WATCHING THE WATCHDOG? EXAMINING THE HISTORY AND UNCERTAIN FUTURE OF THE DEPARTMENT OF JUSTICE NEWS MEDIA GUIDELINES

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INTRODUCTION

On June 21, 2025, the United States military launched a series of airstrikes on three Iranian nuclear enrichment sites.[1] The strikes were characterized as "very successful" by President Donald Trump, who claimed that the three nuclear sites had been obliterated through the use of bunker buster munitions.[2] In the days that followed, a different narrative began to emerge. Quoting anonymous officials, The New York Times reported that Israeli and U.S. assessments of the damage found that the nuclear sites were likely damaged but not destroyed, potentially setting Iran's nuclear program back only a matter of months.[3] The Washington Post cited "four people familiar with the classified intelligence circulating within the U.S. government" in an article stating that the attack had not been as devastating as expected.[4]

While administration officials were upset about the stories, much of their ire seemed focused on the officials who had leaked the information—and the journalists who had published it. Administration officials told Axios that they would limit sharing classified information with Congress, implying that Democrats had leaked the information to the media to undercut the President.[5] Karoline Leavitt, the White House Press Secretary, called it "shameful that The Washington Post is helping people commit felonies by publishing out-of-context leaks."[6] President Trump referred to the reporters doubting the success of the operation as "BAD AND SICK PEOPLE . . . trying to make our Country look bad."[7]

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[1] *See* Joe Hernandez, *4 Things to Know About the U.S. Airstrikes on Iran*, NPR (June 23, 2025, 5:00 AM), https://www.npr.org/2025/06/23/nx-s1-5441791/takeaways-us-airstrikes-iran-nuclear-trump.

[2] *See* Donald Trump (@realDonaldTrump), TRUTH SOCIAL (June 21, 2025, 7:50 PM), https://truthsocial.com/@realDonaldTrump/posts/114724035571020048 ("We have completed our very successful attack on the three Nuclear sites in Iran . . .").

[3] *See* Eric Schmitt & Ronen Bergman, *Iran's Fordo Site Said to Look Severely Damaged, Not Destroyed*, N.Y. TIMES (June 22, 2025), https://www.nytimes.com/2025/06/22/world/middleeast/iran-fordo-nuclear-damaged-not-destroyed.html.

[4] *See* John Hudson & Warren P. Strobel, *Intercepted Call of Iranian Officials Downplays Damage of U.S. Attack*, WASH. POST (June 29, 2025), https://www.washingtonpost.com/national-security/2025/06/29/trump-iran-nuclear-damage-intercepted-call/.

[5] Marc Caputo, *Scoop: Trump to Limit Sharing Classified Info with Congress After Leak on Iran Bombing Damage*, AXIOS (June 25, 2025), https://www.axios.com/2025/06/25/iran-bombing-intelligence-trump-congress.

[6] Hudson & Strobel, *supra* note 4.

[7] *See* David Bauder, *Trump Attacks the Media for Reporting on Intelligence Assessment of Iran Strikes*, THE ASSOCIATED PRESS (June 25, 2025), https://apnews.com/article/trump-strike-iran-media-criticism-cnn-new-york-times-ea103c36bf197901da30750d35a47c45 (quoting a Truth Social post from President Trump).

The Trump administration's inflammatory rhetoric toward the press is well-documented.[8] But the U.S. government's aggressive approach towards members of the media is more than just rhetorical. President Trump stated in a Fox News interview that he would consider using compulsory legal process to force reporters to reveal the anonymous sources they relied on for their reporting on the Iran airstrikes.[9] Though policy disagreements between Republicans and Democrats define much of American discourse, presidents from both parties have been responsible for an exponential uptick in national security leak investigations and Espionage Act prosecutions for disclosure of classified information to journalists.[10]

Journalists subpoenaed to reveal information about their confidential sources have little recourse. In a fractured 1972 decision, the Supreme Court ruled that there is no First Amendment testimonial privilege protecting reporters from government subpoena.[11] Despite repeated attempts, Congress has never enacted a law to protect reporters faced with a subpoena.[12] While every state except Wyoming has either a statutory or common law reporter's privilege, they don't apply in federal court and vary widely in terms of who and what they cover.[13]

In the absence of formal legal protection, the Department of Justice has promulgated "News Media Guidelines" that dictate how federal

[8] *See, e.g.*, Donald Trump (@realDonaldTrump), X (Feb. 17, 2017, 4:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065 ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!"); JD Vance (@JDVance), X (Jan. 31, 2022, 9:48 AM), https://x.com/JDVance/status/1488162298887868419 ("The American media is one giant, industrial-scale harassment organization."); Pete Hegseth (@PeteHegseth), X (Jan. 22, 2023, 10:17 PM), https://x.com/PeteHegseth/status/1617360935022125056 ("The liberal media bias is disgusting . . ."); Marco Rubio (@marcorubio), X (Mar. 7, 2024, 9:12 AM), https://x.com/marcorubio/status/1765742288972443648 ("Under Trump we had manufactured political 'chaos' driven by media hysteria, establishment outrage & unhinged partisans . . .").

[9] Marina Dunbar, *Trump Considers Forcing Journalists to Reveal Sources Who Leaked Iran Report*, THE GUARDIAN (June 29, 2025, 12:29 PM), https://www.theguardian.com/us-news/2025/jun/29/trump-iran-military-strike-report.

[10] *See, e.g.*, Heidi Kitrosser & David Schulz, *A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press,* 19 FIRST AMEND. L. REV. 153, 153 (2021).

[11] *See* Branzburg v. Hayes, 408 U.S. 665, 690 (1972).

[12] *See* Liam Scott, *Bill to Protect Journalists Fails in US Senate*, VOICE OF AM. (Dec. 10, 2024, 10:01 PM), https://www.voanews.com/a/bill-to-protect-journalists-fails-in-senate/7897008.html (describing Congress' most recent unsuccessful attempt to pass a federal reporter's shield law).

[13] Thirty-two states have a statutory shield law, while seventeen other states lack a statute but have acknowledged a common-law qualified privilege in state courts. *See, e.g.,* Michael Froomkin & Zak Colangelo, *Privacy as Safety,* 95 WASH. L. REV. 141, 180–81 (2020); *See* Jeff Victor, *Wyoming "Shield Law" Bill Dies Without a Reading*, WY. PUB. RADIO (Feb. 14, 2023), https://www.wyomingpublicmedia.org/news/2023-02-14/wyoming-shield-law-bill-dies-without-a-reading.

prosecutors and investigators should approach using subpoenas to (1) compel reporters to reveal their sources; or (2) compel third parties to turn over communication records associated with a reporter.[14] The News Media Guidelines are not legally enforceable but have been cited as an important "safeguard" for journalists against subpoenas issued by the Department of Justice.[15] Notably, the guidelines can be changed at will by the Attorney General,[16] and the Obama,[17] Biden,[18] and Trump[19] administrations have all made substantive changes.

This article proceeds in three parts. Part I of this article discusses the initial creation of the News Media Guidelines. While the guidelines emerged out of a time of political and legal uncertainty for journalists, their promulgation would become a bulwark for press freedom and newsgathering over the decades to come. This Part also examines the instantiation of the News Media Guidelines as an ostensible alternative to a constitutional reporter's privilege.

Part II of this article analyzes the subsequent strengthening of the News Media Guidelines during the Obama and Biden administrations. In response to a series of high-profile incidents involving journalist subpoenas, the Obama administration made the first significant changes to the News Media Guidelines since 1980.[20] The Biden administration built upon

[14] *See* 28 C.F.R. § 50.10 (2025).

[15] Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL OF RTS. J. 1063, 1071 (2006).

[16] *See, e.g.*, Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 79 Fed. Reg. 10989 (Feb. 27, 2014) (codified at 28 C.F.R. pt. 50); Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 87 Fed. Reg. 66239 (Nov. 3, 2022) (codified at 28 C.F.R. pt. 50); Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 90 Fed. Reg. 18785 (May 2, 2025) (codified at 28 C.F.R. pt. 50).

[17] Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 79 Fed. Reg. 10989 (Feb. 27, 2014) (codified at 28 C.F.R. pt. 50).

[18] Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 87 Fed. Reg. 66239 (Nov. 3, 2022) (codified at 28 C.F.R. pt. 50).

[19] Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 90 Fed. Reg. 18785 (May 2, 2025) (codified at 28 C.F.R. pt. 50).

[20] *See* Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 79 Fed. Reg. 10989 (Feb. 27, 2014) (codified at 28 C.F.R. pt. 50); Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning,

those changes, fundamentally reshaping how the Department of Justice approached media subpoenas.[21]

Part III of this article turns to the Trump administration's weakening of the News Media Guidelines in May 2025. President Trump and his Department of Justice threatened to rescind or alter the Guidelines throughout his first term without doing so.[22] However, a memo issued by Attorney General Pam Bondi on April 25, 2025, directed DOJ employees to disregard the changes to the Guidelines made by the Biden administration.[23] This Part outlines the substantive changes to the guidelines, which were formalized in May 2025,[24] as well as contextualizing the changes within a hostile rhetorical and political climate around newsgathering and the "lamestream" media.[25] It will then examine the implications of the recent changes to the News Media Guidelines before arguing that more formal guardrails are likely necessary to protect the press, particularly given the adversarial posture of the Trump administration towards journalists.

Arresting, or Charging Members of the News Media, 80 Fed. Reg. 2820 (Jan. 21, 2015) (codified at 28 C.F.R. pt. 50).

[21] *See* Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 87 Fed. Reg. 2820 (Nov. 3, 2022) (codified at 28 C.F.R. pt. 50).

[22] Then-Attorney General Jeff Sessions suggested changing the guidelines in an effort to change the "culture of leaks" within the federal government. *See* Josh Gerstein & Madeline Conway, *Sessions: DOJ Reviewing Polices on Media Subpoenas*, POLITICO (Aug. 4, 2017, 1:45 PM), https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329.

[23] *See* Memorandum from the Att'y Gen. on Updated Pol'y Regarding Obtaining Info. from, or Recs. of, Members of the News Media to All Dep't Emps. (Apr. 25, 2025), https://www.documentcloud.org/documents/25919716-attorney-general-bondi-memorandum-updated-policy-regarding-obtaining-information-from-or-records-of-members-of-the-news-media/; *see also* Ryan Lucas, *Justice Department Revokes Biden-era Protections for Reporters in Leak Investigations*, NPR (Apr. 25, 2025, 8:26 PM), https://www.npr.org/2025/04/25/nx-s1-5377624/pam-bondi-reporters-subpoena-leaks (reporting the existence of Bondi's "internal memo").

[24] *See* 28 C.F.R. § 50.10 (2025); *see also* Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 90 Fed. Reg. 18785 (May 2, 2025) (codified at 28 C.F.R. pt. 50) (promulgating the revised DOJ News Media Guidelines).

[25] *See, e.g.,* Marc Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames 'Lamestream Media' for Protests*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html?smid=url-share (quoting a tweet from President Trump that blamed the "Lamestream Media" for civil unrest and called journalists "truly bad people with a sick agenda.").

I. 1970–2014: THE BIRTH OF THE DOJ NEWS MEDIA GUIDELINES

The sections that follow examine the political, legislative, and legal developments that influenced the creation and continued presence of the DOJ News Media Guidelines ("the Guidelines"). The Guidelines may not create a legally binding and enforceable mandate for federal prosecutors and law enforcement.[26] Yet their importance is such that The New York Times's Supreme Court correspondent has referred to them as a "shadow federal shield law" and argued that their existence make a statutory reporter's privilege unnecessary.[27] The remainder of this Part explores the Supreme Court's analysis of a potential constitutional reporter's privilege in *Branzburg*, as well as the genesis of the Guidelines under the Nixon administration.[28]

A. "Four and a Half to Four and a Half": Branzburg and the Reporter's Privilege

The Supreme Court's decision in *Branzburg v. Hayes* is the only time the Court has formally weighed in on the existence of the "reporter's privilege," a First Amendment privilege that would allow reporters to thwart compelled testimony about the identity of a confidential source or information acquired during the newsgathering process.[29] The Court's decision in *Branzburg* consolidated four cases.[30] Two of the cases involved a Louisville Courier-Journal reporter covering the drug trade in Kentucky.[31] The third case featured a Massachusetts reporter who gained access to Black Panther headquarters during a period of civil unrest in exchange for a vow

[26] *See* 28 C.F.R. § 50.10(i) (2025) ("This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.").

