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Subpoenas, Shield Laws & the DOJ

The latest on the DOJ’s new guidelines on seizure of reporters’ material; the impact of leak investigations on the press; shield laws in the states

Chairs: Karen Kaiser, Associated Press; David Vigilante, CNN

On July 19, the Department of Justice formally adopted new policy restrictions on the use of compulsory process to obtain information from reporters. Attorney General Merrick B. Garland announced the new policy, effective immediately, in a memo (see below). Garland also asked the DOJ to undertake a review process to further explain, develop, and codify the policy. He also affirmed that the DOJ would support a federal shield law for members of the news media.

The announcement followed the disclosure in May and June that the Trump Administration DOJ had seized the records of journalists from CNN, New York Times, and Washington Post in several different leak investigations.

What was the government seeking?

**Everything We Know About the Trump-Era Records Demands From the Press
By Bruce D. Brown, Gabe Rottman**<https://www.lawfareblog.com/everything-we-know-about-trump-era-records-demands-press>

 **What was sought from CNN?**

“[T]he Justice Department notified Barbara Starr, its Pentagon correspondent, that it had sought and received toll records associated with multiple phone lines, including her Pentagon extension, the CNN Pentagon booth, and her home and cell numbers, as well as non-content information associated with Starr’s work and personal email accounts.

As with the Post, the toll records were likely seized pursuant to a grand jury subpoena under § 2703(c)(2) of the Stored Communications Act, while the email records were obtained using a (d) order.

The phone records would have revealed which numbers called or were called by the relevant Starr phone number, the duration of the call and when it took place. The email records would have contained the equivalent information, but, because of the nature of email metadata, could have included other details, like routing data and the size of the email. Also, because email can be “one-to-many,” its metadata is potentially more revelatory than phone records.

Because Starr’s “turner.com” email address was administered by WarnerMedia itself, WarnerMedia received the (d) order for that account’s metadata. It then notified David Vigilante, CNN’s general counsel. But (d) orders often include a “preclusion of notice” order—a gag—under § 2705(b) of the Stored Communications Act, which prohibits the service provider from notifying the subscriber of the records demand.”

[see also **David Vigilante, CNN lawyer describes gag order and secretive process where Justice Department sought reporter's email records**
<https://www.cnn.com/2021/06/09/politics/david-vigilante-cnn-email-secret-court-battle/index.html>
“This article is the first time in almost a year that I have been able to publicly address what happened to CNN without fear of prosecution. While we are gladdened by recent commitments from both the President and the Office of the Attorney General, these commitments must be made permanent and binding on future officeholders to have any meaning.

History teaches us that secret tribunals are ripe for abuse by even well-intentioned officials. Given recent revelations about other Barr DOJ abuses, it is fair to question whether the very high standard for requesting these secret orders was ever satisfied. Indeed, it seems impossible that what a district court judge described as "scenarios unanchored in any facts" could ever survive the scrutiny of an objective DOJ official.”]

**What was sought from The New York Times?**

“According to the New York Times, on June 2, 2021, the government notified four reporters—three currently at the Times and one former Times reporter—that their phone records had been seized and email records sought but not obtained. The current Times reporters are Matt Apuzzo, Adam Goldman and Michael Schmidt; the former is Eric Lichtblau.

On June 4, the Times reported that the (d) order for the reporters’ email metadata included a § 2705(b) gag that initially barred Google, the Times’ email provider, from notifying anyone at the newspaper. Google apparently resisted the gag, insisting that it be able to notify the Times’s newsroom lawyer and deputy general counsel, David McCraw. On March 2, 2021, the government agreed and McCraw was then able to negotiate further notice to the Times’s publisher, chief executive and outside counsel.”

**What was sought from the Washington Post?**

“Of the records demands authorized in 2020 and disclosed this spring and summer, the Washington Post seizure was the first to be reported. In brief, perfunctory letters dated May 3, 2021, the Justice Department notified Greg Miller and Ellen Nakashima, currently at the Post, and Adam Entous, formerly at the Post and now at the New Yorker, that their phone records had been seized and that the department had tried to obtain “non-content” email records but had not actually obtained them.

There was no gag order in the Post case and, while the Post has reported that the Justice Department secured an order compelling the production of email non-content records under 18 U.S.C. § 2703(d) (a (d) order), for reasons that remain unclear, the government said it did not secure the records.”

