

TESTIMONY OF EVE BURTON
EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER,
HEARST CORPORATION
BEFORE
THE UNITED STATES HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
“SECRECY ORDERS AND PROSECUTING LEAKS:
POTENTIAL LEGISLATIVE RESPONSE TO DETER PROSECUTORIAL
ABUSE OF POWER”

JUNE 30, 2021

Chairman Nadler, Ranking Member Jordan, members of the Committee, good morning. My name is Eve Burton. I am an executive vice president and the chief legal officer of the Hearst Corporation, a leading global diversified media, information and services company, with more than 360 businesses, including 33 local television stations; dozens of newspapers including the Houston Chronicle, San Francisco Chronicle and the Albany Times Union, and hundreds of magazine titles.

I am pleased to appear before you today to discuss potential legislative approaches to address concerns arising from unchecked prosecutorial investigative power. This issue is not a partisan political issue. It is not an issue limited to the press or the Congress. It is an American issue, and our efforts in addressing it will tell a lot about what kind of country we want to be.

I would like to begin by acknowledging the obvious: that there is a natural tension between the government's interest in exercising its investigative power and the individual's interest in protecting constitutional rights. This is not a new tension, nor is it likely to be resolved conclusively by this or future generations. These are hard interests to balance. But that is the key – they are interests that must be balanced – fairly and consistently over time, in order to keep our Constitution strong.

And it is clear that the Department of Justice is not suited to do the balancing, nor is any other arm of the Executive branch. They are too vested in the outcome. The balancing must be done by our courts, which are independent and uniquely qualified to consider the competing claims of law enforcement and citizens whose constitutional rights are at stake. It is equally clear that those whose rights are at stake must have notice, so that they can appear in court and seek to protect those rights or have someone else who will. There simply cannot be routine government sanctioned secrecy in such cases. These are basic procedural guarantees that are grounded in fairness and due process, and are absolutely necessary if our constitutional rights are to mean anything in the face of a government investigation.

The fact that government investigations pose a threat to constitutional rights is not a matter for debate. Take the First Amendment rights of the press, for example. The Department of Justice itself recognized the significance of those rights, and the importance of yielding to them, in subpoena guidelines first adopted more than 50 years ago, when tensions between the press and

the government were at a high point. Those guidelines – which are still in effect – require the Department of Justice to balance its investigative needs against the press’ strong First Amendment rights, and to obtain the Attorney General’s personal sign-off on any subpoena seeking newsgathering or editorial materials from the press, creating a framework that meant subpoenas for press records are an investigative means of last resort to be used in only the rarest of cases. Justice White observed in his 1972 opinion in *Branzburg v. Hayes*, shortly after the guidelines were developed, that they held the promise “to resolve the bulk of disagreements and controversies between press and federal officials.” And so they did. The self-regulatory approach reflected in those guidelines and their subsequent revisions worked relatively well for several decades, during which the Department of Justice exercised great restraint in pursuing the records of journalists.

But in recent years the approach has broken down and is no longer sufficient to protect the constitutional rights of journalists, much less members of Congress or other citizens. This is due in no small part to the evolution of communications technology, which has placed ever more of our everyday communications in the hands of third-party cloud and technology companies such as Google, Apple, Microsoft and Verizon. These companies pose an irresistible investigatory target, promising a trove of information, and one that avoids a direct request to individuals whose communications records are actually being sought. The breakdown is also due to an increased aggressiveness by DOJ in more cases to pursue those records it believes will advance its investigations, notwithstanding the rights on the other side of the balance.

One can readily see why self-regulation in this area no longer works; there is an inherent conflict. The DOJ is intensely interested in pursuing its investigative agenda, the records are too easy to obtain secretly under the current scheme, and competing rights are too easy to ignore. The DOJ cannot be the final arbiter of citizens’ constitutional rights. This is why we urgently need legislative reforms that require effective notice, representation, and adjudication before an independent judiciary, separate and apart from the Department’s compliance with its own procedures.

