

Statement for the Record
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***“Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter
Prosecutorial Abuse of Power”***

Before the Committee of the Judiciary

June 30, 2021

I.
INTRODUCTION

Chairman Nadler, Ranking Member Jordan, members of the Judiciary Committee, thank you for inviting me to testify on secrecy orders and the investigation of unauthorized disclosure of classified information. The reported targeting of reporters and members of Congress in recent leak investigations is a serious matter that cuts quite broadly across areas of constitutional and statutory law. It should also cut across any partisan lines to unify the public and the Congress in seeking answers to these difficult and troubling questions. The subject of today’s hearing carries particular significance for me as someone who has litigated,¹ testified,² taught,³ and written in

¹ My past national security cases range from terrorism cases to espionage cases to classified environmental cases. These cases include the Area 51 litigation, the defense of Dr. Ali Al-Timimi, the defense of Dr. Sami Al-Arian, the defense of Harold James (“Jim”) Nicholson, the defense of Petty Officer Danny King, and Dr. Thomas Butler. I have also represented the United States House of Representatives in court as well as a House Intelligence officer accused of national security violations. I have also advised the legal team of Julian Assange on United States criminal and national security issues as part of his extradition proceedings in London.

² I have previously testified in Congress as both a Democratic and Republican witness on a variety constitutional and statutory issues, including national security, oversight, and free press issues. *See, e.g.*, United States House of Representatives, Committee on the Judiciary, *Executive Privilege and Congressional Oversight*, May 15, 2019; United States House of Representatives, House Committee on Science, Space, and Technology, *Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*, September 14, 2016; United States House of Representatives, Committee on the Judiciary, *The President’s Constitutional Duty to Faithfully Execute the Laws*, December 2, 2013; United States House of Representatives, Committee on the Judiciary, *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*, May 30, 2006; United States House of Representatives, Permanent Select Committee on Intelligence, *The Media and The Publication of Classified Information*, May 26, 2006; United States House of Representatives, Subcommittee on Homeland Security, *Protection of Privacy in the DHS Intelligence Enterprise*, April 6, 2006; United States House of Representatives, House Judiciary Committee, *The Constitutionality of NSA Domestic Surveillance Operation*, January 20, 2006; United States Senate, Senate Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security, September 13, 2004; United States Senate, Select Committee on Intelligence (closed classified hearing), *The Prosecution and Investigation of the King Espionage Case*, April 3, 2001.

³ As an academic, I teach and write in the areas of constitutional law, privacy, and constitutional criminal procedure.

the areas of national security and privacy law for over thirty years.⁴ I have also worked in the media as a columnist and legal analyst for roughly three decades.⁵

Today's hearing occurs on the 50th anniversary of the New York Times' publication of the Pentagon Papers story—triggering what would become one of the most consequential legal battles in our history on the meaning of the free press under the First Amendment. It also reflects how drawing a line between national security and press freedom continues to evade clear demarcation. Indeed, it was fifteen years ago that I testified before the House Intelligence Committee⁶ on these issues and the area remains just as dangerously ill-defined and uncertain, if not more so due to new technological realities. What makes the question even more challenging is that both sides have compelling arguments and legitimate interests to advance. Despite being an outspoken advocate for free speech and the free press throughout my career, I have always recognized that the government has a legitimate interest in conducting leak investigations. This can create the ultimate example of the immovable object (of the media) confronting the irresistible force (of the government). Courts have struggled to resolve the zero-sum nature of this conflict. They have long recognized the legitimacy of leak investigations in the interest of national security. In *Haig v. Agee*, for example, the Court stressed that “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”⁷ Yet, the courts also recognize that such national security laws cannot be allowed to curtail free speech or free press rights as guaranteed by the Constitution.⁸ As the Court stated *Bartnicki v. Vopper*, “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”⁹

I would like to begin where I ended fifteen years ago on the need for a federal shield law for the media. There remains a great deal that is not known about the recently disclosed subpoenas issued in February 2018 under the Trump Administration with regard to Apple iCloud accounts.

⁴ These publications include *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*, 100 Boston University Law Review 2179 (2020); *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 Southern Methodist University Law Review 205-249 (2000) (Symposium); *The Not-So-Noble Lie: The Nonincorporation of State Consensual Surveillance Standards in Federal Court*, 79 Journal of Criminal Law and Criminology 66-134 (1988).

⁵ I have previously worked as a legal analyst for NBC/MSNBC (twice), CBS (twice), and BBC. This year I left CBS and BBC to work as Fox legal analyst. I also write as a columnist for USA Today and The Hill as well as periodic columns in other national newspapers. Finally, I am the host of Res Ipsa (www.jonathanturley.org), a legal and policy blog. The views expressed today are entirely my own and not those of my school or my associated media companies. That includes my sole responsibility for any typos or errors in this rushed testimony despite the inspired proofing of my colleague Thomas Huff and my assistant Seth Tate.

⁶ United States House of Representatives, Permanent Select Committee on Intelligence, *The Media and The Publication of Classified Information*, May 26, 2006 (Professor Jonathan Turley).

