Recent Developments in Media Law:
Reporter's Privilege

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Overview of the Year 2020-21

This year we learned—in case we had any doubts—that President Trump really meant it when he said he hated the press and leakers. Not only did the Department of Justice prosecute eight people who disclosed information to the press without authorization, but it also subpoenaed reporters from multiple top papers in secret, often with gag orders preventing the media lawyers from telling their journalists. On top of that, federal prosecutors went after the communications records of several House Democrats, their aides, and their family members in an unusually aggressive investigation that led to concerns that the powers of the DOJ had been weaponized for political purposes.

Now the question is what we can expect from the Biden Administration. President Biden claimed he had no knowledge this his administration was continuing the Trump Administration's pursuit of journalists' communication records or that his own DOJ had obtained orders gagging media lawyers at some of the nation's most prominent news outlets. Attorney General Merrick Garland has released updated guidelines, and Congress is considering (again) proposed federal shield law legislation. At the same time, the tea leaves suggest this new DOJ will not abandon the zealous prosecution of leakers or the controversial prosecution of Julian Assange.

Courts grappling with reporter's privilege issues continue to struggle with defining who counts as a member of the news media, especially in state shield law cases. This issue is not going away any time soon. Garland's policy memo updating the DOJ guidelines does not define the news media; an effort to pass a shield law in Wyoming this year failed (in part) due to concerns about who would be entitled to invoke its protections; and one obstacle for the passage of the PRESS Act is its capacious definition of a "covered journalist." The White House is also reportedly having a behind-the-scenes debate about what to do with a 24-year-old journalist Kyle Mazza of "UNF News" (which stands for "Universal News Forever," which Mazza founded, with 2,500 Twitter followers). *See* Ruby Cramer & Alex Thompson, *The Mysterious Reporter on the Biden Beat*, POLITICO.COM (Sept. 15, 2021), https://www.politico.com/newsletters/west-wing-playbook/2021/09/15/the-mysterious-reporter-on-the-biden-beat-494342.

I. Federal Issues

The spring of 2021 brought a cascade of revelations that the Trump Administration secretly obtained the communications logs for journalists at several leading national publications without providing any advance notice. In addition, both the Trump Administration and Biden Administration went so far to obtain court orders gagging lawyers at leading news media publishers from telling their journalists that prosecutors were seeking their communications records. And as if that weren't enough, we learned that in 2017 and 2018, federal prosecutors secretly seized the data of House Intelligence Committee members, their aides and family members in an effort to find the sources behind news reports about contacts between Trump associates and Russia. These revelations were quickly followed by the expedited resignation of John C. Demers, a 2018 Trump appointee who led the Justice Department's national security division. President Biden, claiming the White House had no knowledge that the DOJ was surveilling journalists and gagging lawyers, declared the surveillance of journalists to be "wrong, simply wrong." Attorney General Merrick Garland issued a policy memo updating the internal

U.S. Attorney Guidelines for subpoenas to the press or to their communications providers. Congress is once again considering the passage of a federal shield law statute called "the PRESS Act."

With the election of President Biden, it is an appropriate time to consider whether President Trump kept his promise to make the prosecution of media leakers a top priority. With eight prosecutions in four years, Trump matched what the Obama Administration achieved in twice as long. It is too soon to know how aggressively the Biden Administration will prosecute journalistic sources, but early signs suggest that it will continue to pursue the "war on leaks"–just perhaps without secretly obtaining journalists' communications records.

A. Surveillance of Journalists and Gag Orders

In April 2021, the U.S. Department of Justice informed three Washington Post reporters who covered the FBI's Russia investigation that prosecutors had obtained their phone records from 2017. Prosecutors sought the work, home, and cellphone records of Ellen Nakashima, Greg Miller, and Adam Entous in an attempt to figure out who gave them information about communications during the 2016 Presidential Election between Sergey I. Kislyak, who was then the Russian ambassador to the United States, and Jeff Sessions, a prominent supporter of Donald Trump who later became the U.S. attorney general. The article contained information about classified U.S. surveillance intercepts.

On May 13, 2021, the DOJ informed CNN Pentagon correspondent Barbara Starr that prosecutors had obtained her work and personal email accounts as well as the phone records for her Pentagon office, her home, and her cellphones. The seizure covered records for a two-month span in 2017. The DOJ said that Starr herself was never under investigation but did not explain which U.S. Attorney General had approved the records request or what they were hoping to find in these records. During the relevant time period, Starr reported on possible U.S. military options in North Korea as well as stories about Syria and Afghanistan. See Jeremy Herb & Jessica Schneider, *Trump Administration Secretly Obtained CNN Reporter's Phone and Email Records*, CNN.COM, May 20, 2021, https://www.cnn.com/2021/05/20/politics/trump-secretly-obtained-cnn-reporter-records/index.html.

On June 9, 2021, CNN General Counsel David Vigilante revealed that he had known about the DOJ's efforts to obtain Starr's communication records since July 2020 but that he had been bound by a gag order prohibiting him from discussing or even acknowledging that a federal magistrate judge had secretly granted the government's request for these records. Vigilante said that they only reason he was contacted in July 2020 was because Starr's work emails resided on CNN's servers. Vigilante said he "was told in no uncertain terms (multiple times) that I was forbidden from communicating about any aspect of the order or these proceedings to the journalist" and "that if I violated the order, I was subject to charges of contempt and even criminal prosecution for obstruction of justice." Vigilante said CNN was given no notice of the order before it was issued, despite DOJ policy to the contrary. In addition, the government officials rebuffed his good-faith attempts to explore ways to narrow the scope of the order even after he told them that there were over 30,000 responsive emails, and that 26,000 of them were internal emails that were clearly irrelevant to the government's investigation. After CNN went to court asking for the government

to engage in good-faith negotiations to narrow the scope of its request, the federal magistrate judge initially granted the order but later reversed it after receiving a secret affidavit from a government official ex parte and under seal. CNN obtained a stay of the production order while it appealed to the district court, which significantly narrowed the order. Notably, the district court said the following about the government's secret evidence:

> [T]he court has reviewed the government's explanation for why [internal email headers are relevant and concluded the theory of relevancy is based on] speculative predictions, assumptions, and scenarios unanchored in any facts. ... the requested information by its nature is too attenuated and not sufficiently connected to any evidence relevant, material, or useful to the governments ascribed investigation, particularly when considered in light of the First Amendment activities that it relates to.