These are not theoretical issues. They are practical problems relevant to our daily work in informing the public. Hearst has dozens of newsrooms around the country and we are sensitive to the practical reality that with the rise of digital communication and cloud computing, and the

storage of records outside of the newsroom, one of the historic checks on prosecutorial power is weakened. If the government is not obligated to come to us directly to get our records, we may never have the opportunity to assert our rights to protect the information, and we may never even find out that our records were sought or obtained.

Subpoenas to newsrooms are not uncommon. We have received thousands over the years, mostly in the context of private litigation, but also from state and federal law enforcement. And in nearly all of those cases where a government agency seeks our newsgathering materials, we have been able to convince the government or have utilized the courts to quash these.

Government subpoenas certainly suggest an increased reliance on the press to serve as its investigative arm, but when we have notice of that intention, we can challenge what is wrong. It is the possibility that the government will bypass us entirely and go directly to technology and telecommunications companies that is most troubling. We can't see those requests when they happen in secret. In those cases, the protection of our interests is left in the hands of the middlemen communications companies that have little incentive to get into conflict with the government. In my experience, these companies have historically seen it as their responsibility to assist the government regarding anything it wanted. As one General Counsel told me "if my government asks for information, I do not question their motives. It is not my job to do so."

Here is one example. A few years ago, we learned that a telecommunications company turned over phone records of Hearst journalists as part of an investigation into the San Francisco Chronicle's reporting on a grand jury investigation into BALCO and the use of steroids in professional sports. Our reporting, which relied on confidential sources, was widely praised, including by President Bush. Yet the government wanted to know who the journalists' sources were, and waged parallel attacks: one, publicly, against our reporters directly, seeking to compel them to identify their sources, and a second, secretly, against their phone service provider. We know little about this second secret effort, which ended with some of our phone records being turned over. Years later, details of that effort remain secret. We don't even know whether the phone company resisted.

This dynamic of unaligned interests between media companies, cloud providers and the government has had a profound impact on many parts of our business. In part because of our

experience in the BALCO case, we have found it necessary to engage in tense contract negotiations with cloud providers over the need for notice and the right to challenge government requests for our records in open court. Our business is reporting information to the public and protecting information our journalists collect. Challenging misguided efforts by the government for access to that information is an imperative for us. Without legislative action requiring notice, judicial process and freedom from secret proceedings, we are left to rely only on trust in government and service providers. That does not inspire much comfort or confidence. Meaningful reform is long overdue in this area.

Recent revelations that the DOJ used secret subpoenas and gag orders to seek communications records from journalists and members of Congress is a continuation of these troubling trends and should be of great concern to every American. It shows the lack of any significant check on government prosecutorial power against the individual. Equally concerning is the DOJ's ability, and apparent routine willingness, to secretly use its investigative powers to obtain an individual's communications directly from communications service providers, such as the technology companies mentioned above, without so much as providing notice to the person whose communications are collected, much less the ability to challenge that subpoena in a court of law. The executive branch is playing the role of prosecutor, judge and jury, and disregards the important role our Constitution envisions for the co-equal branches of government in securing citizens' rights. In this march of the Article II Executive Branch, it has effectively claimed there is no role for our Article I Congress or our Article III judges. This lack of checks and balances is dangerous.

We do not yet know all the details of how or why the DOJ went about this secret collection of communications from the press, legislators, congressional staffers and others. The facts that have emerged so far suggest we are at an inflection point for Congress to consider adopting legislative safeguards that ensure appropriate balancing and adequate protection of constitutional rights. The aim of my testimony is to share what I think must be central components of any reform in this area.

The single most important step – and one that should be easy to agree on, based on our shared American values – is to recognize the importance of process, procedural safeguards and

transparency. This can be accomplished through legislation that codifies the procedures laid out in the DOJ subpoena guidelines. As I note below, these guidelines, while framed in the context of regulating subpoenas to the press, could form the basis for a legislated set of procedural protections for fundamental constitutionally protected conduct, not just for the press, but for members of Congress and the American public in the context where the government is using its prosecutorial investigative power. Those protections could also extend beyond the DOJ to all executive branch investigative and law enforcement agencies.