⁷ 453 U.S. 280 (1981) (citing *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

⁸ *Mills v. Alabama*, 384 U.S. 214, 218 (1966); see also *United States v. Morison*, 844 F.2d 1057, 1086 (4th Cir. 1988) (Phillips, J., concurring) (“notwithstanding information may have been classified, the government must still be required to prove that it was in fact ‘potentially damaging ... or useful,’ *i.e.*, that the fact of classification is merely probative, not conclusive, on that issue, though it must be conclusive on the question of authority to possess or receive the information. This must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact.”).

⁹ 532 U.S. 514, 527 (2001).

It appears that “metadata”¹⁰ or other information may have been sought on various individuals associated with the House Intelligence Committee, including most notably Democratic ranking member Adam Schiff and Rep. Eric Swalwell. If true, this is an extremely serious matter with implications for the separation of powers, the free press, and privacy. As a Madisonian scholar, I admittedly favor the legislative branch in many disputes with the executive branch. However, such demands would give pause to even the most ardent advocates of executive power.¹¹ These searches also reportedly included media targets and were accompanied by gag orders preventing the disclosure of the demands to customers. We have much to learn about these demands but the one thing that should be clear is that we need a federal shield law as well as other measures to address new threats to both media and privacy interests.

II. GENERAL OBSERVATIONS ON THE CURRENT CONTROVERSY

For those of us who support robust protections for the press, the current scandal is what Yogi Berra would call “deja vu all over again.” After the Watergate and Pentagon Paper scandals, the public demanded protections for the media and whistleblowers. However, each scandal was met by legislative responses that failed to protect the media from abusive searches. Guidelines are only as good as they are enforceable, including the use of adversarial processes. For example, the current guidelines mandate that searches and subpoenas targeting reporters must be “extraordinary measures, not standard investigatory practices.”¹² However, while we still need more details on these demands, the current controversy would suggest the same pattern of the casual targeting of media sources. Much of our current system relies on the self-regulation by the government, which has repeatedly failed that test. There remains a need for greater judicial review and transparency. As Judge Tatel noted in *In re Grand Jury, Judith Miller*, 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 traditionally falls within the competence of courts.”¹³ The alternative is to repeat the regular pattern of abuses, apologies, and assurances from the Justice Department.

During the Bush Administration, New York Times reporters Eric Lichtblau and James Risen were targeted by secret searches after they co-authored an article on the Bush Administration NSA’s warrantless surveillance program. The belated disclosure of the searches was followed by

¹⁰ Metadata is generally defined “data about data” and includes vital identifiers and descriptors on communications. Such metadata is often needed for searches of vast bodies of electronic data to isolate and organize sources. It often reveals information about when the document was created or last modified, and its history and author. See generally Ben Minegar, *Forging a Balanced Presumption in Favor of Metadata Disclosure Under the Freedom of Information Act*, 16 J. Tech. L. & Pol’y 23, 24 (2015).

¹¹ This point was made previously by former Vice President Mike Pence when a member of the House in support of a federal shield law. He declared “[a]s 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.” 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).

¹² 28 C.F.R. § 50.10(a)(3).

¹³ 438 F.3d 1141, 1175-76 (D.C. Cir. 2006).

the same perfunctory apology from the FBI and the promise for future steps to protect the media.¹⁴

During the Obama administration, the Justice Department under then Attorney General Eric Holder ordered a full investigation targeting then Fox News reporter James Rosen. Rosen was investigated for simply speaking with a source in a story involving classified information. Even the phone numbers of Rosen's parents were not spared in an operation that was said to have been approved by Holder. More than 20 lines linked to Associated Press reporters were also secretly targeted. The Justice Department evaded its own policies by branding Rosen a "co-conspirator" in the crime of information leakage.¹⁵ The scandal was followed by apologies, policy changes,¹⁶ and pledges that the media would be protected in the future.¹⁷

During the Trump Administration it was revealed that the Justice Department seized the phone and email records of New York Times reporter Ali Watkins as part of an investigation of a legislative aide.¹⁸ It has now been alleged that, during the Trump Administration and the early Biden Administration, both media and members of Congress may have been targeted by secret searches. This controversy was followed by a meeting of media figures with Attorney General Merritt Garland, who offered the same apologies and reassurances of future reforms.

While I will focus on the constitutional issues and the need for a shield law, I would like to briefly raise six concerns about the current controversy. As I stated when this operation was first disclosed,¹⁹ the accounts of this investigation raise serious concerns about the conduct of the Justice Department.

1. Authorization. It is notable that former Attorneys General Jeff Sessions and Bill Barr as well as Attorney General Merrick Garland all deny knowledge of the investigation in the Trump and Biden Administrations. That should not be the case under current federal policies and regulations. Since the 1970s, the Justice Department has required such authorization.²⁰ This requirement for approval by the Attorney General or a designated high-ranking official was reaffirmed after a scandal in the Obama Administration.²¹ The Justice Department agreed to the protection "[b]ecause freedom of the press can be no broader than the freedom of members of the

¹⁴ *F.B.I Says it Obtained Reporters' Phone Records*, N.Y. Times, Aug. 8, 2008.