[27] *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 236 (1999) (explaining that the Justice Department guidelines "have served as a shadow federal shield law" that "[c[ourts have routinely embraced" because "[t]hey are sensible, rigorous, and predictable.").

[28] *See* Policy Regarding Issuance of Subpoenas to, and Interrogation, Indictment, or Arrest of, Members of News Media, 38 Fed. Reg. 29583 (Oct. 26, 1973) (codified at 28 C.F.R. pt. 50).

[29] *See* Branzburg v. Hayes, 408 U.S. 665, 668, 698 (1972); *see also* Kitrosser & Schulz, *supra* note 10, at 180 ("The Supreme Court has addressed the reporter's privilege on only one occasion, in the midst of upheavals from the Vietnam War, the Black Panther movement, and social unrest.").

[30] *See Branzburg*, 408 U.S. at 667–76.

[31] *See id.* at 667–71.

of silence around the group's activities.[32] Similarly, the fourth case involved a New York Times reporter who had cultivated a relationship with the Black Panthers in California.[33] In each case, the reporters were subpoenaed to testify about what they had seen before a grand jury and declined to do so, citing a First Amendment privilege.[34]

On appeal, the cases were adjudicated inconsistently. The Kentucky Court of Appeals rejected the presence of a First Amendment privilege and held that state law created a privilege to avoid revealing a source but not to avoid testifying about events or individuals the reporter "had observed personally."[35] The Supreme Judicial Court of Massachusetts upheld a lower court's decision to deny a First Amendment privilege, finding that reporters had no special status allowing them to refuse testifying before a court or grand jury.[36]

Conversely, the Ninth Circuit ruled that the First Amendment required a qualified reporter's privilege in *Caldwell v. United States*, the case involving The New York Times.[37] Inspired in part by several amicus briefs filed by news organizations and press advocates,[38] the court's decision established a "general rule" that the government must show a compelling need for the reporter's testimony when "the public's First Amendment right to be informed would be jeopardized" by compelled testimony.[39] This inconsistency created a circuit split requiring Supreme Court intervention, and the Court granted certiorari in May 1971 to dictate the limits of a potential First Amendment privilege.[40]

Justice White's majority decision in *Branzburg* began by recognizing the significance of freedom of speech and press to a functioning democracy.[41] Writing for Chief Justice Burger as well as Justices Blackmun and Rehnquist, White acknowledged the reporters' First Amendment

[32] *See id.* at 672 ("As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid.").

[33] *See id.* at 675–76.

[34] *See id.* at 668–76.

[35] *See id.* at 668–71; *see also* Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

[36] *See Branzburg*, 408 U.S. at 674; *see also In re* Pappas, 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

[37] *See* Caldwell v. United States, 434 F.2d 1081, 1086 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

[38] *See id.* at 1083 ("The case is one of first impression . . . [and] presents vital questions of public policy: questions as to how competing public interests shall be balanced.").

[39] *See id.* at 1089.

[40] *See Branzburg*, 408 U.S. at 679.

[41] *See id.* at 680–81.

argument that forcing reporters to identify their confidential sources and information may "measurably deter[]" them from publishing.[42]

Despite this language, the Court then narrowly defined the issue as the obligation of reporters to appear before a grand jury and answer questions "as other citizens do."[43] Within this framing, a press subpoena functions as an "incidental burdening" of a reporter's speech similar to the application of the National Labor Relations Act, Fair Labor Standards Act, or Sherman Act.[44] Without empirical evidence showing that confidential sources would refuse to speak to reporters, the Court refused to credit the journalists' arguments that the lack of a testimonial privilege would weaken journalistic work product.[45]

Despite a stated regard for the First Amendment value of newsgathering and reporting, the White majority declined to recognize a privilege for reporters. When balancing these First Amendment values against the function of a grand jury, White cited the "great weight of authority" suggesting that reporters had no privilege to avoid appearing before a grand jury.[46] He wrote:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[47]

The majority conceded that part of the reluctance to recognize a constitutional reporter's privilege is the logistical and conceptual challenge of

[42] *Id.* at 679–80; *see also* Kitrosser & Schulz, *supra* note 10, at 180 ("But in rejecting the reporters' claim of privilege not to respond to a subpoena at all, the Court acknowledged the significant First Amendment implications presented . . . .").

[43] *Branzburg*, 408 U.S. at 682.

[44] *Id.* at 682–83.

[45] *See id.* at 693–94 ("[T]he evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.").

[46] *Id.* at 685.

[47] *Id.* at 689–91.

determining a "reporter" that can invoke the privilege to avoid revealing their sources as opposed to an author, researcher, or other party who may not be able to avoid compelled disclosure.[48] Justice White placed great weight on the principle that reporters do not hold any First Amendment protections not available to other citizens, but he suggested that a First Amendment privilege applying specifically to reporters would create exactly such a hierarchy.[49] Accordingly, the majority shifted the burden for creating a reporter's privilege to federal[50] and state legislatures.[51]

While the majority opinion declined to recognize a First Amendment reporter's privilege, the four liberal Justices signed onto dissenting opinions expressing support for such a privilege. Justice Stewart, with Justices Brennan and Marshall, rejected the majority's suggestion that reporters have no First Amendment right to protect their sources from government subpoena.[52] Instead, Stewart argued that the right to publish is essential to democratic self-governance, with the right to gather news and information as a necessary corollary.[53]

After recognizing a First Amendment right to newsgathering, the dissent argued that reporters necessarily have a related right to a confidential relationship with sources.[54] Unlike the majority, Justice Stewart suggested that failure to recognize a testimonial privilege will have a chilling effect

[48] The inconsistent definition of a "journalist" for reporter's shield purposes has continued into state laws creating a privilege. *See, e.g.*, Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 58 (2010) ("The shield laws also use substantially varied definitions of 'journalist' and 'press.'"); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL OF RTS. J. 1063, 1115 (2006) ("The task of defining who is or is not a 'journalist' will not get any easier. A 2005 opinion poll indicated that the public has trouble distinguishing between conservative radio commentator Rush Limbaugh and Watergate reporter Bob Woodward when asked to identify whether someone is a 'journalist.'").

[49] Justice White makes this point at least twice in the majority decision. *See Branzburg*, 408 U.S. at 689–92; *see also id.* at 697 ("[T]he right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function.").

[50] *Branzburg*, 408 U.S. at 706 ("At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable . . . .").

[51] *Id.* ("There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards . . . .").

[52] *See id.* at 725 (Stewart, J., dissenting).

[53] *See id.* at 727 ("In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.") (citations omitted).

[54] *Id.* at 728–29.

on newsgathering and reporting, as sources will "clearly be deterred from giving information, and reporters will clearly be deterred from publishing it . . . ."[55] He dismissed the majority's insistence on empirical evidence that compulsory process would limit journalists' First Amendment rights, suggesting that the Court has never before insisted on such specific proof.[56]

Instead of deferring to the function of a grand jury (even if it causes an incidental burden on speech), Justice Stewart argued that the Court must provide safeguards for First Amendment rights.[57] According to Stewart, the majority's failure to do so was a "profound" error that far outweighed any concerns about judicial inconsistency or logistical challenges caused by a potential testimonial privilege.[58] He also referenced the First Amendment interest in "breathing space" for journalists famously invoked by the Court in the *New York Times Co. v. Sullivan* decision establishing actual malice.[59]

Ultimately, Justice Stewart suggested a three-part test when a reporter is subpoenaed to turn over confidential sources or information.[60] First, the government must show probable cause to believe that the reporter has information clearly relevant to a specific crime.[61] Second, the government must demonstrate that the information cannot be obtained in a way less "destructive" of First Amendment rights.[62] Finally, they must show a "compelling and overriding interest in the information."[63]

Justice Douglas, writing for himself, took an even stronger stance against the majority's refusal to recognize a First Amendment privilege for reporters.[64] Like Justice Stewart, Douglas invoked the writing of Alexander Meiklejohn to argue that effective self-governance can only occur when citizens have a "steady, robust, unimpeded, and uncensored flow of

[55] *See id.* at 731.

[56] *See id.* at 733 ("But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number . . . who would actually be dissuaded from engaging in First Amendment activity.").

[57] *Id.* at 738.

[58] *Id.* at 745–46.

[59] *Id.* at 746; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) ("That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' . . . ." (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

[60] *Branzburg*, 408 U.S. at 743.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See id.* at 711–25.

opinion and reporting,"[65] which he referred to as the "high[est] function" in a democratic society[66]

However, he then suggested that Stewart's proposed compelling interest test would provide insufficient protection for journalists, claiming that anything short of an absolute privilege for journalists would be "twisted and relaxed" in a way that limited First Amendment protection.[67] Justice Douglas paints a dystopian vision of a press living in constant fear of the government, subject to constant harassment from the government, and capable of doing little more than conveying official government narratives to the public.[68] In his eyes, anything short of an absolute privilege to avoid disclosure of confidential sources will cause reporters to self-censor and strike a fundamental blow to American democracy.[69]

With four Justices firmly in favor of some form of constitutional reporter's privilege and four Justices against, Justice Powell's brief concurring opinion has taken on an outsized importance in determining the potential contours of a privilege.[70] While agreeing with the majority's view that no privilege protected the reporters in this case, Powell emphasized the "limited" nature of the Court's holding and suggested that reporters retain some constitutional protection while gathering news and protecting sources.[71]

Justice Powell concluded by noting that reporters may use courts to protect them when "legitimate First Amendment interests require protection," but his opinion is vague about exactly what those interests are.[72] Harassment and bad faith are two clear triggers,[73] but Powell also suggests that being asked to turn over information that is "remote or tenuous or . . . without a legitimate need of law enforcement" may allow a journalist to argue that the First Amendment provides some protection against

[65] *Id.* at 713–14.

[66] *Id.* at 722.

[67] *See id.* at 720.

[68] *See id.* at 722–23.

[69] *See id.* at 724–25 ("The intrusion of government into this domain is symptomatic of the disease of this society. . . . Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims.").

[70] *See id.* at 709–10 (Powell, J., concurring); *see also, e.g.,* RonNell Andersen Jones, *Rethinking Reporter's Privilege,* 111 MICH. L. REV. 1221, 1236 (2013) (noting that Powell's suggestion that a qualified privilege may sometimes be appropriate laid the groundwork for "almost every federal appellate court" to adopt such an approach); *see also* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 554 (2007) ("Because Justice Powell cast the deciding vote in Branzburg, many courts and commentators have read his concurring opinion as the controlling opinion in the case.").

[71] *Branzburg*, 408 U.S. at 709–10.

[72] *Id.*

[73] *See id.*

compulsory process.[74] Despite refusing to recognize a testimonial privilege in this case, Powell's advocacy for a case-by-case approach to the balancing of First Amendment interests and law enforcement seems to align more with Justice Stewart's dissent than with the majority.

This apparent inconsistency in Justice Powell's concurrence has sparked confusion in the decades since *Branzburg*. Justice Stewart's dissent refers to the Powell concurrence as "enigmatic," while commentators remain befuddled by the dimensions of the reporter's privilege hinted at in Powell's opinion.[75] The Reporter's Committee for the Freedom of the Press has referred to the concurrence as creating a "4½-to-4½ decision,"[76] a sentiment also expressed by Justice Stewart in a subsequent law review article.[77] Geoffrey Stone has written that Justice Powell's concurrence "seem[s] directly at odds" with the majority opinion he joined.[78] In 2007, a law professor found Justice Powell's notes on the *Branzburg* decision within a larger archive of documents.[79] In his notes, Powell wrote, "we should not establish a constitutional privilege . . . [it would create] problems difficult to foresee . . . [but] there is a privilege analogous to an evidentiary one which courts should recognize and apply to protect confidential information."[80] A New York Times article discussing the discovery

[74] *See id.* at 710.