An equally uncontroversial second step is to recognize the role of Article III judges to balance competing interests. Consideration of such weighty matters of constitutional rights should not be left solely to the discretion of the very department that seeks to override such rights.

A third step is to establish procedures that recognize the realities of modern communications technology. Protections should be guaranteed to a person's communications regardless of where that information is stored. In other words, because information is in a cloud storage bin rather than in a file cabinet in the newsroom or at home, the government should have no greater investigative and secrecy interest due to the ease of access.

Finally, legislation should establish procedures governing those exceptional cases where the government can meet the necessarily high bar for seeking records in secret or with gag orders, where the party is not given notice and the opportunity to seek judicial review. This might include the establishment of panels of independent counsel qualified to advocate for constitutional interests. The key concept is to have some procedural method to get the issue before a court with someone representing the individual who might otherwise only find out about it months or years later, if ever.

As I hope will be clear in my testimony, I believe the primary answer is the establishment of strong and fair procedural protections with a presumption against secrecy, which should be limited to rare circumstances and only upon an affirmative showing of necessity by the government, applied narrowly and with a time limit. Once such protections are in place, many of the difficult questions can be left to the courts, which are uniquely empowered to balance precisely such competing and fundamental interests.

I.

I noted above that, in my view, these steps should be largely uncontroversial. Take, for example, the establishment of clear procedural protections and safeguards to ensure the balancing of constitutional interests. We all have individual constitutional rights that we cherish, and regardless of where we fall on the ideological or political spectrum, we also have an expectation that when our rights are challenged by the power of the government, federal prosecutors should not decide the question on their own. Indeed, the separation of powers that defines our system of governance provides for review of constitutional issues by the judiciary, which is uniquely well-suited to handle difficult balancing questions like these.

The DOJ has in some measure, over the five decades the guidelines have been in place, agreed on the importance of the rights at issue and the need for checks and balances – even if confined to its own agency – by expressly recognizing the legitimacy of its guidelines as a means to limit its investigative powers. These guidelines provide an excellent starting point for the discussion. While they are framed in the context of subpoenas to the news media, the guidelines, at their core, provide a series of procedures and safeguards designed to limit incursions on constitutionally protected conduct. They provide a basis to evaluate whether the investigative need is sufficient to overcome fundamental protections.

But guidelines lack the force of law and there is no right of standing to challenge the DOJ in court. The codification of the procedures embodied in these guidelines would clarify and limit the Department's use of subpoenas, and, of particular concern today, outline the procedures it must follow when it seeks to justify the use of secrecy to obtain constitutionally protected materials.

II.

Codification of these procedures should naturally include explicit recognition that, because we are concerned about the protection of constitutional interests, the proper administration of these procedures must be subject to independent judicial review. Article III judges can and should provide impartial oversight of the Department's investigative actions when they implicate constitutional interests. That oversight must include, except in the rarest of cases, notice to the individual and an opportunity to be heard, presumptively in an open court.

On occasion the DOJ has made clear that it views itself as the sole arbiter of its own conduct in applying these guidelines, deciding for itself whether it has done enough to balance its investigative interests against fundamental constitutional concerns.

This DOJ pushback against oversight was famously at the center of the 2006 Second Circuit decision in *New York Times v. Gonzales*, 459 F.3d 160 (2nd Cir., 2006). There, the Department approached a newspaper, seeking access to its phone records as part of an investigation into the leak of a not-yet executed government plan to freeze assets and search the premises of two organizations in connection with an investigation into funding of terrorist activities by organizations raising funds in the United States. When the newspaper declined to cooperate by providing the requested phone records, the Department threatened to seek the records directly from third party cloud service providers. The phone service providers declined the newspaper's request that it be notified if the government subpoenaed the records and that the newspaper be given an opportunity to challenge such action. And, when the same request for notice and an opportunity to object was put directly to the Department, it, too, rejected the notion that any such notice or opportunity to object was required.