¹⁵ 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).

¹⁶ DOJ Report on Review of News Media Policies (July 12, 2013).

¹⁷ Charlie Savage, *Holder Tightens Rules on Getting Reporters' Data*, N.Y. Times, Jul. 7, 2013.

¹⁸ Adam Goldman, et al., *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. Times (June 7, 2018), available at <https://www.nytimes.com/2018/06/07/us/politics/timesreporter-phone-records-seized.html>.

¹⁹ Jonathan Turley, *If You Want To Protect Journalists, You First Need To Define Them*, USA Today, June 13, 2021, available at: <https://jonathanturley.org/2021/06/16/the-leak-investigation-if-we-want-to-protect-journalists-we-first-need-to-define-them/>

²⁰ 28 C.F.R. § 50.10(a)(1) (2005).

²¹ 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 § 9-13.400 (updated Jan. 2020), <https://www.justice.gov/usam/usam-9-13000-obtaining-evidence#9-13.400>.

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."²² Any investigation of a member of Congress or the media should not occur without the highest knowledge and approval. If the three Attorneys General were not fully briefed on this operation, it is a very serious failure of the system and should not go unaddressed by this body.

2. *Reverse Engineering.* My greatest concern is whether the Justice Department has continued to "reverse engineer" such investigations. The problem is not that an investigation into the leaks confirmed telephone numbers or addresses related to journalists. Such contact information is part of any leak investigation. Moreover, there was ample reason for investigation. The Trump Administration was hit with an unprecedented number of leaks. Some of those leaks appeared to occur in astonishingly short periods of time after conversations in the White House, including with the President. As a result, the Administration publicly announced that it would pursue such leaks aggressively. Few people dispute that the federal government has a legitimate interest, if not an obligation, to investigate the unauthorized disclosure of classified or sensitive information. These leaks are criminal acts under federal law. The real concern is whether the investigation targeted the recipients of these leaks, rather than the leakers themselves. Prosecutors and investigators are often tempted to reverse engineer a leak, starting with the recipients of the information and working back to identify the senders. The government often knows the recipients of classified information just by looking at the byline on the articles. It is much easier for the investigation but it is also much more damaging for the Constitution.

The issue is not that the government should be barred from confirming numbers of journalists as part of leak investigations. Such investigations are important not just to protect national security but privacy and other rights. Indeed, a president cannot effectively operate if denied confidentiality of communications with staff or foreign leaders. While Congress is (rightly) demanding answers on the targeting of its members and journalists, many are also calling for an investigation into the leaks after the tax records of select billionaires were released.²³ The leak of these tax records is a federal crime and appears likely to have originated from a hack of IRS records or an actual IRS employee or contractor. If the Justice Department finds a suspect, tracing that person's calls or data may reveal contacts in the media, public interest groups, and other associations. The Pro Publica article was a classic use of a leak. If this was an IRS employee, it was someone who believed they were acting in the public interest as a whistleblower. It was also someone who was committing a federal crime. Regardless of the source of the tax information, the one thing the Justice Department should not do is reverse engineer its investigation by targeting Pro Publica staff. When the media relied on the Edward Snowden leaks, it was done to denounce the unconstitutional surveillance of citizens during the Obama administration. This has brought about substantial and needed changes. However, no one has sought to prosecute the New York Times reporters or editors. Conversely, few have questioned the legitimate effort to arrest Snowden as responsible for the leak. The Justice Department should seek to find the leaker, but it should do so by targeting those suspected of disclosing the information rather than reporters who received it.

²² *Id.*

²³ Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files; Trove of Never-Before-Seen Records Reveal How The Wealthiest Avoid Income Tax*, Pro Publica, June 8, 2021.

3. *Gag Orders*. The reported imposition of a gag order on these companies magnifies the concerns over the protection of the free press and privacy. There is a growing need for legislative and policy changes on such gag orders. In the secret orders targeting CNN’s Pentagon reporter Barbara Starr in 2017, the Justice Department reportedly fought to maintain a gag order that ultimately was found to be too broad and sweeping. Such orders can magnify abuses. It allows the government to not only conduct secret searches with little required showings but also allows the government to then prevent others from challenging its actions to halt possible abuses.²⁴

These orders are troubling on a variety of levels. They not only make these companies effective agents of the government but they require them to effectively deceive their clients who continue to share information under the assumption that these are private communications. Court orders often limit who corporate officials can consult as they seek to challenge the limitations. It is easy to see the utility for the government in hiding such searches from possible targets. Yet, the authority to do so has long been controversial. These companies are not targets or suspects or knowing abettors. However, they are being forced into silence—often on the mere suspicion of unlawful conduct of third parties. These companies could have principled objections to cooperating on some searches or the means being used by the government. Notably, some courts have found that even people warning drivers of speed traps are protected under the Constitution.²⁵ However, if a company warns a customer of a search, it is deemed in violation under these orders. Again, there are good-faith interests on both sides but there has been little debate over the use and basis of such authority in Congress. At a minimum, the use of such gag orders should be narrowly defined, sharply curtailed, and carefully monitored.