[75] *See, e.g.,* Anthony L. Fargo, *Protecting Journalists' Sources Without a Shield: Four Proposals*, 24 COMM. L. & POL'Y 145, 152 (2019) ("Because Justice Powell's concurrence appeared to limit the majority opinion in unspecified ways, and he was in the majority, the decision as a whole caused some confusion for the lower courts in subsequent cases."); *see* Lucy A. Dalglish & Casey Murray, *D. . .jà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 14, 19 (2006) (noting the media's ability to use the Powell concurrence to create exceptions to the majority decision); s*ee also* Nicole N. Wentworth, *Hot Off the Press: An Argument for a Federal Shield Law Affording a Qualified Evidentiary Privilege to Journalists in Light of Renewed Concerns About Freedom of the Press and National Security*, 53 LOY. L.A. L. REV. 745 (2020) (suggesting that the characterization of Powell's concurrence as enigmatic foreshadowed future confusion in the lower courts); *Cf.* Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1953 (2006) (noting that Powell's decision to concur rather than concur in the judgment or concur in part creates additional confusion about the lasting impact of his decision).

[76] Monica Dias, *Branzburg Revisited?*, THE NEWS MEDIA & THE LAW 4 (2002), available at https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2002/branzburg-revisited.

[77] Justice Potter Stewart, *"Or Of the Press,"* 26 HASTINGS L.J. 705, 709 (1975) ("In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half.").

[78] *See* Geoffrey R. Stone, *Why We Need A Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 44 (2005).

[79] Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES (Oct. 7, 2007), https://www.nytimes.com/2007/10/07/weekinreview/07liptak.html?ref=weekinreview.

[80] *See id.*

spoke to two First Amendment litigators with wildly varying views about Justice Powell's statement, emphasizing the continued confusion. Floyd Abrams characterized the notes as a vindication of media attorneys who had argued Powell's concurrence established a privilege,[81] while Randall D. Eliason said all the notes show is that Powell didn't believe in a First Amendment privilege.[82]

Despite an obvious lack of clarity, the Supreme Court has repeatedly declined to clarify the contours of *Branzburg*.[83] Federal and state courts have similarly grappled with the potential existence and limits of a constitutional reporter's privilege,[84] and many states have responded by enacting their own legislative privilege, though those also vary in terms of who they protect and what they cover.[85]

B. "The Only Satisfactory Protection": The Genesis and Initial Codification of the News Media Guidelines

The Court's refusal in *Branzburg* to formally recognize a constitutional reporter's privilege left the press scrambling to protect themselves and their materials from government subpoena.[86] Legislators responded to the call, with at least sixty-five reporter's privilege laws proposed in Congress in the year after the *Branzburg* decision and nearly 100 proposed by the end of the decade.[87] Justice White's majority opinion left the door open for such a step:

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[81] *See id.*

[82] *See id.*

[83] *See, e.g.*, Kitrosser & Schulz, *supra* note 10; Christina Koningisor, *The De Facto Reporter's Privilege*, 127 Yale L.J. 1176, 1246 (2018) ("For the past forty-five years, the Court has rejected petitions asking for clarification of its decision.").

[84] *See infra* Part III.B; *see also* Koningisor, *supra* note 83 ("After decades of lower court rulings, the circuits are now split on both the meaning and scope of *Branzburg*.").

[85] *See infra* Part III.B.

[86] *See* Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress*, 31 HASTINGS COMM. & ENT L.J. 395, 406 (2009) ("The Branzburg Court did not decide whether journalists have a First Amendment right to refuse to testify in federal proceedings other than grand juries or how power should be distributed in cases that do not involve grand juries.").

[87] *See, e.g.,* Packer, *supra* note 86, at 407 ("Members of Congress responded by quickly introducing six shield law bills, and, within a year, sixty-five bills had been introduced. Ninety-nine bills were introduced between 1973 and 1978."); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1391 (2003) ("Since *Branzburg*, there have been recurring calls for a federal shield law or for a reconsideration of that decision. Nearly one hundred proposed federal statutes were introduced in the six years after the *Branzburg* decision.").

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.[88]

Despite this proposed legislation and the apparent momentum towards a federal shield law, no bill was signed into law.[89] Congress failed to agree on whether the privilege would be qualified or absolute, as well as who would be classified as a "reporter" under the law.[90] While a legally instantiated federal reporter's privilege remains elusive, the federal government *has* imposed some limits on efforts to subpoena media members through the Department of Justice's News Media Guidelines.[91] Though the Guidelines are intrinsically linked with the Supreme Court's decision in *Branzburg*–and occasionally errantly identified as a direct executive response to the Court's refusal to recognize a First Amendment reporter's privilege–they actually predate the decision by two years.[92]

When U.S. Attorney General John Mitchell appeared before the American Bar Association to speak in August 1970, journalists were facing an unprecedented avalanche of subpoenas from federal prosecutors working in the Nixon administration.[93] While Mitchell defended the Department of Justice's subpoena practices, stating that prosecutors had acted "in a completely responsible and traditional manner," he also acknowledged a core tension between public interests in freedom of speech and fair

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[88] *Branzburg*, 408 U.S. at 706.

[89] *See* Berger, *supra* note 87, at 1391–92 ("[No proposed federal reporter's privilege laws] were passed, a failure attributed in part to an inability to reach consensus on the definition of a "journalist" and to the insistence of the press on an absolute privilege, not a qualified one.").

[90] *See id.*

[91] *See* Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 90 Fed. Reg. 18785 (May 2, 2025) (codified at 28 C.F.R. pt. 50).

[92] *See* Liptak, *supra* note 27 at 231 ("Despite the conventional wisdom, the regulations were not prompted by *Branzburg*. They were announced almost two years earlier, on August 10, 1970, in a speech by Attorney General John N. Mitchell . . . ."); *but see* Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV.445, 472–73 (2002) (suggesting the News Media Guidelines "responded" to the Court's decision in *Branzburg*); Sandra Davidson & David Herrera, *Needed: More Than A Paper Shield*, 20 WM. & MARY BILL OF RTS. J. 1277, 1282 n. 26 (2012) (stating that the News Media Guidelines have existed since 1980).

[93] John N. Mitchell, U.S. Att'y Gen., Free Press and Fair Trial: The Subpoena Controversy, (August 10, 1970) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/08-10-1970.pdf); *see also* Lucy A. Dalglish & Casey Murray, *D. . .jà Vu All over Again: How A Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 20 (2006) (referring to the "excesses" of media subpoenas in the Nixon administration).

administration of justice.[94] To address public concern that excessive media subpoenas may be inhibiting the role of the press, Mitchell announced a set of internal guidelines for federal prosecutors.[95] While the Guidelines would remain internal for the next three years, they were promulgated in October 1973 by Attorney General Elliott Richardson, becoming the initial version of the Guidelines still codified at 28 C.F.R. § 50.10 today.[96]

In his initial speech announcing the Guidelines, Attorney General Mitchell stated that he felt the law recognized no constitutional or common law privilege for journalists to avoid a subpoena.[97] He positioned the Guidelines as an interim measure, noting that he "would not oppose" federal legislation creating a reporter's privilege.[98] Despite Mitchell's statement, the Guidelines were almost immediately seen as an alternative to a constitutional or statutory reporter's privilege. The Department of Justice quickly adopted the position that there was no need for a federal statute, arguing that the Guidelines provided sufficient protections for journalists against excessive subpoenas.[99] Then-Assistant Attorney General (and future Supreme Court Justice) Antonin Scalia outlined the Department's arguments in a 1975 Congressional hearing, suggesting not only that the Guidelines negated the need for a federal statute but also that the guidelines represented the "only satisfactory protection":

> [D]espite the Department's opposition to the provisions of this proposed legislation, I think you are aware that we acknowledge the need for particular care in subpoenaing the work product of newsmen. Their profession is a particularly important one in our society, and should assuredly not be perverted into doing the work which law enforcement officers should do on their own. Every effort should be devoted to obtaining the information necessary for effective law enforcement in a fashion that does not impair the free flow of information necessary to a free society. As my earlier comments indicate, however, I do not think such a result can best be achieved by any form of rigid legislative proscription. The variables are too many, the competing social interests too imponderable. In my view, the only satisfactory protection is constant advertence to the particular sensitivity of this area by law enforcement agencies themselves. At the Federal level, this has been assured by Justice Department

[94] Mitchell, *supra* note 93, at 9, 12.

[95] *See id.* at 18–20.

[96] Policy Regarding Issuance of Subpoenas to, and Interrogation, Indictment, or Arrest of, Members of News Media, 38 Fed. Reg. 29588, 29588–89 (Oct. 26, 1973) (codified at 28 C.F.R. pt. 50.10).

[97] Mitchell, *supra* note 93, at 5.

[98] *Id.* at 21.

[99] *See generally* Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 457 (2006) ("The few opponents of shield laws who testified during the congressional hearings downplayed the need for a federal statute and ignored the importance of protecting leaks.").

> guidelines issued in August 1970, and reissued in modified form in October 1973.[100]

The *Branzburg* majority also praised the Guidelines, calling them a "major step" and suggesting that they may be "wholly sufficient" to resolve most disagreements between journalists and federal prosecutors.[101] Indeed, the Guidelines suggested protection for freedom of the press is at its broadest when journalists "investigate and report the news."[102] Prosecutors were directed to make "[a]ll reasonable attempts" to obtain information from non-journalists before considering a subpoena,[103] with a case-by-case balancing of the public's interests in (1) the free flow of ideas and information; and (2) "effective law enforcement and the fair administration of justice."[104] Prosecutors were also instructed to engage in negotiations with journalists before requesting a subpoena of a journalist.[105] If a prosecutor determined that negotiations were unsuccessful, they were required to get express approval from the Attorney General before requesting a subpoena.[106]

The initial codified version of the Guidelines provided six "principles" for prosecutors and the Attorney General to consider when weighing a potential subpoena of a journalist.[107] First, there must be reasonable grounds to suspect that a crime has occurred.[108] Second, there must be reasonable grounds to believe that the information the journalist has is "essential" to establishing guilt or innocence.[109] Third, the prosecutor must first seek to obtain the information from a non-media source.[110] Fourth, absent exigent circumstances, journalists should be subpoenaed only for the verification of published information.[111] Fifth, subpoena requests should be "treated with care" to avoid the concerns about harassment

[100] *Newsmen's Privilege: Hearing on H.R. 215 Before the Subcomm. on Courts, Civ. Liberties, and the Admin. of Just. of the H. Comm. on the Judiciary,* 94th Cong. 6, 12 (1975) (statement of Antonin Scalia, Assistant Attorney Gen., Office of Legal Counsel, Department of Justice); *see also* Kielbowicz, supra note 99, at 457 ("The Department of Justice, represented by Assistant Attorney General Antonin Scalia, reassured reporters that its guidelines for subpoenaing the press guarded against abuses.").

[101] *See* Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

[102] 28 C.F.R. § 50.10 (1974).

[103] 28 C.F.R. § 50.10(b) (1974).

[104] *See* 28 C.F.R. § 50.10(a) (1974).

[105] *See* 28 C.F.R. § 50.10(c) (1974).

[106] *See* 28 C.F.R. § 50.10(d) (1974).

[107] *See* 28 C.F.R. § 50.10(e) (1974).

[108] 28 C.F.R. § 50.10(e)(1) (1974).

[109] 28 C.F.R. § 50.10(e)(2) (1974).

[110] 28 C.F.R. § 50.10(e)(3) (1974).

[111] 28 C.F.R. § 50.10(e)(4) (1974).

echoed in *Branzburg*.[112] Finally, any subpoena of media members should "wherever possible" be directed at material and limited information over a limited period of time, with a focus on avoiding required production of a "large volume of unpublished material."[113]

The 1973 Guidelines also imposed limits on criminal investigations,[114] arrest warrants,[115] and indictments[116] directed towards members of the news media, requiring Attorney General approval for each unless exigent circumstances exist.[117] The guidelines failed to articulate specific consequences for failure to comply but noted that a prosecutor who failed to obtain approval from the Attorney General could be subject to "administrative reprimand or other appropriate disciplinary action."[118]

The first substantive change to the Guidelines occurred in 1980. In February 1980, Howell Raines, a New York Times reporter, published a series of articles revealing that an FBI informant had participated in violent attacks as a member of the Ku Klux Klan during the height of the Civil Rights Movement.[119] In response, the Department of Justice subpoenaed the phone toll records of both Raines's home telephone and the Atlanta bureau of The New York Times, representing the first subpoena of telephone records since the Nixon administration.[120] Despite receiving the records within weeks, prosecutors requested that the telephone company wait ninety days before informing Raines or the newspaper, preventing either party from contesting the subpoena in court.[121]

When The New York Times was informed of the subpoena in September 1980, the resulting uproar led Attorney General Benjamin R. Civiletti to promulgate a new version of the Guidelines two months later.[122]

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[112] 28 C.F.R. § 50.10(e)(5) (1974); *see also Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring) (referencing government harassment as a clear trigger of First Amendment interests for journalists); *Caldwell*, 408 U.S. at 722 (Douglas, J., dissenting) (warning that failure to acknowledge a constitutional reporter's privilege will lead to government harassment of the media).

