guidelines otherwise guarantee (albeit according to his own, and not necessarily the DOJ's, standards).

C. Thus, while some review is indicated in consensual situations, there is good reason for making it somewhat less rigorous than in the case of the ordinary newsman subpoena.