4. *Fishing in the Cloud*. The current controversy highlights the vulnerability of data held in “the Cloud.” While the government is required to satisfy probable cause for searches of computers, it has been able to circumvent that Fourth Amendment protection in acquiring electronic data under a minimal reasonable suspicion standard. (As discussed below, the growth of these searches followed court decisions limiting the need for warrants). This can be accomplished under the Stored Communications Act of Title II of the Electronic Communications Privacy Act of 1986. Agents need to “offer[] specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”²⁶ It is important to note that any media leak investigation will easily satisfy that standard since the disclosure of classified or privileged information is confirmed in the publication itself. The storage of such information represents the type of technological leap that has regularly undermined constitutional protections.²⁷ The fact that information is stored on the Cloud should

²⁴ This includes the use of boilerplate claims to nondisclosure orders. *In re Grand Jury Subp. Subp. to Facebook*, 2016 WL 9274455, at *1 (E.D.N.Y. May 12, 2016) (“In each [of 15 separate applications seeking a secrecy order], the application relies on a boilerplate recitation of need that includes no particularized information about the underlying criminal investigation. For the reasons set forth below, I now deny each application without prejudice to renewal upon a more particularized showing of need.”).

²⁵ See, e.g., *Florida Court Rules That Flashing Lights To Warn Other Drivers of Speed Trap is Protected Speech*, Res Ipsa, May 23, 2012, available at <https://jonathanturley.org/2012/05/23/florida-court-rules-that-flashing-lights-to-warn-other-drivers-of-speed-trap-is-protected-speech/>

²⁶ 18 U.S.C. § 2703(d).

²⁷ Jonathan Turley, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*, 100 Boston University Law Review 2179 (2020).

not be material to the privacy protections afforded that information. Moreover, the Stored Communication Act allows for a nondisclosure order but has no limit on its duration for a court.²⁸

5. *National Security Letters*. Civil libertarians have long objected to the use of National Security Letters (NSLs), which have historically been abused by the federal government, including violations of the underlying statutes and the use of “exigent letters” (rather than formal NSL submissions). NSLs seek transactional information in national security investigations from communications providers, financial institutions, and credit agencies.²⁹ When Congress enacted the Right to Financial Privacy Act (RFPA), it made an exception to specify that “Nothing in this chapter . . . shall apply to the production and disclosure of financial records pursuant to requests from—(A) a Government authority authorized to conduct foreign counter- or foreign positive-intelligence activities for purposes of conducting such activities; [or] (B) the Secret Service for the purpose of conducting its protective functions.”³⁰ This was not an authorization for mandatory NSLs. Indeed, Congress assumed that companies could refuse such letters.³¹ However, Congress passed incremental amendments expanding the authority for NSLs. These expansions, particularly after the Patriot Act, raised concerns under both the First Amendment and the Fourth Amendment.³² Later Congress enhanced this authority further with judicial enforcement provisions in the 109th Congress.³³ With the ever-expanding authority given to agencies, NSLs have surged. From 2000 to 2005, for example, NSLs grew from 8,500 to 47,000.³⁴ The reason is obvious. Such demands require little showing from the government and evade the conventional warrant process under the Fourth Amendment.

What is particularly chilling is that NSLs are often used under this lower standard to satisfy the applications for secret searches in the Foreign Intelligence Surveillance Act (FISA) court.³⁵ Inspector general investigations have found extensive abuses in recent years in the use of NSLs. Both NSLs and FISA searches operate below the traditional probable cause standard and, again not surprisingly, they have ballooned as the search avenues of choice for investigators.

The abuse of NSLs is a problem created not just by Congress but the courts. The Supreme Court ruled in 1979 in *Smith v. Maryland*³⁶ that there was no expectation of privacy in telephone numbers given to telephone companies as a third party. Thus, pen registers are not treated as

²⁸ 18 U.S.C. § 2705(b).

²⁹ See generally Congressional Research Service, *National Security Letters in Foreign Intelligence Investigations*, July 30, 2015.

³⁰ Section 1114, P.L. 95-630, 92 Stat. 3706 (1978); now codified at 12 U.S.C. 3414(a)(1) (A), (B).

³¹ CRS, supra, at 1 (“It was neither an affirmative grant of authority to request information nor a command to financial institutions to provide information when asked.”).

³² See, e.g., *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876-77 (2d Cir. 2008), *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004), vac’d and remanded, 449 F.3d 415 (2d Cir. 2006). See also *In re National Security Letter*, 930 F.Supp.2d 1064, 1081 (N.D.Cal. 2013) (“[T]he Court concludes that the nondisclosure provision of 18 U.S.C. §2709(c) violates the First Amendment and 18 U.S.C. §3511(b)(2) and (b)(3) violate the First Amendment and separation of powers principles”).