The DOJ filed a motion for reconsideration on January 15, 2021, but the DOJ leadership in the Biden Administration worked with CNN to reach a resolution and conclude the proceedings. Vigilante appeared satisfied with the results. In an article he wrote for CNN, he stated: "Our internal communications were protected and the production was significantly narrowed. We were also in a position where Barbara Starr had the crucial right to be involved in any follow up proceedings." But Vigilante said he never was involved in the government's requests to obtain Starr's records from third-party communications providers and had no way to know how those requests were handled. *See* David Vigilante, *CNN Lawyer Describes Gag Order and Secretive Process where Justice Department Sought Reporter's Email Records*, CNN.COM (Jun. 9, 2021), https://www.cnn.com/2021/06/09/politics/david-vigilante-cnn-email-secret-court-battle/index.html

In early June 2021, the public learned that the Trump DOJ had secretly seized the phone records of four of its reporters—Matt Apuzzo, Adam Goldman, Eric Lichtblau, and Michael Schmidt—and tried to seize their email records, all without notice to the newspaper, as part of a leak investigation in 2017. The U.S. Attorney's Office in Washington, D.C. obtained a court order from a magistrate judge requiring Google to turn over the email logs of these four reporters. The magistrate judge declared that secrecy was essential, stating "there is reason to believe that notification of the existence of this order will seriously jeopardize the ongoing investigation, including by giving targets an opportunity to destroy or tamper with evidence."

Google resisted the court order and demanded that the Times receive notice, as its contract with the newspaper requires. The government continued to fight Google for the reporters' data, but when the Biden DOJ lawyers took over, they agreed to give limited notice to the Times. On March 3, 2021, the Biden DOJ notified David McGraw, the Times's lawyer, about the DOJ's efforts to obtain the reporters' records, but this notification came with a gag order preventing McGraw from telling anyone else what was going on. After some negotiations with the prosecutor, McGraw was able to convince the prosecutor to ask the court to amend the gag order to permit McGraw to talk to the paper's other top lawyers and two senior Times executives. Prosecutors dropped the request for the email records in early June, and the gag order was lifted in early June 2021. The Times learned that the government had seized its reporters' phone records only after it convinced prosecutors to drop its quest for their email records. *See* Charlie Savage & Katie Brenner, *U.S. Waged Secret Battle to Obtain Emails of 4 Times Reporters*, NYTIMES.COM, Jun. 5,

2021, at A1, https://www.nytimes.com/2021/06/04/us/politics/times-reporter-emails-gag-order-trump-google.html.

Although the New York Times was not told any details about the underlying leak investigation, it is believed that it probably related to the newspaper's coverage of how James Comey handled politically charged investigations while he was FBI director. In an April 17, 2017 article, the four reporters cited a classified document hackers working for Dutch intelligence officials obtained from Russia. As the New York Times had reported in January 2020, the FBI had been investigating whether Comey had been the source of this leak to the reporters. See Adam Goldman, *Justice Dept. Investigating Years-Old Leaks and Appears Focused on Comey*, N.Y. TIMES, Jan. 16, 2020, at A1, https://www.nytimes.com/2020/01/16/us/politics/leak-investigation-james-comey.html. Sources say that President Trump was obsessed with proving that Comey had leaked classified information to the press, but the investigation failed to find evidence to support this. Indeed, within the DOJ in the fall of 2020 (while Trump was still in office), department officials debated whether to close the case.

In June 2021, the DOJ revealed that federal prosecutors obtained communications records about 100 email accounts belonging to House Democrats, their aids, and their family members, including minor children. Prosecutors obtained a court order preventing Apple from telling its customers that their records had been subpoenaed. Reports indicate that prosecutors were unable to tie House Democrats to the leaks, and they considered closing the inquiry. Attorney General Barr had reinvigorated the investigation into the House Democrats when he took office. *See* Katie Benner, Nicholas Fandos, Michael S. Schmidt, and Adam Goldman, *Hunting Leaks, Trump Officials Focused on Democrats in Congress*, NEW YORK TIMES at A1, June 11, 2021, https://www.nytimes.com/2021/06/10/us/politics/justice-department-leaks-trump-administration.html.

The revelations in May and June 2021 about the DOJ's aggressive and politicized leak investigations and the troubling use of gag orders led to a hearing before the House Committee on the Judiciary on June 30, 2021. The video of the hearing as well as the supporting testimony from Tom Burt (Microsoft), Eve Burton (Hearst), Lynn Oberlander (Ballard Spahr), Jonathan Turley (George Washington Law School) is available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4615.

When the revelations about the DOJ's leak investigations and gag orders started to come to light in May 2021, President Biden expressed surprise and disgust. He declared at a press conference that going after reporters' communications records is "wrong, simply simply wrong. I will not let that happen." *See* Charlie Savage, *White House Seems to Affirm Biden's Vow to Bar Seizure of Reporters' Data*, N.Y. TIMES, May 25, 2021, at A17, https://www.nytimes.com/2021/05/24/us/politics/biden-reporter-data-seizures.html.

Initially it was not clear whether President Biden intended to announce a major policy change with his off-the-cuff comment. But in July 2021, Attorney General Merrick Garland released a three-page policy paper declaring that the DOJ "would no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of their newsgathering activities." [A copy of the July 19, 2021 memo is available at

https://www.justice.gov/ag/page/file/1413001/download.] This policy applies to seeking communications records from third-party service providers, including metadata and telephone toll records. The memo specifically stated that "[t]he prohibition does apply when a member of the news media, in the course of newsgathering, only possessed or published government information, including classified information." It is not clear from this "only possessed or published" language what sorts of additional activities would be sufficient to remove a journalist from the policy's protections. The policy does not define "news media."

