**Testimony of Lynn B. Oberlander[1]**
**Before the House Committee on the Judiciary**

**"Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power"**

**June 30, 2021**

Mr. Chairman, and Members of the Committee. Thank you for inviting me to testify today. We have learned in the past few weeks that the Justice Department has secretly sought the email and telephone records of eight journalists, working for three media companies, in what appears to be a purposeful attempt to evade the protections of the law and of the Department's own guidelines. These actions have had – and will have if allowed to continue – a profound and disruptive effect on the ability of journalists to practice their craft, and to report stories of vital public importance to our democracy. Based on my decades of experience as a lawyer in newsrooms and counseling reporters around the country who are bringing news and information to your constituents, I am here to attest to the importance of confidential sources in bringing matters of great public interest to light, and to the detrimental impact of secret attempts to discover those sources. In this written testimony, I will also propose several ideas for legislative responses.[2]

## The Current State of Affairs

When the founders drafted the First Amendment, surely far from their minds was a series of laws that permitted the government, in all its might, to secretly demand from communications companies the records of members of the press, and then in many circumstances, gag those companies from ever letting the press know. If sunshine is the best disinfectant, it is obvious that this shadowy state of affairs allows for all manner of dark things to grow. And indeed, in the last few weeks, we have seen evidence of a rash of prosecutorial overreach. But in fact it is not the

[1] Of counsel, Ballard Spahr LLP, https://www.ballardspahr.com/People/Attorneys/O/Oberlander-Lynn.

[2] Any opinions expressed in this testimony are my own and are not necessarily those of my law firm or its clients. The historical portions of my testimony are substantially derived from numerous "friend-of-the-court" briefs submitted by my colleagues on behalf of coalitions of media organizations to the United States Supreme Court in *Risen v. United States*, No. 13-1009, 2014 WL 1275185, and *Miller v. United States* and *Cooper v. United States*, Nos. 04-1507, 04-1508, 2005 WL 1199075; from my column, *The Law Behind The AP Phone Record Scandal*, published by The New Yorker on May 14, 2013, https://www.newyorker.com/news/news-desk/the-law-behind-the-a-p-phone-record-scandal; from prior testimony by former Ballard Spahr LLP attorney Lee J. Levine before a committee of the House considering reporter's shield legislation, *see Shielding Sources: Safeguarding the Public's Right to Know, Joint Hearing Before Subcomm. of the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 10-28 (July 24, 2018) (Statement of Lee Levine), https://docs.house.gov/meetings/GO/GO27/20180724/108595/HHRG-115-GO27-Wstate-LevineL-20180724.pdf; and relevant chapters from the Fifth Edition of a treatise co-authored by my Ballard Spahr colleagues entitled *Newsgathering and the Law*. I want to thank my Ballard Spahr colleague Mara Gassmann for assisting me in the preparation of this testimony.

first time that the Department of Justice has secretly sought journalists' records. Nor, if Congress declines to act, will it be the last. In 2013, I wrote a column for The New Yorker, of which I was then General Counsel, about the secret Justice Department subpoena for several months of Associated Press phone records, for more than 20 office and home telephone lines of reporters.[3] The Department did this without AP's knowledge. This was an egregious case, and likely a violation of the Department of Justice's own guidelines, but not an isolated one. Around the same time, it was revealed that the Department, in the course of an investigation of alleged leaks related to North Korea, secured a search warrant for the emails of James Rosen, a Fox News correspondent, without his knowledge.[4] The application for the warrant asserted that Rosen was an "aider, abettor and/or co-conspirator" in the potential violation of the Espionage Act, specifically to get around the broad prohibition on search warrants for newsrooms and journalists found in the Privacy Protection Act of 1980.[5] The public outcry that resulted from the AP subpoenas and the Rosen search warrant[6] prompted the Department to revise its internal guidelines governing the use of compulsory process to secure such records from a journalist's or news organization's service providers, known as its Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media, 28 CFR § 50.10 (the "News Media Guidelines" or "Guidelines").[7]

---

[3] Lynn Oberlander, *The Law Behind The AP Phone Record Scandal*, NewYorker.com (May 14, 2013), https://www.newyorker.com/news/news-desk/the-law-behind-the-a-p-phone-record-scandal; *see also* Charlie Savage, *Phone Records of Journalists Seized by U.S.*, N.Y. Times (May 13, 2013), https://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html.