[113] 28 C.F.R. § 50.10(e)(6) (1974).

[114] *See* 28 C.F.R. § 50.10(f) (1974).

[115] *See* 28 C.F.R. § 50.10(g) (1974).

[116] *See* 28 C.F.R. § 50.10(h) (1974).

[117] *See* 28 C.F.R. § 50.10(j) (1974).

[118] *See* 28 C.F.R. § 50.10(k) (1974).

[119] *See* Robert Pear, *Justice Dept. Restricts Subpoenas for Reporters and Phone Records*, N.Y. TIMES, Nov. 13, 1980, at A30.

[120] *See id.*; *see also* Liptak, *supra* note 27, at 232–33.

[121] *See* Pear, *supra* note 119, at A30.

[122] *See id.*; *see also* Policy With Regard to Issuance of Subpoenas to Members of News Media, Subpoenas for Telephone Toll Records of Members of News Media, and Interrogation, Indictment, or Arrest of, Members of News Media, 45 Fed. Reg. 76436 (Nov. 19, 1980) (codified at 28 C.F.R. § 50.10)

The primary change in the 1980 guidelines was ostensibly to add "telephone toll records" as a category of information.[123] The Guidelines also added a section allowing a U.S. Attorney or Assistant Attorney General to sign off on a subpoena where the reporter has voluntarily agreed to turn over already published information,[124] as well as a section allowing subpoenas for "purely commercial or financial information unrelated to the newsgathering function."[125] Unlike the 1973 Guidelines, the 1980 Guidelines explicitly state that they are intended to protect against "forms of compulsory process . . . which might impair the news gathering function."[126] But a closer look at the 1980 Guidelines as applied to the controversial subpoena of Raines's telephone records raises more questions.

The updated Guidelines created a two-tiered notice provision when reporter phone records have been subpoenaed.[127] Prosecutors are instructed to provide "reasonable and timely notice" to a reporter when there have been negotiations and the Attorney General decides to authorize a subpoena.[128] However, if a journalist does not receive notice of an approved and issued subpoena for phone records, the Department of Justice is supposed to notify the reporter as soon as notice would not pose a "clear and substantial threat" to an investigation.[129] The Guidelines state that the Department has forty-five days to notify the reporter, with leave for the Assistant Attorney General to authorize an additional delay of forty-five days.[130]

[123] *Compare* 28 C.F.R. § 50.10(a) (1981) (applying to issuing a subpoena for a media member "or for telephone toll records" of any media member) *with* 28 C.F.R. § 50.10(a) (1974) (failing to include any guidance for subpoena of journalist telephone records).

[124] 28 C.F.R. § 50.10(e) (1981).

[125] 28 C.F.R. § 50.10(m) (1981).

[126] *Compare* 28 C.F.R. § 50.10 (1981) (stating policy purpose to protect against "forms of compulsory process . . . which might impair the news gathering function") *with* 28 C.F.R. § 50.10 (1974) (stating policy purpose to balance press freedom and administration of justice but lacking reference to compulsory process).

[127] *See* 28 C.F.R. § 50.10(g)(2)–(3) (1981).

[128] 28 C.F.R. § 50.10(g)(2) (1981).

[129] 28 C.F.R. § 50.10(g)(3) (1981).

[130] *Id.*

Table 1: Notable Changes in the 1980 News Media Guidelines

Expands scope to include telephone toll records
Explicit statement of application to compulsory process
Mandatory notice period for subpoena of telephone records: forty-five days, with one additional delay of forty-five days upon AG approval
Exception to AG authorization provision when journalist agrees and material is already published
Clarification that guidelines create no legally enforceable right

This codified ninety-day notice period meant that the prosecutorial request to delay notice to Raines and The New York Times would not have violated the Guidelines, as the Department of Justice did provide notice within ninety days.[131] In addition, even if the failure to notify *had* violated the Guidelines, Raines and The New York Times would have had no legal recourse. While Department of Justice employees who fail to obtain Attorney General approval could still be subject to administrative reprimand or other disciplinary action, a newly added section clarified that the Guidelines are "not intended to create or recognize any legally enforceable right in any person."[132] While the Guidelines may place meaningful guardrails on the subpoena practices of federal prosecutors, the 1980 revisions confirmed that the guidelines are judicially unenforceable, limiting the protection they can provide for journalists.

II. 2014–2025: REEVALUATION AND STRENGTHENING

Despite a tumultuous opening decade, the Guidelines remained more or less unchanged for the next forty-three years.[133] However, a series of high-profile journalist subpoenas and arrests in the early 2000s ratcheted up the pressure on the Department of Justice. In 2001, author Vanessa Leggett was jailed on contempt of court charges for 168 days after she refused to comply with a subpoena directing her to disclose confidential sources to a federal grand jury.[134]

Two prominent government leak investigations highlighted the potential danger for reporters who report on national security issues while

[131] *See* Pear, *supra* note 119, at A30 ("The new rules would still allow the Justice Department to delay notification of reporters up to 90 days after their phone telephone records were subpoenaed.").

[132] 28 C.F.R. § 50.10(n) (1981).

[133] *See, e.g.*, Liptak, *supra* note 27, at 232 (referring to the 1980 amendment as the "only . . . significant amendment" to the regulations).

[134] *See* Dias, *supra* note 76; *see also* Leggett v. U.S., 535 U.S. 1011 (2002) (denying certiorari on the Fifth Circuit's denial of Leggett's First Amendment and Fifth Amendment appeal).

using confidential sources. In the build-up to the U.S. invasion of Iraq in 2003, then-President George W. Bush claimed during his State of the Union speech that Iraqi dictator Saddam Hussein was attempting to acquire uranium from Africa.[135] Joseph Wilson, a career foreign service officer, published an article in The New York Times in July 2003, revealing that he had traveled to Africa in 2002 at the behest of the Bush administration and questioning President Bush's claim.[136] Less than a week later, a Washington Post reporter revealed that Wilson's wife, Valerie Plame, was a CIA operative and quoted two "senior administration officials" who suggested Plame was involved in sending her husband to Africa.[137]

In the aftermath of Plame's outing, the Department of Justice began an investigation into whether government employees had violated the law by leaking her identity.[138] In the course of the investigation, a grand jury subpoenaed multiple journalists, seeking information about conversations with administration officials.[139] One subpoenaed journalist, Judith Miller of The New York Times, spent eighty-five days in jail after being held in civil contempt for refusing to reveal her source, while another reporter who faced jail time reached a deal with his confidential source allowing him to testify.[140] While the special prosecutor refused to release her from custody until she revealed her source, Miller was freed after she was released from her pledge of confidentiality.[141]

The sections that follow explore the significant changes made to the Guidelines during the Obama administration. This Part analyzes the transition of the guidelines from a policy statement to a codified regulation with specific definitions and explicit exclusion criteria. It also analyzes the evolution of notice and approval provisions for journalist subpoenas. This

[135] *See* Wolf Blitzer, *Did the Bush Administration Exaggerate the Threat from Iraq?*, CNN (July 8, 2003), https://www.cnn.com/2003/ALLPOLITICS/07/08/wbr.iraq.claims/.

[136] Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. TIMES (July 6, 2003), https://www.nytimes.com/2003/07/06/opinion/what-i-didn-t-find-in-africa.html.

[137] *See* Robert D. Novak, *Mission To Niger*, WASH. POST (July 14, 2003), https://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html.

[138] *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 966 (D.C. Cir. 2005), *cert. denied*, Miller v. United States, 545 U.S. 1150 (2005), *superseded,* 438 F.3d 1141, 1143 (D.C. Cir. 2006).

[139] *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 967.

[140] Adam Liptak, *Reporter Jailed After Refusing to Name Source,* N.Y. TIMES (July 7, 2005), https://www.nytimes.com/2005/07/07/politics/reporter-jailed-after-refusing-to-name-source.html; Neil A. Lewis & Scott Shane, *Reporter Who Was Jailed Testifies in Libby Case*, N.Y. Times (Jan. 31, 2007), https://www.nytimes.com/2007/01/31/washington/31libby.html.

[141] *See* Lewis & Shane, *supra* note 140; "Scooter" Libby, former chief of staff to U.S. Vice President Dick Cheney, was convicted on perjury and obstruction of justice charges related to the leak of Plame's identity before ultimately being pardoned by President Trump. *See* Peter Baker, *Trump Pardons Scooter Libby in a Case That Mirrors His Own*, N.Y. TIMES (Apr. 13, 2018), https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html.

Part concludes by examining the high-water mark of the Guidelines, promulgated by the Biden administration in response to investigative tactics during the first Trump presidency but foreshadowing an inevitable backlash during the second Trump administration.

A. "Out for Scalps": National Security Leaks and Obama-Era Reforms

While President Barack Obama swept into the White House in 2008 on the back of a campaign built on hope and change, his administration brought more charges in national security leak cases than all previous administrations combined.[142] The administration took a scorched-earth approach to leak investigations and prosecutions, with one senior Department of Justice official warning a journalist that they were "out for scalps."[143] In 2006, New York Times reporter James Risen published a book discussing a failed CIA operation attempting to "disrupt" Iran's burgeoning nuclear program.[144] When former CIA officer Jeffrey Sterling was indicted four years later under the Espionage Act for leaking classified information,[145] Attorney General Eric Holder authorized a subpoena

[142] This is true both in terms of individuals charged and cumulative prison time, though President Trump's first term saw a similar level of leak prosecutions. *See* Gabe Rottman, *On Leak Prosecutions, Obama Takes it to 11. (Or Should We Say 526?)*, AM. CIV. LIBERTIES UNION (Oct. 14, 2014), https://www.aclu.org/news/free-speech/leak-prosecutions-obama-takes-it-11-or-should-we; *see also Incident Database,* U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us/all-incidents/?categories=Leak+Case; *Press-Related Espionage Act Prosecutions*, KNIGHT FIRST AMEND. INST. (Sept. 25, 2020), https://knightcolumbia.org/content/espionage-act-prosecutions-chart.

[143] *See* Shane Harris, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5009, 5012 (2011).

[144] *See* Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html; *see also* U.S. v. Sterling, 724 F.3d 482, 490 (4th Cir. 2013).

[145] Most government prosecutions for national security leaks involve charges under one of two sections of the Espionage Act. 18 U.S.C. §793(d), which applies to anyone who has lawful possession or access to, among other things, any "document, writing . . . or note relating to the national defense" or "information relating to the national defense," criminalizes an individual who "willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or . . . willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it." *See* 18 U.S.C. § 793(d). 18 U.S.C. § 793(e) contains similar language, but applies to one having "unauthorized possession of, access to, or control over" a document or information relating to the national defense. *See* 18 U.S.C. § 793(e). While a journalist has not been prosecuted under these provisions of the Act, many commentators have argued that journalists fall within the statutory language and risk potential prosecution. *See, e.g.* Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L. J. 233, 264 (2008) ("[T]he press plainly is vulnerable to

compelling Risen to testify about the source of his information.[146] Risen contested the subpoena on First Amendment grounds, but the Fourth Circuit denied his appeal, holding that *Branzburg* creates no constitutional reporter's privilege.[147] Risen appeared to testify but refused to identify his source, risking jail time; Attorney General Holder ultimately ordered prosecutors not to "demand" information and potentially open Risen up to contempt charges.[148]

While the high-profile Risen standoff attracted extensive public attention,[149] the backlash from two other incidents involving reporters and national security leak investigations eventually forced the Obama administration to change the Guidelines. After The Associated Press ("AP") published a 2012 story about a CIA operation that halted a planned terror attack, the Department of Justice launched an investigation to determine the source of the leaked information.[150] As part of the investigation, the Department subpoenaed two months of telephone records for twenty phone lines associated with the AP, including work and personal phone numbers for individual reporters and general office numbers.[151] This sweeping demand sparked protest from major news organizations, with the Reporters Committee for Freedom of the Press characterizing the subpoena as an "inexcusable breach" that violated reporters' First Amendment freedoms.[152]

At the same time, the Obama administration was also under fire for its handling of a separate leak investigation involving Fox News chief

indictment under these provisions."); Judson O. Littleton, *Eliminating Public Disclosures of Government Information from the Reach of the Espionage Act*, 86 TEX. L. REV. 889, 891 ("The fact that the language of § 793(e) is broad enough to encompass [media disclosures of information about U.S. foreign policy and the national defense] is unacceptable from both constitutional and policy perspectives."); *but see* Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 224 (2007) ("A number of judges and scholars have argued against the applicability of § 793(e) to the press because of the absence of an express reference to the 'publication' of such secret national security information.").

