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

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OVERSIGHT AND REVIEW DIVISION

25-010

DECEMBER 2024

REDACTED FOR PUBLIC RELEASE

The full version of this report contains information that the Department determined to be grand jury information or law enforcement sensitive and therefore could not be publicly released. To create this public version of the report, the Office of the Inspector General redacted (blacked out) portions of the full report.

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Chapter One: Executive Summary and Background

I. Executive Summary

In the spring and summer of 2017, *CNN.com* (*CNN*), *The New York Times*, and *The Washington Post* published articles containing classified information, some of which was classified as Top Secret/Sensitive Compartmented Information. In May and June 2021, multiple news media outlets reported that, in 2020, the Department of Justice (Department or DOJ) issued compulsory process to obtain non-content communications records of reporters at *CNN*, *The New York Times*, and *The Washington Post* in an attempt to identify the sources of the leaked classified information.[1] The reported revelations sparked widespread concern, including from the news media, that the Department's use of compulsory process was an encroachment on the news media's ability to report on government activities. Concerns also were raised about the Department's use of non-disclosure orders (NDO)—sought by the Department and issued by federal courts—that prevented the reporters and newsroom leadership from learning about the use of compulsory process to seek reporters' non-content email records.[2] Such NDOs could prevent reporters and news media companies from having an opportunity to challenge the compulsory process in court.[3] Concerns also were expressed that the NDOs impeded the news media's ability to report on the orders, thereby hindering public scrutiny of

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[1] "Compulsory process" generally refers to subpoenas, search warrants, and court orders issued pursuant to 18 U.S.C. § 2703(d). With the exception of communications records sought for two congressional staffers, which are described on page 9 of this report, all of the compulsory process the Department issued in connection with the leak investigations that we reviewed sought what we refer to in this report as "non-content communications records," as further explained in Section II.B. below.

[2] *See* "The *Times*, *Post*, and CNN Want Answers as Secret Trump DOJ Tactics Come to Light," *Vanity Fair*, June 10, 2021, www.vanityfair.com/news/2021/06/the-times-post-and-cnn-want-answers-as-secret-trump-doj-tactics-come-to-light (accessed August 1, 2024), "Justice Department says it'll no longer seize reporters' records," *Associated Press*, June 5, 2021, apnews.com/article/politics-business-government-and-politics-67ac2f4f96b2dfd7f47446662e59ec6e (accessed August 1, 2024).

[3] With regard to the compulsory process seeking email records for a *CNN* reporter, because the parent company for *CNN* was the provider of *CNN's* email services, the parent company was served with the compulsory process, which included an NDO prohibiting the parent company from informing the *CNN* reporter of the compulsory process. The parent company challenged the order seeking records from the reporter's work email accounts in court, and the Department ultimately agreed to narrow the scope of the request. The compulsory process seeking the *CNN* reporter's personal email also included an NDO, so the reporter was not made aware of its existence until after the fact and did not have an opportunity to negotiate with the Department or challenge the compulsory process in court. In response to the compulsory process seeking email records for *The New York Times* reporters and the accompanying NDO, the third-party service provider for *The New York Times* negotiated with the Department over the NDO's limitation on its ability to inform *The New York Times* about the compulsory process, and the Department moved to modify the NDO to allow The New York Times Company executives and its lawyers, but not the reporters, to learn of the compulsory process. Following discussions with counsel for the *New York Times*, the Department moved to withdraw its application for the reporters' records, to quash the order seeking the records, and to withdraw the NDO. With regard to the compulsory process seeking work email records for *The Washington Post* reporters, the third party service provider from which the Department sought the work email records complied with the compulsory process and the NDO but did not possess the requested records and did not challenge the compulsory process or NDO, and neither *The Washington Post* executives nor its reporters learned of the compulsory process contemporaneous with its issuance and therefore did not have an opportunity to challenge it.

the government's activities.[4] In addition, the news media was troubled by the Department's lack of notice prior to issuance of the compulsory process because in 2014 and 2015, in the wake of a controversy stemming from similar efforts by the Department to obtain reporters' communications records, the Department issued new guidelines that presumptively favored prior notice to and negotiation with the affected parties when the Department sought records of members of the news media to allow the affected parties to challenge any request and negotiate the scope of the records sought.[5]

On May 21, 2021, President Joseph Biden stated that the practice of subpoenaing news media records to identify reporters' sources was "simply, simply wrong," and he would not allow it.[6] On June 5, 2021, the Department announced it would no longer "seek compulsory legal process in leak investigations to obtain source information from members of the news media doing their jobs."[7]

Shortly after the Department's announcement, news media outlets reported that the Department used compulsory process to obtain records of Members of Congress and congressional staffers in connection with the alleged unauthorized disclosure of classified information. In response to this reporting, Members of Congress expressed concerns that their records had been obtained for political reasons and/or that issuing the compulsory process violated the separation of powers between the executive and legislative branches of government.[8] Similar to the news media's criticism, Members of Congress also voiced concern about the use of NDOs to prohibit the communication service providers from disclosing the existence of the compulsory process.[9]

On June 11, 2021, the DOJ Office of the Inspector General (OIG) initiated a review to examine whether the Department's use of compulsory process to obtain communications records of Members of Congress and affiliated persons and members of the news media in certain investigations of alleged unauthorized disclosures of classified information to the news media complied with Department policies and procedures, and whether there was evidence that compulsory process seeking non-

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[4] *See* "Times Requests Disclosure of Court Filings Seeking Reporters' Email Data and Gag Order," *The New York Times*, June 8, 2021, www.nytimes.com/2021/06/08/us/politics/times-leak-investigation-seized-records.html (accessed July 19, 2024); "CNN Lawyers Gagged in Fight With Justice Dept. Over Reporters' Email Data," *The New York Times*, June 9, 2021, www.nytimes.com/2021/06/09/us/politics/cnn-reporter-emails-justice-department.html (accessed July 19, 2024).

[5] "DOJ Access to Journalists' Phone Records is Ruled Out by Biden," *The Wall Street Journal*, May 21, 2021, www.wsj.com/articles/biden-rules-out-justice-department-access-to-journalists-phone-records-11621639951 (accessed August 1, 2024).

[6] "Biden won't allow Justice Dept. to seize reporters' records," *Associated Press*, May 21, 2021, apnews.com/article/arts-and-entertainment-government-and-politics-27a0ab87662217be1989a2d5a7465610 (accessed February 14, 2024).

[7] "Biden's Justice Department says it will no longer seize reporters' records for leak investigations," *CNN.com*, June 5, 2021, www.cnn.com/2021/06/05/politics/justice-department-leak-investigations-reporters-new-york-times/index.html (accessed September 19, 2024).

[8] Letter from Senate Judiciary Committee to Merrick B. Garland, June 14, 2021; Letter from House Judiciary Committee to Merrick B. Garland, June 17, 2021.