[4] Application for Search Warrant dated May 28, 2010 & Aff. of Reginald Reyes in Support, *USA v. Email Account Redacted@Gmail.com*, No. 1:10-mj-00291 (D.C. Cir., unsealed Nov. 7, 2011) (Dkt. Nos. 20 & 20-1); *see also* Jonathan Capehart, *Regrets, Eric Holder has a few*, Wash. Post (Oct. 31, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/10/31/regrets-eric-holder-has-a-few/?utm_term=.afb411750c1a.

[5] The Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, *et seq.*, protects reporters and newsrooms from certain government searches. Specifically, it bars the government from compelling journalists to turn over to law enforcement work product and documentary materials, including sources, prior to publication, absent one of the statutory exceptions. One of those specified exceptions is involvement in the alleged underlying criminal conduct.

[6] *See* Editorial Board, *Another Chilling Leak Investigation*, N.Y. Times (May 21, 2013), https://www.nytimes.com/2013/05/22/opinion/another-chilling-leak-investigation.html?_r=0.

[7] *See* Lynn Oberlander, *Holder's New Rules for Pursuing Reporters*, NewYorker.com (July 13, 2013), https://www.newyorker.com/news/news-desk/holders-new-rules-for-pursuing-reporters; *Justice Dep't tightens guidelines on reporter data*, Associated Press (July 12, 2013), https://www.ap.org/ap-in-the-news/2013/justice-dept-tightens-guidelines-on-reporter-data. *See also DOJ Report on Review of News Media Policies* (July 12, 2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf. The Guidelines were revised in February 2014 and again in January 2015. *See* 28 C.F.R. § 50.10; *see also* Off. of the Attorney Gen., *Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media* (Jan. 14, 2015), https://www.justice.gov/file/317831/download; *DOJ Justice Manual* §

The News Media Guidelines begin with the principle that "Because freedom of the press can be no broader than the freedom of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities."[8] Calling law enforcement tools such as subpoenas, court orders issued pursuant to 18 U.S.C. § 2703(d) or 3123, and search warrants to seek information from members of the news media "extraordinary measures" and not "standard investigatory practices," the Guidelines establish that the prosecutors must get permission from the Attorney General or another senior official prior to their issuance. The Guidelines also state that the information must be "essential to a successful investigation, prosecution or litigation"; that all reasonable alternative methods of seeking the information have been pursued; and that notice and negotiation with the affected member is presumed, subject to narrow exceptions when such notice and negotiation "would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm." And where prior notice is not given, the Department must notify the affected media within 45 days of the return of process, with one additional 45-day period permitted.[9]

Despite the revisions to the Guidelines and the change in Administrations, the practice of secretly obtaining journalists' records continues.[10] In 2018, the Justice Department revealed that it had secretly procured years' worth of phone and email records of *New York Times* reporter Ali Watkins in furtherance of its investigation of a Congressional aide.[11] It remains unclear whether the Department complied with its own guidelines when it did so.[12]

---

9-13.400 (updated Jan. 2020), https://www.justice.gov/usam/usam-9-13000-obtaining-evidence#9-13.400.

[8] 28 CFR § 50.10(a)(1).

[9] *Id.* § 50.10(a)(3), (e)(3).

[10] Most courts that have considered the issue have held that the Guidelines are not judicially enforceable by journalists. *See, e.g.*, *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 974-75 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37, 43-44 (1st Cir. 2004); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992).