It is important to note that the new policy does not ban the seizure of journalists' records in all circumstances. Instead, the memo retained some of the carve-outs present in the Holder-era regulations. The new policy permits the use of compulsory legal process when "necessary to prevent an imminent risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor . . . , or incapacitation or destruction of critical infrastructure . . . ." The memo reaffirmed that "current exhaustion and component approval requirements" will continue to apply. Furthermore, the memo makes clear that the prohibition would not restrict the government's efforts to obtain records from sources, like government employees, who have disclosed government information. The memo concluded with a statement that the Deputy Attorney General would be tasked with explaining, updating, and codifying this policy in regulations after speaking with relevant stakeholders and that the DOJ would support legislation to codify this policy in congressional legislation.

B. Leak Prosecutions

These revelations about the aggressive and politicized leak investigations of the Trump administration were consistent with signals the press received from the Trump Administration, which repeatedly made clear that prosecuting leakers was a top priority. Trump tweeted or retweeted messages attacking leakers at least 123 times during his presidency. In August 2017, Sessions stated at a news conference that the Justice Department "has more than tripled the number of active leak investigations" and had created a new FBI counterintelligence team focusing on leaks to the press and public. In November 2017, Sessions told a congressional oversight committee that DOJ had 27 open investigations (compared to just nine in the three years prior). That year, the Trump Administration established a unit in the FBI dedicated to investigating media leaks. In 2019, Attorney General William Barr said at a news conference about the Muller report that Trump "was frustrated and angered by a sincere belief that the investigation was undermining his presidency, propelled by his political opponents and fueled by illegal leaks."

Ultimately, the Trump administration indicted eight government employees or contractors in connection with suspected media leaks. The Obama Administration, which itself aggressively prosecuted journalistic sources, indicted the same number of leakers but over a period of eight years. How aggressively the Biden Administration will prosecute journalistic sources remains to be seen. *See* Heidi Kitrosser, *Media Leak Prosecutions and the Biden-Harris Administration*, 2021 U. ILL. L. REV. ONLINE: Biden 100 Days 121 (Apr. 30, 2021). On the one hand, Biden and Harris have condemned the anti-press rhetoric of the Trump presidency, and Attorney General Merrick Garland has amended internal DOJ policy to protect journalists. The Biden DOJ has also ended the criminal inquiry and civil lawsuit against John R. Bolton aimed at recovering profits from his book "The Room Where It Happened." But on the other hand, while the Biden DOJ has not yet

initiated the indictment of any media sources yet, it did continue the prosecution of news media source Daniel Hale, who did not plead guilty until March 2021 and was not sentenced until July 2021. In addition, the DOJ press release accompanying the Hale sentence indicated a continuing intolerance for media leaks: "Daniel Hale knowingly took classified documents and disclosed them without authorization, thereby violating his solemn obligations to our country. We are firmly committed to seeking equal justice under the law and holding accountable those who betray their oath to safeguard national security information."

Furthermore, although Attorney General Merrick Garland has embraced revised guidelines to protect journalists, concerns remain about the government's potential to interfere with the important functions of the media. The DOJ guidelines are not enforceable; until there is a federal shield law that covers subpoenas to communications providers, the press remains vulnerable. Both Democratic and Republican administrations have demonstrated a willingness to seize the communications records of journalists during leak investigations. During the Obama Administration, for example, DOJ obtained James Rosen's emails and seized the phone records for reporters at the Associated Press as part of leak investigations. The Biden Administration has also chosen to continue the prosecution of Julian Assange even though the Obama Administration had rejected such a prosecution due to concerns about the adverse impact the prosecution could have on press freedom.[1]

Scholars and practitioners have continued to express concerns that prosecutions of journalist sources raise significant First Amendment concerns that the courts have largely failed to address. In some recent leak cases, sentencing courts have received amicus briefs from scholars and the Reporters Committee for the Freedom of the Press asking the judge to take these First Amendment concerns into account in the sentencing phase. *See*, *e.g.*, Gabe Rottman, *Ahead of Daniel Hale Sentencing, RCFP Highlights Concerns about Severe sentences in Leak Cases*, WWW.RCFP.ORG, Jul. 19, 2021, https://www.rcfp.org/daniel-hale-sentencing-amicus/.

Here is a complete list of the prosecutions of journalistic sources during the four years of the Trump Administration and during the Biden Administration to date.

- Reality Leigh Winner (Former NSA contractor): In 2018, Winner was the first person the Trump Administration prosecuted. She pleaded guilty to one count of violating the Espionage Act for sending journalists at *The Intercept* a top-secret NSA intelligence report showing that the NSA had collected intelligence about Russian military attempts to hack into a company that sells voter registration-related software as well as a "spear-fishing campaign" the accounts of 122 local election officials. Prior to the release of this document, the Obama administration had revealed that there were cyberattack attempts coming from Russian servers but never confirmed that the Russian government was behind those attempts. The Intercept was criticized for showing the NSA the report Winner had sent them anonymously; markings on the document helped the NSA identify Winner as the source. Winner, whose social media feed made clear her hostility toward then-President

[1] Shortly after President Biden took office, various press freedom, civil liberties and international human rights advocacy organizations wrote to the Biden Administration to express their "profound concern" about the ongoing Assange prosecution. The letter is available at https://freedom.press/static/pdf.js/web/viewer.html?file=/documents/64/DOJ-letter-Assange.pdf.

Trump, was sentenced to 63 months in jail. She sought clemency from President Trump, who called her sentence "so unfair" and proclaimed that what she had done was "small potatoes," but he never acted on her clemency request. She was released early in June 2021 to a halfway house due to good behavior.

- Terry Albury (Former FBI field agent in Minnesota): In 2018, Albury pled guilty to two charges under the Espionage Act. Albury was sentenced to 48 months in prison and three years of supervised release. Albury gave The Intercept access to a trove of internal FBI documents revealing loopholes permitting racial and religious profiling and domestic spying as part of the domestic war on terror. Judge Wright told Albury at his sentencing that his leaks "put our country at risk." The New York Times Magazine ran a front-page story about Albury in September 2021. Janet Reitman, *"I Helped Destroy People,"* N.Y. TIMES MAGAZINE (Sept. 1, 2021), available at https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html.