[146] *Sterling*, 724 F.3d at 490.

[147] *See id.* at 493–95.

[148] *See* Apuzzo, *supra* note 144.

[149] *See id.* ("The case became a rallying cry for journalism groups and civil rights advocates.").

[150] *Gov't Obtains Wide AP Phone Records in Probe*, THE ASSOCIATED PRESS (May 13, 2013), https://www.ap.org/media-center/ap-in-the-news/2013/govt-obtains-wide-ap-phone-records-in-probe/.

[151] *Id.*

[152] *See Media Organizations Call on Justice Department to Mitigate Damage from Broad Subpoena of Journalists' Phone Records*, REPS. COMM. FOR FREEDOM OF THE PRESS (May 14, 2013), https://www.rcfp.org/media-organizations-call-justice-department-mitigate-damage-broad-subpoena-journalists-phone-records/.

Washington correspondent James Rosen.[153] While investigating a State Department adviser for an Espionage Act violation, the Department of Justice obtained a warrant to seize all of Rosen's communication with the adviser, as well as two days' worth of personal emails.[154] In an affidavit supporting the warrant application, prosecutors referred to Rosen as "at the very least, either . . . an aider, abettor and/or co-conspirator."[155] Though Rosen was never charged with a crime, the classification of a reporter as an unindicted co-conspirator was deeply troubling to supporters of a free press.[156]

In an effort to defuse the controversies around press subpoenas, Attorney General Holder launched a "comprehensive evaluation" of internal practices and policies around news media.[157] This evaluation ultimately resulted in significant revisions to the Guidelines. Most notably, where the Guidelines previously required negotiations with the journalist only if they "*would not* pose a substantial threat" to the investigation,[158] the Department of Justice was now required to give "reasonable and timely" advance notice to the journalist unless the notice "*would pose* a clear and substantial threat" to the investigation, risk grave harm to national security, or cause an imminent risk of death or serious bodily harm.[159] In addition, subpoenas were explicitly classified (along with court orders under 18 U.S.C. § 2703(d) or 18 U.S.C. § 3123 and search warrants) as "*extraordinary* measures."[160]

The 2013 Guidelines represented an increased formalization of the Department's policies towards media subpoenas. They contained nearly

[153] *See* Tom McCarthy, *James Rosen: Fox News Reporter Targeted as 'Co-Conspirator' in Spying Case*, THE GUARDIAN (May 21, 2013, 4:00 AM), https://www.theguardian.com/world/2013/may/20/fox-news-reporter-targeted-us-government.

[154] Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html.

[155] *See* McCarthy, *supra* note 153.

[156] *See, e.g.,* Michael Isikoff, *DOJ Confirms Holder OK'd Search Warrant for Fox News Reporter's Emails*, NBC NEWS (May 23, 2013, 5:16 PM), https://www.nbcnews.com/news/investigations/doj-confirms-holder-okd-search-warrant-fox-news-reporters-emails-flna6c10054626.

[157] U.S. DEP'T OF JUST., REPORT ON REVIEW OF NEWS MEDIA POLICIES, at 1 (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf.

[158] *See* 28 C.F.R. § 50.10(g)(3) (1981) (emphasis added).

[159] 28 C.F.R. § 50.10(a)(4) (2014) (emphasis added); *see also* U.S. DEP'T OF JUST., REPORT ON REVIEW OF NEWS MEDIA POLICIES, at 2 (2013) https://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf (describing the change).

[160] 28 C.F.R. § 50.10(a)(3) (2014) (emphasis added); *see also* Hannah Bloch-Wehba, *Process Without Procedure: National Security Letters and First Amendment Rights*, 49 SUFFOLK UNIV. L. REV. 367, 407 (2016) ("The guidelines make clear that the use of subpoenas or search warrants to gather information or records from a member of the news media is an extraordinary event and not customary.").

three times as many words as the previous version of the guidelines.[161] A new "Scope" provision articulates covered individuals and entities, as well as the law enforcement tools and records subject to limitation.[162] The policy extended not only to subpoenas of news media members but also to demands for "communication records"[163] or "business records"[164] of news media members that are held by third parties.[165] In addition, investigators were encouraged to use minimization protocols like keyword searches and filter terms to "minimize intrusion into potentially protected materials or newsgathering materials unrelated to the investigation."[166]

The updated Guidelines also included several provisions specifically relating to national security leaks. New language exempted terrorists and foreign agents from the policy's protections.[167] While journalists could still be subpoenaed as part of national security leak investigations, the Guidelines require the Director of National Intelligence to directly certify to the Attorney General that the information in question was classified.[168] The Director is also required to articulate the "significance of the harm raised by the unauthorized disclosure."[169] While the statement of principles introducing the Guidelines emphasizes the protection of "ordinary" newsgathering activities, journalists who are the "focus" of criminal investigations receive no protection.[170]

Table 2: Notable Changes in the 2013 News Media Guidelines

Strengthening of advance notice requirement
Suggestion of minimization search protocols, including keyword searches and filter teams
Expanded applicability to 2703(d) orders, 3123 orders, journalist search warrants, and requests from third-party communication service providers
Certification of Director of National Intelligence in national security leak investigations

[161] The 2013 News Media Guidelines are more than 4400 words, while the 1980 News Media Guidelines are approximately 1600 words. *Compare* 28 C.F.R. § 50.10 (2014) *with* 28 C.F.R. § 50.10 (1981).

[162] *See* 28 C.F.R. § 50.10(b)(ii)(A)–(H) (2014).

[163] 28 C.F.R. § 50.10(b)(2)(ii)—(3)(i)(A) (2014) (defining "communications records").

[164] *See* 28 C.F.R. § 50.10(b)(3)(iii)(A) (2014) (defining "business records").

[165] 28 C.F.R. § 50.10(b)(2)(ii) (2014).

[166] 28 C.F.R. § 50.10(c)(5)(vi) (2014).

[167] *See* 28 C.F.R. § 50.10(b)(1)(ii)(A)—(G) (2014).

[168] *See* 28 C.F.R. § 50.10(c)(4)(iv) (2014).

[169] 28 C.F.R. § 50.10(c)(4)(iv) (2014).

[170] *See* 28 C.F.R. § 50.10(a)(1) (2014).

Definition of "exigent circumstances"
Exception to application for foreign agents/terrorists
Approval from lower-level DOJ employee when exigent circumstances exist
Additional balancing considerations
Protection for "ordinary" newsgathering activities

While many of the changes to the Guidelines signaled stronger protections for journalists, some changes either reflected a continued de-emphasis of press protections under the First Amendment or made it easier for prosecutors to subpoena members of the press. For example, the prior version of the guidelines called for the balancing between "the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice."[171] The 2013 Guidelines added several interests to consider, including national security and public safety.[172] In addition, the 2013 Guidelines added an exception to the previous Attorney General authorization requirement.[173] The United States Attorney or Assistant Attorney General responsible for the investigation may approve the subpoena when (1) the journalist has agreed to turn over the information; (2) the information is unrelated to ordinary newsgathering activities; (3) the information is related to public comments or posts where the journalist lacks editorial control; or (4) where the journalist may be a "perpetrator . . . victim . . . or witness to crimes where that status is not based on, or within the scope of, ordinary newsgathering duties."[174]

The 2013 changes to the Guidelines were widely praised by journalists and press advocacy groups.[175] However, the News Media Dialogue Group, a group of stakeholders created by Attorney General Holder

[171] 28 C.F.R. § 50.10(a) (1981).

[172] 28 C.F.R. § 50.10(a)(2) (2014).

[173] *See* 28 C.F.R. § 50.10(c)(3)(i)–(ii) (2014).

[174] 28 C.F.R. § 50.10(c)(3)(i)–(ii) (2014).

[175] *See, e.g.*, Nicole Meir, *AP CEO Welcomes DOJ's Revised Media Guidelines*, THE ASSOCIATED PRESS (June 15, 2015), https://www.ap.org/the-definitive-source/announcements/ap-ceo-welcomes-dojs-revised-media-guidelines/; *SPJ Cautiously Supports DOJ's Latest Regulations About Acquiring News Organizations' Records*, SOCIETY OF PROFESSIONAL JOURNALISTS (Feb. 25, 2014), https://www.spj.org/spj-cautiously-supports-dojs-latest-regulations-about-acquiring-news-organizations-records/; *Amending the Department of Justice Subpoena Guidelines*, REPS. COMM. FOR FREEDOM OF THE PRESS https://www.rcfp.org/attorney-general-guidelines/ (last visited Dec. 10, 2025) (stating that the revisions "addressed most of the concerns that the journalism coalition sought"); *see also* Anthony L. Fargo, *Protecting Journalists' Sources Without a Shield: Four Proposals*, 24 COMMC'N. L. & POL'Y 145, 156 (2019) (referring to Attorney General Holder's revised News Media Guidelines as "mak[ing] it more cumbersome" to get approval for subpoenas of media members).

during his initial review, identified several instances of unclear language in the newly revised guidelines.[176] This led the Attorney General to promulgate another version of the Guidelines in 2015 with the intent to "clarify and expand the scope of the policy."[177] The 2015 Guidelines removed the word "ordinary" from 2013's "ordinary news gathering activities," intending to broaden protection and prevent Department of Justice employees from arguing that journalists were engaged in *extraordinary* newsgathering activities in an effort to avoid the procedural restrictions in the guidelines.[178] In addition, while the previous Guidelines exempted prosecutors from adhering to the Guidelines when journalists were the "focus" of criminal investigations, the 2015 Guidelines clarified that that exemption only applied when journalist were "subjects or targets" of a criminal investigation.[179] Finally, the definition of "business records," which require adherence to the Guidelines, was expanded to include the work product and other documentary materials of a journalist.[180]

Table 3: Notable Changes in the 2015 News Media Guidelines

Removal of "ordinary" in "ordinary newsgathering activities"
"Business records" includes work product
Removal of protection when journalist is "focus" of investigation shifted to when journalist is "subject or target" of the investigation

B. "Simply, Simply Wrong": Biden's Reaffirmation of the News Media Guidelines

The election of President Donald Trump in 2016 represented an existential crisis for mainstream journalists. During a tense and contentious 2016 campaign, President Trump repeatedly criticized reporters, referring

[176] *Amending the Department of Justice Subpoena Guidelines*, REPS. COMM. FOR FREEDOM OF THE PRESS https://www.rcfp.org/attorney-general-guidelines/ (last visited Dec. 10, 2025) (noting that the News Media Dialogue Group worked with Attorney General Holder and Department of Justice officials to amend the rules); *see also* U.S. DEP'T OF JUST., REPORT ON REVIEW OF NEWS MEDIA POLICIES at 6 (2013) (establishing the News Media Dialogue Group).

[177] Memorandum from Attorney Gen. Eric Holder to all Justice Dep't Emps. (Jan. 14, 2015), https://perma.cc/PV9M-VT37.

[178] *See* 28 C.F.R. § 50.10(a)(1) (2016).

[179] *Id.*

[180] *See* 28 C.F.R. § 50.10(b)(3)(iii)(A) (2016).

to them as "dishonest,"[181] "not good people,"[182] and "disgusting."[183] He suggested on multiple occasions that the election was being "rigged by the media" in coordination with the campaign of Democratic nominee Hillary Clinton.[184] This rhetoric likely played a role in shifting public perceptions of the news media. A Gallup poll published in September 2016 showed that only 32 percent of Americans trusted the mass media to report the news "fully, accurately, and fairly," including only 14 percent of Republicans.[185]

After President Trump's election, mainstream media outlets and reporters grappled with their role in his rise to power. Journalists faced continued criticism from the Trump administration for being biased and corrupt while simultaneously being castigated by press advocacy groups and liberals for coverage seen as insufficiently focused on policy positions.[186] At the same time, President Trump continued to escalate his attacks on the press, referring to them as the "enemy of the American people."[187] He also tied his criticism of the press to "leakers," suggesting in a 2018 tweet that the "Fake News Media" published information provided by "traitors and cowards" in order to make his administration look bad.[188]

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[181] Jeremy Diamond, *Trump Launches All-Out Attack on the Press*, CNN (June 1, 2016), https://www.cnn.com/2016/05/31/politics/donald-trump-veterans-announcement.