[11] *See* Adam Goldman, et al., *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. Times (June 7, 2018), https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html. According to the *Times*, the records were obtained through subpoenas to telecommunications companies, including Google and Verizon, and that "[i]t appeared that the F.B.I. was investigating how Ms. Watkins learned that Russian spies in 2013 had tried to recruit Carter Page, a former Trump foreign policy adviser," a subject on which she had published reports. *Id.*

[12] Editorial Board, *The Justice Department's seizure of a reporter's records could signal a dangerous campaign*, Wash. Post (June 13, 2018), https://www.washingtonpost.com/opinions/the-justice-departments-seizure-of-a-reporters-records-could-signal-a-dangerous-campaign/2018/06/13/ba3aa04a-6d9b-11e8-afd5-778aca903bbe_story.html?utm_term=.84b56c1ad4e3 ("Under Justice guidelines, hammered out between 2013 and 2015, the government should use subpoena power, court orders or search warrants for journalists' records only as extraordinary measures, not as normal investigatory tools,

And now in the latest example, we have learned that the Trump Administration served such secret subpoenas for the records of CNN, the Washington Post, and The New York Times. And when the news organizations were finally notified of the subpoenas, which the government resisted, the in-house counsel for CNN and the Times were placed under gag orders precluding them from revealing the proceedings to their own client-colleagues. This state of affairs is untenable, as it placed the lawyers in an extremely difficult position, as surely any member of the bar can understand.

The public suffers most from these government overreaches. The public relies on a free press to inform them about a multitude of important matters, not least what their government is doing. Sources, including confidential sources, are a vital part of the information ecosystem that keep the balance of powers in check within government and ensure citizens can hold their leaders accountable.

**Confidential Sources: Why They Matter**

Congress' efforts to curtail secret subpoenas and enact reporter's privilege legislation could have real, tangible effects. Confidential sources are often essential to the press's ability to inform the public about matters of vital concern. The current uncertainty regarding the existence and scope of a reporter's privilege in the federal courts[13] and the latest slew of secret subpoenas threaten to jeopardize the public's ability to receive such information. As the Supreme Court has recognized, the press "serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials."[14] The historical record demonstrates that the press cannot effectively perform this constitutionally recognized role without some assurance that it will be able to maintain its promises to those sources who will speak about the public's business only following a promise of confidentiality.

Journalists must occasionally depend on confidential sources to report stories about the

---

and, except in unusual circumstances, the government should give reporters advance notice of a bid for records, to allow sufficient time for a protest or negotiation. . . . In light of the guidelines, was the broad sweep for Ms. Watkins's communications really necessary? Or is the Justice Department using a vacuum-cleaner approach?"). DOJ refused to provide details on its practices in response to an inquiry from Senator Ron Wyden regarding the number of times in the prior five years the Department had used "subpoenas, search warrants, national security letters, or any other form of legal process authorized by a court" to collect information about journalists in the United States or American journalists abroad. *See* Ramya Krishnan, *More questions than answers from DOJ letter about journalist surveillance*, Columbia J. Rev. (July 13, 2018), https://www.cjr.org/united_states_project/surveillance-justice-department-reporters-sessions.php; Letter from Stephen E. Boyd, Assistant Attorney Gen., U.S. Dep't of Justice, to Hon. Ron Wyden, U.S. Senate (Mar. 5, 2018), https://s3.documentcloud.org/documents/4596074/3-5-18-Boyd-Letter-to-Wyden.pdf.

[13] *See* Lee Levine et al., *Newsgathering & The Law*, Chs. 18-21 (5th ed. 2018); *Shielding Sources: Safeguarding the Public's Right to Know, Joint Hearing Before Subcomm. of the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 10-28 (July 24, 2018) (Statement of Lee Levine), https://docs.house.gov/meetings/GO/GO27/20180724/108595/HHRG-115-GO27-Wstate-LevineL-20180724.pdf.

[14] *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

operation of government and other matters of public concern. According to recent research by the Pew Research Center, 82% of U.S. adults responded that there are times when it is acceptable for journalists to rely on unnamed sources.[15] While there is healthy ongoing debate within the journalism profession about the appropriate uses of confidential sources, nearly all agree that they are at times essential to effective news reporting.[16] As then-Congressman Mike Pence testified before the House Judiciary Committee in 2007, "[c]ompelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our Government will be shut down."[17]

Indeed, in proceedings in the federal courts in recent years, journalists have convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern.[18] Confidential sources are not only critical to investigative