As noted in the majority opinion in *Gonzales*, the Department asserted that it had “diligently pursued all reasonable alternatives out of regard for First Amendment concerns,” and that it had “adhered scrupulously to Department policy.” (*Gonzales*, 165). Despite these assurances, the Department rejected the notion that it had “an obligation to afford *The New York Times* an opportunity to challenge the obtaining of telephone records from a third party prior to its review of the records, especially in investigations in which the entity whose records are being subpoenaed chooses not to cooperate with the investigation.” (*Gonzales*, 165). In an effort to be heard before the records were obtained, the *Times* filed a lawsuit seeking judicial review of the government's threatened actions and weighing of the important First Amendment interests at stake against the government's investigative interests.

Ultimately, the court ruled that whatever common law and First Amendment protections exist for journalists also protect their records when held by third party service providers, but that, on the facts presented, any such protections were overcome. Reasonable minds may disagree on the sufficiency of the government's evidence in that case, but the reason I raise this case today is

as an example of the value of judicial oversight of prosecutorial action. In *Gonzales*, as Judge Sack put it in his dissenting opinion, and a point on which all the judges agreed, was the court's clear affirmation that questions regarding the proper balancing of constitutional interests should be reviewed independently by the courts, not by the very agencies that seek to overcome those fundamental interests.

As Judge Sack wrote, the “question at the heart of” *Gonzales* was less about whether the information sought was subject to some constitutional protection, but rather which branch of government should decide whether such protection was overcome. In other words, the primary dispute was “not whether the plaintiff is protected in these circumstances, or what the government must demonstrate to overcome that protection, but to whom the demonstration must be made.” (*Gonzales*, 176).

The government in *Gonzales* took the position that “federal courts have no role in monitoring its decisions as to how, when and from whom federal prosecutors or a federal grand jury can obtain information.” (*Gonzales*, 176). That position was rejected because the Justice Department is not in a position to fairly and impartially evaluate when its own prosecutorial interests compete with the constitutional rights of those it is investigating.

As Judge Tatel noted in *In re Grand Jury, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006), the executive branch “possesses no special expertise that would justify judicial deference to prosecutors’ judgments about the relative magnitude of First Amendment interests. Assessing those interests,” he continued, “traditionally falls within the competence of courts.” (*In re Grand Jury*, 1175-76)

The codification of procedural protections governing the issuance of subpoenas should also ensure effective notice to those whose rights are at issue and an opportunity to be heard by an independent judiciary.

III.

These two steps – codification of procedures for issuance of subpoenas and impartial judicial review to ensure proper application of procedural and substantive safeguards – form the baseline for resolving concerns about abuse of investigatory power in seeking access to

constitutionally protected materials. But recent events make clear that in order to be effective, these procedural protections must also reflect the realities of modern communication and data storage.

In the past, the government might have sought an individual's communications by going directly to that person. Today, the government can, as it threatened to do in *Gonzales* and as it has done in many other cases (including those recently in the news), go directly to the companies that house those communications and seek to compel their production from those companies. This has perverse effects. First, it ignores the fact that these communications, whether stored in a person's home or on an email server in the cloud, still implicate the same fundamental constitutional interests. Second, particularly in those situations where no notice is given to the individual or where secrecy orders are used, it puts the third party communications service provider in the unenviable position of having to decide whether to turn over the materials or protect their customers in opposition to the government. That should not be their burden to bear. As I noted earlier, the technology companies have been clear for the most part that they do not want to be in the middle.