[182] *Id.*

[183] Rebecca Morin, *Trump blames 'disgusting' media: 'I would be beating Hillary by 20%,'* POLITICO (Aug. 14, 2016), https://www.politico.com/story/2016/08/trump-on-nyt-their-reporting-is-fiction-226988.

[184] *See, e.g.* Donald Trump (@realDonaldTrump), X (Oct. 16, 2016, 8:31 AM), https://x.com/realDonaldTrump/status/787632098794467328 ("Election is being rigged by the media, in a coordinated effort with the Clinton campaign, by putting stories that never happened into news!"); Donald Trump (@realDonaldTrump), X (Oct. 16, 2016, 1:01 PM), https://x.com/realDonaldTrump/status/787699930718695425 ("The election is absolutely being rigged by the dishonest and distorted media pushing Crooked Hillary - but also at many polling places – SAD[.]").

[185] *See* Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx.

[186] *See, e.g.* Thomas E. Patterson, *News Coverage of the 2016 General Election: How the Press Failed the Voters*, HARV. SHORENSTEIN CTR. (Dec. 7, 2016), https://shorenstein-center.org/news-coverage-2016-general-election/; Duncan J. Watts & David M. Rothschild, *Don't blame the election on fake news. Blame it on the media.,* COLUM. JOURNALISM REV. (Dec. 5, 2017), https://www.cjr.org/analysis/fake-news-media-election-trump.php.

[187] Donald Trump (@realDonaldTrump), X (Feb. 17, 2017, 4:48 PM), https://x.com/realDonaldTrump/status/832708293516632065 ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!").

[188] *See* Donald Trump (@realDonaldTrump), X (May 14, 2018, 1:48 PM), https://x.com/realDonaldTrump/status/996129630913482755, ("The so-called leaks coming out of the White House are a massive over exaggeration put out by the Fake News Media in order to make us look as bad as possible. With that being said, leakers are traitors and cowards, and we will find out who they are!").

While President Trump's first term represented an aggressive rhetorical shift from the Obama administration, his Department of Justice used many of the same tactics to investigate journalists connected to leaks of national security information. After President Trump criticized Attorney General Jeff Sessions for being "VERY weak" on leakers, Sessions held a press conference and stated that his Department had "tripled" the number of leak investigations from the Obama administration.[189] In June 2018, James Wolfe, the former director of security for the Senate Intelligence Committee, was arrested and charged with lying about contacts with reporters.[190] As part of the investigation, investigators subpoenaed phone and email records for Ali Watkins, a New York Times reporter who had been in an romantic relationship with Wolfe.[191]

Several aspects of the Watkins subpoena were seen as concerning by journalists and press freedom advocates. While most of the seizures under the Obama administration had been temporally limited, the subpoena of Watkins' email and phone captured records dating back multiple years.[192] Gabe Rottman, vice president of policy at the Reporters Committee for Freedom of the Press, noted that the subpoena's breadth might allow the Trump administration to "identify a multitude of confidential sources beyond Wolfe."[193] In addition, the indictment of Wolfe referenced his interactions with Watkins and other reporters on Signal and WhatsApp, both encrypted messaging apps that ostensibly provide a confidential avenue for reporters to communicate with sources.[194] And despite the Guidelines presuming advance notice for reporters subject to subpoenas, Watkins received delayed notice of the subpoena in February 2018.[195] While the 2015

[189] Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says,* N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html. The Trump administration would ultimately investigate 334 people for leaking information to the press during President Trump's first term. *See* Kyle Paoletta, *A New Normal*, COLUM. JOURNALISM REV. (Oct. 22, 2024), https://www.cjr.org/covering_the_election/new-normal-paoletta-trump-espionage-act-project-2025-prosecute-enemies.php.

[190] *See* Adam Goldman, Nicholas Fandos, & Katie Benner, *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.

[191] *See id.*

[192] *See* Michael M. Grynbaum, *Press Groups Criticize the Seizing of a Times Reporter's Records*, N.Y. TIMES (June 8, 2018), https://www.nytimes.com/2018/06/08/business/media/ali-watkins-records-seized.html.

[193] *See* Gabe Rottman, *A Typology of Federal News Media "Leak" Cases*, 93 TUL. L. REV. 1147, 1148 n. 6 (2019)

[194] Anthony L. Fargo, *The End of the Affair: Can the Relationship Between Journalists and Sources Survive Mass Surveillance and Aggressive Leak Prosecutions?*, 26 COMM. L. & POL'Y 187, 204 (2021) ("Both of those messaging apps are supposed to be encrypted, so how did the government get in?").

[195] *See* Grynbaum, *supra* note 192.

Guidelines contained an exception to the presumption of advance notice, that only applied if the Attorney General found "compelling reasons" that notice 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."[196] It is unclear whether the personal relationship between Wolfe and Watkins was sufficient to represent a clear and substantial threat to the investigation.

Some of the Trump administration's most aggressive news media subpoenas were not revealed until after President Joe Biden took office in 2021.[197] Between 2017 and 2020, the Department of Justice issued subpoenas to third parties for communications records for eight reporters working for CNN, The Washington Post, and The New York Times.[198] The subpoenas were part of a larger leak investigation that also led to subpoenas of the records of forty-three congressional staffers and two Democratic members of Congress.[199] A 2024 report from the Department of Justice's Office of Inspector General revealed that DOJ investigators had not complied with existing DOJ media guidelines by (1) failing to obtain Director of National Intelligence certification (as required in investigations involving national security leaks); (2) failing to convene the News Media Review Committee to consider the authorization requests; and (3) failing to obtain Attorney General approval for non-disclosure orders that accompanied the subpoenas.[200]

President Biden was deeply concerned about the Trump administration's broad use of subpoenas for journalists, calling it "simply, simply wrong" and vowing not to use subpoenas for journalists' data.[201] President Biden's comment was off-the-cuff, but after meeting with media members,

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[196] *See* 28 C.F.R. § 50.10(a)(3) (2016).

[197] *See* Press Release, U.S. Dep't of Just., Off. of Inspector Gen., DOJ OIG Releases Report on DOJ Obtaining Records of Members of Congress, Congressional Staffers, and Members of the News Media using Compulsory Process (Dec. 10, 2024), https://oig.justice.gov/news/doj-oig-releases-report-doj-obtaining-records-members-congress-congressional-staffers-and; *see generally* U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., A REVIEW OF THE DEPARTMENT OF JUSTICE'S ISSUANCE OF COMPULSORY PROCESS TO OBTAIN RECORDS OF MEMBERS OF CONGRESS, CONGRESSIONAL STAFFERS, AND MEMBERS OF THE NEWS MEDIA (2024).

[198] *See supra* note 197.; *see also* Ryan Lucas, *Trump-Era Justice Department Subpoenaed Congressional Staffers, Watchdog Finds*, NPR (Dec. 10, 2024), https://www.npr.org/2024/12/10/g-s1-37644/justice-department-subpoenae-trump.

[199] *See supra* notes 197–98.

[200] Press Release, U.S. Dep't of Just., Off. of Inspector Gen., DOJ OIG Releases Report on DOJ Obtaining Records of Members of Congress, Congressional Staffers, and Members of the News Media using Compulsory Process, https://www.justice.gov/d9/2022-12/media_memo_07-19-2021.pdf.

[201] Charlie Savage, *White House Seems to Affirm Biden's Vow to Bar Seizures of Reporters' Phone Data*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/us/politics/biden-reporter-data-seizures.html?action=click&module=RelatedLinks&pgtype=Article.

Attorney General Merrick Garland issued a Department of Justice memorandum in July 2021 directing employees to "no longer use compulsory legal process" for journalists acting within the scope of newsgathering duties.[202] In his memo, Garland suggested the balancing test previously incorporated in the Guidelines was insufficiently protective of journalists.[203]

The following year, the Department of Justice would promulgate formal News Media Guidelines reflecting the policy change.[204] The 2022 Guidelines include several drastic changes from 2015. The first sentence of the guidelines notes that a "free and independent press is vital to the functioning of our democracy," laying the groundwork for stronger journalist protections.[205] The Guidelines then recognize the "important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their Government[,]"[206] before explicitly stating that protecting journalists from "compelled disclosure of information revealing their sources" is key to an open society.[207]

Table 4: Notable Changes in the 2022 News Media Guidelines

Prohibition on compulsory process for obtaining information from or records of journalists acting within scope of newsgathering
Language on importance of free and independent press to democracy
Broad definition of compulsory legal process to include records held by third parties
Though they are narrow in scope, some exceptions to the prohibition remain

The 2022 Guidelines maintain many of the procedures in place from the Obama-era guidelines. However, there is a general prohibition on Department of Justice use of "compulsory legal process" for obtaining information from or records of news media members acting within the scope of newsgathering.[208] The "mere receipt, possession, or publication of

[202] Memorandum from Merrick Garland, U.S. Att'y Gen., to Fed. Prosecutors (July 19, 2021), https://www.justice.gov/d9/2022-12/media_memo_07-19-2021.pdf.

[203] *Id.*

[204] *See* Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 87 Fed. Reg. 2820 (Nov. 3, 2022) (codified at 28 C.F.R. pt. 50).

[205] *See* 28 C.F.R. § 50.10(a)(1) (2023).

[206] 28 C.F.R. § 50.10(a)(2) (2023).

[207] *See* 28 C.F.R. § 50.10(a)(3) (2023).

[208] *See* 28 C.F.R. § 50.10(a)(2) (2023). Compulsory legal process is broadly defined as:

classified information" is explicitly protected as newsgathering under the guidelines, directly limiting many of the subpoenas issued under the Obama and Trump administrations.[209] Compulsory legal process for journalists engaged in newsgathering was only permissible to authenticate already-published information, to obtain information or records with the consent of the journalist, or when necessary to prevent imminent or concrete risk of death or serious bodily harm.[210] Outside of those narrow exceptions, department investigators and prosecutors could only subpoena a news media member if they were the subject or target of a criminal investigation outside the scope of newsgathering[211] or a terrorist or foreign agent.[212] Additionally, the prohibition did not apply if the journalist used "criminal acts" to obtain government information.[213]

III. 2025: "SOUNDING THE ALARM" ON AN UNCERTAIN FUTURE

President Biden's changes to the Guidelines were widely praised by media organizations and advocacy groups.[214] For the first time, the

> [S]ubpoenas, search warrants, court orders issued pursuant to 18 U.S.C. 2703(d) and 3123, interception orders issued pursuant to 18 U.S.C. 2518, civil investigative demands, and mutual legal assistance treaty requests—regardless of whether issued to members of the news media directly, to their publishers or employers, or to others, including third-party service providers of any of the forgoing, for the purpose of obtaining information from or records of members of the news media, and regardless of whether the compulsory legal process seeks testimony, physical or electronic documents, telephone toll or other communications records, metadata, or digital content.

28 C.F.R. § 50.10(b)(2)(i) (2023).

[209] *See* 28 C.F.R. § 50.10(b)(2)(ii)(A) (2023).

[210] 28 C.F.R. § 50.10(c)(1)–(3) (2023).

[211] *See* 28 C.F.R. § 50.10(a)(1) (2023).

[212] 28 C.F.R. § 50.10(b)(3)(i)(A)–(H) (2023).

[213] 28 C.F.R. § 50.10(b)(2)(ii)(B) (2023).