---

[15] Jeffrey Gottfried & Mason Walker, *Most Americans see a place for anonymous sources in news stories, but not all the time*, Pew Research Ctr. (Oct. 9, 2020), https://www.pewresearch.org/fact-tank/2020/10/09/most-americans-see-a-place-for-anonymous-sources-in-news-stories-but-not-all-the-time/. An examination of roughly 10,000 news media reports, conducted in 2005 by the Pew Research Center, concluded that fully thirteen percent of front-page newspaper articles relied at least in part on confidential sources. *See The State of the News Media*, at 20 (2005), http://assets.pewresearch.org.s3.amazonaws.com/files/journalism/State-of-the-News-Media-Report-2005-FINAL.pdf. The following year, Pew observed that newspapers, compared to other media, tend to showcase "more and deeper sourcing on major stories" while also tending "to rely more on anonymous sourcing." *See The State of the News Media*, at 130 (2006), http://assets.pewresearch.org.s3.amazonaws.com/files/journalism/State-of-the-News-Media-Report-2006-FINAL.pdf.

[16] Much of the debate regarding confidential sources concerns whether such sources are overused or misused. At bottom, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[17] *Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Jud.*, 110th Cong. 32-34 (June 14, 2007) (Rep. Mike Pence ), https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36019/html/CHRG-110hhrg36019.htm; *see also id.* ("As a conservative who believes in limited Government, I know that the only check on Government power in real-time is a free and independent press. The 'Free Flow of Information Act' is not about protecting reporters. It is about protecting the public's right to know.").

[18] For example, one distinguished national security reporter has testified that:

> The purpose of [confidential reporter-source] relationships is to get and verify accurate information. In order to promote a free and candid relationship with confidential sources, I have frequently found it necessary to guarantee them anonymity in regard to information provided about classified or otherwise confidential and sensitive information. Much of the verification process could not be done without the guarantee of anonymity. Over the course of three decades, such guarantees of confidentiality when used to confirm information with multiple confidential sources, have proven to my satisfaction that this process yields more candid and accurate

journalists, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. Without the ability to speak off the record to sources in the government who are not officially authorized to do so, there is substantial evidence that reporters would often be relegated to repeating to the public the "official" statements of public relations officers. For this reason, among others, news reporting based on confidential source material regularly receives the nation's top journalism awards, including the Polk Awards for Excellence in Journalism[19] and the Pulitzer Prize.[20]

---

> information than to rely solely or predominantly on public or official comments or documentation.

Pet. for a Writ of Cert., *Risen v. United States*, No. 13-1009 (Jan. 13, 2014) at 237a-238a (Decl. of Scott Armstrong in *In re Grand Jury Subpoena to James Risen*, No. 1:08dm61 (E.D. Va. Feb. 16, 2008)).

The testimony of other luminaries in national security reporting is the same. And as a long-time Rhode Island television reporter, who had exposed government corruption in his home state, testified before being sentenced to house arrest because he refused to comply with a court order requiring him to reveal a confidential source:

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.

Testimony of James Taricani, *Appendix B to the Brief Amici Curiae of ABC, Inc, et al.*, in *Miller v. United States* and *Cooper v. United* States, Nos. 04-1507, 04-1508, *available at* 2005 WL 1199075.

[19] Numerous recipients of the Polk Award, which honors enterprise reporting across various media and disciplines, have incorporated material or information provided by confidential sources into their reporting. *See* http://liu.edu/George-Polk-Awards/Past-Winners. In 2016, for example, the International Consortium of Investigative Journalists received the Polk Award for Financial Reporting, for its series on "The Panama Papers," relying on leaked documents to uncover corruption and money laundering. *See* https://www.icij.org/blog/2017/02/panama-papers-investigation-wins-george-polk-award/. The next year, an 18-month investigation by the AP that similarly relied on confidential sources yielded numerous published reports about slave labor in the seafood industry and went on to win both a Polk Award for Foreign Reporting and the 2016 Pulitzer Prize for Public Service. *See* https://www.ap.org/explore/seafood-from-slaves/. In 2020, The New York Times was honored for its reporting on Donald Trump's income tax information. *See* https://liu.edu/polk-awards/past-winners#2020.

