Department of Justice

FOR RELEASE ON DELIVERY

"FREE PRESS AND FAIR TRIAL:

THE SUBPOENA CONTROVERSY"

AND ADDRESS BY

HONORABLE JOHN N. MITCHELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

HOUSE OF DELEGATES

AMERICAN BAR ASSOCIATION

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NOTE: This is the official text of Attorney General Mitchell's speech. It may be fully quoted and attributed to him. Due to time limitations, however, a shorter version will be delivered.

INTRODUCTION

It is an honor to be in St. Louis to address the House of Delegates at the annual meeting of the American Bar Association.

The topic I would like to discuss today is the current controversy involving subpoenas to the press media for information that may be of some use in court proceedings.

This is one of the most difficult issues I have faced as Attorney General. It is difficult constitutionally and it is difficult administratively.

Let me begin by outlining the problem. Federal judges have issued a number of subpoenas to the press for information which is deemed to be useful in the investigation of possible violations of federal criminal statutes.

These subpoenas were issued at the request of federal grand juries advised by Justice Department lawyers or U.S. Attorneys.

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The subpoenas have been served on newspapers, magazines, and TV networks and on individual newsmen. They have asked for verbal, printed and pictorial information; for information published and unpublished, received under promises of confidentiality and received under no promises of confidentiality.

Most of the subpoenas were limited in scope. A few were very broad. Some asked only for testimonial information. Others asked only for documents. Some asked for both.

Some of the subpoenas posed little if any constitutional or administrative problems to the press. Others imposed what the press saw as extreme burdens.

Some of the subpoenas were issued in haste with little awareness of their burden on the press. Some were issued after careful consideration and approval by the Department.

Some of the subpoenas were agreed to by the press in negotiations with the Department. Others were not and are being resisted in the courts.

I emphasize the factual variations in just a dozen cases to date involving federal grand juries and the press to point out that we may be on the threshold of a much broader controversy.

In all probability, this dispute over subpoenas to the press may expand to state and county criminal court trials

and grand juries, to federal criminal trials, to federal and state civil litigation and possibly to executive and legislative fact-finding proceedings.

It will have a substantial impact on the Bar because private lawyers represent clients whose cases could be won or lost based on information held by the press.

The government views subpoenas to the press as an authorized and proper exercise of the federal grand jury power to obtain facts tending to prove or disprove allegations of criminal conduct.

The press views subpoenas as an effort by the government to utilize the media as a quasi-governmental investigatory agency--whether the subpoenas call for the production of publicly disclosed information, such as photos of a demonstration, or for information received in confidence.

Thus, the press argues that its appearances before a grand jury inhibit its ability to freely collect and publish news, and impose both pre-publication and post-publication limitations on First Amendment rights.

Basically, this is not a new dispute. Generally, in the past, it has been worked out on a rather ad hoc basis. There have been few serious legal confrontations. There has been no clear Supreme Court resolution of this particular aspect of the free press-fair trial controversy.

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This is a classic free press-fair trial controversy because clearly these are the two great rights in conflict: the right of the press to gather and publish news and opinion as it sees fit -- and the right of the judicial process to elicit facts necessary to obtain justice in a criminal or civil proceeding.

Apparently, the era of ad hoc agreements is over. We are involved in a number of major legal confrontations which could seriously mutate fundamental relationships among the government, the press, the bar and the courts.

It is a bitter dispute which has already produced seeds of suspicion and bad faith. It contains implications of self-doubt and institutional damage which ought immediately to be resolved for the benefit of all of us.

While current law clearly supports the government's position, we must not forget the maxim that "hard cases make bad law."

To us lawyers that means that there are some situations where the public interest is better served by negotations and self-restraint than by judicial mandate and where it is in the interests of all concerned to avoid a confrontation and an imposed settlement.

In an attempt to avoid any unnecessary confrontations, I am today taking two initiatives which should go far

toward reaching a reasonable and workable arrangement with responsible members of the press.

In addition to their substantive content, I hope that they will show our good faith and common sense in attempting to resolve this fair trial-free press controversy.