- James Wolfe (Former security director for the Senate Select Committee on Intelligence): Wolfe pled guilty in 2018 to one count of lying to federal investigators; he was sentenced to two months in prison and ordered to pay a $7500 fine. Prosecutors alleged that when FBI agents questioned Wolfe on December 15, 2017, he lied about his contacts with four reporters, one of whom the New York Times identified as Ali Watkins, a national security reporter who previously worked at BuzzFeed and Politico. Watkins and Wolfe had a three-year affair, but Watkins had assured her various employers that Wolfe was not a source. During this leak investigation, the DOJ secretly seized Watkins' phone and email records covering a three-year period to collect "metadata" about every one of her calls, texts, and emails. Metadata includes the recipient of each call and email, the duration of each call, and the timestamp of each message, but does not include the actual content of each message. On the advice of her personal lawyer, Watkins decided not to tell her employer the New York Times that the DOJ had notified her that her communication records had been seized and revealed this information only when the newspaper was about to publish a story about Wolfe's arrest. Although President Trump proclaimed that the FBI had arrested a "very important leaker," Wolfe was never charged with mishandling national security information or revealing such information without authorization.

- Joshua Schulte (Former CIA employee): In June 2018, federal prosecutors indicted former CIA computer engineer Joshua Schulte for giving WikiLeaks thousands of pages of classified material detailing the CIA's efforts to compromise iPhones and other popular electronic devices. This leak is commonly called the "Vault 7" leak. Schulte had previously worked in the CIA's Engineering Development Group and designed hacking tools for the Center for Cyber Intelligence. Schulte was first arrested in 2017 on three child pornography charges; the recent superseding indictment reiterates these charges and added several charges related to the leak. These charges include unlawful computer access and interference with the leak investigation (lying to investigators and obstruction of justice). WikiLeaks claims that its source wanted "to initiate a public debate about the security, use, proliferation and democratic control of cyberweapons."

  In 2020, after four weeks of trial and six days of deliberations, a judge in the Southern

District of New York declared a mistrial on the most serious charges against him. For more details about this trial, see Nicole Hong, Trial of Programmer Accused in C.I.A. Leak Ends in Hung Jury, N.Y. Times (Mar. 9, 2020), available at https://www.nytimes.com/2020/03/09/nyregion/cia-wikileaks-joshua-schulte-verdict.html. The jury deadlocked on the Espionage Act charges and convicted him only on contempt of court and false statement allegations. Schulte, who remains in custody awaiting retrial, recently asked a judge to order the federal Bureau of Prisons to improve the conditions of the Metropolitan Correction Center, where he has been held in solitary confinement without access to the outdoors in over two years. The child pornography charges against Schultz remain pending and will be tried in a separate federal trial.

- Natalie Mayflower Sours Edwards (former official in U.S. Treasury's financial crimes division): In October 2018, Edwards was charged with giving details about suspicious banking transactions to reporter Jason Leopold at BuzzFeed News. BuzzFeed published a series of articles about suspicious financial transactions made by Russian diplomats and Trump associates, including his former campaign chair Paul Manafort. Edwards gave Leopold "Suspicious Activity Reports." While such reports are not classified, federal law prohibits their unauthorized disclosure. *See* 31 C.F.R. 1020.320(E)(2). Edwards's attorney said that Edwards made the disclosures because she did not believe the federal government was not reacting properly to the information in these reports. In January 2020, Edwards pled guilty to one count of conspiring to unlawfully disclose financial reports. Her sentencing was delayed due to the pandemic, but in June 2021, she was sentenced to six months in prison and three years of supervised release. Sentencing judge Gregory Woods told Edwards that she should have known "that violating her oath and exposing sensitive law enforcement information could be used to help the bad guys and to tarnish the reputations and interests of innocent people was both illegal and wrong." BuzzFeed condemned her sentence, calling Edwards a "brave whistleblower who fought to warn the public about grave risks to America's national security."

- John Fry (former IRS employee): Like Edwards, Fry was charged with the unlawful disclosure of Suspicious Activity Reports, or SARs, to attorney Michael Avenatti and a New Yorker reporter presumed to be Ronan Farrow. These SARs revealed overseas financial transactions by Trump's former attorney Michael Cohen. Fry told Farrow he came forward with the SARs because they had inappropriately been pulled off the system. In the indictment, the DOJ quoted WhatsApp messages between Fry and the reporter, but it is not clear how the DOJ obtained these messages. In January 2020, Fry pleaded guilty to one count of illegally disclosing sensitive information and was ultimately sentenced to five years of probation and a $5,000 fine.

- Henry Kyle Frese (Former counterterrorism analyst for the U.S. Defense Intelligence Agency): Frese pleaded guilty to the willful transmission of classified national defense information about foreign countries' weapon systems to two journalists in 2018 and 2019. In June 2020, he was sentenced to 30 months in prison. Frese lived with one of the journalists, his then-girlfriend Amanda Macias of CNBC, who later introduced him to a second journalist, Courtney Kube for NBC News. According to Frese's lawyers, Frese gave information to these journalists in an effort to promote Macias's career "in a misguided

effort to salvage a relationship that was not worth saving." Based on information she received from Frese, Macias reported that China had installed anti-ship cruise missiles and surface-to-air missile system in the South China Sea. The government contended that Frese conducted at least 30 searches on classified government databases to find information to share with the reporters.

- Daniel Everette Hale (U.S. Air Force intelligence analyst assigned to NSA and later contractor at National Geospatial Intelligence Agency): Hale, a descendant of the American patriot Nathan Hale, was charged under the Espionage Act with leaking classified information about drone warfare and other counterterrorism measures to a reporter. The indictment did not reveal the identity of the reporter, but it is widely believed to be Jeremy Scahill, co-founder of The Intercept. Although he was initially charged with five charges under the Espionage Act and related statutes, he ultimately pleaded guilty to one Espionage Act charge and was sentenced in July 2021 to 45 months in jail. Hale told the sentencing judge that he exposed the inner workings of the drone program and severe innocent civilian costs "to dispel the lie that drone warfare keeps us safe, that our lives are worth more than theirs." Hale also exposed a secret yet unclassified rulebook detailing how the government decides to put people on watchlists and categorizing them as known or suspected terrorists. Judge O'Grady told Hale he "could have been a whistleblower . . . without taking any of these documents." This case is notable because the Biden Administration had taken over the case prior to sentencing and asked the court to sentence Hale to nine years in prison.