[9] Letter from House Judiciary Committee to Merrick B. Garland, June 17, 2021.

content records of Members of Congress and congressional staffers was sought based on party affiliation. This report summarizes the results of our review and describes the Department's use of compulsory process to obtain records of Members of Congress, congressional staffers, and members of the news media in four criminal investigations into the unauthorized disclosure of classified information that were opened in 2017. The Department did not charge anyone in these investigations with unauthorized disclosure of classified information, and all four of the investigations are now closed.

As described in this report, we make several findings regarding the Department's use of compulsory process to obtain non-content communications records of Members of Congress and congressional staff and members of the news media. With respect to Members of Congress and congressional staff, which are the focus of Chapter Two, we found the Department issued compulsory process for the non-content communications records of 2 Members of Congress and 43 individuals who were congressional staffers at the time the articles containing the classified information were published as part of the investigations to identify the sources of the leaked classified information. Both Members of Congress were Democrats, and of the 43 congressional staffers, 21 worked for Democratic Members of Congress or the Democratic staff of a congressional committee or congressional leadership office, 20 worked for Republican Members or the Republican staff of a congressional committee or congressional leadership office, and 2 worked in nonpartisan positions for congressional committees. All of the Members and staffers whose records were sought became aware of the classified information in connection with their congressional responsibilities. For most of the staffers, the basis for the Department's decision to include them in the pool of possible leakers (subject pool) was that the Department or a U.S. Intelligence Community agency determined that they had been provided, consistent with their job responsibilities, access to the classified information by the Department, a U.S. Intelligence Community agency, or another congressional staffer, or may have otherwise gained access to the information; the decision to issue compulsory process was based in most instances on the close proximity in time between that access and the subsequent publication of the news articles.

During the relevant timeframe of this review, the Department did not have a policy that expressly or clearly addressed the use of compulsory process to obtain from third parties the communications records of Members of Congress or congressional staffers, or the use of NDOs in connection with such compulsory process. Further, Department policy did not require any supervisory approval, including by senior Department officials, before a prosecutor issued such compulsory process or sought an NDO in connection with such process.

The Department's decision to compel the production of non-content communications records of Members of Congress and congressional staffers implicated the constitutional rights and authorities of a co-equal branch of government. Although Members of Congress and congressional staff are not immune from prosecution for criminal conduct, including the unauthorized disclosure of classified information, and we did not find any evidence of retaliatory or political motivation by the career prosecutors who issued the compulsory process for non-content records that we reviewed, we believe that using compulsory process to obtain such records when based solely on the close proximity in time between access to the classified information and subsequent publication of the information—which was the case with most of the process issued for non-content communications records of congressional staff in the investigations we examined—risks chilling Congress's ability to conduct

oversight of the executive branch because it exposes congressional officials to having their records reviewed by the Department solely for conducting Congress's constitutionally authorized oversight duties and creating, at a minimum, the appearance of inappropriate interference by the executive branch in legitimate oversight activity by the legislative branch. Moreover, even non-content communications records—such as those predominantly sought here—can reveal the fact of sensitive communications of Members of Congress and staffers, including with executive branch whistleblowers and with interest groups engaging in First Amendment activity.

We also determined that the Department obtained 40 NDOs related to the compulsory process that was issued for records of Members of Congress and congressional staffers, most of which were renewed at least once, with some extended for up to 4 years. The NDO applications filed with the courts—both in original and renewal applications—relied on general assertions about the need for non-disclosure rather than on case-specific justifications. Department policy permits prosecutors to make boilerplate statements in applications. However, Department policy also expects that in the later stages of investigations, applications will include more specific facts relevant to the requests "as available" to extend non-disclosure. The renewal applications in these investigations, including a renewal application filed in August 2021 after news broke about the Department's issuance of compulsory process for congressional records and after the Department determined that a former congressional staffer on whom one of the investigations had focused likely did not leak the classified information, contained the same boilerplate assertions about the need for non-disclosure that were contained in the original applications. Additionally, DOJ policy in effect at the time did not require the NDOs filed with the courts to reference, and they did not reference, the fact that they related to requests for records of Members of Congress or congressional staffers.

In November 2023, the Department substantially revised its policy on congressional investigations (Congressional Investigations Policy) to require, among other things, approval of the Department's Public Integrity Section and the U.S. Attorney before issuing compulsory process to a third party for records of a Member of Congress or congressional staffer when related to the staffer's duties and before seeking NDOs in connection with such compulsory process. The revised policy also stated that the Public Integrity Section "should" notify the Criminal Division's Assistant Attorney General of approvals, although it did not unambiguously require similar notice to the Deputy Attorney General or Attorney General. Although we believed the revised Congressional Investigations Policy represented an improvement over prior policy, we were concerned that it still lacked a provision clearly requiring senior level DOJ notification to ensure that senior leadership would be able to consider and decide matters potentially raising constitutional separation of powers issues. This report therefore recommends that the Department evaluate when advance notification to a senior Department official, such as the Deputy Attorney General or Attorney General, should be required before compulsory process is issued, and any corresponding NDOs are sought, for records of a Member of Congress or congressional staffers and establish, as necessary, implementing policies and guidance. We also recommend that the Department consider the circumstances in which NDO applications and renewals should identify for the reviewing judge that the records covered by a proposed NDO are records of Members of Congress or congressional staffers.

After reviewing a draft of this report that included these recommendations, the Department revised applicable DOJ policies in September 2024 in response to the concerns we identified. The newly revised Congressional Investigations Policy now requires the Public Integrity Section (PIN) to notify the

Criminal Division's Assistant Attorney General of all consultations and approvals undertaken by PIN in connection with investigations involving Members of Congress or congressional staffers, including concerning the issuance of compulsory process to a third party for the communications records of a Member of Congress or congressional staffer and related NDOs.[10] The newly revised policy also makes explicit that, prior to taking one of the enumerated investigative steps specified in the policy, including issuing compulsory process and related NDOs for records of Members of Congress or congressional staffers, the U.S. Attorney's Office or other prosecuting component must file an "Urgent Report" to Department leadership, including the Attorney General and Deputy Attorney General.[11] At the same time, the Department also revised the Urgent Reports Policy to explicitly add "investigations involving elected or appointed officials" to the list of circumstances that require urgent reporting when there are major developments.[12] The Department also revised applicable DOJ policy to require that, in cases where an NDO would delay notice to a Member of Congress, congressional office, or a congressional staffer, the prosecutor must disclose this fact in the application filed with the court.[13]

Our review also observed that while the Department's former and current News Media Policy requires the government, with some exceptions, to exhaust all reasonable avenues to obtain the information sought from non-news media sources before seeking approval to issue compulsory process for news media records, no similar exhaustion requirement exists in the Department's revised Congressional Investigations Policy. Consistent with the News Media Policy's exhaustion requirement, DOJ prosecutors issued compulsory process for records of Members of Congress and congressional staffers approximately 3 years before issuing similar process for records of the news media. Accordingly, we recommend that the Department consider whether there are circumstances in which a similar exhaustion requirement should be a prerequisite for issuing compulsory process to obtain records of Members of Congress and congressional staffers.