³³ 28 U.S.C. 3511.

³⁴ U.S. Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation’s Use of National Security Letters* 120 (March 2007).

³⁵ CRS, supra, at 6.

³⁶ 442 U.S. 735, 745 (1979).

searches under the Fourth Amendment's probable cause requirement. With the expansion of new technology on data storage and transfer, more data is being sucked into this vortex of unprotected or less protected material or communications. At the same time, there is a growing disconnect with other more protected areas. For example, the Court ruled in *Carpenter v. United States*³⁷ that it is a violation of the Fourth Amendment to track the location of cell phones without a warrant. Many of us celebrated that ruling. There is an obvious inconsistency with the requirement that the government obtain a warrant to obtain locational information from cellphone companies but no such warrant requirement for obtaining metadata revealing contacts and communication information.

The problem in these cases was highlighted in *New York Times v. Gonzales*.³⁸ The Second Circuit was faced with a refusal of the New York Times to grant access to its phone records as part of a terrorist investigation. The government indicated that it would seek the records directly from a third-party cloud service provider and that provider refused to inform the newspaper if it was compelled to release the information. The Justice Department denied that it has "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."³⁹ The court found that the constitutional concerns did not warrant intervention in the case. However, as Judge Sack stated in his dissenting opinion, the question is "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."⁴⁰ As with the lack of protections for journalists by the Court discussed below, this is an area that will likely require congressional action if we are to protect privacy and speech interests. That includes bolstering appeals, adversarial proceedings, and standing to guarantee greater judicial review.

6. *Defining Journalism*. Finally, it is worth noting that any effort to protect the media will return Congress to a question that has been left unanswered by design, or at least by general resignation: what is a journalist? It is generally accepted that the tax disclosure was a case of investigative journalism. After all, Pro Publica has won six Pulitzer Prizes and stands as a nonprofit investigative group committed to exposing "abuse of power and betrayals of public trust by government, business and other institutions, using the moral force of investigative journalism to spur reform through the sustained exposure of wrongdoing." That sounds a bit familiar. WikiLeaks was founded as a non-profit organization "to bring important news and information to the public . . . to publish original sources alongside our reporting so that readers and historians can see evidence for the truth." In 2013, WikiLeaks was declared by the International Federation of Journalists as a "new generation of media organizations" that "provide important opportunities for media organizations" through the publication of such non-public information. Yet, the Justice Department is still fighting to extradite Assange. It uses the same tactics used in the Rosen case by treating Assange not as a journalist but as a criminal co-conspirator. The DOJ insists that Assange played an active role in his correspondence and advice with the hacker. Still, Assange would not be the first journalist to work with a whistleblower who

³⁷ [138 S. Ct. 2206 \(2018\)](#).

³⁸ 459 F.3d 160 (2nd Cir., 2006).

³⁹ *Id.* at 165.

⁴⁰ *Id.* at 176.

prospectively acquires or continues to acquire non-public information. That is why a shield law is meaningless if the protected class is ill-defined.⁴¹ I will discuss this issue further below.

We obviously need to learn much more about what occurred in this investigation and the ongoing Inspector General investigation will be critical in laying the foundation for any legislative reform. However, there is no reason why we cannot move forward on the long-needed passage of a federal shield law.

III. THE “CHOICEST PRIVILEGE”: THE ROLE AND PROTECTION OF THE FREE PRESS IN OUR CONSTITUTIONAL SYSTEM

As will come as little surprise to people who know me, I believe that any discussion of this latest controversy should start (and ideally end) with James Madison. The father of our Constitution made clear the central importance of a free speech in preserving the other rights guaranteed under the Bill of Rights. He wrote in one of his most cited passages:

“[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.”

It is a common lament that, as civil libertarians, we often must defend abstractions like free speech or the free press against concrete and immediate dangers often raised by the government. However, Madison articulated the reason for refusing a Faustian bargain in the limitation of the free press. It is not just that this is the “power which knowledge gives” but this is the very source of information that allows a free people to protect against tyranny. It is the guarantee, like free speech, that helps to guarantee the protection of other rights.

The Framers themselves could not be clearer. The First Amendment of the Constitution reads in relevant part, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁴² Justice Hugo Black famously stated “I read ‘no law abridging’ to mean no law abridging.”⁴³ For some of us, the importance of this quote is not to suggest an absolutism in the protection of free speech and free press (though I confess to supporting few limitations on these rights). It is to reaffirm that the natural default position under our Constitution should be the protection of both rights with a heavy presumption against encroachments from the government.

That natural default was evident in the words of key figures like Madison who referred to the “inviolable” right of the free press as the “choicest privileges of the people.”⁴⁴ Madison was not

⁴¹ Jonathan Turley, *The Assange Case Could Prove The Most Important Press Case in 300 Years*, BBC, available at <https://jonathanturley.org/2019/05/26/the-assange-case-could-prove-the-most-important-press-case-in-300-years/>

⁴² U.S. CONST. amend. I.