[20] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, Wall St. J. (Oct. 18, 1995) at A1. In 2002, the Prize was awarded to the staff of the *Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* https://www.pulitzer.org/winners/staff-55. The *Post*'s series was based, in significant part, on

The history of the American press provides ample evidence that the information confidential sources make available to the public through the news media is often vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. While the *Washington Post's* "Watergate" reporting may be the most celebrated example of journalists' reliance on such confidential sources,[21] there are numerous

information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, Wash. Post (Oct. 3, 2001), https://www.washingtonpost.com/archive/politics/2001/10/03/us-was-foiled-multiple-times-in-efforts-to-capture-bin-laden-or-have-him-killed/c29ace2b-db37-4e84-8536-dfe1c5e4aaab/. In 2016, a South Florida *Sun-Sentinel* investigation about the death toll attributable to speeding police officers, often off-duty and in their personal vehicles, which was based in part on information provided by confidential sources, received Pulitzer's highest prize, for Public Service reporting. *See* Sally Kestin et a.l, *Speeding cops get special treatment*, Sun-Sentinel (Feb. 13, 2012), http://www.sun-sentinel.com/news/speeding-cops/fl-speeding-cops-culture-20120213-story.html. In 2018, *The New York Times* and *The New Yorker* shared the Public Service award for their articles, similarly based in significant part on information provided by confidential sources, exposing allegations of sexual assaults and related abuses in the motion picture industry. *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, The New Yorker (Oct. 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories; Jodi Kantor et al., *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. Times (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html. And in 2019, a team at The Seattle Times earned the National Reporting prize for groundbreaking stories that, relying in part on unnamed sources, revealed the causes of the Boeing crashes and failures in oversight. *See* https://www.pulitzer.org/winners/dominic-gates-steve-miletich-mike-baker-and-lewis-kamb-seattle-times.

[21] Several journalists, including Bob Woodward and Carl Bernstein, were subpoenaed to reveal their confidential sources in 1973 in the context of a civil action in federal court brought by the Democratic National Committee against those allegedly responsible for the burglary of the committee's offices at the Watergate building. *See Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973). One year after the Supreme Court's decision in *Branzburg*, the district court quashed the subpoenas, explaining that it "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public." *Id.* In an affidavit submitted to the Supreme Court in support of James Risen, Bernstein testified:

> I am greatly concerned about the federal government's drive in recent years to subpoena reporters to testify about their confidential sources. Not only do I believe it is an assault on the First Amendment and the press freedoms we are guaranteed, but on an individual level, compelling the disclosure of confidential information by any reporter is certain to obstruct his future newsgathering and make it nearly impossible to do his job effectively. In my experience, confidential sources will speak only to a journalist they trust and one whom they believe is sufficiently independent of government influence and authority. If an investigative reporter is compelled by the government to testify as to confidential information, his trustworthiness, integrity and independence will likely be forever tainted and any potential sources who might have previously approached him with important information may very well be deterred.

other examples of valuable journalism that would not have been possible if a reporter could not credibly have pledged confidentiality to a source, including such reporting about the Pentagon Papers,[22] Enron,[23] Abu Ghraib,[24] the dire conditions at the Walter Reed Medical Center,[25] the use of military weapons,[26] and the Harvey Weinstein reporting which launched the Me Too

---

> I also believe, based on my professional experience, that compelled disclosure of confidential information will cause irrevocable damage to the quality of information the public receives.

Pet. for a Writ of Cert., *Risen v. United States*, No. 13-1009 (Jan. 13, 2014) at 253a-257a (Decl. of Carl Bernstein in *In re Grand Jury Subpoena to James Risen*, No. 1:08dm61 (E.D. Va.)).

[22] *N.Y. Times Co. v United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do"). There is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place. Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had "never seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, Wash. Post (Feb. 15, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/.

[23] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, Wall St. J. (Nov. 2, 2001), at A1; Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, Wall St. J. (Oct. 19, 2001), at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, Wall St. J. (Dec. 5, 2001), at A1.