With respect to compulsory process to obtain communications records of members of the news media, which is the focus of Chapter Three, the Department has emphasized the need to "ensure the highest level of oversight" when using this investigative tool.[14] However, in the three investigations we examined as part of this review in which compulsory process was issued for non-content communications records of members of the news media, we found that the Department complied with some but not all of the then applicable provisions of the News Media Policy. Specifically, we found that the Department failed to convene the News Media Review Committee to consider the compulsory process authorization requests; the Department did not obtain the required Director of National Intelligence (DNI) certification in one investigation, and we were unable to confirm whether the DNI certification it obtained in another investigation was provided to the Attorney General before he authorized the request; and the Department did not obtain the Attorney General's express

[10] JM 9-85.110 n.2, updated September 2024.

[11] JM 9-85.110, updated September 2024.

[12] JM 1-13.130, updated September 2024.

[13] JM 9-13.700, updated September 2024, Item 2, updated September 2024.

[14] Attorney General Memorandum to all Department Employees, Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, January 14, 2015 at 1.

authorization for the NDOs that were sought in connection with compulsory process issued in the investigations. Given the important interests at stake, we were troubled that these failures occurred, particularly given that only a few years had elapsed since the Department substantially overhauled its News Media Policy in 2014 and 2015 following serious criticisms concerning the Department's efforts to obtain communications records of members of the news media. Having once again revised its News Media Policy to address this most recent criticism, the Department must make every effort to ensure full and exacting compliance with its new policy in the future.

II. Background

A. The Investigations and Issuance of Compulsory Process

Under federal law, the unauthorized disclosure of classified information may cause "damage," "serious damage," or "exceptionally grave damage" to the national security, depending on the nature of the information disclosed.[15] Unauthorized disclosures may expose the sources and methods the U.S. Intelligence Community (USIC) uses to collect information, allowing adversaries to potentially evade those techniques; may damage relationships between the United States and foreign allies; and may endanger the lives of military or intelligence community personnel, as well as of civilians.[16] Given the harm unauthorized disclosures may cause, Department employees told us that investigations conducted to identify and prosecute the perpetrators of unauthorized disclosures of classified information—both to hold these individuals accountable and to deter others—have been a priority across multiple administrations, both Republican and Democratic.

When an unauthorized disclosure occurs, the USIC agency with which the classified information originates is responsible for submitting a "Crimes Report" to the Department's National Security Division (NSD) identifying the classified information disclosed and answering a series of questions about the disclosure. If NSD determines that an investigation of the unauthorized disclosure is appropriate, it will refer the matter to the Federal Bureau of Investigation (FBI) to open an investigation.

One of the unauthorized disclosures we examined concerned classified information that originated with the FBI and was published by *The Washington Post*. The information, which the FBI considered classified at the time of the disclosure but has since been declassified, concerned the Department's electronic surveillance of Carter Page under the Foreign Intelligence Surveillance Act.[17] The FBI sent a

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[15] Executive Order 13526 on Classified National Security Information, Secs. 1.2(a)(1)-(3) (2009).

[16] "The Consequences of Permissive Neglect: Law and Leaks of Classified Intelligence," Studies in Intelligence Vol. 47 No. 1 (2003), pp. 1, 3-4, 6-7 (available at www.cia.gov/resources/csi/static/Consequences-Permissive-Neglect.pdf (accessed July 4, 2024)); DOJ Office of Public Affairs, "WikiLeaks Founder Pleads Guilty and Is Sentenced for Conspiring to Obtain and Disclose Classified National Defense Information," June 25, 2024, www.justice.gov/opa/pr/wikileaks-founder-pleads-guilty-and-sentenced-conspiring-obtain-and-disclose-classified (accessed July 4, 2024) ("Assange's decision to reveal the names of human sources illegally shared with him by Manning created a grave and imminent risk to human life.")

[17] The OIG examined the Department's electronic surveillance of Carter Page in our 2019 report *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (U.S. Department of Justice

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Crimes Report to NSD upon discovering the unauthorized disclosure and subsequently opened an investigation. We refer to this investigation as **Washington Post 1** throughout this report.

In response to the three other unauthorized disclosures of classified information to the news media that we examined—published by *CNN*, *The New York Times*, and *The Washington Post*—the originating USIC agencies submitted Crimes Reports to NSD requesting that the Department open investigations into the sources of these unauthorized disclosures.[18] NSD reviewed the Crimes Reports and directed the FBI to open investigations into all three media leaks, which the FBI did in August 2017. We refer to these investigations as **CNN**, **New York Times**, and **Washington Post 2** in this report.[19]

As noted above, all four investigations were opened in 2017. The FBI partnered with the U.S. Attorney's Office for the Eastern District of Virginia (USAO-EDVA) in **CNN** and with the U.S. Attorney's Office for the District of Columbia (USAO-DC) in **New York Times, Washington Post 1,** and **Washington Post 2**; NSD's Counterintelligence and Export Control Section participated in all four investigations; an attorney from PIN was also assigned to **Washington Post 2**. In mid-2018, the USAO-DC consolidated **New York Times**, **Washington Post 1,** and **Washington Post 2** with other ongoing investigations that concerned the unauthorized disclosure of classified information on related subject matter. According to records we reviewed, Department investigators determined that, in addition to concerning related subject matter, **Washington Post 2** and **New York Times** had "similar" pools of individuals who had access to the classified information that was disclosed to the news media, and they suspected that the sources of these disclosures had similar motives for leaking the classified information. We refer to the USAO-DC-led consolidated investigation of **New York Times**, **Washington Post 1, Washington Post 2** and other investigations as **Consolidated Leaks** in this report.

At the time of events described in this report, the DOJ policy that governed issuing compulsory process for records of members of the news media (News Media Policy) required that prosecutors first exhaust all other reasonable means of identifying the sources of the unauthorized disclosures before requesting Attorney General authorization to issue compulsory process for records of members of the news media.[20] No similar exhaustion or Attorney General approval requirement, or

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Office of the Inspector General, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, Oversight and Review Division Report 20-012 (December 2019), oig.justice.gov/reports/review-four-fisa-applications-and-other-aspects-fbis-crossfire-hurricane-investigation.)

[18] The Crimes Reports stated that classified information from various USIC agencies was disclosed to the news media without authorization and that the originating USIC agencies believed the disclosures warranted criminal investigation. Because three of the USIC originating agencies were outside of the Department and therefore outside of the OIG's jurisdiction, we did not further examine the underlying predication contained in the Crimes Reports.

[19] Other news media outlets also published some of the same classified information published by *The New York Times* and *The Washington Post,* and the Crimes Reports to the Department from the originating USIC agencies referred to those publications as well. For investigative reasons, however, the Department ultimately decided to focus the investigations on the leaks to *The New York Times* and *The Washington Post*.

