New DOJ Rule And PRESS Act Are A Win For Journalists

By **Lynn Oberlander and Charles Tobin** (November 15, 2022)

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In two giant steps forward for journalists' ability to protect news sources, the U.S. Department of Justice has released a **new rule** sharply limiting government subpoenas of the press, and a broad shield law has passed the U.S. House of Representatives and is headed to the U.S. Senate.

Both measures would prohibit the government from using compulsory process to obtain newsgathering material and sources' identities from journalists or their email and phone providers, with some narrow exceptions.

The new rule and proposed shield law follow 2021 revelations that in leak investigations the Trump administration's DOJ had secretly obtained court orders for phone and email records from service providers for journalists at The New York Times, CNN and The Washington Post.[1]

The Trump administration also secretly sought records from Apple Inc. concerning Reps. Adam Schiff, D-Calif., and Eric Swalwell, D-Calif., as well as their families and staff.

Along with obtaining these secret court orders, the DOJ also sought gags that prevented the service providers from disclosing the process to the newsrooms or to the affected officials.

Without that notice, journalists and their news organizations are unable to go to court to challenge the orders. Google LLC did receive permission from the court to alert certain members of The New York Times' management that its information was being sought, but the paper was barred from informing its newsroom.

The revelations sparked a significant outcry from press freedom advocates and government officials. President Joseph Biden said, "It's simply, simply wrong" and "I will not let that happen," when asked about the Trump administration's efforts to unmask the journalists' sources.

The House Judiciary Committee held a hearing into related matters on June 30, 2021, at which Lynn Oberlander, one of the authors of this article, testified. Reps. Jamie Raskin, D-Md., Ted Lieu, D-Calif., John Yarmuth, D-Ky., and Sen. Ron Wyden, D-Ore., introduced similar shield laws in both houses of Congress.

Following Biden's spontaneous declaration, the DOJ announced a change to its long-standing policy that had permitted certain investigations into reporters' sources.

The DOJ declared that the government "will not seek compulsory legal process in leak investigations to obtain source information from members of the news media doing their jobs."

In July 2021, Attorney General Merrick Garland issued a three-page memo more clearly delineating the new policy, and said that new regulations would follow.

Over a year later, on Oct. 26, 2022, the DOJ finally unveiled its policy regarding obtaining records from members of the media.[2]

"[R]ecogniz[ing] 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," the final rule prohibits the DOJ's use of compulsory legal process to obtain information from the news media about their newsgathering, with only a few narrow exceptions.

The policy also restricts the government's ability to subpoena phone, email or digital services providers for journalists' information.

The policy broadly prohibits the DOJ from seeking reporters' information using any form of compulsory legal process, including subpoenas, search warrants, court orders issued pursuant to Title 18 of the U.S. Code, Sections 2703(d) and 3123, and mutual legal assistance treaty requests, among others.

The exceptions to the prohibition include when a journalist is under investigation in a matter unconnected to newsgathering; when a journalist is an agent of a foreign power or a foreign terrorist group; and when necessary to prevent an imminent or concrete risk of death or serious bodily harm.

In addition, the government can obtain records with the consent of the member of the news media or to authenticate already published information or records. Approval for any exceptional use must come from either the attorney general or a high-level deputy.

The policy is a bit murky in its coverage as it does not discuss who constitutes a member of the news media. As such, it is not clear whether book authors, bloggers or nontraditional journalists are protected.

The policy does, however, specify scenarios in which a reporter or their employer would not be protected: when there is a reasonable ground to believe that the person or entity is a foreign power or agent of a foreign power; a terrorist or terrorist organization; attempting to commit terrorism or supporting terrorism; or aiding or abetting or conspiring in illegal activity with one of the above.[3]

"Newsgathering" itself is defined fairly broadly as "the process by which a member of the news media collects, pursues, or obtains information or records" in order to produce content intended for public dissemination.

The definition explicitly includes "the mere receipt, possession, or publication by a member of the news media" of government information, including classified information, "as well as establishing a means of receiving such information, including from an anonymous or confidential source."

So the policy protects both the affirmative actions of journalists in reporting and also passively receiving leaks of information.

But other than the potential acquisition of information whose mere possession might normally be a crime, newsgathering does not include any "criminal acts committed in the course of obtaining information or using information" such as breaking and entering, theft, unlawfully accessing a computer, or aiding or abetting such criminal activities.[4]

The assistant attorney general for the Criminal Division must approve any determination in which there is a "close or novel question" as to whether an individual or entity is a member of the news media, or whether they are engaged in newsgathering. If there is genuine uncertainty as to whether the member of the news media is engaging in newsgathering, the attorney general then decides.[5]

The new policy represents an extremely positive development for journalists and news organizations, but it can be modified — or revoked — by future administrations, and it is not the law. A federal shield law would provide somewhat more certainty within the industry.

In 1972, the U.S. Supreme Court held in Branzburg v. Hayes[6] that the First Amendment does not provide an absolute privilege for a journalist to refuse to testify before a criminal grand jury.