[24] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/ stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker (May 10, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib; *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, Balt. Sun (May 9, 2004), https://www.baltimoresun.com/news/bal-te.guard09may09-story.html (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, Denver Post (May 19, 2004), https://www.denverpost.com/2005/06/06/brutal-interrogation-in-iraq/ (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[25] *See* Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, Wash. Post (Feb. 18, 2007), https://www.washingtonpost.com/archive/politics/2007/02/18/soldiers-face-neglect-frustration-at-armys-top-medical-facility/c0c4b3e4-fb22-4df6-9ac9-c602d41c5bda/; Steve Vogel & William Branigin, *Army Fires Commander of Walter Reed*, Wash. Post (Mar. 2, 2007) at A01.

[26] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, Wash. Post (June 7, 1977), at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, Wash. Post (June 25, 1977), https://www.washingtonpost.com/archive/politics/1977/06/25/pentagon-wanted-secrecy-on-neutron-bomb-production/96a418bd-6d66-45c1-9ea3-5df52ed32c9c/; *See* Don Phillips, *Neutron Bomb Reversal;*

movement. Most recently, reporting by respected news organizations on President Trump's tax returns and ProPublica's reporting on the tax returns of the nation's richest citizens – both based on confidential documents provided by unnamed sources – have spurred criminal investigations and a call for revision of the nation's federal tax policy.[27]

These are just a few of the important stories that might not have been told were it not for the bravery of individuals who shared information with reporters on a confidential basis, and for reporters who used their training and expertise to use these sources consistent with journalism ethics.[28]

---

*Harvard Study Cites '77 Post Articles*, Wash. Post (Oct. 23, 1984), https://www.washingtonpost.com/archive/politics/1984/10/23/neutron-bomb-reversal/c7e0d7d7-2439-4a4a-83ff-0b60f66cc8aa/ (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

[27] *See* Jonathan Weisman & Alan Rappeport, *An Exposé Has Congress Rethinking How to Tax the Superrich*, N.Y. Times (June 9, 2021), https://www.nytimes.com/2021/06/09/us/politics/propublica-taxes-jeff-bezos-elon-musk.html; Jesse Eisinger, et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, ProPublica (June 8, 2021), https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax.

[28] While this testimony focuses on modern examples of confidential sources, reliance by the press on such confidential sources is not an exclusively modern phenomenon. When the First Amendment was enacted, the Founders understood their importance to maintaining an informed citizenry:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

*Talley v. California*, 362 U.S. 60, 64-65 (1960). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

## What Congress Can Do

After many years working in and advising newsrooms, I have identified some tangible changes that could be made by Congress to improve transparency and accountability in the use of subpoenas to communications companies for the media's records. The strongest and simplest way to protect the rights of journalists to report on the actions of government and of the public to receive such reporting would be to codify President Biden's and the Attorney General's recent policy announcements that the Department of Justice will not seek journalists' records to uncover their sources.[29] And it is promising that the Attorney General last week said that he would work to do so. But even in the absence of such a law there are other ways to improve protections for the journalistic process, and give some comfort to the press that their materials will not be accessed without a full and fair opportunity to challenge the orders.

### (1) Require Independent Judicial Review

Independent judicial review of prosecutorial attempts to access journalist materials is crucial to protecting the news media's First Amendment rights. The process should be adversarial, with a representative for the affected media able to counter the government's arguments for necessity of the information. As Judge Sack of the Second Circuit wrote in dissent in *New York Times Co. v. Gonzales*, "For the question… is not so much whether there is protection for the identity of reporters' sources, or even what that protection is, but which branch of government decides whether, when, and how any such protection is overcome." He further added that the majority opinion also acknowledged the need for judicial review. "Judge Winter's opinion makes clear that the government's demonstration of 'necessity' and 'exhaustion' must, indeed, be made to the courts, not just the Attorney General."[30] As there is no putting the horse back in the barn once a reporter's confidential records have been seized, there also should be a right of interlocutory review. An appeal, perhaps expedited to meet the needs of the government, is a necessary protective measure against overzealous prosecutors.

### (2) Enhance Legal Process

While the current News Media Guidelines are not perfect--and crucially are not enforceable by journalists--they provide an excellent starting point in looking to strengthen legislatively the protections for journalists. The Guidelines recognize that "freedom of the press can be no broader than the freedom of members of the news media to investigate and report the

[29] *See* John Gerstein, *Garland backs legislation to end subpoenas for reporters' records*, Politico (June 25, 2021), https://www.politico.com/news/2021/06/25/garland-reporters-records-subpoenas-496291.

