



April 3, 2019

The Honorable William Barr
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

We the undersigned organizations are committed to supporting and defending press freedom in this country. We are eager to engage with your office over the coming months on a variety of issues affecting members of the media across the United States. At this critical time, when constitutionally sound First Amendment protections for journalists and the media are of the utmost importance, we raise our concern about proposed changes in the Justice Department's guidelines regarding how records are obtained from journalists during criminal investigations.

As fellow citizens of a democracy whose vibrancy depends upon a free and independent press, and on behalf of organizations concerned professionally with press freedom and civil liberties, we are concerned about reports of a proposed revision to the Department of Justice's guidelines governing how, when and in what circumstances prosecutors can obtain the records, including electronic records, of journalists. We seek your clarification as to whether this proposal is indeed being considered by the Department of Justice and if so, would welcome the opportunity to brief you on the implications of this proposal for freedom of expression and independent journalism.

The existing guidelines require prosecutors to use all available investigative methods for identifying the source of leaks before seeking to intrude on a journalist's First Amendment rights through issuing a subpoena, a court order, or a search warrant. The rules also generally require the Department of Justice to alert a news organization in advance before it issues a subpoena. The existing language included in the guidelines explicitly states that subpoena power with respect to news and journalist records should be used only in the rarest of circumstances and are not "standard investigatory practices." *See* 28 CFR 50.10(a)(3).

According to an [article](#) published in *The Hill* recently, the proposed revision would lower the threshold that prosecutors must meet before requesting subpoenas for journalists' records. Additionally, the proposed revision appears to eliminate the need to alert a media organization that the Department of Justice intends to issue a subpoena. We understand the proposed changes may be a response to an increase in the number of criminal leak investigations, which the Department claims has caused extra stress on the agency. We firmly believe that it is inappropriate to address that problem through unconstitutional actions such as intrusions into the electronic records of professional members of the free press.

The proposed revision would have chilling implications for the state of the free press in the U.S., making it easier for the Department of Justice to use law enforcement tools that are currently considered only "extraordinary measures" in the existing guidelines (*see id*). Such government overreach would not only affect journalists and members of the media; it also implicates the public and possible government whistleblowers themselves, who might be far more reticent to speak with the media should the proposal be accepted.

The Department of Justice has a responsibility to protect both national security and freedom of the press, and the proposed revision would increase the risks that journalists face in their newsgathering activities and therefore fall short of this dual mandate, putting front and center in the minds of journalists the heightened threat of unbridled government seizure.

For the past several years, civil society groups and media organizations have fruitfully engaged in discussion with the Department of Justice about these matters. In June 2018, many of the undersigned organizations sent a [letter](#) to Attorney General Jeff Sessions to express our concern with the Department's decision to seize the phone and email records of *New York Times* reporter Ali Watkins. We shared our concern that this would have a chilling effect on other journalists who now know that records of their calls, emails and texts may be reviewed without their knowledge, perhaps months and years after the fact. We strongly believe that writers and journalists should conduct their work free from threats of overreach from the government.

We hope you will agree that protecting the public's right to know is something that transcends political differences. Our democracy works because there are checks and balances on political power. The Fourth Estate is one of them. "The only security of all is in a free press," as Thomas Jefferson wrote to the Marquis de Lafayette.

In order to perform its vital duty of informing the public, the press must be able to gather news without fearing the retaliation of the government, and whistleblowers must be free to expose governmental waste, fraud, or abuse without fear of either exposure or retaliation. The proposed revision would instead foster a climate of fear for journalists on the basis of government convenience. We urge you to reject these new guidelines and, in the words of your Department's

own existing guidance for handling investigations of the news media, “strike the proper balance between law enforcement and free press interests.”

We look forward to your response and are prepared to meet with you at any time to address these questions directly.

Sincerely,

Suzanne Nossel
Chief Executive Officer
PEN America

Alison Fitzgerald Kodjak
President
National Press Club

Sabine Dolan
Interim Executive Director
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North America Bureau

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