**Meetings with the Press and a Change in Policy**

In June 2021, ahead of the policy announcement, Attorney General Garland held an off-the-record meeting with representatives from CNN, New York Times, Washington Post and Reporters Committee to discuss the matter.

**DOJ Memorandum**
<https://www.justice.gov/ag/page/file/1413001/download>

Because a free and independent press is vital to the functioning of our democracy, the Department of Justice has long employed procedural protections and a balancing test to restrict the use of compulsory process to obtain information from or records of members of the news media.

There are, however, shortcomings to any balancing test in this context. The United States has, of course, an important national interest in protecting national security information against unauthorized disclosure. But a balancing test may fail to properly weight the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government. To better protect that interest, the Department is now adopting the following policy:

A. Prohibition on the Use of Compulsory Process

1. The Department o fJustice will no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering activities, as set out below.

2. This new prohibition applies to compulsory legal process issued to reporters directly, to their publishers or employers, and to third-party service providers of any of the foregoing. It extends to the full range of compulsory process covered by the current regulations, specifically, subpoenas, warrants, court orders issued pursuant to 18 U.S.C. § 2703(d) and§ 3123, and civil investigative demands. Further, it applies regardless of whether the compulsory legal process seeks testimony, physical documents, telephone toll records, metadata, or digital content.

3. As with the current regulations, this prohibition on compulsory process does not apply to obtaining information from or records of a member of the news media who is the subject or target of an investigation when that status is not based on or within the scope of newsgathering activities.

a. The prohibition does not apply when a member of the news media is under investigation for a violation of criminal law, such as insider trading. Nor does it apply to a member of the news media who has used criminal methods, such as breaking and entering, to obtain government information.

b. The prohibition does apply when a member of the news media has, in the course of newsgathering, only possessed or published government information, including classified information. This does not, however, affect the Department's traditional ability to use compulsory legal process to obtain information from or records of, for example, a government employee (rather than a member of the news media) who has unlawfully disclosed government information.

4. As with the current regulations, this prohibition also does not apply:

a. to an entity or individual who comes within the small category of those to which the protections of the current regulations do not extend, such as an agent of a foreign power or a member of a foreign terrorist organization;

b. when the member of the news media agrees to provide or consents to the provision of the requested information or records with a subpoena or other form of compulsory process; or when the Department seeks already-published information or records for the purpose of authentication; or

c. when the use of compulsory legal process is necessary to prevent an imminent risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor (as defined in 34 U.S.C. § 20911(7)), or incapacitation or destruction of critical infrastructure (as defined in 42 U.S.C. § 5195c(e)).

5. In the limited circumstances in which it remains permissible to use compulsory legal process for the purpose of obtaining information from or records of a member of the news media, current exhaustion and component approval requirements continue to apply. Further, as an interim measure while regulations are drafted, additional advance approval must also be obtained from the Deputy Attorney General for any use of compulsory legal process for the purpose of obtaining information from or records of a member of the news media. If there is any uncertainty about the applicability of this memorandum to a particular circumstance, the Deputy Attorney General must be consulted before process is sought.

6. Other issues currently addressed by Department regulations, but not subject to the prohibition of this Part, will be addressed in the review process discussed in Part B.

B. Regulations and Legislation

1. Because the goal is to protect members of the news media in a manner that will be enduring, I am asking the Deputy Attorney General to undertake a review process to further explain, develop, and codify the above protections in regulations, after consulting with the relevant internal and external stakeholders.

2. As part of that review, the Deputy Attorney General will examine existing regulations to determine how those regulations should be tightened in the limited circumstances in which it remains permissible to use compulsory legal process for obtaining information from or records of a member of the news media. That review will also determine whether there are additional forms of legal process to which further restrictions should be extended consistent with the intent of this memorandum.

3. Also as part of that review, the Deputy Attorney General will examine the procedures used to safeguard information from or records of members of the news media obtained by compulsory legal process in the limited circumstances in which that remains permissible, as well as such information or records that were previously obtained. That examination will include developing procedures for the appropriate destruction or return of such information or records, as permitted by law.

4. Finally, to ensure that protections regarding the use of compulsory legal process for obtaining information from or records of members of the news media continue in succeeding Administrations, the Department will support congressional legislation to embody protections in law.