[20] 28 C.F.R. § 50.10(a)(3).

any other policy limitation was in place at the time concerning the issuance of compulsory process for records of Members of Congress or congressional staffers.[21]

Between September 2017 and March 2018, in connection with **Washington Post 1** and **Washington Post 2**, the USAO-DC issued compulsory process to third party electronic communication service providers (such as email services providers, telephone companies, cell phone service providers, and Internet-based messaging services) and to remote computing service providers (such a cloud based storage providers)[22] to obtain non-content communications records for phone numbers and email addresses the Department had identified as being associated with 2 Members of Congress and 43 individuals who were congressional staffers at the time the articles containing the classified information were published; the Department issued additional compulsory process for 1 of the 43 congressional staffers, who was by then no longer a staffer, through June 2020.[23] The Department or the originating USIC agency identified these Members and staffers as individuals who had been given or may have gained access to the disclosed classified information, consistent with their congressional responsibilities, prior to its publication in the news media. As detailed below, both Members of Congress were Democrats. Of the 43 congressional staffers, 21 worked for Democratic Members of Congress or the Democratic staff of a congressional committee or congressional leadership office, 20 worked for Republican Members or the Republican staff of a congressional committee or congressional leadership office, and 2 worked in nonpartisan positions for congressional committees. The USAO-DC issued the compulsory process for records of the Members and staffers as part of an effort to determine whether the Members and staffers communicated with the reporters who authored the articles containing the classified information. The USAO-DC and USAO-EDVA did not issue any compulsory process for Members of Congress or congressional staffers in connection with **CNN** and **New York Times**.[24]

In **Washington Post 2**, after interviewing a witness (who we refer to throughout this report as "Committee Witness") and obtaining compulsory process returns showing contact by one of the staffers with the reporters during the relevant timeframe, the USAO-DC also obtained an order

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[21] U.S. Department of Justice, Office of the Deputy Attorney General, Craig S. Morford, Acting Deputy Attorney General, Memorandum for All Federal Prosecutors, Subject: "Recent Opinion Regarding the Speech or Debate Clause from the Court of Appeals for the District of Columbia Circuit: United States v. Rayburn House Office Building, Room 2113," September 12, 2007; Justice Manual (JM) 9-85.110 Investigations Involving Members of Congress, Added April 2018.

[22] We refer to electronic communications services and remote computing services collectively as "communication service providers" throughout this report.

[23] For the reasons we describe in Footnote 25, this report does not address (and we do not include among our data) the Department's issuance of compulsory process in **Washington Post 1** for the records of a 44th staffer, James Wolfe, who was then the Director of Security at the Senate Select Committee on Intelligence (SSCI). We also note, and describe further in Chapter Two, that the Department also sought records for members of the executive branch in connection with **Washington Post 1** and **Washington Post 2**.

[24] One of the case agents for **New York Times** told the OIG that congressional personnel were not part of the subject pool in that investigation. The case agent for **CNN** told us that although at least one congressional staffer was in the subject pool, the investigative team did not pursue records for that staffer because the language the reporter used in the article to refer to the source of the classified information suggested the source was not affiliated with Congress.

pursuant to 18 U.S.C. § 2703(d) (2703(d) order), a court order for pen register and trap and trace devices, and search warrants to obtain additional records related to the staffer, including the content of the staffer's email communications.[25] At the time the USAO-DC issued the original compulsory process and the subsequent orders and search warrant, the staffer no longer worked in a congressional position (we refer to this staffer as "Senior Committee Staffer" throughout this report). Based on the Committee Witness's testimony and other indicators that the Senior Committee Staffer and his spouse used each other's accounts, the USAO-DC also issued compulsory process to obtain non-content records for a phone number and email address associated with the Senior Committee Staffer's spouse.[26] After interviewing the Senior Committee Staffer—the interview was conducted after they had left their congressional position—the FBI and the USAO-DC ultimately determined that the Senior Committee Staffer likely did not leak the classified information to the reporters and the investigation was closed without any charges being filed.

The USAO-DC sought and obtained court-issued NDOs prohibiting the third party communication service providers from disclosing the existence of the compulsory process issued for the non-content communications records of the two Members of Congress and some of the compulsory process issued for the congressional staffers.[27]

After exhausting various reasonable efforts to identify the source of the unauthorized disclosures through other means, as required by the then DOJ News Media Policy, including by using compulsory process for non-content communications records of Members of Congress and congressional staffers in **Washington Post 2**, the Department issued compulsory process for records of the news media. This compulsory process was issued after obtaining authorization from the Attorney General, as the DOJ News Media Policy required at the time. Specifically, between July 2020 and January 2021, in connection with **CNN**, **New York Times**, and **Washington Post 2**, the USAO-EDVA and the USAO-DC issued compulsory process directed to third party communication service providers to obtain non-

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[25] The Department also used pen registers, trap and trace devices, and search warrants to obtain the communications records of James Wolfe, then the Director of Security at SSCI. That compulsory process was issued in a separate investigation into Wolfe that the Department opened in October 2017, after the Department received returns from the compulsory process it issued for Wolfe's communications records in **Washington Post 1**, which records showed extensive communication with a journalist who reported on national security matters and had previously authored articles containing sensitive information that the FBI was concerned had originated with Wolfe. In October 2018, Wolfe pleaded guilty to one count of violating 18 U.S.C. § 1001 for making a false statement to FBI agents about his repeated contacts with reporters.

In this separate investigation into Wolfe, the Department also sought the records of one additional Senator and two additional congressional staffers, as further explained below.

Because the Wolfe investigation differed from those under our review in multiple respects and led to the prosecution and conviction of Wolfe, this report does not address in detail the compulsory process sought for Wolfe's records in that investigation or in **Washington Post 1**, nor does it address compulsory process sought in the Wolfe investigation for records of the Senator, the congressional staffers, or the above-referenced journalist with whom Wolfe had extensive contact.

[26] Department records variously associated the phone number with the former staffer and their spouse, as described in Footnote 95 below.

[27] Prosecutors told us that they generally do not apply for NDOs when the company from whom records are being sought does not typically disclose to its customers that their records have been sought.

content communications records for eight reporters from the three publications. In connection with **CNN**, the USAO-EDVA also obtained a 2703(d) order directed at *CNN*'s parent company, Warner Media LLC, to obtain non-content communications records for one reporter. None of the reporters whose records were sought during this period were the subjects of any of the media leak investigations; rather, their records were sought in an effort to help identify the government employees who were sources of the classified information published in their articles. All of the 2703(d) orders were accompanied by NDOs that barred the recipients from disclosing the 2703(d) orders to the reporters whose records were sought. Those NDOs issued to third party communication service providers (as opposed to *CNN*'s parent company) also barred the providers from disclosing the orders to the news media outlets for which the reporters worked. Upon motions filed by the Department after discussions with the third party service provider that received compulsory process in connection with **New York Times** and then with Deputy General Counsel for *The New York Times* , the court modified the NDO on three occasions to allow the service provider to disclose the 2703(d) orders to the Deputy General Counsel, General Counsel, and outside counsel for *The New York Times*, as well as the Publisher and Chairman of the New York Times Company and the President and Chief Executive Officer of the New York Times Company.