C. Pending Federal Legislation: The PRESS Act

U.S. Representatives Jamie Raskin (D-Md.), Ted Lieu (D-CA), and John Yarmuth (D-Ky), and U.S. Senator Ron Wyden (D-Ore.) have revived proposed federal shield law legislation in their respective congressional bodies in response to revelations about the politicized surveillance of reporters. The proposed legislation is called "Protect Reporters from Exploitative State Spying Act" or the "PRESS Act." Congress has considered passing a federal shield law many times over the past fifty years; it is not clear that this effort will be any more successful.

The proposed law limits the compelled disclosure of information from covered journalists unless the court from which the subpoena or "other compulsory process" is issued determines by a preponderance of the evidence that the disclosure is necessary "to prevent, or to identify any perpetrator of, an act of terrorism against the United States" or "to prevent a threat of imminent violence, significant bodily harm, or death." The statute would also prohibit any federal entity from compelling any records from the communications provider about covered journalists unless "there is a reasonable threat of imminent violence unless the testimony or document is provided." Furthermore, any federal entity seeking a journalist's communication records must give the journalist notice and an opportunity to be heard before the court before it compels the production of these records, unless providing notice and an opportunity to be heard would "pose a clear and substantial threat to the integrity of a criminal investigation, or would present an imminent risk of death or serious bodily harm." The proposed law defines "covered journalist" and "journalism" broadly to include anyone who is engaged in the collection, editing, or dissemination of "news or

information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

D. Other Notable DOJ Subpoenas

1. Devin Nunes Parody Accounts

The Trump DOJ obtained a grand jury subpoena of Twitter in late November 2020 in an effort to unmask the user of the parody account @NunesAlt, who poses as the mother of Californian Republican representative Devin Nunes. This subpoena was accompanied by a gag order preventing Twitter from disclosing it. DOJ claimed that the subpoena was part of an investigation into possible threats in violation of federal law, but Twitter (which contested the subpoena) contended that it "may be related to Nunes's repeated efforts to unmask individuals behind parody accounts critical of him." In its motion, Twitter include examples of some of the accounts tweets which were plainly protected First Amendment political speech (such as a photo of Nunes superimposed with the text: "Believe in conspiracy theories. Even if there is no evidence."). Twitter also argued that the DOJ had failed to meet the high standard of strict scrutiny for the imposition of a gag order.

DOJ ultimately dropped the subpoena, but it remains unclear who and what DOJ was investigated and whether that investigation is over. Despite Twitter's inquiries, prosecutors refused to share any details about the underlying investigation prompting the subpoena. Some reports suggest that the investigation concerned alleged online threat to Senator Mitch McConnell, not Nunes. *See* Charlie Savage, *Subpoena to Twitter is Said to Concern a Purported Threat to McConnell, Not Nunes*, N.Y. TIMES, May 20, 2021 at A18, https://www.nytimes.com/2021/05/19/us/politics/subpoena-threat-nunes-mcconnell.html. Notably, although the subpoena first was served during the Trump Administration, the Biden Administration continued to press it. In 2019, Nunes also filed an unsuccessful $250 million defamation suit against Twitter for defamation based on posts in several anonymous parody accounts @DevinCow, @DevinNunesMom, @fireDevinNunes, and @DevinGrapes; that case was dismissed under Section 230. See Coral Murphy Marcos, *Trump DOJ Subpoenaed Twitter over Devin Nunes Parody Account*, THEGUARDIAN.COM, May 18, 2021, https://www.theguardian.com/us-news/2021/may/18/devin-nunes-mother-twitter-trump-justice-department.

2. Department of Homeland Security Subpoena to BuzzFeed

On December 1, 2020, Immigration and Customs Enforcement investigators sent a subpoena to BuzzFeed asking it to identify its source for emails sent to ICE attorneys about a fast-track deportation program and plans to fine certain undocumented immigrations. After BuzzFeed refused to comply with the request (along with ICE's request that BuzzFeed not disclose the contents of the subpoena), ICE announced it would not pursue the information from BuzzFeed but would instead "pursue the investigation through other channels." Accompanying this announcement was a warning to ICE employees to remember "their obligation to properly protect, safeguard, and transmit official information garnered during official business," and that failure to follow proper whistleblower reporting processes "may subject an employee to discipline, among

other serious adverse consequences." Hamed Aleaziz, *The Trump Administration Has Backed Down from its Subpoena Demanding BuzzFeed News Divulge Its Sources*, BUZZFEEDNEWS.COM (Dec. 9, 2020), https://www.buzzfeednews.com/article/hamedaleaziz/ice-trump-subpoena-buzzfeed-news.

3. Subpoena to Gannett to Reveal *USA Today* Readers

In late May and early June 2021, the Biden Administration also came under criticism for an FBI subpoena to newspaper publisher Gannett seeking the internet addresses and mobile phone information that would help identify the readers of a USA Today story about the deadly shooting in Florida of two FBI agents serving a warrant in a child exploitation case. The subpoena asked for reader information covering a 35-minute period starting just after 8 p.m. on the day of the shootings; the subpoena claimed that the information "relates to a federal criminal investigation being conducted by the FBI." See Josh Gerstein, *USA Today Fights Subpoena Aimed at Readers of Florida FBI Shooting Story*, POLITICO.COM, Jun. 3, 2021, https://www.politico.com/states/florida/story/2021/06/03/usa-today-fights-subpoena-aimed-at-readers-of-florida-fbi-shooting-story-1385003 After Gannett filed a motion to quash, government withdrew the subpoena, stating that it had been able to identity the subject of their investigation "by other means." Kristine Phillips, Justice Department Withdraws FBI Subpoena for USA TODAY records ID'ing Readers, USATODAY.COM, Jun. 5, 2021, https://www.usatoday.com/story/news/politics/2021/06/05/fbi-withdraws-usa-today-subpoena-seeking-reader-identity/7561422002/

II. Reporter's Privilege Issues in Federal Courts

One theme in the federal courts this past year was that sometimes the discovery rules can be a subpoenaed party's friend. Cases this past year reminded lawyers that subpoenaed parties can get relief by showing that the subpoenaed materials are not relevant to the underlying litigation or if "the party seeking discovery has had ample opportunity to obtain the information by discovery in the [underlying] action." Fed. R. Civ. P. 26(b)(2)(C)(ii). In addition, when the court determines that a party or attorney issuing a subpoena has failed to take reasonable steps to avoid "imposing undue burden or expense on a person subject to the subpoena," it also has the power to award attorneys' fees under Fed. R. Civ. P. 45(d)(1).