⁴³ *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

⁴⁴ Jeffery A. Smith, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 166 (1988) (quoting Letter from James Madison to Edmund Randolph (May 31, 1789), in 5 THE WRITINGS OF JAMES MADISON 372, 377, 380 (Gaillard Hunt ed., 1904)).

just speaking of prior restraints but the penalties that might be imposed for the exercise of this right. He noted that the American notion of the free press would extend beyond that of England. It was a telling observation since figures like William Blackstone defined the right as a protection against prior restraint.⁴⁵ Yet, Madison wrote “the essential difference between the British government and the American constitutions will place this subject in the clearest light.”⁴⁶ That was evident in Madison’s opposition to the Sedition Act of 1798. Madison observed that “it would seem to be a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them should they be made.”⁴⁷

Obviously, this right is not absolute. The media can be sued for defamation and generally cannot commit crimes in the name of journalism. However, even on defamation, the Supreme Court has adopted a protective standard to protect the media from liability in *New York Times v. Sullivan*.⁴⁸ In both the freedom of speech and the free press, the Court has recognized the need for “breathing space” for these rights to play their desired role. The harm often claimed by the exercise of these rights is often a thinly veiled attack on the very essence of those rights.⁴⁹

The protections afforded to the press have been curtailed through years of equivocating and distinguishing decisions. For the government in the national security area, the natural default often appears as not just deference but sweeping deference, even when targeting journalists. That is the position repeatedly advanced by the Justice Department in cases going back to the Pentagon papers controversy. Yet, the Court rejected sweeping arguments by the Justice Department in *New York Times Co. v. United States*.⁵⁰ The Court captured the rivaling interests. In his concurrence, Justice Stewart noted that “the frequent need for absolute secrecy is, of course, self-evident.”⁵¹ Conversely, Justice Douglas noted that “Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion issues are vital to our national health.”⁵² Justice Black warned that sweeping national security rationales could “wipe out the First Amendment” by placing it on the slippery slope of censorship:

“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial

⁴⁵ 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (William Draper Lewis, 2007) (1765-69) (“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”).

⁴⁶ James Madison, *Report on the Resolutions* (Feb. 7, 1799), in 6 THE WRITINGS OF JAMES MADISON 341, 386 (Gaillard Hunt ed., 1906).

⁴⁷ *Id.* at 386

⁴⁸ 376 U.S. 254 (1964).

⁴⁹ Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harvard Journal of Law and Public Policy (forthcoming 2021)

⁵⁰ 403 U.S. 713 (1971) (per curiam).

⁵¹ *Id.* at 728 (Stewart, J., concurring).

⁵² *Id.* at 724.

governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.”

Even with his strong view of the necessity of secrecy, Stewart noted that sacrificing the protections of the press was too costly for our constitutional system:

“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”⁵³

The allegations contained in the New York Times report are precisely the type of information that is meant to be protected under these cases. Yet, it was also based on the disclosure of classified information. Historically, as shown in the Pentagon Papers case, some of the most important disclosures of the press have involved classified information. Indeed, the government has often classified information that is embarrassing or incriminating as it did in the Area 51 litigation.

There are a wide variety of laws that can be used for such searches. The removal or disclosure of such information is clearly a crime by those who are the sources of these articles. As a result, the mere publication of the information is confirmation of a criminal act and thus a basis for warrants and subpoenas. The 1917 Espionage Act, 18 U.S.C. §793(g), criminalizes the receipt of classified information. There are also provisions criminalizing “aiding and abetting” such disclosures. Section 798 of Title 18 also makes it a crime for anyone who “knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information [concerning communications intelligence or devices or processes].”⁵⁴ There are comparably fewer protections for the press. For example, the Privacy Protection Act of 1980⁵⁵ protects reporters from some searches and seizure of work product and materials. However, there is an exception for involvement in the alleged underlying criminal conduct.

Politicians, particularly presidents, have long professed fealty to the free press. However, attacks on the media have increased in the last twenty years. The Obama Administration prosecuted more “leakers” under the Espionage Act than any prior administration and targeted journalists and their family like James Rosen.⁵⁶ Even after the past scandals like the Rosen investigation, the current controversy may reveal the same lack of care and consultation. Despite opposing federal

⁵³ *Id.* at 728.

⁵⁴ 18 U.S.C. 798.

⁵⁵ 42 U.S.C. § 2000aa, et seq.,

⁵⁶ Ann E. Marimow, *Justice Department’s Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, Wash. Post, May 20, 2013, available at https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44_story.html?utm_term=.6539d44c6ca6.

shield laws in past years, the Justice Department continues to menace the media in these cases through searches that seem little more than fishing expeditions. The media has few protections due to the curtailment of journalistic or reporter's privilege in the courts.