B. "Non-Content" versus "Content" Communications Records

The Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510-23, "protects wire, oral, and electronic communications [(e.g., a phone call, an email)] while those communications are being made, are in transit, and when they are stored on computers."[28] Title II of ECPA, the Stored Communications Act, 18 U.S.C. §§ 2701-12, distinguishes between the *content* of records, which include the communication itself (e.g., the text of an email) or information reflecting its substance or meaning (e.g., the subject line of an email), and *non-content* records, which include information about how a communication was made (e.g., the date and time a text message was sent but without the text of the message) or information about an account or account holder unrelated to specific communications (e.g., an account holder's name and address).[29]

We use the term "non-content communications records" to include basic subscriber information for an account such as the subscriber's name; address; and billing information, including credit card or bank account numbers; the length of time an account has been in service; the types of service the customer utilizes (where a provider offers more than one type of service); and subscriber numbers or other identifying information, including any Internet protocol (known as IP) addresses and telephone or instrument numbers (e.g., MAC addresses, ESNs, MEINs, MEIDs, MINs, SIMs, IMSIs or IMEIs). "Non-content communications records" also include records of session times and durations (i.e., when someone signed on to an account and for how long) or local and long distance telephone connection records (e.g., text message logs or call detail records, which are records of each call made to and from the phone number for which records were sought, the source and destination phone numbers for each call, and the date, time, and duration of each call.) Other records or information pertaining to a subscriber or customer, such as email addresses with whom the account holder has corresponded,

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[28] U.S. Department of Justice, Bureau of Justice Assistance, Justice Information Sharing, "Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510-2523," https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1285#civil-rights-and-civil-liberties (accessed December 4, 2024).

[29] *Id.*

also constitute "non-content communications records." This term is for purposes of this report only, and we recognize that the News Media Policy does not treat subscriber or other information described in 18 U.S.C. §§ 2703(c)(2)(A), (B), (D), (E), and (F) as "communications records."

In contrast, "content communications records" include "any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). Such records may include an email subject line, the body or text of an email, the content of a text message, or a recording or transcript of a voice mail. See 18 U.S.C. § 2510(8). The SCA provides greater protections to content communications records than to non-content communications records because the content of a communication is viewed as more sensitive than the time, date, or other non-content information about a communication.[30]

C. Legal Standards

With the exception of the records regarding the one former congressional staffer sought in Washington Post 2 referenced above, compulsory process was issued for records (not testimony) of Members of Congress, congressional staffers, and members of the news media in the four investigations for non-content communications records only. A federal prosecutor is not required to make any threshold showing prior to issuing a federal grand jury subpoena,[31] including for local and long distance telephone connection records.[32] In fact, the grand jury does not even need to be notified prior to issuance of a grand jury subpoena.[33]

Although a federal grand jury subpoena can be used by investigators to obtain many non-content records, including for local and long distance telephone connection records, prosecutors must obtain a court order pursuant to 18 U.S.C. § 2703(d) to obtain electronic and wire communications records, such as for non-content email information (i.e., the to/from/cc information on an email). To obtain a 2703(d) order, a federal prosecutor must file an application with the court and establish "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). This "reasonable grounds to believe" threshold is lower than the "probable cause" standard required to obtain a search warrant, which, following the Sixth Circuit's opinion in *United States v. Warshak*, the Department chooses to seek to obtain the

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[30] *Id.*

[31] *See Doe* v. *DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985) ("The United States Attorney's Office has considerable latitude in issuing subpoenas. It has been held that the government is not required to make a preliminary showing of reasonableness or relevancy before issuing a subpoena.").

[32] We use this term to refer to call detail records, text message logs, and any other telephone connection records as explained in Section II.B. above.

[33] *Lopez* v. *Dep't of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("This Court has recognized that the term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does.").

content of email communications.[34] As noted above, other than for James Wolfe and for the one former congressional staffer in **Washington Post 2**, no search warrants were sought in any of the four investigations addressed in this report for records of Members of Congress, congressional staffers, or members of the news media.

In order to obtain an NDO pursuant to 18 U.S.C. § 2705(b), the government must demonstrate to a federal judge that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in "(1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(b).

D. The FBI's Retention and Storage of the Records Obtained in the Media Leak Investigations[35]

1. Congressional Records

According to information the FBI provided to the OIG, the FBI retains the [redacted] containing records of [redacted] obtained in **Washington Post 1** in electronic form in a restricted-access electronic file. Two Special Agents and an Intelligence Analyst who were on the squad that conducted the investigation have access to the electronic file.[36] The FBI further told us that a digital copy of some of the records obtained in **Washington Post 1** also is stored in the FBI's case management system, and that only personnel who were assigned to the investigation and whose names were provided to the court pursuant to Federal Rule of Criminal Procedure 6(e)(3)(B) have access to these records.[37] In addition, the FBI told us that the hard copies of all of the [redacted] for the records of [redacted] from **Washington Post 1** are retained in a locked filing cabinet to which only Special Agents and professional staff assigned to the squad that handled the

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[34] *See United States* v. *Castro-Aguirre*, 983 F.3d 927, 934 (7th Cir. 2020) (noting that 18 U.S.C. § 2703(d)'s reasonable grounds standard is "significantly lower than the probable-cause requirement for a warrant"); *see also United States* v. *Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (holding that a warrant based on probable cause is required to obtain the content of emails).

[35] The FBI's retention of records was beyond the scope of this review, and, therefore, we did not examine the Department's compliance with any retention policies. Nonetheless, we asked the FBI to provide us with information about how it had retained information, which we describe in this section.

[36] FBI field offices are divided into branches (e.g., Cyber, Criminal), which each contain squads that have specific subject matter responsibilities (e.g., drug squad, counterterrorism squad).

[37] Federal Rule of Criminal Procedure 6(e) limits disclosure of grand jury materials to certain persons, including "an attorney for the government for use in performing that attorney's duty" and "any government personnel...that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(A)(i)-(ii). When federal prosecutors disclose grand jury materials to other government personnel, such as FBI Special Agents, the federal prosecutors must "promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule." Fed. R. Crim. P. 6(e)(3)(B).

investigation have access. The hard copy materials are sealed in distinct case-specific envelopes that note that they contain "Grand Jury Material—Disseminate Only Pursuant to Rule 6(e)."

The FBI told us that [redacted] containing the records of [redacted] and [redacted] obtained in **Washington Post 2** are stored in digital form in a folder on the shared drive of the squad that handled the investigation, and that access to the folder is restricted to current Special Agents and staff assigned to the squad. Hard copies of the records are stored in envelopes that note that they contain "Grand Jury Material—Disseminate Only Pursuant to Rule 6(e)." These envelopes are stored in a locked cabinet to which only current Special Agents and staff assigned to the squad that handled the investigation have access.

