

THE PUBLIC PRESSURE ON SUBPOENAS

Yesterday, there were two stories about subpoenas of journalists that suggest something about journalist subpoenas. The first story involves an attempt by some Phoenix big-wigs to cow the alternative New Times into backing off investigations into them.

In a breathtaking abuse of the United States Constitution, Sheriff Joe Arpaio, Maricopa County Attorney Andrew Thomas, and their increasingly unhinged cat's paw, special prosecutor Dennis Wilenchik, used the grand jury to subpoena "all documents related to articles and other content published by Phoenix New Times newspaper in print and on the Phoenix New Times website, regarding Sheriff Joe Arpaio from January 1, 2004 to the present."

Every note, tape, and record from every story written about Sheriff Arpaio by every reporter over a period of years.

The New Times published news of the subpoena, the Sheriff arrested New Times' execs, and then—after these events received national attention, the County Attorney sheepishly dropped the investigation into the paper, claiming he hadn't known the direction the investigation had been headed. The subpoena of the press (and its readers) was a clear abuse of power on its face and the publication of that subpoena forced the County to drop its investigation.

One note: this abuse of power was really little more than an application of the Bush Administration's terrorist fighting techniques to the area of public corruption. The Sheriff thought he could get away with asking for the cookies data from New Times readers (going back longer than Comcast, at least, keeps such

information) by hiding it under a veil of secrecy. A National Security Letter for personal political gain, if you will. While this abuse of such secrecy was exposed, it sure makes you wonder how often law enforcement is mimicking the NSL model without being exposed?

And then there's Murray's story, revealing that DOJ tried to get two dicey guilty pleas in the investigation into the sources for James Risen's and Eric Lichtblau's exposure of the illegal domestic wiretapping. The point of Murray's story is that DOJ was trying to get a conviction in the domestic wiretap case to shift the focus away from Alberto Gonzales' lying and onto this skimpy case.

Some investigators in the leak case say they believe there was pressure to obtain guilty pleas despite the paucity of evidence to deflect attention away from charges that Gonzales gave false or misleading testimony to Congress about the eavesdropping program, as well as broader questions about the legality of the program

But it suggests something else: they've hit a wall in this investigation, and they're not going to get any further without subpoenaing Risen and Lichtblau. But since the time "earlier this year" when DOJ tried to get these guilty pleas and now, they have not chosen to subpoena the journalists.

I suspect that is not a mistake. In spite of the fact that the wingnutosphere will lead the fight to lynch Risen and Lichtblau for their reporting, a great deal of the country would not follow along in this case—there has just been too much published about the improprieties of the program. Furthermore, as soon as you get Risen and Lichtblau before the courts, they can start arguing that their sources were true whistleblowers, exposing an illegal program, rather than leakers guilty of the espionage act (which is, I presume, the legal basis on which

they would try to subpoena the journalists).

In other words, the refusal, by these two people, to plead guilty to leaking this information has effectively called the Administration's bluff, it's claim that it will go after journalists to find out who leaked this information. And thus far, in a highly public case, they have chosen not to do so. Don't get me wrong—the Administration is subpoenaing those journalists it can subpoena quietly; they're doing so with abandon. But thus far, they've proven unwilling to subpoena Risen or Lichtblau (or Dana Priest, for that matter).