While closely divided, the decision in *Branzburg v. Hayes* devastated efforts to establish a robust privilege as a defense in such cases. It held that reporter Paul Branzburg could be forced to testify before state grand juries about his confidential sources.⁵⁷ While the defendant argued for a qualified, not absolute, privilege, the Court was strikingly cavalier about the need for a constitutionally grounded privilege. Justice White declared that the First Amendment “does not invalidate every incidental burdening of the press.”⁵⁸ He added that “we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.”⁵⁹ Notably, the majority recognized that some states had already passed shield laws but cited the failure of Congress to pass such protections as an indication of a lack of need for such protections⁶⁰ – a facially absurd rationale given the fact that members of Congress are more often the subjects not the supporters of investigative journalists.

In his dissent, Justice Stewart (joined by Justices Brennan and Marshall) rebutted the dismissive treatment of the majority and warned that the lack of a journalistic privilege would “impair performance of the press’ constitutionally protected functions.”⁶¹ The costs of such denial of evidence, he argued, paled in comparison to the loss of “full and fair flow of information to the public.”⁶² While Stewart argued for a qualified privilege, Justice Douglas argued for an “absolute and unqualified” privilege.⁶³ Douglas feared that a qualified privilege would be “twisted and relaxed so as to provide virtually no protection at all.”⁶⁴ Under Stewart’s approach, the burden would be on the government to show (1) “that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;” (2) “that the information sought cannot be obtained by alternative means less destructive of First Amendment rights;” and (3) that there is a “compelling and overriding interest in the information.”

This left the concurrence by Justice Powell, who stated that courts could balance any claim of privilege against “the obligation of all citizens to give relevant testimony with respect to criminal conduct.”⁶⁵ Under Powell’s test, the burden would effectively rest with the media, which would be effectively left without any reliable evidentiary privilege to protect their sources. That is why many states created such protections statutorily through shield laws. It is also why circuits have struggled to carve out a qualified privilege in the wake of *Branzburg*.⁶⁶ It is also why the Congress should, belatedly, do the same.

⁵⁷ 408 U.S. 665 (1972).

⁵⁸ *Id.* at 682.

⁵⁹ *Id.* at 695.

⁶⁰ *Id.* at 691 n.28.

⁶¹ *Id.* at 725 (Stewart, J., dissenting).

⁶² *Id.*

⁶³ *See id.* at 712 (Douglas, J., dissenting).

⁶⁴ *Id.* at 720.

⁶⁵ *Id.* at 710 (Powell, J., concurring).

⁶⁶ *See generally The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006)

III. THE NEED FOR A FEDERAL SHIELD LAW

The state legislatures have shown greater concern for press freedom than Congress. Sixteen states and the District of Columbia adopted the type of absolute privilege advocated by Justice Douglas. Another twenty-four states have adopted qualified privileges along the lines of Justice Stewart. Other states recognize privilege as a matter of common and state constitutional law. There is considerable variety in these laws with exceptions and qualifications, but forty states afford express protections for reporters in resisting demands for evidence.⁶⁷ This includes such distinctions as protected confidential sources as opposed to nonconfidential material.⁶⁸ Even with these laws, the media is reporting a sharp increase in subpoena demands in civil and criminal cases.⁶⁹

The Free Flow of Information Act of 2017 (H.R. 4382) adopts the qualified immunity approach. The legislation is clearly a major enhancement for press rights, though it could be strengthened further in my view. There could be language creating a greater presumption against compelled disclosures. It also leaves unclear the relative weight that national security claims should have in these balancing determinations. The bill simply states that “[f]or purposes of making a determination under subsection (a)(4), a court may consider the extent of any harm to national security.” That offers little guidance for a court and does not address the specific issues that arise in these cases, including the ability of counsel to see evidence in classified cases or the involvement of the Foreign Intelligence Surveillance Act courts.

My primary concern is with the definition of a journalist. The legislation defines a covered person as including:

“a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.”

The definition tracks some laws but it would exclude a rising number of citizen journalists, bloggers, and others. To be honest, this is no easy task but this definition would leave most writers unprotected. Media is changing around the world. There is a shift from the classic hardnosed reporter sent on a story by a veteran editor. Most people today receive their news in substantial part from non-traditional media sources, particularly Internet sites and bloggers. These “Net-Newsters” are mixing Internet and traditional new sources.⁷⁰ For their part, traditional

⁶⁷ See *Number of States with shield law climbs to 40*, Reporters Comm. For Freedom of the Press, available at: <https://www.rcfp.org/journals/number-states-shield-law-climbs/>.

⁶⁸ See generally Jonathan Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php.

⁶⁹ Sarah Matthews, Reporters Comm. For Freedom Of The Press, *Press Freedoms In The United 2019*, at 1-5 (2020), <https://www.rcfp.org/wp-content/uploads/2020/03/2020-Press-Freedom-Tracker-Report.pdf>.

⁷⁰ *Key News Audiences Now Blend Online and Traditional Sources*, Pew Research Center, August 17, 2008, available at <https://www.pewresearch.org/politics/2008/08/17/key-news-audiences-now-blend-online-and-traditional-sources/>.

reporters have become more like bloggers with social media and Internet postings. Today more people get their news for social media than newspapers.⁷¹ The bill's definition of a covered person remains frozen in the journalistic amber of prior years. Similarly, states like California define covered persons as “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed.”⁷² The federal bill is less rigid but still wedded to a narrow and frankly dated view of journalism. As previously noted, journalistic privilege has been defended by Supreme Court justices as protecting the “full and fair flow of information to the public.”⁷³ The full array of information now flows through many sites that would not be covered by this law.