[30] 459 F.3d 160, 175 (2d Cir. 2006). The case concerned an attempt to get the New York Times' phone records in a leak investigation over the disclosure of information about a federal raid on two foundations suspected of providing aid to terrorists. When the Times refused to provide the records, the prosecutor threatened to get the records from the phone companies. The Times sought a declaratory judgment that its records were protected by the reporter's privilege. The Second Circuit ruled that the phone records were subject to the same common-law privilege as any other journalist records, but that on the facts of the case, the privilege was overcome.

news."[31] They also reflect that subpoenas and search warrants are "extraordinary measures, not standard investigatory practices."[32] To this end, all such subpoenas or process may be issued only after authorization of the Attorney General or another senior official, and only when the "information sought is essential to a successful investigation"; "after all reasonable alternative attempts have been made to obtain the information from alternative sources"; and after negotiation and notice with the affected member of the news media.[33] These protections should be now statutorily enacted.

The government must provide notice to the news media whenever information is sought, whether it is directly sought from the media itself, or from their service providers. It is an accident of technology that the government is able to bypass the journalists: if the media company maintained its own email servers, for example, it would be impossible to seek the records without notice. Notice provides an opportunity for the affected media to seek judicial review from an Article III judge, and to challenge the government's purported rationales for seeking the information.

The Department of Justice believes that there are some rare cases where prior notice and negotiation is impossible – the Guidelines specifically reference substantial threats to the integrity of the investigation; grave harm to national security; and imminent risk of death or serious bodily harm. 28 CFR § 50.10(a)(3). In such limited cases, Congress should consider legislating – at the very least -- a "Duty of Candor" – an affirmative obligation to notify third party providers that it is seeking journalist material, and not hide the request within a broader request for subscriber materials, as was apparently the case with the subpoena to Apple for information about members of Congress and their staffs.[34] The service provider can then determine how best to respond to the heightened First Amendment interests in the records.

In circumstances where the affected journalist or media entity is not provided notice, Congress should consider requiring a confidential advocate to represent the media's interests before the court considering the application for a subpoena, court order, or search warrant for journalists' material. This would not be unique, as the USA Freedom Act permits a similar type

[31] 28 CFR § 50.10(a)(1).

[32] *Id.* § 50.10(a)(3).

[33] *Id.* § 50.10(a)(3), (c)(4).

[34] Jack Nicas, et. al., *In Leak Investigation, Tech Giants Are Caught Between Courts and Customers*, N.Y. Times (June 11, 2021), https://www.nytimes.com/2021/06/11/technology/apple-google-leak-investigation-data-requests.html; Jay Greene, *Tech giants have to hand over your data when federal investigators ask. Here's why*, Wash. Post (June 15, 2021), https://www.washingtonpost.com/technology/2021/06/15/faq-data-subpoena-investigation/ ("the subpoena 'provided no information on the nature of the investigation and it would have been virtually impossible for Apple to understand the intent of the desired information without digging through users' accounts'").

of "Special Advocate" in proceedings before the FISA court. [35]

The standard for a magistrate judge to approve a subpoena or warrant under the Stored Communication Act is also woefully inadequate to protect journalists, as it only requires that the government provide "specific and articulable facts showing that there are reasonable grounds to believe" that the records sought, "are relevant and material to an ongoing criminal investigation."[36] The Act should be amended to require the enhanced protections of the News Media Guidelines before a warrant or subpoena to a service provider for journalist records can issue.

In addition, Congress should consider limiting the length of time that a secrecy order under the Stored Communication Act can operate. Currently, the statute permits a court to order the service provider not to inform its customer of a request for records, but does not place an outside limit on the gag order. See 18 U.S.C. § 2705(b). The Guidelines, in contrast, require notice to the news media within 45 days from the return made pursuant to the process, with an additional 45-day delay permitted for certain compelling reasons. See 28 CFR § 50.10(e)(3).