II. CONSTITUTIONAL AND POLICY CONSIDERATIONS FOR THE GOVERNMENT'S POSITION

I believe it to be quite clear that, under the law as it stands today, there is no constitutional or common law privilege for the press to refuse to produce evidence requested in a properly drawn subpoena.

There is no explicit grant of authority in the Constitution itself. But the courts have uniformly held that the common law of compulsory process was incorporated into Article I for the Congress and Article III for the courts; and that the process was certainly contemplated in the grand jury clause of the Fifth Amendment.

Apparently, the question of a press privilege first became an issue in state and federal courts in the late 19th Century.

One of the earliest federal cases involved a story which appeared in the Philadelphia Press and the New York Mail alleging bribery in the Senate in connection with a

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a tariff bill. The two reporters who wrote the articles were summoned before a Senate Committee and refused to divulge their source of information. They were cited for contempt and indicted by a federal grand jury.

The reporters made a motion for summary judgment on the grounds that the disclosure of the confidential informant infringed their First Amendment right of freedom of the press.

In rejecting their claim in 1894, the U.S. District Court in Washington said:

"No case is cited herein in which any court has held that communications made to a newspaper editor or correspondents are privileged. It is claimed that public policy requires the rule. . .But there is no support for this position in the adjudged cases."

The Supreme Court denied review. The New York State Supreme Court had reached a similar result in 1874 in a case in which an editor refused to divulge even the name of the reporter who had written an article for his newspaper.

And while the Supreme Court has had dozens of cases involving freedom of expression, it has never decided a case directly on the question of press subpoenas.

The leading case in the field, to date, is Judy Garland v. Marie Torre. In this case, Miss Torre published an article in the New York Herald Tribune reporting that a CBS official said Miss Garland was unfit to work for television.

Miss Garland sued CBS for libel and subpoenaed Miss Torre to discover the name of the CBS official. Miss Torre refused and was held in contempt.

Judge, now Mr. Justice, Stewart upheld the contempt citation in the Court of Appeals. He said:

"But freedom of the press, precious and vital though it is to a free society, is not an absolute. . .If an additional First Amendment liberty -- freedom of the press -- is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice."

Justice Stewart's reasoning has never been seriously challenged by any of the state or federal appellate court decisions which have arisen since his 1958 opinion.

As another Supreme Court justice has explained, the courts have the responsibility to "preserve values and procedures which assure the ordinary citizen that the press

is not above the reach of the law -- that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in performance of these functions."

It must be remembered that Miss Garland's case was a civil case of libel. Traditionally, the courts have given broader scope to criminal inquiries than to civil litigation.

In addition, grand juries, by their very nature, must have broad latitude to adequately perform their duties. As one U.S. Court of Appeals has said:

"Some exploration or fishing necessarily is inherent and entitled to exist in all. . .productions sought by a grand jury."

The press ought to remember we are not talking about abstract theory. A newspaperman may have information which may convict a criminal or which may exonerate an innocent man. Certainly, the government and the press have the obligation to see that justice is accomplished through our established legal processes.

Despite these strong policy considerations and the clear legal mandate, the Department of Justice has traditionally been cautious when subpoenaing the press.

This continuing policy of caution was reflected in my statement of February 5. It regretted "any implication"

that the federal government "is interfering in the traditional freedom and independence of the press."

It pointed out that, prior to my taking office, "subpoenas had been served on, and complied with by, members of the press from various media and had covered pictorial and written information, both published and unpublished."

I also pointed out that I was continuing the policy of attempting to negotiate with the press prior to the issuance of a subpoena in an attempt to maintain a balance with respect to free press-fair trial interests.

III. CONSTITUTIONAL AND POLICY CONSIDERATIONS FOR ADMINISTRATIVELY MODIFYING THE GOVERNMENT'S POSITION

A. The State of the Press:

I wish to emphasize once again that the Department of Justice has acted in a completely responsible and traditional manner in arranging for subpoenas to the press. Our position is strongly supported by case law and my public policy requirements for the fair administration of justice.

However, as Dean Pound pointed out at Darmouth 49 years ago, the obligation of a legal policy maker -- such as an attorney general -- is continually to consider

"the interests which legal order secures" rather than only "the legal rights by which it secures them" and always to take account of "the moral. . .significance" of a policy decision rather than just the "legal significance."