In the years since, almost all states have recognized some form of protection for reporters' sources and newsgathering materials, whether found in common law or statutorily enacted.

But despite multiple attempts over the years, Congress has never passed a federal shield law, and the various circuits interpose their own versions of a reporter's privilege, usually with some form of balancing test that measures the necessity of the information to the party seeking it, the relevance to the claims at issue, and whether the information is available from another source.

As a result, journalists may face significantly different standards depending on whether they receive a subpoena for information or testimony in a state case or a federal one.

It now appears that a federal shield law may be closer than ever. In September, the aptly named Protect Reporters from Exploitative State Spying, or PRESS, Act, passed the House with unanimous, bipartisan support.

It has now moved onto the Senate and has been referred to the Committee on the Judiciary.

The PRESS Act would prohibit the federal government from compelling both journalists and their phone and email providers from disclosing protected information — information that would identify a source and newsgathering materials, such as records, notes or work products — unless a court finds that disclosure is necessary to prevent an act of terrorism or to identify a terrorist, or to prevent a threat of imminent violence or significant bodily harm.

In each case, the journalist is to be provided notice and an opportunity to be heard.

To avoid a repeat of the secret court orders to service providers that plagued the media last year, the PRESS Act requires that the federal entity seeking the information inform the service provider that the person whose records are sought is a journalist, and that the affected journalist is given notice so that they can be heard and object.

Notice may be delayed for intervals of 45 days when the court determines that there is clear and convincing evidence that it would pose a clear and substantial threat to the integrity of a criminal investigation, or present an imminent risk of death or serious bodily harm.

The PRESS Act does not apply to civil defamation cases or prevent the government from investigating a journalist who is suspected of committing a crime, who is a witness to a

crime unrelated to engaging in journalism, or suspected of being a terrorist or an agent of a foreign power.

The PRESS Act covers a larger swath of journalists than the news media of the DOJ policy, defining a "covered journalist" as "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, investigates or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

The federal shield law would therefore protect bloggers and book authors as long as they regularly practice their trade.

The DOJ is currently involved in at least two investigations that put pressure on these definitions. It obtained search warrants and raided the home of Project Veritas' founder, James O'Keefe in November 2021 in connection with its investigation into Project Veritas' payment of $40,000 for Ashley Biden's diary.

Project Veritas argued that it is a member of the news media and that the search warrant violated its rights. The DOJ argued that there was no First Amendment protection for the theft and transport of stolen property and stated that they had complied with DOJ's then-policy concerning the media.

In August, two Florida residents **pled guilty** in the U.S. District Court for the Southern District of New York in U.S. v. Harris to a conspiracy to transport stolen property — Ashley Biden's diary.

And whether the new DOJ policy or the proposed shield law would reach WikiLeaks and its founder, Julian Assange — everyone's favorite question when it comes to discussing national security leaks and shield laws — is still an open question.

Assange, who is currently fighting **extradition** to the U.S. in London's Westminster Magistrates' Court in Government of the United States of America v. Assange, has been charged in a second superceding indictment with violations of the Espionage Act and with conspiracy to commit computer intrusions.

A number of prominent journalists and media organizations have been concerned that the descriptions of what he is alleged to have done are little different from the way they report on national security issues.

If either the new policy or the proposed shield law were in place when Assange was first publishing the leaked cables, would they have protected him from a court order seeking his sources or information? The answer is unclear.

Several elements of the indictment against Assange suggest that Assange and WikiLeaks might not be covered by the new DOJ policy or the PRESS Act.

For example, would Assange and WikiLeaks be considered members of the news media, or would the government argue that they fell outside the scope of the protected media and were acting as agents of a foreign government?

The DOJ could also potentially argue that they were not engaged in protected newsgathering activities as they allegedly engaged in criminal acts by hacking or by aiding and abetting former U.S. Army intelligence analyst Chelsea Manning in the course of

obtaining or using the information.

Or, the DOJ could argue that there was an imminent or concrete risk of death or serious bodily harm such as by publishing the identities of government informants and agents that were contained in the cables.

The new DOJ policy and the proposed PRESS Act would collectively widely extend protection to the media from government overreach into their sources and records.

Both would set a strong — almost insurmountable — bar to uncovering confidential sources by seeing with whom the reporters are communicating, both those who leak national security information and those who provide information that while not classified, may still be valuable and in the public's interest to learn.

At the very least, both would give the affected media notice and an opportunity to go to court to argue their case in the vast majority of circumstances, preventing the government from secretly seeking this information without a check on its power.

In this, they would give comfort to reporters who promise confidentiality to their sources, and therefore more effectively work to report on the activities of government. These steps should be applauded.

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[1] Lynn Oberlander was one of a team of lawyers at Ballard Spahr LLP who represented the New York Times in its efforts to unseal the applications for the secret court orders at issue.

[2] 28 CFR § 50.10.

[3] 28 CFR § 50.10 (b)(3) (i) A-H.

[4] Id. at (b)(2)(ii)(B).

[5] Id. at (e).

[6] 408 U.S. 665 (1972).