A. Relying on Rule 26's Discovery Limits

In *Marquinez v. Dole Food Company Inc.*, Case No. 1:20-mc-042, 2021 WL 122997 (S.D. Ohio Jan. 13, 2021), the Cincinnati Enquirer successfully quashed a motion a subpoena seeking testimony and documents that generally related to an investigative journalism article about the business practices of Chiquita Banana that was published in May 1998 but subsequently retracted.

In the underlying lawsuit, the plaintiff foreign nationals contend that multiple U.S. corporations exposed them to a toxic pesticide while the plaintiffs were working on banana plantations in Ecuador, Costa Rica, and Panama in the 1960s through 1980s. The plaintiffs seek to connect Chiquita to their exposure in Ecuador, where Chiquita has denied owning or controlling any banana plantations in the relevant years. The May 1998 Cincinnati Enquirer article stated that

Chiquita "secretly controls dozens of supposedly independent banana companies in Latin America through an international trust structure designed to avoid restrictions on land ownership and national security laws." The article also states that Chiquita was considering engaging in banana plantation operations in Ecuador in the future. The Cincinnati Enquirer ultimately retracted the entire article.

The plaintiffs had already tried twice to get information about Chiquita's operations in Ecuador. First, the plaintiffs filed document requests on Chiquita, with a focus on the Ecuador plans referenced in the Cincinnati Enquirer article. Chiquita claimed it could not find such a document and had no reason to believe it ever existed. The judge denied the plaintiff's motion to compel, stating that it would not grant a motion to compel based on "something that was retracted." The plaintiffs' second attempt to get this report was to subpoena the co-author of the article in Georgia federal court. The court granted the reporter's motion to quash relying upon the Georgia shield law, which provides a qualified privilege for newsgathering materials. The court held that the subpoena sought information that was hardly relevant or material to the underlying litigation, especially since it sought information about Ecuador operations in the 1990s even though the time period of the complaint's allegations did not extend past the 1980s. Furthermore, the court explained, the plaintiffs could obtain the information through alternative and better sources, like the Chiquita employees.

In the most recent case involving the subpoena on Cincinnati Enquirer, the court held that the information sought was beyond the scope of discovery in Fed. R. Civ. P. 26(b)(2) because it was not relevant, material, or necessary to prove the allegations in the underlying case, and because the request is unduly burdensome. The court explained that asking the newspaper "to search its records for decades-old materials that appear unlikely to exist" fails the proportionality test, especially since the newspaper is not a party to the underlying action.

Because the court resolved the motion to quash on Rule 26 grounds, it "decline[d] to reach the parties' specific arguments on privilege." Nevertheless, the court explained that even though the Sixth Circuit does not recognize any special journalistic privilege, see *In Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987), the court must still "make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony." Considering the status of a nonparty as a member of the press is one factor to be considered in this proportionality inquiry, but it is not dispositive. In this particular case, however, "it is clear that the burden on The Enquirer to produce the requested documents vastly outweighs any hypothetical benefit to the Plaintiffs."

B. Attorneys' Fees and Costs

Breaking Media, Inc., the publisher of the legal news website Above the Law ("ATL"), successfully quashed a subpoena for documents and deposition testimony in a civil action brought by the legal recruiting law firm MWK Recruiting, Inc. against its former employee Evan Jowers for allegedly misappropriating trade secrets and breaching a non-compete and non-solicitation agreement. The court's application of a qualified reporter's privilege under federal common law and constitutional law was not remarkable, but its decision to grant Breaking News's motion for attorneys' fees and costs is reminder to subpoenaing parties that it can be costly to subpoena

journalistic records that are not sufficiently relevant to the underlying litigation. *Breaking Media, Inc. v. Jowers*, 2021 WL 1299108, 21 Misc. 194 (KPF) (S.D.N.Y. April 7, 2021), *appeal filed* (Aug. 9, 2021).

Defendant Jowers served a subpoena on Breaking News seeking extensive journalistic information in connection with four articles published on the website. Two of these articles covered the underlying lawsuit between MWK and Jowers; another article published in 2013 discussed inappropriate remarks made by another legal recruiter; and the fourth article, from 2015, reported that Jowers had moved to Hong Kong. Breaking News claimed that three of these four articles were covered by the reporter's privilege and that it should not have to produce information relating to any of the articles because the subpoena was unduly burdensome.

Noting that the case involved both federal claims and pendant state law claims, the court held that the Second Circuit's articulation of the reporter's privilege under federal constitutional and common law principles controlled the action, "with consideration of the congruent federal and state policies." The relevant federal and state laws recognize a qualified privilege for newsgathering materials and covers both confidential and nonconfidential materials. Jowers conceded that the subpoenaed materials were covered by the reporter's privilege but contended that the qualified privilege was overcome. The court disagreed and granted the motion to quash.

The court first determined that the subpoenaed materials were not relevant to any significant issue in the underlying lawsuit. Jowers claimed that two of ATL's articles about the underlying litigation were orchestrated by the plaintiff recruiting firm and led his lawyers to drop their representation of him. The court pointed out that even if Jowers's allegations were true, they are "completely irrelevant" to the underlying lawsuit alleging that Jowers misappropriated trade secrets and breached his contracts with his former employer. The court also determined that Jowers failed to demonstrate that the information he sought was not reasonably obtainable from other sources. The court states that Jowers could have done more to follow up on his discovery requests to his former employer seeking information about its relationship with ATL.