[214] *See, e.g., 'Night and Day': The Biden Administration and the Press*, COMM. TO PROTECT JOURNALISTS (Jan. 13, 2022), https://cpj.org/reports/2022/01/night-and-day-the-biden-administration-and-the-press/; Hannah Bloch-Wehba, *The Ideology of Press Freedom*, 14 UC IRVINE L. REV. 1, 47–48 (2024) ("[P]ress institutions sought and received special treatment that would effectively afford journalists an exemption from the typical criminal investigative procedures. Strikingly, the government appeared to agree with press advocates."). Despite praise for changes to the News Media Guidelines, President Biden's record on First Amendment issues involving journalists was far from perfect. The Biden administration continued to pursue the prosecution of WikiLeaks founder Julian Assange under § 793 of the Espionage Act. While Assange ultimately agreed to a plea deal, press freedom argued that the activities Assange was prosecuted for—obtaining, retaining, and disclosing sensitive information—were identical to the activities journalists undertake in stories on sensitive national security issues. In response, the

Guidelines were written as a quasi-reporter's privilege, with a broad prohibition on when federal prosecutors could subpoena members of the news media. The looming specter of the 2024 presidential election signaled a drastically different path. In the last two months of the 2024 campaign, then-candidate Donald Trump verbally attacked the media more than 100 times, including explicitly threatening to subpoena the records of CBS media members and suggesting that journalists who published a draft Supreme Court opinion should be jailed until they revealed their sources.[215] Shortly before his re-election, President Trump joked about a failed assassination attempt by saying that he would not mind if someone had to "shoot through the fake news" to try and assassinate him.[216] After President Trump was inaugurated in January 2025, he quickly launched a "muscular and precise" attack on the media, slashing funding and repeatedly threatening litigation.[217]

The remaining sections will discuss the Trump administration's changes to the Guidelines. The May 2025 changes not only weakened procedural protections preventing journalist subpoenas but also signal a shift in priorities. This Part will examine those changes and why they matter.

A. "This Justice Department Will Not Tolerate Unauthorized Disclosures": The Trump Administration's Revised News Media Guidelines

Despite then-Attorney General Jeff Sessions' threats to rewrite the Guidelines, the Guidelines remained unchanged during President Trump's first term.[218] While some may have hoped that a similar pattern would repeat itself, a series of embarrassing leaks involving senior Trump

Biden administration argued that Assange should not be classified as a journalist. *See, e.g.,* Paul Karp, *US Lawmakers Urge Biden to Pardon Assange to Send 'Clear Message' On Media Freedom*, THE GUARDIAN (Nov. 26, 2024), https://www.theguardian.com/australia-news/2024/nov/27/joe-biden-urged-to-pardon-julian-assange-congressmen-letter; Seth Stern, *Prosecuting Journalists Complicates Biden's Press Freedom Legacy*, LAWFARE (Jan. 30, 2025), https://www.lawfaremedia.org/article/prosecuting-journalists-complicates-biden-s-press-freedom-legacy.

[215] Clayton Weimers, *USA: Trump Verbally Attacked the Media More Than 100 Times in Run-Up to Election,* REPORTERS WITHOUT BORDERS (Oct. 25, 2025), https://rsf.org/en/usa-trump-verbally-attacked-media-more-100-times-run-election.

[216] Jacob Rosen & Olivia Rinaldi, *Trump Says "I Don't Mind" If Someone Had To Shoot Through Media*, CBS NEWS (Nov. 3, 2024), https://www.cbsnews.com/news/donald-trump-lititz-pennsylvania-rally-shoot-through-media-bulletproof-glass/.

[217] *See* Jess Bidgood, *Trump Sharpens Attacks on a Favorite Foe: The News Media*, N.Y. TIMES (July 21, 2025), https://www.nytimes.com/2025/07/21/us/politics/trump-news-media.html.

[218] *See* Gerstein & Conway, *supra* note 22.

administration officials meant that the writing was on the wall.[219] On April 25, 2025, Attorney General Pam Bondi issued a memorandum to Department of Justice employees immediately rescinding the Biden administration's reforms to the Guidelines.[220] Bondi's memo led with criticism of national security leaks, suggesting that they are "illegal and wrong" and suggesting that changes to the Guidelines were necessary to reduce leaks.[221] Attorney General Bondi reiterated that a free and independent press is "vital to the functioning of our democracy," but simultaneously criticized members of the "legacy news media" for a lack of independence.[222] She also implied that Biden administration officials had strategically used changes to the Guidelines to leak damaging information about President Trump.[223]

Less than two weeks later, the Trump administration promulgated a new set of Guidelines which remain in effect as of August 2025.[224] Every significant procedural reform from the 2022 Guidelines was rescinded, largely reverting the Guidelines back to their Obama-era form. The updated Guidelines retain language classifying subpoenas of news media as "extraordinary measures,"[225] while the presumption of advance notice for a news media subpoena also remains.[226] However, two changes in particular have legal implications for journalists using confidential sources. First, the 2025 Guidelines revert to the multi-factor balancing inquiry criticized

[219] Notably, The Atlantic editor-in-chief Jeffrey Goldberg was accidentally added to a group chat discussing plans for a classified military operation in Yemen, while a top aide to Defense Secretary Pete Hegseth claimed he was targeted for his opposition to airstrikes in Iran after being fired as part of a leak investigation. *See, e.g.,* Jeffrey Goldberg, *The Trump Administration Accidentally Texted Me Its War Plans*, ATLANTIC (Mar. 24, 2025), https://www.theatlantic.com/politics/archive/2025/03/trump-administration-accidentally-texted-me-its-war-plans/682151/; Jack Detsch & Gregory Svirnovskiy, *Fired Pentagon Adviser Says He Threatened 'Established Interests,'* POLITICO (Apr. 21, 2025), https://www.politico.com/news/2025/04/21/fired-pentagon-adviser-threatened-established-interests-00302336.

[220] *See* Memorandum from Pam Bondi, U.S. Att'y Gen., to Dep't of Just. Emps. (Apr. 25, 2025), https://www.documentcloud.org/documents/25919716-attorney-general-bondi-memorandum-updated-policy-regarding-obtaining-information-from-or-records-of-members-of-the-news-media/.

[221] *Id.* at 1.

[222] *Id.* at 2.

[223] *Id.*

[224] *See* Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 90 Fed. Reg. 18785 (May 2, 2025) (codified at 28 C.F.R. pt. 50) (promulgating the revised DOJ News Media Guidelines).

[225] 28 C.F.R. § 50.10(a)(3) (2025).

[226] As with the Obama-era guidelines, there is an exception to the requirement of advance notice where the Attorney General determines that notice "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." *See* 28 U.S.C. § 50.10(e)(1) (2025).

by the Biden administration as insufficiently restrictive.[227] The 2022 changes were initially made in response to widespread subpoenas of journalists by the Trump administration under that same balancing test,[228] so this reversion suggests that news media subpoenas may be more common in the years to come. The balancing language in the 2022 Guidelines tied the interest in a free press to "protecting members of the news media from compelled disclosure of information revealing their sources," but the 2025 Guidelines removed that provision.[229]

Second, the 2022 Guidelines explicitly included the "mere receipt, possession, or publication of Government information . . . as well as establishing a means of receiving such information" within the definition of protected newsgathering.[230] The 2025 Guidelines remove that provision, suggesting that the Trump administration may justify subpoenas of journalists simply for receiving classified information from a source.[231] This possibility is exacerbated by the fact that the 2025 Guidelines provide protection only for media members engaged in "lawful newsgathering activities,"[232] rather than the general "newsgathering activities" protected since the 2015 Guidelines[233] or even the "ordinary newsgathering activities" under the 2014 Guidelines.[234] In addition, the Guidelines do not apply to news media members who are "the focus" of criminal investigations, removing the narrower "subject or target" requirement from the 2015 Guidelines.[235]

Though many recent controversies around subpoenas of journalist communication records have involved the unauthorized disclosure of classified information, Attorney General Bondi's memorandum refers to

[227] 28 C.F.R. § 50.10(a)(2) (2025); *see also* Memorandum from Merrick Garland, U.S. Att'y Gen., to Fed. Prosecutors (July 19, 2021), https://www.justice.gov/d9/2022-12/media_memo_07-19-2021.pdf (eliminating the balancing test because it "fail[ed] to properly weight the important national interest in protecting journalists from compelled disclosure of information revealing their sources").

[228] *See* Savage, *supra* note 201.

[229] *Compare* 28 C.F.R. § 50.10(a)(3) (2022) (specifying protection for news media members), *with* 28 C.F.R. § 50.10 (a)(3) (2025) (specifying no such protection).

[230] 28 C.F.R. § 50.10(b)(2)(ii)(A) (2022).

[231] *Compare id. with* 28 C.F.R. § 50.10 (b) (2025) (lacking any definition of newsgathering).

[232] *See* 28 C.F.R. § 50.10(a)(1) (2025).

[233] *See* 28 C.F.R. § 50.10(a)(1) (2015); 28 C.F.R. § 50.10(a)(1) (2022).

[234] *See* 28 C.F.R. § 50.10(a)(1) (2014).

[235] *Compare* 28 C.F.R. § 50.10(a)(1) (2025) ("The policy is not intended to extend special protections to members of the news media who are the focus of criminal investigations for conduct not based on, or within the scope of, such activities."), *with* 28 C.F.R. § 50.10(b) (2015) ("The policy is not intended to extend special protections to members of the news media who are subjects or targets of criminal investigations for conduct not based on, or within the scope of, newsgathering activities.").

punishing the leaking of "sensitive and sometimes classified information."[236] This suggests that the Trump administration may investigate and exercise subpoena power for not only leaks of classified information but also the much broader categories of "sensitive," "privileged," or "protected"
information.[237]

Table 5: Notable Changes in the 2025 News Media Guidelines

Retains advance notice provision
Continued classification of press subpoenas as extraordinary measures
Removal of prohibition on compulsory legal process targeting journalists
Removal of "receipt, possession, or publication" from protected category of newsgathering
Return to exception for journalists who are the "focus" of criminal investigations, rather than those who are the "subject or target"

The 2022 Guidelines led with the sentence "A free and independent press is vital to the functioning of our democracy" before broadly prohibiting the use of compulsory legal process against members of the news media.[238] While the 2025 Guidelines drastically narrow protections from subpoena by federal investigators for journalists, they also remove that sentence.[239] The symbolism of removing such a statement is emblematic of the Trump administration's approach to the news media. The return to a balancing test for the Guidelines already inherently weakens the procedural barriers limiting how federal prosecutors can use subpoenas to compel information related to confidential sources. Actively removing a statement assuring that journalists serve a key role in democracy implies that the Trump administration may not think that they do. Given the rhetoric and policy positions of the administration, Department of Justice officials weighing First Amendment interests of journalists against finding the perpetrators of national security leaks are unlikely to reach a result favoring the media.

[236] Memorandum from Pam Bondi, U.S. Att'y Gen., to Dep't of Just. Employees, at 3 (Apr. 25, 2025), https://www.documentcloud.org/documents/25919716-attorney-general-bondi-memorandum-updated-policy-regarding-obtaining-information-from-or-records-of-members-of-the-news-media/; *see also* Gabe Rottman, *US Justice Department Rescinds Biden-Era Protections for Press*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Apr. 30, 2025), https://www.rcfp.org/doj-rescinds-news-media-guidelines-analysis/.

[237] *See id.*

[238] *See* 28 C.F.R. § 50.10(a)(1) (2023).

[239] *Compare* 28 C.F.R. § 50.10(a)(1) (2023) *with* 28 U.S.C. § 50.10 (a)(1) (2025) (eliminating statement on value of free and independent press).

B. The Limits of the News Media Guidelines

In the early days of the first Trump presidency in 2017, RonNell Andersen Jones and Lisa Grow Sun warned that the President has "extensive power" to shape prosecutorial discretion through the Department of Justice News Media Guidelines.[240] Given President Trump's repeated attacks on the press, they suggested his administration would "capitalize on this enemy construction to justify guidelines that more frequently, and more aggressively, compel reporters to divulge their sources."[241] Eight years later, those changes have largely come to fruition. President Trump used sweeping subpoenas of journalists to identify leakers during his first term[242] and, in the face of multiple prominent national security leaks, he has threatened to do the same in his second term.[243] The recently promulgated Guidelines significantly weaken protection from compulsory legal process for journalists, but there may not be an alternative source of protection for journalists subpoenaed in federal court.

The continued ambiguity of the *Branzburg* decision has led many federal courts to recognize some form of constitutional protection for reporters challenging the compelled disclosure of confidential sources, but courts are far from unanimous on the issue.[244] When Attorney General John Mitchell first announced the creation of the Guidelines, he urged that consensus on a constitutional reporter's privilege was "imperative" to avoid "dozens of conflicting results" as state and federal courts faced the issue.[245]

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[240] RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1353–54 (2017).