**Comments and Reactions**

**The Justice Department’s New Media Protections Are (Mostly) a Promise, Not Yet a Reality**
Knight First Amendment Institute
By Anna Diakun and Jameel Jaffer
<https://knightcolumbia.org/blog/the-justice-departments-new-media-protections-are-mostly-a-promise-not-yet-a-reality>

Without question, the new rules are much better than the old ones. But as Garland effectively acknowledges in his memorandum, the ultimate significance of the policy change will depend in large part on what the Justice Department and Congress do next. Below, we outline the steps they should take, highlighting the key issues that are still left to resolve.

First, the Justice Department should revise its media subpoena regulations in light of Garland’s memorandum. Garland has instructed the deputy attorney general to begin this process, and doing so promptly is important for at least two reasons. One is that it’s more difficult to change regulations than it is to change a memorandum; setting out the new policy in regulation will create a little more friction if a future Justice Department decides to backtrack on the commitments that Biden and Garland have now made. The other reason is that translating the memorandum into regulation will give the Justice Department an opportunity to answer some of the important questions the memorandum leaves unanswered.

One such question: Who will the new regulations protect? By its terms, Garland’s memorandum applies to “members of the news media” who are “acting within the scope of newsgathering activities.” But the document doesn’t define the first phrase and defines the second only partially. And yet a lot turns on what these terms mean. There may be no question that reporters for The Wall Street Journal and National Public Radio are “members of the news media,” but these days a great deal of important reporting is done by journalists who don’t fit the traditional mold. Consider the many technology and national security journalists who have set up shop on Substack, for example. Will the new regulations protect them? A document released to the Knight Institute and Freedom of the Press Foundation under the Freedom of Information Act (FOIA) shows that the Justice Department currently assesses who qualifies as a “member of the news media” by considering a dozen different factors. Perhaps a multi-factor test is inevitable, but this one seems to reserve a great deal of discretion for agency officials. The task will be challenging, but the Justice Department should develop (and adopt) a test that offers more clarity and predictability while also accounting for the diversity of legitimate and valuable journalistic activities.

Implementing the memorandum in regulation would also give the Justice Department an opportunity to better define the memorandum’s other key phrase—“acting within the scope of newsgathering activities.” Again, the memorandum does define this term, but only partially. It explains that journalists are not acting within the scope of newsgathering activities if they use “criminal methods” to obtain government information—if they break into government buildings, for example, or, presumably, into government databases. At the other end of the spectrum, the memorandum provides that journalists do not lose protection merely because they “possessed or published government information.” These markers are helpful, but national security journalism often involves activities that fall between them. Has a journalist gone beyond the scope of newsgathering activities if she asks a government official to share a classified document, for example, or asks for information about classified activities? It’s important to remember that a good deal of what we ordinarily think of as national security journalism can readily be reframed as “soliciting classified information,” which the government has previously characterized as a violation of the Espionage Act. Thus, if the Justice Department defines newsgathering narrowly, there is a real risk that the protections the rules seem to offer will be unavailable in some of the cases in which those protections are likely to be most important.

Second, the Justice Department should make clear that the new regulations apply to all forms of compulsory process—including to national security tools not covered by the current regulations. The current regulations do not apply to surveillance conducted under the Foreign Intelligence Surveillance Act (FISA), or to national security letters, which allow the FBI to obtain metadata from communication service providers, like phone companies and internet service companies, without a warrant. But these national security authorities can be used in ways that raise the same press freedom concerns that led Garland to issue his memorandum last week. And in fact they have been. In one notorious incident, the FBI used “exigent letters”—a kind of watered-down (and unlawful) national security letter—to obtain records relating to Ray Bonner and Jane Perlez from The New York Times, and Ellen Nakashima and Natasha Tampubolon from The Washington Post. According to news reports, the Justice Department may have used an (actual) national security letter to obtain records relating to Bart Gellman, another Washington Post journalist. Records released in response to the same FOIA case mentioned above contemplate the use of FISA tools against media organizations and reporters as well—though the heavily redacted records do not indicate to what extent, and in what ways, these tools have been used in these ways in the past.

Third, Congress should codify the new protections. Doing so will ensure that they can’t be withdrawn by a future Justice Department, and it will also ensure that the Justice Department’s implementation of the protections is overseen by the judiciary.