The court also quashed the subpoena for materials relating to the article about Jowers's move to Hong Kong. Breaking News did not assert the reporter's privilege with respect to this article but instead argued that the subpoena was unduly burdensome. Given that Jowers articulated no explanation about how this article was relevant to the underlying suit, the court readily granted Breaking News's motion to quash.

The court also granted Breaking Media's request for attorney's fees under Federal Rule of Civil Procedure 45(d)(1). The court concluded that the subpoena imposed an undue burden and expense on Breaking Media to produce information irrelevant to the underlying lawsuit and refused to narrow the scope of the subpoena or otherwise address any of Breaking Media's objections based on privilege, relevance, and proportionality grounds despite several meet-and-confers.

III. State Shield Law Developments

A. Arkansas

A state court in Arkansas ordered that a blogger who had written allegedly defamatory comments about a former Little Rock School Board president was not entitled to the protections of the Arkansas shield law. The law, which shields the identify of sources, protects "any editor, reporter, or other writer for any newspaper, periodical, radio station, television station, or internet news source, or publisher of any newspaper, periodical, or internet news source, or manager or owner of any radio station." A.C.A. § 16-85-510. In court filings, Lyon-Balley claimed she was an internet publisher who regularly features work by other writers on her "Orchestrating Change" blog and that she writes a separate blog for the Education Defense League of Arkansas.

In its ruling, the court did not apparently engaged in an extensive legal analysis but rather concluded: "She's a blogger. She's not a reporter. She's not [an internet] news source." The court also ordered Lyon-Ballay to pay the costs of her deposition and the plaintiff's legal fees. *See* John Lynch, *Education Blogger Ordered to Reveal Sources in Defamation Lawsuit*, ARKANSASONLINE.COM, Feb. 9, 2021, https://www.arkansasonline.com/news/2021/feb/09/education-blogger-ordered-to-reveal-sources-in/.

B. Wyoming's Efforts to Pass Shield Law Fail

This past year, the Wyoming Senate Judiciary Committee narrowly voted down proposed legislation to create a shield law in that State. Advocates for the bill argued that such a law was necessary to protect whistleblowers and other anonymous sources who speak out about the government, business, or other institution. The Wyoming Press Association backed the bill, and a variety of journalists and transparency advocates offered examples of important Wyoming stories that relied on confidential sources. A copy of the doomed legislation can be found at https://wyoleg.gov/Legislation/2021/HB0103.

The law had passed the House, but only after it had been amended in two important respects. First, the draft bill was amended to create two exceptions to the privilege. The privilege would not apply where the failure to disclose the desired information would "create an imminent risk of death or serious bodily harm" or in a defamation action where the person seeking disclosure "can demonstrate that the news information will lead to evidence that is relevant to an element of the defamation claim." Second, to alleviate concerns that nonprofessional bloggers would be able to take advantage of the law, the draft bill required the information to be collected in the course of newsgathering for an entity with one of its "principal functions the processing and researching of news intended for publication or for broadcast by a radio station or television network." It appears the bill covered both newsgathering materials and the identity of courses provided that the "news information" involves a matter of public concern or public interest affecting the public welfare."

The senators voting against the bill voiced concerns that the privilege would protect journalists who might abuse it. One senator said: "I am in favor of a shield law. I don't have any issues with it, I think it serves a great purpose in trying to get data and information, but I'm concerned about

the lack of consequence. I'm sorry. Maybe I'm a skeptic." *See* Cayla Nimmo, *Wyoming Senate Rejects Shield Law Proposal*, CASPER STAR-TRIBUNE, Mar. 20, 2021, https://trib.com/news/state-and-regional/govt-and-politics/wyoming-senate-rejects-shield-law-proposal/article_a23146d9-8f4d-5d1c-aadd-622095ffcf6f.html

C. Illinois

Illinois-based aviation lawyer Manuel von Ribbeck represents families who lost relatives in the Lion Air Flight 610 crash that occurred in Indonesia in October 2018. Christine Negroni, a Connecticut resident who regularly blogs about aviation and travel on her blog *Flying Lessons*, published a blog post about von Ribbeck titled "Lion Air Lawyer Accused of Sexual Assault in 2010." Ribbeck brought defamation and interference with prospective contractual relations claims against Negroni in state court in Illinois; Negroni promptly removed to federal court. During jurisdictional discovery, Negroni objected to certain document requests and deposition questions as "invad[ing] her reporter's privilege" under Connecticut law. The plaintiff argued Illinois law applied instead. The court ultimately determined Illinois's shield law applied and that it covered bloggers—and, along the way, determined that the Connecticut law did not. The court's interpretation of the Connecticut shield law relied on a snippet of legislative history that appears hard to reconcile with the plain language of the statute. *Von Ribbeck v. Negroni*, Case No. 19 C 1205, 2019 WL 6894400 (N.D. Ill. Dec. 18, 2019).

In its choice of law analysis, the court started by determining whether there was a "true conflict" between the statutory shield laws in Illinois and Connecticut. Although both States have statutory shield laws, and both define the scope of who can claim the privilege broadly, the *von Riddeck* court determined that Connecticut's definition of "news media" excludes bloggers. The Connecticut statute defines "news media" protected from compelled disclosure as "[a]ny newspaper, magazine or other periodical, . . . that disseminates information to the public, whether by print, broadcast, . . . electronic or any means or medium." CONN. GEN. STAT. § 52-146t(a)(2). Although defendant Negroni would appear to fit this definition because she has disseminated information to the public on her blog at least once a month for the past decade, the court held instead that she was not protected under the statute, relying on dicta from a Connecticut superior court opinion that in turn relied upon a comment in legislative history by Senator McDonald that the law did not cover internet blog sites. *See State v. Buhl*, No. S20NCR10127478S, 2021 WL 4902683, at *7 n.5 (Conn. Super. Ct. Sept. 25, 2012), *aff'd in part, rev'd in part*, *State v. Buhl*, 152 Conn. App. 140 (Aug. 12, 2014).