[241] *Id.* at 1354.

[242] *See* Lucas, *supra* note 198.

[243] *See* Dunbar, *supra* note 9.

[244] *See generally Introduction to the Reporter's Privilege Compendium,* REPORTERS COMM. FOR FREEDOM OF THE PRESS (Nov. 5, 2021), https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/ (noting that all federal circuits other than the Seventh and Eighth Circuits have acknowledged a qualified reporter's privilege derived from the First Amendment in at least some circumstances); *see, e.g.,* Alharbi v. Theblaze, Inc., 199 F. Supp. 3d 334, 348 (D. Mass. 2016) ("The First Circuit has not decided the 'semantic question of whether the protection afforded to a journalist's sources and research is a type of privilege.' Instead, the First Circuit applies a 'heightened sensitivity to First Amendment concerns and invite[s] a balancing of considerations.'"); Baker v. F & F Inv., 470 F.2d 778, 785 (2d Cir. 1972) (upholding a lower court decision allowing reporter to refuse to disclose identity of confidential source); *but see* U. S. v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013) (declining to recognize a reporter's privilege in a criminal leak investigation involving Fox News reporter James Risen); *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, Miller v. United States, 545 U.S. 1150 (2005), *superseded,* 438 F.3d 1141, 1153 (D.C. Cir. 2006) (refusing to recognize a First Amendment reporter's privilege in a case involving New York Times reporter Judith Miller).

[245] *See* Mitchell, *supra* note 93, at 21–22 (calling for a study of the "fair trial-free press issue" as it relates to subpoenas of the press).

The *Branzburg* majority called for Congress to take action and enact a federal reporter's privilege law but also urged state legislatures to address the problem as they see fit.[246] Thirty-two states have heeded that call and enacted a reporter's shield law, though (1) state reporter's shield laws do not provide protection in federal court absent diversity jurisdiction; and (2) state statutes vary widely in how they define a "reporter," whether they provide a qualified or absolute privilege, and whether the privilege applies to confidential information, nonconfidential information, or both.[247]

Meanwhile, a federal shield law is yet to pass through both houses of Congress and be signed into law. The PRESS Act, the most recent legislative attempt, would have placed limits on compelled disclosure from both journalists and "service providers" possessing a journalist's communication records.[248] The bill broadly prohibited compulsory legal process of journalists without approval of a court in the relevant judicial district after the journalist received notice and an opportunity to be heard.[249] Similarly, compelled disclosure from a service provider would only be permitted where a court finds "reasonable threat of imminent violence."[250] If a court did make such a finding, the journalist would be entitled to notice and an opportunity to be heard before the information is compelled.[251] The only exception to the notice requirement occurred with clear and convincing evidence that notice would pose a "clear and substantial threat to the integrity of a criminal investigation, or . . . an imminent risk of death or serious bodily harm . . . ."[252] The PRESS Act received praise from news media organizations[253] and passed the House of Representatives unanimously,[254] but the bill died in the Senate after President Trump demanded

[246] *Branzburg*, 408 U.S. at 706 ("There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards . . . with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from . . . recogniz[ing] a newsman's privilege, either qualified or absolute.").

[247] *See supra* note 13 and accompanying text.

[248] Protect Reporters from Exploitative State Spying Act, H.R. 4250, 118th Cong. (2024).

[249] *See id.* at § 3.

[250] *Id.* at § 4(a).

[251] *Id.* at § 4(b)–(c).

[252] *Id.* at § 4(c)(2)(B).

[253] *Reporters Committee Urges Congress to Pass PRESS Act*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Oct. 8, 2024), https://www.rcfp.org/press-act-letters-house-senate/ (quoting a letter praising the PRESS Act sent on behalf of 108 news media and press rights organizations).

[254] Press Release, Rep. Jamie Raskin (D-MD), Raskin, Kiley's Bipartisan PRESS Act Unanimously Passes House of Representatives (Jan. 20, 2024), https://raskin.house.gov/2024/1/raskin-kiley-s-bipartisan-press-act-unanimously-passes-house-of-representatives.

"REPUBLICANS MUST KILL THIS BILL" in a social media post.[255] U.S. Senator Tom Cotton (R-AR) blocked the law, stating that the "liberal media doesn't deserve more protections."[256] The futile attempts to advance a federal reporter's shield law through Congress are likely to continue. The previous version of such a law, the Free Flow of Information Act, was proposed at least five different times in the Senate without success.[257]

In the absence of a federal reporter's shield law or definitive case law articulating a constitutional reporter's privilege, the Department of Justice's News Media Guidelines may be the "most important protection for news-gathering and reporting at the federal level."[258] For the last fifty years, government officials have argued that the Guidelines are an effective substitute for a statutory shield protection.[259] The Guidelines are certainly worthy of praise. Since 1970, they have placed procedural limits on the Department of Justice's ability to use subpoenas of news media members or of third parties possessing communication records of news media. They refer to press subpoenas as extraordinary measures outside of the normal scope of investigatory practice.[260] Yet their protections are mostly aspirational. Reporters who feel that federal prosecutors subpoenaed them in violation of Guidelines have no legal remedy. Most concerningly, the Guidelines can be altered at will by the Attorney General.[261] The changes made by the Trump administration represent the first time an administration has acted to weaken the Guidelines, setting a dangerous precedent and raising questions about how President Trump plans to approach press subpoenas during the remainder of his second term.

[255] Donald Trump (@realDonaldTrump), TRUTH SOCIAL (Nov. 20, 2024, 2:37 PM), https://truthsocial.com/@realDonaldTrump/posts/113516968142292237.

[256] Lauren Irwin, *Cotton Blocks Federal Shield Law for Journalists*, THE HILL (Dec. 10, 2024), https://thehill.com/homenews/senate/5033592-cotton-blocks-federal-shield-law-journalists/.

[257] *See, e.g.,* Free Flow of Information Act of 2005, S. 340, 109th Cong. (2005); Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006); Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007); Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009); Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

[258] Rottman, *supra* note 236.

[259] *See Hearing on H.R. 215*, *supra* note 100; *see also* Letter from Michael B. Mukasey, U.S. Att'y Gen. & J.M. McConnell, Dir. Of Nat'l Intel., to Sen. Harry Reid & Sen. Mitch McConnell (Apr. 2, 2008), https://www.justice.gov/archive/opa/mediashield/ag-dni-ltr-s2035-040208.pdf (expressing intelligence community opposition to the potential passage of a reporter's shield law and noting that advisors would recommend that then-President Bush veto the bill if made it to his desk).

[260] 28 C.F.R. § 50.10(a)(3) (2025).

[261] *See supra* notes 16–19 and accompanying text.

CONCLUSION

At a 2013 gathering of the Federalist Society, former Attorney General Michael Mukasey argued that the Department of Justice's approach to news media subpoenas had essentially adopted the dissent's suggestions in *Branzburg*, suggesting that an appropriate alternative to a federal reporter's privilege law is "common sense and restraint on both sides."[262] Yet when the first substantive changes to the Guidelines were made in 1980, The New York Times quoted an unnamed senior Department of Justice official as warning that the guidelines could be changed "at the stroke of a pen."[263] Those two statements capture the promise and the peril of the Department of Justice's News Media Guidelines. In the absence of a federal reporter's privilege, the Guidelines are intended to provide similar protections. Despite their judicial unenforceability, they forced federal investigators and prosecutors to weigh policy interests in freedom of speech and the administration of justice. Each evolution of the Guidelines had strengthened protections for journalists, making it harder for federal prosecutors to use compulsory legal process against the media. At their high-water mark during the Biden administration, the Guidelines prohibited subpoenas of news media in nearly all circumstances.[264]

Recent changes made by the Trump administration offer a cautionary note about the limits of the Guidelines. For the first time, the Department of Justice significantly weakened its policies to make it easier to subpoena media members. Even for the protections that remain, nothing forces the Department to adhere to the Guidelines other than vague mentions of "administrative reprimand or other appropriate disciplinary action" for employees who do not comply.[265] President Trump's caustic rhetoric towards the press has left many journalists and advocates fearing the potential damage a second Trump presidency could do to the Fourth

[262] Michael Mukasey et al., *Federalist Society for Law and Public Policy: 2013 National Lawyers Convention Criminal Law: Criminal Law Enforcement v. the Free Press*, 39 U. DAYTON L. REV. 379, 393 (2015) ("At the Justice Department, I will tell you that there is a whole set of procedures, including a requirement that the Attorney General approve any subpoena for a reporter before it's served. So in essence, the position of the dissent in *Branzburg* has been carried through administratively by actual practice within the Justice Department. I think what we don't need is more statutes, more procedures. I think what we need is common sense and restraint on both sides.").

[263] *See* Pear, *supra* note 119.

[264] *See* 28 C.F.R. § 50.10(a)(2) (2023).

[265] 28 C.F.R. § 50.10(h) (2025).

Estate.[266] Many of those concerns have been well-founded. The Trump administration has defunded public broadcasters,[267] used dubious defamation lawsuits as leverage to receive large settlements,[268] and denied White House access to mainstream media outlets.[269] The controversial media subpoenas that sparked the Biden administration's changes to the Guidelines occurred between 2017 and 2020,[270] under a stronger version of the Guidelines than what is now in place.

Ironically, at least one commentator has compared the tactics of the Trump presidency to those of Richard Nixon—tactics that ultimately led to the initial development of the Guidelines.[271] At that time, then-Attorney General John Mitchell warned that the Guidelines had been designed as an "interim" measure before lasting action was taken on the reporter's privilege and news media subpoenas.[272] More than fifty years later, Congress still has not passed a federal reporter's privilege law, though many, many legal scholars have continued to argue that such a law is necessary.[273] The Guidelines may be unenforceable, voluntary procedures. Even so, the weakening of the Guidelines should be deeply concerning for journalists,

[266] *See, e.g.*, Paoletta, *supra* note 189; Clayton Weimers, *Trump's War on the Press: 10 Numbers from the US President's First 100 Days,* REPORTERS WITHOUT BORDERS (Apr. 25, 2025), https://rsf.org/en/trump-s-war-press-10-numbers-us-president-s-first-100-days.

[267] Dierdre Walsh & David Folkenflik, *House Votes to Kill Funding for Public Media*, NPR (June 12, 2025), https://www.npr.org/2025/06/12/g-s1-72223/public-media-funding-up-in-the-air-as-house-prepares-to-vote-on-claw-backs.

[268] *See* Benjamin Mullin et al., *Paramount to Pay Trump $16 Million to Settle '60 Minutes' Lawsuit*, N.Y. TIMES (July 2, 2025), https://www.nytimes.com/2025/07/02/business/media/paramount-trump-60-minutes-lawsuit.html (referencing a $16 million legal settlement Paramount made with President Trump in the midst of a proposed merger with Skydance which required Trump administration approval); Michael M. Grynbaum & Alan Feuer, *ABC to Pay $15 Million to Settle a Defamation Suit Brought by Trump*, N.Y. TIMES (Dec. 14, 2014), https://www.nytimes.com/2024/12/14/business/media/trump-abc-settlement.html (describing a $15 million settlement with ABC News after anchor George Stephanopoulos incorrectly stated President Trump had been found "liable for rape" when a jury actually found him liable for sexual assault).

[269] Mike Scarcella, *US Appeals Court Will Not Lift Limits on Associated Press Access to White House*, REUTERS (July 22, 2025), https://www.reuters.com/legal/government/us-appeals-court-will-not-lift-limits-associated-press-access-white-house-2025-07-22/.

[270] *See supra* notes 216–219 and accompanying text.

[271] Jim Rutenberg, *Trump's Blueprint for Bending the Media Has Nixon Written All Over It*, N.Y. TIMES (Feb. 9, 2025), https://www.nytimes.com/2025/02/09/business/media/trump-nixon-media-press.html.

[272] *See* Mitchell, *supra* note 93, at 21.

[273] *See, e.g.,* Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Paul Marcus, *Reporter's Privilege: An Analysis of the Common Law,* Branzburg v. Hayes*, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1984); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39 (2006); Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 55 (2010); Christina Koningisor, *The De Facto Reporter's Privilege*, 127 Yale L.J. 1176 (2018).

media organizations, and the public, providing yet another reminder that a statutory federal reporter's shield is necessary to avoid overreliance on the common sense and restraint of an unpredictable administration.