Congress can step in to correct this problem, much as it did with the federal Privacy Protection Act of 1980, a direct response to a Supreme Court decision that threatened to open the door to investigative searches of newsrooms. Two years earlier, the Supreme Court's decision in *Zurcher v. Stanford Daily* held that a newsroom could be searched as part of a criminal investigation as long as police had a valid search warrant. The decision sparked concerns that the government would view the decision as a license to convert the news media into an investigative arm of the government, and that it would chill investigative journalism on the actions of government. Congress stepped in quickly with the PPA, which established strong procedural protections for journalists against state and federal search warrants, allowing them the opportunity to challenge a search in court.

While the PPA provides robust procedural protection for journalists against a direct search of a newsroom, it falls short – as do the DOJ Guidelines – in protecting against an indirect search of records. To remedy this, the procedural safeguards discussed above should extend to requests for information that go to individuals' communications services providers – whether a telephone

company, email provider, cloud storage space, or other venues yet to be developed. This would recognize, as the *Gonzales* Court did, that whatever constitutional interests apply when an individual is subpoenaed directly must also extend to that individual's electronic records, even when in the hands of a third-party service provider. In most cases, this may be accomplished through notice to the individual whose records are being sought (preferably by the Department of Justice directly to the individual) and an opportunity to be heard by an Article III judge. Ideally, this would take the third-party service provider out of the middle in most circumstances, and would leave it to the individual, properly noticed, to defend their own interests in opposing a subpoena for their records from the outset.

Transparency is the key here. The secrecy orders that were placed on the press' lawyers most recently are another instance of prosecutorial overreach. The Pentagon Papers case, decided fifty years ago today, is a stark reminder that prior restraints are rarely, if ever, constitutionally permissible – even when the government invokes national security concerns. The recent gag orders placed on lawyers for the New York Times and CNN, which prevented them from communicating with and counseling their clients on the most urgent and important of all possible matters – government requests for their constitutionally protected editorial work product and source material – were egregious not only because they were prior restraints, but because they directly interfered with the attorney-client relationship, and those attorneys' ability to fulfill their professional responsibility to their clients. It prevented those attorneys from even notifying their clients that their rights were in danger. While the Department eventually agreed to loosen these unprecedented gag orders, by that time much damage had already been done to the rights of both the attorneys and their clients, and to the rule of law. Any legislation should clarify the extraordinary presumption against such secrecy orders, and the heavy burden the government must bear to justify one.

And for those rare circumstances where the Department might be able to satisfy a court that total secrecy is clearly justified, and where a court agrees that an individual cannot be given notice without causing grave harm to the integrity of the investigation, the procedures I believe are necessary should also include mechanisms to ensure that the individual's interests are in some way put before a judge by a competent representative. This might involve the development of independent panels of attorneys trained in the area of constitutional rights who could be called on

confidentially to stand in for the individual and represent their interests. Such panels might be agreed on contractually between individuals and their service providers at the outset of their contractual relationship, as some companies do already, but the public should not have to rely on their ability to privately negotiate such an arrangement with their telephone carrier or email service provider to ensure their rights are protected. For that reason, ideally, panels should be developed locally by courts themselves.

But the details of how such a system of confidential representation would be set up are secondary to the establishment of a procedural guarantee that even when a court order is obtained permitting the government to proceed with a request for protected materials without notifying the individual affected, the individual's constitutional interests will still be represented and an independent court will have the opportunity to review the government's purported need to override those interests.

I would like to close my testimony by reiterating my belief that much of our concern about prosecutorial abuse of investigative power can be addressed in a way that need not be politically controversial. Resolution of these issues need not be bogged down in discussions of who qualifies for judicial review, or what privileges against compelled discovery might apply to one group or another. Instead, I believe we can all agree that what matters most is, first, establishing a set of procedures governing the issuance of subpoenas that seek constitutionally protected materials, regardless of whether they are held by the individual or by a service provider, and, second, clearly establish a procedure for judicial review of such subpoenas, including in those rare circumstances where a court is satisfied that secrecy is warranted.

I look forward to our discussion today and I thank you for the opportunity to participate in this hearing.