In contrast, the court determined that the Illinois statute does cover bloggers like Negroni. Under the Illinois law, a reporter is "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium . . . and includes any person who was a reporter at the time the information sought was procured or obtained." 735 ILCS 5/8-901(a). The statute defines "news medium" as "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format." *Id.* at 5/8-902(b). Citing *Johns-Byrne Co. v. Technobuffalo LLC*, No. 2011 L 009161, 2012 WL 7746968, *4 (Ill. Cir. Ct. July 13, 2012), the court noted at least one Illinois court had already had that this statute covers bloggers like Negroni because there was no legislative intent to the contrary justifying the exclusion of bloggers from the statute.

Applying the "most significant contacts test"—which is Illinois's choice of law rule—the court concluded that Illinois law applied. The court noted precedent from the Court of Appeals for the Seventh Circuit holding that in "defamation cases, the plaintiff's home state often has the most 'significant relationship' because that is where the plaintiff suffers the most reputational harm." *Board of Forensic Doc. Exam'rs, Inc. v. American Bar Ass'n*, 992 F.3d 827, 831 (7th Cir. 2019). The court noted that sometimes it is unfair to apply the law of the plaintiff's home state, such as situations where the defendant did not foresee injury in the forum states, but that in this case, Negroni should have foreseen von Ribbeck would suffer injury in Illinois because she included in her post hashtags for Chicago and for Jason Meisner, a Chicago Tribune reporter covering the Lion Air case that was filed in Chicago.

The court ultimately held that under the Illinois statute, Negroni did not have to disclose the identity of her sources or the content of the information she may have obtained from them, but that she still had to answer general questions about whether she had contacts with any persons or companies in Illinois. On January 21, 2021, the court issued an unpublished order ruling on Von Ribbeck's motion to compel Negroni to respond to multiple document requests. In addition to repeating its prior ruling that Negroni was not required to reveal the identity of any of her sources, the court notably held that "source" materials under the Illinois statute "include photographs, video recordings of interviews, and information learned during the newsgathering process."

D. Washington

In the context of a public records case, the Supreme Court of Washington declared that a "youtuber" was not a member of the "news media." *Green v. Pierce County*, 487 P.3d 499 (Wash. 2021). This decision reversed the trial court's contrary ruling.

Under Washington's Public Records Act (PRA), the "news media" is entitled to have access to otherwise exempted information, such as certain records relating to public employment and licenses. Brian Green, who runs the "Libertys Champion" YouTube channel, submitted a request to the Pierce County Sheriff's public records office seeking certain information, including official photos and birth dates, for the detention center personnel on duty the day he and a friend had an altercation with a security guard when seeking entrance to the building. The sheriff's department gave him some of the records he sought but not the photographs or dates of birth, which were exempted under the PRA but would have been available to a member of the "news media." The PRA applies the definition of "news media" from Washington State news media shield law. Under RCW 5.68.010(5), "news media" covers the following:

> Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of newsgathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution.

The statute also covers any employees, agents, or independent contractors engaged in "bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity."

After determining that Green bore the burden of proof of demonstrating he qualifies for the PRA exemption, the Washington Supreme Court concluded that Green's YouTube Channel "does not fit into any of the categories of traditional news outlets listed in the statute, or is it an 'entity.'" The court explained that the word "entity" had to be read in context, which suggested it should mean similar "similar in nature to the specific types of traditional news outlets listed in the statute." This list, the court concluded, does not include individuals, only organizations. Libertys Champion did not fit into any of the specific categories of traditional news outlets or in the general category of "entity" because Libertys Channel does not exist separately from Green. The court went on to conclude that for the same reason that Green was not an "employee, agent, or independent contractor" of the news media, and that it was therefore not necessary to determine whether he was engaged in "bone fide news gathering." The court did not consider whether YouTube might be considered the news media outlet and Green an agent of it, or whether Green could be satisfy the court's limited construction of the term "entity" by considering him to be the sole proprietor of Libertys Channel.

The court wrote that because the Washington statute was enacted in 2007, it is perhaps no surprise that the statutory definition "may no comport with the current intersection of social media and the news." After all, "[t]he manner in which we access news today is vastly different from how we did it in 2007." The court concluded that it was bound by "the statute's unambiguous language." In a footnote, the court dismissed concerns that its narrow construction of the shield law infringed on the freedom of the press, concluding that "there are no freedom of the press implications if there is no news media."

The dissent disagreed that this statute was so unambiguous, arguing that there was no reason to assume that an "entity" had to have a separate legal identity from an individual or must be an organization. Indeed, the dissent argues, the legislative intent suggests that "entity" should be interpreted broadly. For example, the dissent argued, the term "newspaper" under the statute would include high school papers and community newspapers, regardless of whether they are published by a separate legal entity.

E. Subpoenas to Journalists in Protest-Related Cases

Prosecutors around the country have sought testimony and newsgathering materials from journalists who covered protests and riots in summer 2020. In Wisconsin, a judge ordered three journalists to testify in the trial of two women accused of assaulting state senator Tim Carpenter, D-Milwaukee, during a protest over the murder of George Floyd. Carpenter was trying to take a video of the crowd that had torn down statues when he was kicked and punched in the head, suffering serious injury. Wisconsin's shield law provides a qualified privilege for newsgathering materials, but the judge held that testimony from Isthmus newspaper reporter Dylan Brogan, WORT-FM radio reporter Chali Pittman and WKOW television reporter Lance Vesser was crucial to the case and could not be retrieved by any other source. The prosecutor had argued that their testimony offered "an objective view of the mood and tenor of the protestors and crowd, the way

the two defendants rushed the Victim, corroboration of the fact that they pushed him down," and that this perspective was "not obtainable anywhere else." An attorney representing the reporters countered that the police "should have been getting names and phone numbers and email addresses of witness" and that "[w]e in the news media shouldn't suffer and have to be forced to testify contrary to the legislature's strong intent just because the police and DA didn't do their jobs." The reporters are considering an appeal. *See* Molly Beck, *Dane County Judge Compels Three Madison Journalists to Testify in Trial of Women Accused of Beating State Lawmaker*, MILWAUKEE JOURNAL SENTINEL, Sept. 9, 2021, https://www.jsonline.com/story/news/local/wisconsin/2021/09/09/judge-compels-journalists-testify-trial-into-lawmakers-beating/8258733002/.