In a moral sense, as the Supreme Court said in the Associated Press case, ". . .a free press is the condition of a free society."

Nowhere is this more evident than in our country today.

We boast of 1800 daily newspapers with a total circulation of 62 million and an additional 49 million on Sundays.

We have 600 television stations, 4000 AM radio stations and 1400 FM stations.

We produce $2 billion worth of books, magazines and periodicals every year, and annual copyright registrations have jumped by more than 100,000 since 1950.

We have motion pictures and the theater. We have a busy underground press, and pamphleteers argue their causes from one end of the nation to the other.

The conclusion is clear: We have more freedom of speech and freedom of the press in this country than in any country in the world. Our press is numerous, vigorous and diverse.

Indeed, it is the very strength of the press today -- both editorial and economic -- which has helped to bring on this controversy over the subpoena power.

Editorially, more and more news organizations are giving coverage to the type of controversial events which tend to come under government scrutiny.

And their news coverage of these developments has become more intense and more sophisticated. Because of their healthy economic conditions, news organizations today are willing to detach a reporter for weeks, or even months, to study one issue.

The result is that the American public is not only told about the surface news event, which may itself entail a violation of law, but the public is also told about the planning of the event, the personalities of the major players and the alleged motives of the group involved. . .all factors of some consequence in an investigation.

Thus, occasionally, we have newsmen and photographers who are experts in a case we are investigating and who may have more information than the government has -- factual information and photographs which the government finds difficult, if not impossible, to obtain through its own investigatory agencies.

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Therefore, occasionally the government must depend upon its ability to gain some firsthand information from the press.

This system of fact gathering has proved to be fair and effective in the past. Generally, our press -- as responsible citizens -- recognizes its obligations to the courts.

B. The Constitutional Background: DIRECT LIMITATIONS

And yet the press has always been in an ambivalent position, attempting as it must to balance the public interest in the fair administration of justice with the public interest in freedom of speech.

As the Supreme Court has said: "(The first) amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

It is the right of the press to continually question government power; and to especially question that power when it may tread on the essential functions of the press itself.

The press has learned by bitter experience how governments have, in the past, attempted censorship -- both directly, by pre-publication and post-publication penalties; and indirectly by threats and other forms of intimidation.

The first reported common law case of direct censorship occurred in 1341 when Adam de Ravensworth was indicted and convicted for criminal libel for calling Richard of

Snowhill "the king of robbers."

Subsequently, the Kings of England used the Star Chamber, the High Commission, the licensing of the press, and criminal libel in order to control freedom of speech.

These methods left a lasting impression -- St. Thomas More, John Udall, William Prynne, John Lilburne, Algernon Sidney, the Seven Bishops of England and, of course, John Peter Zenger.

The Framers of the Constitution were thoroughly familiar with the abuses of the English monarchy. They read history, particularly the British State Trial reports, and they had seen some of this repression practiced in the colonies.

They wrote that "Congress shall make no law abridging the freedom of speech, or of the press." This concept drew universal agreement. It was one of the few phrases in the Constitution which was virtually unchanged, from the first draft through the last, and one which drew almost no debate.

From 1789 until today, this nation has been fortunate in having had few serious attempts to restrict freedom of the press.

The first and most serious occurred in the Sedition Act of 1798. Designed by the Federalists to perpetuate their power, it contributed to their downfall and left a lasting impression on both Congress and the executive. It was repealed without a Supreme Court review.

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Forty-two years later, Congress voted to repay all fines paid under the Act.

And thus it was not until the First World War that Congress attempted to censor the press a second time. This attempt gave the Supreme Court its first chance to rule on the constitutionality of federal legislation restricting the First Amendment.

The court upheld the Federal Espionage Act. But it began building a First Amendment case law structure which is admired by free men everywhere.

The ringing dissents of Justice Brandeis and Justice Holmes continue to serve us well today.

"The best test of truth is the power of the thought to get itself accepted in the market place . . . That, at any rate, is the theory of our Constitution. It is an experiment," said Justice Holmes, "as all life is an experiment."