It is also unclear what a “substantial portion of the person’s livelihood” means beyond eliminating those journalists who take little compensation for their work. For example, you may have someone who volunteers as a journalist without taking a salary to assist sites struggling to survive. Likewise, if Ted Koppel were to continue to write for a blog after retiring from any network, would he no longer be a journalist because he was not making money from his work? It would seem like a better definition would focus on the character and function of the work as opposed to the financial gain derived from it.

Moreover, it is not clear why it is important for protecting journalism that a protected person have “a supervisor, employer, parent, subsidiary, or affiliate of such covered person.” A figure may be forced out of a news organization or simply choose to operate alone. New technology has allowed far greater freedom for journalists in reaching a global audience without the affiliation or costs of a traditional news organization. That person can still continue to write in that capacity as an independent writer and researcher. Under the common definition, a person literally becomes a non-journalist when they leave a newsroom to continue to write the same type of columns on a blog.⁷⁴

The definition in H.R. 4382 tracks some state laws. Even states like New York which used more verbose treatments are still tied to traditional publications and a showing of working for “gain or livelihood” rather than information dissemination:

“one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function

⁷¹ Social Media Outpaces Print Newspapers in the U.S. as News Source, Pew Research, Dec. 10, 2018, available at <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

⁷² Cal. Evid. Code § 1070 (West 2018).

⁷³ *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

⁷⁴ Many blogs have a readership that far exceeds newspapers. For example, I would likely meet the definition due to my position as a legal analyst with a network. However, my blog (Res Ipsa) has a modest circulation but still reaches millions of readers each year and can top roughly a quarter of a million in a single day. However, a writer for a small-town newspaper reaching a couple thousand readers would still be viewed as a journalist under this definition but most bloggers (including writers for even larger blogs) would not since many of us do not accept advertising on our blogs.

either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.”⁷⁵

One aspect of the New York law that is notable (and in my view worth considering) is a differentiation between “confidential news” (which receives the protections of an absolute privilege) and “nonconfidential news” (which receives the protection of a qualified privilege).

Some states have broader definitions like Montana. In *Tracy v. City of Missoula*, a court considered a motion to quash a subpoena by a student journalist who filmed a meeting of the Hell’s Angels Motorcycle Club for a documentary film.⁷⁶ The film captured a scene of a confrontation with police. Montana is one of the states with an absolute protection for “any person connected with or employed by” any agency responsible for “disseminating news.”⁷⁷ The student journalist prevailed in the challenge. Nebraska also covers any person “engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public.”⁷⁸ Likewise, the model language put forward by media groups encompasses “any person in journalism or an affiliate or assistant thereof, as well as any person for whom protection would be ‘in the interest of justice’ or would facilitate legitimate newsgathering.”⁷⁹

I would strongly recommend a broadening of the definition of a covered person in the federal law. Specifically, Congress should allow a court to extend any privilege to non-traditional journalists by focusing on the work itself rather than the compensation received for that work. In the end, any federal shield law would likely be a great improvement but Congress should consider whether it is basing the law on an outdated and artificially narrow concept of journalism.

IV. CONCLUSION

Fifteen years ago, I warned that, without the protections of a federal shield law, we would undermine not only the free press but also its critical function in our constitutional system. Congress has thus far failed to act to protect journalists at the time that we need them the most. Indeed, recent years have only reaffirmed, if not magnified, the importance of the media in our constitutional scheme. We cannot afford to allow our press to be targeted without additional statutory protections. Without congressional action, reporters will face an increasingly difficult environment in which to report on alleged abuses and crimes by the government. With the loss or harassment of the press reporting on these controversies, the public will be left increasingly in the dark at a time when we must be most vigilant in the protections of our rights. It will indeed be, as Madison warned, “a Prologue to a Farce or a Tragedy; or perhaps both.”

⁷⁵ CIV. RIGHTS § 79-h(a)(6).

⁷⁶ *Tracy v. City of Missoula*, 2001 MT 1171, 2001 Mont. Dist. LEXIS 3168, at *21, *23, *36-40 (Dist. Ct. Missoula Cty. Mar. 9, 2001).

⁷⁷ MONT. CODE ANN. §§ 26-1-901 to -903 (West 2019).

⁷⁸ NEB. REV. STAT. ANN. § 20-146 (West 2020).

⁷⁹ MODEL QUALIFIED SHIELD LAW § 7 (MEDIA L. RES. CTR.

2014), http://medialaw.org/images/stories/Article_Reports/Committee_Reports/2014/Model_Shield_Law/modelshield2014.pdf

Thank you for the opportunity to speak with you today and I would be happy to answer any questions that you might have at this time.

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