

ON ACCESS TO CONFIDENTIAL INFORMANTS BY SOCIAL SCIENTISTS

In my President's Message in the November 1970 issue of the *Review*, I discussed Attorney General Mitchell's proposed guidelines to the Justice Department for issuing subpoenas to newsmen to testify in criminal cases. I noted that the guidelines are "far removed from assertion or recognition of the inviolability of the First Amendment," and stated my concern that "for the scholar, at least as much as for the newspaper reporter, the danger remains real that he may find himself an unwitting or unwilling investigator for the Department of Justice."

The Justice Department subsequently sought to cast scholars into investigators' roles and, failing to obtain their voluntary cooperation, undertook contempt citations against several professors for refusal to answer questions about sources and contents of their research by the grand jury investigating public release of the Pentagon Papers. Noam Chomsky of the Massachusetts Institute of Technology, Richard Falk of Princeton, and Samuel Popkin of Harvard asserted that scholars have the right to protect informants from public disclosure. If they cannot legally offer such assurance, they maintained, key sources of reliable data would dry up and the public's right to know would be substantially impaired.

In deciding Professor Falk's case, Judge Garrity of the Federal District Court in Boston distinguished between the constitutional rights of reporters who receive confidential information from members of organizations such as the Black Panther Party and the rights of scholars who obtain information from government officials, industrial leaders, or other educators.

While recognizing that a substantial First Amendment question was posed by subpoenaing scholars, the court perceived "no real likelihood that petitioner's sources of lawfully transmitted information will be inhibited by his mere appearance before the grand jury."

Judge Garrity took judicial notice of the proposition that members of the Black Panther Party are "persons often lacking in education and sophistication, whose distrust of Government,

especially of police and prosecutors, is well known." There could be "no persuasive analogy" drawn between a Black Panther's fear of harassment and prosecution and the anxieties of Professor Falk's sources, "who likely are highly trained and sophisticated individuals." The judge maintained that the professor's informants, "highly placed in the councils of Government, education and industry, undoubtedly will continue to 'leak' confidential but otherwise lawful information to petitioner and indeed to other scholars, journalists and consultants too."

Judge Garrity's assertion that typical informants would not be intimidated by compelling testimony of scholars before grand juries was not accompanied by citations of empirical data. An alternative hypothesis would strike many social scientists as at least equally cogent: Government officials, businessmen, and educators who are beneficiaries of an ongoing politico-legal system will be more intimidated by the fact that confidentiality cannot be assured them than persons who are alienated from such a system.

A Harvard faculty council has urged the government "to exercise restraint in subjecting scholars to questioning before grand juries," and faculty groups in other universities have been developing similar proposals. Faculty resolutions alone, however, have not amassed prior records of overwhelming success. It is essential that university officials and professional associations exercise leadership along with faculties in protecting scholarly research by maximizing the ability of scholars to assure informants of confidentiality. Litigation may well be a more effective tool than resolutions in achieving this goal.

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Before passing the President's baton to Dean Richard D. Schwartz of the State University of New York at Buffalo School of Law, I want to express my thanks to my fellow officers, trustees, and members of the Law and Society Association for the stimulating and memorable opportunities these two years as President have brought. Your suggestions, comments, and critiques have been most helpful and their continuance will assure the vitality of our Association in the years ahead.

Victor G. Rosenblum,
President