2. Records of Members of the News Media

The FBI told us that [redacted] for records of [redacted] in **Washington Post 2** and **New York Times** are retained only in hard copy in envelopes that note "Grand Jury Material—Disseminate Only Pursuant to Rule 6(e)." The envelopes are kept in locked cabinets to which only current Special Agents and professional staff on each of the squads that handled the respective investigations have access. According to the FBI, all electronic copies of the returns in **Washington Post 2** have been deleted from internal FBI systems and records of deletion are included in the envelope with the hard copy returns. The FBI represented to the OIG that, according to the case agent, no digital returns were received in **New York Times.**

As to the records of the [redacted] obtained in **CNN**, the FBI represented to us that electronic copies of the [redacted] containing these records are retained in a section of its case management system known as a sub-file, which in this case is accessible to 22 individuals who were involved with the investigation, as well as in a folder accessible only on the agent's employee drive.[38] The FBI was unable to provide us with information as to whether any [redacted] were received in hard copy; it told us that if hard copy records were obtained, following the closure of the investigation, the FBI would have provided them to the FBI's Information Management Division for archival storage of closed case information.

The FBI represented to the OIG that none of the Congress-related or news media-related returns in any of the four investigations are "available for view or use in any other investigation or for other purposes."

E. Comparison of the Department's Approach to Issuing Compulsory Process for Records of Members of the News Media and for Records of Members of Congress and Congressional Staffers

The use of compulsory process to obtain records of members of the news media and congressional personnel may implicate separate and important constitutional considerations—the First Amendment in connection with the news media, and separation of powers, including the Supreme Court's

[38] The FBI represented that the case agent would retain this information until the completion of the OIG's review, at which point the records would be deleted.

recognition of Congress's right to oversee the executive branch,[39] and the Constitution's Speech or Debate Clause in connection with Members of Congress and congressional staff.

Although federal law does not recognize a reporters' privilege,[40] the Department has long imposed on itself strictures greater than those required by the First Amendment when seeking records of members of the news media. As explained in Chapter Three, the Department's News Media Policy in place at the time of the investigations we reviewed (the 2015 policy) required Attorney General authorization prior to issuing compulsory process to obtain records of a member of the news media in an investigation into the unauthorized disclosure of classified information.[41] The 2015 policy also required the Department to exhaust all other reasonable means of identifying the source of the unauthorized disclosure prior to seeking Attorney General authorization to seek records of a member of the news media. Moreover, the 2015 policy required the Attorney General to weigh several factors, such as whether the information sought was "essential" to the successful investigation of the crime and whether the compulsory process was "narrowly drawn," before approving issuance of compulsory process for the records of a member of the news media.[42]

Members of the news media received less protection under the 2015 policy if the Attorney General determined a member of the news media was a "subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities."[43] Nonetheless, even then, Attorney General approval was required, although the Attorney General only had to consider the principles laid out in paragraph (a) of 28 C.F.R. § 50.10, which stated the basic principles upon which the policy was based.[44] The policy had some exceptions to the requirement of Attorney General authorization, including when the member of the news media was the perpetrator, victim, or witness of a crime not based on, or within the scope of, newsgathering activities; when the member of the news media consented to the subpoena request; and when the subpoena was for information unrelated to newsgathering activities.[45]

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[39] *See Watkins* v. *United States*, 354 U.S. 178, 187 (1957) (holding that Congress's investigatory power encompasses inquiries concerning the administration of existing laws).

[40] *See Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (finding no First Amendment privilege for a reporter to refuse to answer questions before a grand jury); *New York Times Co.* v. *Jascalevich*, 439 U.S. 1317, 1322, (1978) ("There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had.").

[41] 28 C.F.R. § 50.10 (2015).

[42] 28 C.F.R. §§ 50.10(c)(5)(ii)-(viii) (2015).

[43] 28 C.F.R. § 50.10(c)(5)(i) (2015).

[44] 28 C.F.R. § 50.10(c)(5)(i) (2015).

[45] 28 C.F.R. § 50.10(c)(3) (2015). The 2015 policy did not define "newsgathering activities." The current policy, however, defines newsgathering to include "mere receipt, possession, or publication by a member of the news media of Government information, including classified information, as well as establishing a means of receiving such information, including from an anonymous or confidential source," whereas other criminal acts committed in the course of obtaining or using information do not constitute "newsgathering." 28 C.F.R. § 50.10(b)(2)(ii) (2022).

In addition, in those instances where Attorney General authorization was required before issuing compulsory process to obtain news media records, the 2015 policy required DOJ prosecutors to indicate whether they intended to seek an NDO and required the Attorney General's authorization to expressly state whether an NDO may be sought.[46]

In 2022, the Department's News Media Policy was revised to preclude DOJ employees from seeking records of a member of the news media in an effort to identify the source of an unauthorized disclosure of classified information.[47] The current policy allows the Department to seek compulsory process to obtain records of a member of the news media acting within the scope of newsgathering only to authenticate published information or records, in which case authorization of a Deputy Assistant Attorney General for the Criminal Division is required; or with consent of the member of the news media, in which case authorization by a U.S. Attorney or Assistant Attorney General responsible for the matter is required; or "[w]hen necessary to prevent an imminent or concrete risk of death or serious bodily harm," in which case authorization by the Attorney General is required.[48] The policy also allows the Department to seek records of a member of the news media not acting within the scope of newsgathering in several circumstances, including when "the member of the news media is the subject or target of an investigation and suspected of having committed an offense," in which case authorization of a Deputy Assistant Attorney General for the Criminal Division is required.[49]

Although the foundational principles of separation of powers and the Constitution's Speech or Debate Clause similarly demand that the Department take great care not to impede or appear to impede the functioning of Congress, at the time of the investigations under our review the Department did not have a policy that expressly or clearly addressed the use of compulsory process to obtain records of Members of Congress or congressional staffers from third parties. For example, although Department policy required its prosecutors to consult with PIN, which is within DOJ's Criminal Division, prior to taking certain steps in investigations involving a Member of Congress or congressional staff, the policy did not require a prosecutor to obtain supervisory approval, or to consult with PIN, before issuing compulsory process to third parties for records of Members of Congress or congressional staffers. Moreover, Department policy did not require any consultation or supervisory approval before a prosecutor could seek an NDO in conjunction with compulsory process seeking records of Members of Congress or congressional staff. Additionally, in contrast to the Department's News Media Policy, there were no circumstances where Attorney General approval was required before issuing compulsory process for records of Members of Congress or congressional staffers, or before seeking an NDO.

In the wake of news reports about the compulsory process issued for records of Members of Congress and congressional staffers in the investigations under our review, Attorney General Merrick Garland directed Deputy Attorney General Lisa Monaco to strengthen the Department's policies and procedures for obtaining records of Members of Congress and congressional staff, noting that,

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[46] JM 9-13.400(C)(7)(i).