Following this philosophy, the Supreme Court has stoutly resisted attempts to limit freedom of the press through a variety of methods. These attempts have included public nuisance laws as in Near v. Minnesota; public licensing as in Cantwell v. Connecticut; overly broad permit regulations as in Kingsley Books; criminal prosecutions against sellers of books and periodicals as in Smith v. California -- and even libel laws as in New York Times v. Sullivan.

C. The Constitutional Background: INDIRECT LIMITATIONS

Upon this rock of protection against direct limitation of the press, the Supreme Court then constructed a second line of defense aimed at indirect limitation by persecution and threats.

This doctrine is based on the theory that "First Amendment freedoms are delicate and vulnerable, as well as supremely precious in our society."

In line with this reasoning, the Supreme Court has constructed a special set of rules allowing broad pre-emptive challenges to possible future violations of First Amendment rights.

As the Court explained in the Dombrowski case:

"We have not thought that the improbability of a successful prosecution makes the case any different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

Or, as the Court said in another case: "First Amendment freedoms need breathing space to survive."

In their public statements and private conversations, I am struck by the intensity of the belief by newsmen that our subpoena policies are endangering their First Amendment guarantees. Of course, they are advocates for their own position.

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The New York Times said:

> "Demands by police officials, grand juries or other authorities for blanket access to press files will inevitably dry up essential avenues of information . . . The attendant and even more serious danger is that the entire process will create the impression that the press operates as an investigative agency for the government rather than as an independent force dedicated to the unfettered flow of information to the public. . ."

A group of reporters from the Wall Street Journal petitioned the management to insure that it would not "put them in the role of a government investigator."

Protests have come from the American Society of Newspaper Editors, the American Newspaper Guild, the TV cameramen's union and a number of other responsible groups.

Editors have complained that broad subpoenas have imposed such heavy administrative requirements as to constitute a substantial burden on the operation of their news departments.

Cameramen and reporters have complained that they are viewed as government agents and subjected to harassments when covering certain public events.

Newsmen have reported that their confidential sources are appearing hesitant to impart vital information.

Serious journalists from all the media have told me privately that they will go to prison rather than comply with subpoenas; that they will destroy their notebooks and burn their film rather than permit them to be used in a judicial proceeding.

Our courts have been mindful that the subjective fear of intimidation may have the same effect as direct limitation itself.

Therefore, it is incumbent upon me as Attorney General to recognize the numerous expressions of concern by many responsible members of the press.

These protests make it clear that our subpoena policy -- no matter how well rooted in current law and past practice -- is sincerely believed by the media to constrict their necessary "breathing space" and to impose a "chilling effect" on their First Amendment rights.

It is possible that these fears -- if unabated -- may seriously affect the vigor of our press institutions and their relationships with the federal government, the bar and the courts.

Heeding Dean Pound's advice, I am using my internal administrative discretion to allay these doubts as much as possible.

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Today I am issuing the first set of departmental guidelines for use by our attorneys in requesting courts to issue subpoenas to the news media.

These guidelines are designed to provide new and reasonable safeguards to protect the rights and privileges of a free press in a manner consistent with the "paramount public interest in the fair administration of justice."

They represent a genuine effort by the Department to accommodate the respective responsibilities of the news reporter and the federal prosecutor. I sincerely hope they will provide a workable modus vivendi for both.

I should emphasize that these standards will be administered with sensitivity. Certainly, we will welcome suggestions from the press for adjustments as experience may dictate.

With your permission, I will read the guidelines:

DEPARTMENT OF JUSTICE GUIDELINES

FOR SUBPOENAS TO THE NEWS MEDIA

FIRST: The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.

SECOND: The Department of Justice does not consider the press "an investigative arm of the government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

THIRD: It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media.

In these negotiations, where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

FOURTH: If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General.

If a subpoena is obtained under such circumstances without this authorization, the Department will -- as a matter of course -- move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

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FIFTH: In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation -- particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

D. Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.

Now, I know that these guidelines may not go as far as some members of the press would suggest, and that they may go too far for some prosecutors. Personally, I would not oppose legislation granting some form of reporter-informant privilege. But we have no such legislation today, and I am required to use the tools which I have in attempting to fairly administer justice.

IV. THE NEED FOR A STUDY

These guidelines have been designed only as an interim measure.