(3) **Enact A Reporter's Shield Law**

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were rare. Since the turn of the century, however, that situation has changed significantly. In the last two decades, a period that spans four presidential Administrations, a substantial number of subpoenas seeking the identities of confidential sources have been issued by federal courts to a variety of media organizations, the journalists they employ, and the third parties that provide them with telephone and email services. Over the same period of time, the federal courts have increasingly found themselves in conflict over whether, and the extent to which, either the First Amendment or federal common law provides journalists with a privilege to resist such subpoenas, a conflict that the Supreme Court has repeatedly declined to resolve.[37] In many parts of the country, the level of protection afforded a journalist to protect their sources will depend entirely on which court issues the subpoena. As a result of these phenomena, at the very moment when journalists are most in need of such protection, they are justifiably uncertain whether the law will honor the commitments they have made to protect the confidentiality of their sources. Reporters simply doing their jobs have been held in contempt and jailed.[38]

---

[35] 50 U.S.C § 1803(i); *see generally* Faiza Patel & Raya Koreh, *Enhancing Civil Liberties Protections in Surveillance La*w, Brennan Center for Justice (Feb. 27, 2020), https://www.brennancenter.org/our-work/analysis-opinion/enhancing-civil-liberties-protections-surveillance-law.

[36] 18 U.S.C § 2703(d).

[37] For a detailed description of the differing standards among the federal circuits, see *Shielding Sources: Safeguarding the Public's Right to Know, Joint Hearing Before Subcomm. of the H. Comm. on Oversight & Gov't Reform*, *supra* n. 2, at 12-15.

[38] Numerous examples were detailed at length in the 2007 testimony of former Ballard Spahr attorney Lee Levine, when he testified before this Committee when the shield bill was introduced. *See*

Moreover, the threat posed by government-issued subpoenas to journalists extends beyond the Justice Department. In 2016, for example, a filmmaker was forced to initiate his own federal action after a military prosecutor sought all 25 hours of unpublished interviews he had conducted.[39]

The states have, by and large, approached this balance differently. Forty-nine states and the District of Columbia recognize some form of reporters' privilege. Of those jurisdictions, forty, in addition to the District, have enacted shield laws. Although these statutes vary in the degree of protection they provide to journalists, they "rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest."[40]

This moment presents an excellent opportunity to revisit – and finally to pass – a strong statutory shield law that would enshrine protections for journalists, and mandate a consistent test for when – if ever – the government or private individuals can seek journalist work product and the identity of confidential sources. Today's patchwork of shield laws and conflicting standards of protection between state and federal courts leads to inconsistent results and prevents journalists from adequately informing their sources of the risks they face in coming forward with vital information for stories of public importance.

## Conclusion

There is a palpable need for congressional action to preserve the ability of the American press to engage in the kind of important, public-spirited journalism that is often possible only when reporters are not, knowingly or unknowingly, turned into an investigative tool of the very government that the First Amendment contemplates they will hold accountable.

---

*Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 32-34 (June 14, 2007) (Statement of Lee Levine); *see also, e.g., United States v. Sterling*, 818 F. Supp. 2d 945, 947-50 (E.D. Va. 2011), *vacated in part*, 724 F.3d 482 (4th Cir. 2013) (declining to find a privilege in criminal cases involving national security).

[39] *See* Josh Gerstein, *Feds fight bid to head off 'Serial' Bergdahl subpoena*, Politico (Aug. 7, 2016), https://www.politico.com/blogs/under-the-radar/2016/08/feds-fight-bid-to-head-off-serial-bergdahl-subpoena-226772.

[40] *Brief Amici Curiae of The States of Oklahoma, et al., Miller v. United States; Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1317523. In addition, the Attorneys' General of thirty-four states and the District of Columbia have urged the Supreme Court to recognize a federal reporters' privilege. In doing so, the Attorneys' General noted that the States "are fully aware of the need to protect the integrity of the factfinding functions of their courts," yet they have reached a nearly unanimous consensus that some degree of legal protection for journalists against compelled testimony is necessary. *See id*. (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)). Significantly, the experience of the States demonstrates that shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, criminal or civil. As the Attorneys' General explained, a "federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect" serves to undermine "both the purpose of the [States'] shield laws, and the policy determinations of the State courts and legislatures that adopted them." *Id.*