[47] 28 C.F.R. § 50.10 (2022), JM 9-13.400(c) (updated February 2024).

[48] 28 C.F.R. § 50.10(c) (2022).

[49] 28 C.F.R. §§ 50.10(d)(1)(i) and (d)(2) (2022).

"'[c]onsistent with our commitment to the rule of law, we must ensure that full weight is accorded to separation-of-powers concerns moving forward.'"[50]

In November 2023, the Department thus promulgated a new Congressional Investigations Policy requiring DOJ prosecutors to obtain PIN approval prior to issuing compulsory process to a third party for records of a Member of Congress or congressional staffer when related to the staffer's duties or when seeking an NDO pursuant to 18 U.S.C. § 2705(b) in connection with compulsory process seeking such records.[51] The new policy further stated that PIN "should" notify the Criminal Division's Assistant Attorney General of any consultations or approvals[52] and that U.S. Attorney's Offices "should…apply elevated internal review and approval requirements" for all investigative steps requiring PIN consultation or approval, as outlined in the policy.[53] As described earlier, after reviewing a draft of our report, the Department revised the Congressional Investigations Policy in September 2024 to require, rather than merely encourage, PIN to notify the Criminal Division's Assistant Attorney General of any consultation or approval.[54] The November 2023 (and revised September 2024) Congressional Investigations Policy also requires that prosecutors obtain U.S. Attorney approval for an investigative step only where PIN approval is required.[55] The November 2024 (and revised September 2024) policy does not require under any circumstances Attorney General approval or unambiguously mandate notification to the Attorney General or Deputy Attorney General before issuing compulsory process for records of Members of Congress or congressional staffers, or before Department prosecutors seek an NDO in connection with a request for such records.[56]

F. Congress's Power to Conduct Oversight of the Executive Branch, to Conduct Investigations, to Receive Classified Information, and to Receive Information from Whistleblowers

The U.S. Supreme Court has long recognized that Congress has the power to investigate, which is "inherent" in its "power to make laws."[57] Moreover, this investigative power includes "probes into

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[50] U.S. Department of Justice, Office of Public Affairs, "Statement from Attorney General Merrick B. Garland," June 14, 2021, available at www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland#:~:text=Consistent%20with%20our%20commitment%20to,%2Dpowers%20concerns%20moving%20forward.%E2%80%9D (accessed August 20, 2024).

[51] Deputy Attorney General Memorandum to All Federal Prosecutors, Policies and Procedures in Criminal Investigations Involving Members of Congress and Staff, November 7, 2023; JM 9-85.110 Investigations Involving Members of Congress, updated November 2023. The policy requires consultation with PIN, rather than PIN approval, before issuing compulsory process to a third party that seeks records of a congressional staffer not related to the staffer's duties.

[52] JM 9-85.110 n.2, Investigations Involving Members of Congress, updated November 2023.

[53] JM 9-85.110 Investigations Involving Members of Congress, updated November 2023.

[54] JM 9-85.110 n.2, updated September 2024.

[55] *Id.*

[56] JM 9-85.110, updated September 2024

[57] *See, e.g.*, *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *McGrain* v. *Daugherty*, 273 U.S. 135, 173-74 (1927) (finding that Congress possesses "not only such powers as are expressly granted to them by the

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departments of the Federal Government to expose corruption, inefficiency or waste."[58] Thus, while the Department has the power to conduct criminal investigations relating to wrongdoing by Members of Congress and congressional staffers as part of its constitutional duties to enforce the criminal laws—including investigations into the unauthorized disclosure of classified information—Congress has the constitutional authority to conduct oversight investigations of the Department.

In exercising its oversight and appropriation authority, Members of Congress and congressional staffers, including those on the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI), regularly receive and review classified information provided by executive branch agencies. Moreover, the House and Senate Judiciary Committees exercise oversight authority over the activities of the Department and the FBI and have legislative and oversight responsibilities for the Foreign Intelligence Surveillance Act.[59] Federal law also requires the executive branch intelligence agencies to keep HPSCI and SSCI fully informed of their activities, including of "any significant anticipated intelligence activity."[60]

Another important source of information for Congress in conducting its oversight authority are whistleblowers, including executive branch employees who wish to inform Congress of alleged wrongdoing within their agencies.[61] Federal law and congressional rules provide that executive branch employees have a right to produce such information to Congress without providing any notice to their agencies and generally provides for confidentiality for the whistleblower.[62] Additionally,

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Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective" and that "the power of inquiry…is an essential and appropriate auxiliary to the legislative function").

[58] *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

[59] U.S Senate Committee on the Judiciary, "About the Committee," www.judiciary.senate.gov/about/committee (accessed August 5, 2024); House of Representatives, Judiciary Committee, "About the Committee," judiciary.house.gov/about (accessed August 5, 2024). *See, e.g.,* U.S Senate Committee on the Judiciary, "Oversight of Section 702 of the Foreign Intelligence Surveillance Act and Related Surveillance Authorities," www.judiciary.senate.gov/oversight-of-section-702-of-the-foreign-intelligence-surveillance-act-and-related-surveillance-authorities (accessed August 5, 2024); House of Representatives, Judiciary Committee, "Fixing FISA: How a Law Designed to Protect Americans Has Been Weaponized Against Them," April 27, 2023, judiciary.house.gov/committee-activity/hearings/fixing-fisa-how-law-designed-protect-americans-has-been-weaponized (accessed August 6, 2024).

[60] 50 U.S.C. § 3092; Intelligence Community Directive 112, Congressional Notification, June 29, 2017, www.dni.gov/files/documents/ICD/ICD-112.pdf (accessed August 2, 2024). *See also* 50 U.S.C. § 3093(b).

[61] Office of the Whistleblower Ombuds, "Whistleblower Best Practices for Working with Congress," whistleblower.house.gov/whistleblower-best-practices-working-congress (accessed July 29, 2024).

[62] *See, e.g.*, U.S. Const. amend. I (establishes right of free speech, including communications with Congress); Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) (provides whistleblower protections for most federal employees who make authorized disclosures, including to Congress); Lloyd-La Follette Act of 1912 (5 U.S.C. § 7211) (federal employees' right to communicate with Congress may not be interfered with or denied); House Code of Official Conduct, Rule XXIII Clause 21 (House personnel should not publicly disclose the identity of anyone who makes a disclosure of wrongdoing under protections provided by federal law); *see also* Office of the Whistleblower Ombuds, "Frequently Asked Questions: Are whistleblower communications with Congress legally protected?" and "Are there legal protections to ensure a whistleblower's confidentiality?", https://whistleblower.house.gov/resources/all-resources/frequently-asked-questions (accessed July 29, 2024).

agencies are prohibited from retaliating, or threatening to retaliate, against an employee for being a whistleblower.[63]

G. Methodology

During this review, the OIG interviewed 24 witnesses from various Department components who worked on or supervised the investigations.[64] These witnesses included at least one primary FBI Special Agent assigned to each of the investigations; the lead Assistant U.S. Attorneys (AUSA) assigned to the investigations from the USAO-DC and the USAO-EDVA; supervisors from the FBI, NSD and the USAO-DC; attorneys from the Policy and Statutory Enforcement Unit of the Department's Criminal Division who reviewed the requests for Attorney General authorization to issue compulsory process for the communications records of members of the news media; an attorney from PIN and the Deputy Assistant Attorney General with oversight of PIN at the time of the issuance of some of the compulsory process; an attorney from NSD; and one AUSA who was temporarily assigned to NSD to work on the **New York Times** and **Washington Post 2** investigations. Former Attorney General William Barr and former Deputy Attorney General Rod Rosenstein declined our requests for voluntary interviews, and, because the OIG does not have the authority to subpoena testimony from former Department employees, we were unable to compel their interviews.