What we urgently need now is an immediate and comprehensive study of the fair trial-free press issue as it affects the controversy over subpoenas to the press.

Hopefully, this study, would provide a standard basis for references by judges, prosecutors, private attorneys and the press all over the nation.

The study might very well be patterned on the model successfully established by the pre-trial publicity study conducted by the ABA Project on Minimum Standards for Criminal Justice.

The study group should certainly consult extensively with such professional groups as the American Society of Newspaper Editors and the Association of State Attorneys General. The Justice Department would give whatever

cooperation is requested.

As you know, the ABA study has established pre-trial publicity standards and thus has helped to avoid much litigation on the issue so far.

If anything, the controversy over subpoenas to the press appears to have more far reaching consequences in the area of free press-fair trial than the pre-trial publicity issue had at the time it first arose.

Thus, the potential for alienation and distrust is much greater and the need for a permanent concensus more imperative.

No one wants this dispute -- which is now mainly centered in the federal government -- to fragment into the 50 states and then to refragment into the civil and criminal courts.

We might have dozens of conflicting results and an unwanted escalation of accusation and distrust.

For all of these reasons, I hope you join with me in supporting this study.

There are a number of fundamental questions to be explored:

A. Whose right are we talking about? The right of the individual reporter to collect news -- whether or not it is ever published? The right of the

publisher to collect news? The right of the publisher to publish news? The right of the public to read news? Or perhaps even the right of an informant to give news?

As you know, the Supreme Court cases talk about the right of publication. News reporters say the right of confidential communication is as important in the news business as in the business of law or medicine. And yet, the privileges accorded in law or medicine are accorded to the client and the patient, not the lawyer and the physician. Furthermore, in the attorney-client privilege, the identity of the informant is known. What is generally sought is the content of his information. In the reporter-informant privilege, the identity of the informant is generally not known. But the informant's information may be known.

B. In light of this, are we perhaps not talking about freedom of the press, but freedom of association. Are reporters not saying, perhaps, that subpoenas restrict their ability to move freely about a community and associate -- for news gathering purposes -- with a whole spectrum of citizens of differing opinions?

C. Furthermore, what constitutes the press? In this day of a communications explosion, should we make a distinction among different categories of media?

D. Then there is the question of the scope of subpoenas to the press. Perhaps they should be more limited in nature than subpoenas to other persons having information about a possible criminal violation. Perhaps, the government should be required to make certain showings of need for the information sought.

E. If a privilege is to be accorded confidential communitcaions, should it be done by statute -- as it is done now in 12 states? Or should it be done by the federal courts under their rule-making powers in reference to the Federal Rules of Criminal Procedure? Or should it be done by the type of informal concordat contemplated by the Warren Commission and the American Bar Association Report on pre-trial publicity?

F. There is a second area of this dispute -- the subpoenaing of information which is not confidential, such as photographs of demonstrations or remarks made during public press conferences.

In a recent case, a newspaper refused to surrender all photographs of the burning of a building on the grounds that it would violate its freedom of the press. And yet, its competitor, did surrender its pictures without protest.

We have had other instances where, for example, one executive in a news organization agrees to supply information which another executive in the same organization believes to be an infringement of the First Amendment.

Thus, not only is there disagreement between the government and the press media, but there is disagreement within the media as to the proper scope and extent of their obligations.

CONCLUSION

I should like to conclude with a quote from your own ABA study on free press-fair trial. It says:

"One of the hallmarks of a civilized society, and particularly of a society that places the highest value on the worth and dignity of the individual, is the quality of its criminal justice."

Ladies and Gentlemen: It would indeed be a questionable society which permitted an innocent man to be convicted or a guilty man to be freed because, under current law, I declined to subpoena a newsman who had information vital to the case.

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I want to emphasize, therefore, that we are not in any way conceding our constitutional and statutory power to request a court to subpoena the press, or anyone else, in any case where, in our opinion, the fair administration of justice requires it.

As Mr. Justice Stewart said so well:

"Freedom of the press, hard won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice armed with the power to discover the truth."

My fellow delegates, with good faith on both sides, I am confident that those two great principles can continue to live together side by side.