We also reviewed thousands of documents, including FBI electronic communications documenting the opening and closing of the relevant investigations and certain investigative steps; FBI interview reports; memoranda to the Attorney General seeking authorization to issue compulsory process to obtain communications records of members of the news media, as well as related documents; court filings from the litigation arising out of the issuance of compulsory process for records of members of the news media; and contemporaneous notes, briefing material, and memoranda prepared by various witnesses in the investigations under our review. In addition, we reviewed a select number of electronic communications between and among various members of the investigative team pertaining to various authorization requests. We also examined the Crimes Reports from the originating USIC agencies describing the classified information that was leaked to the news media and requesting that the FBI investigate those media leaks.

One significant and time-consuming challenge of this review was identifying and aggregating information about the Department's issuance of compulsory process for records of Members of Congress and congressional staffers, and associated NDOs. Because Department policy in effect at

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[63] Whistleblower Protection Act (5 U.S.C. § 2302(b)(8)). *See* Congressional Research Service, "Compilation of Federal Whistleblower Protection Statutes," updated April, 25, 2024, https://crsreports.congress.gov/product/pdf/R/R46979 (accessed July 29, 2024) for a list of federal whistleblower protection statutes.

[64] Among those interviewed was the Chief of the Criminal Division at the USAO-DC from the time these investigations were initiated through early April 2018—the period in which most of the compulsory process was issued for non-content communications records of Members of Congress and congressional staff in **Washington Post 1** and **Washington Post 2**, but before compulsory process was issued for non-content communications records of members of the news media in **Washington Post 2** and **New York Times**. This individual currently serves in a senior position in the OIG. Given his involvement in the investigations at issue, he was recused and was not involved with the OIG's review other than as a witness.

the time of the investigation we reviewed required Attorney General approval prior to issuance of compulsory process to obtain records of members of the news media, we were able to rely on the documentation for Attorney General approval as a starting point for ascertaining what compulsory process likely was issued for records of members of the news media. In contrast, because there was no policy at the time requiring Main Justice review before issuance of compulsory process for records of Members of Congress or congressional staffers, the Department did not have a centralized record of the compulsory process likely issued for records of Members of Congress and congressional staffers. Therefore, to compile this information, we requested and reviewed a summary chart provided by the USAO-DC and one provided by the FBI that described the information sought by the compulsory process issued, whether information was received in response, and, in the chart provided by the USAO-DC, some of the information that was received. We also obtained and reviewed hundreds of compulsory process documents issued by the USAO-DC, applications for NDOs, and NDOs. The information contained in the summary charts that we received from the USAO-DC and the FBI were not entirely consistent with one another nor with the underlying compulsory process documents. As a result, the OIG had to expend considerable time and resources to identify and reconcile inconsistencies, and to request additional records from the USAO-DC and the FBI to fill in the information gaps.

H. Structure of the Report

This report consists of four chapters. The public version of this report contains limited redactions of information that the Department determined contains grand jury information or is too sensitive for public release.[65] Following this Executive Summary and Background, Chapter Two describes the Department's use of compulsory process to obtain records of Members of Congress and congressional staffers in certain media leak investigations, as well as the use of NDOs in connection with some of that compulsory process. The chapter first summarizes the relevant Department policies then describes what records were sought and why, the method by which they were obtained, and the use of NDOs in connection with the compulsory process issued. The chapter concludes with our analysis of the facts presented in the chapter, as well as a summary of the recommendations made in the chapter.

Chapter Three addresses the Department's use of compulsory process to obtain communications records of members of the news media in certain media leak investigations. The chapter first summarizes the Department's News Media Policy and related Justice Manual provisions. It then describes the process and requirements to obtain Attorney General authorization of compulsory process seeking communications records of members of the news media and our factual findings regarding whether the Department complied with those requirements. Next, the chapter describes what records were sought and authorized, the method by which they were obtained, the use of NDOs in connection with the compulsory process issued, and the delayed notice to the reporters whose records were obtained. The chapter concludes with our analysis of the facts presented in the chapter.

Chapter Four summarizes our recommendations.

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[65] Consistent with our standard practice, we provided a draft copy of this report to the Department for the purpose of conducting a factual accuracy and sensitivity review.

Appendix 1 is the Department's response to this report.

Appendix 2 is a table summarizing what the Department sought for each Member of Congress and congressional staffer, with some exclusions noted below.

Chapter Two: Issuance Of Compulsory Process To Obtain Records Of Members Of Congress And Congressional Staffers

As described in Chapter One, starting in 2017, in Washington Post 1 and Washington Post 2, the Department issued compulsory process to third parties for primarily non-content communications records of Members of Congress and congressional staffers in an effort to identify who leaked the classified information contained in the articles that triggered those investigations. Unlike with the Department's News Media Policy, which required investigators to exhaust all other reasonable means of identifying the sources of the unauthorized disclosures before seeking to use compulsory process to obtain records of members of the news media, the Department had no exhaustion requirement, or any other policy limitation or approval requirement, for issuing compulsory process to third parties for records of Members of Congress or congressional staff.

In this chapter, we first describe any then applicable Department policies and procedures regarding the use of compulsory process to obtain communications records of Members of Congress and congressional staffers. We then summarize our factual findings, and we conclude with our analysis of the Department's actions in issuing compulsory process for records of Members of Congress and congressional staffers.

I. Applicable DOJ Policies

In this section we describe the applicable polices governing the Department's use of compulsory process to obtain communications records of Members of Congress and congressional staffers (Congress-related compulsory process) and the non-disclosure orders (NDO) issued in connection with that compulsory process. We also describe, where relevant, significant revisions the Department made to applicable policies after reviewing a draft of this report. As described in Chapter One, investigations involving Members of Congress or congressional staffers can implicate constitutional considerations, including separation of powers and the Constitution's Speech or Debate Clause.

A. DOJ Policies Concerning the Issuance of Compulsory Process for Records of Members of Congress and Congressional Staffers, and Notification Regarding the Issuance of Such Process to Department Leadership

Department policy during the relevant timeframe did not expressly or clearly address the use of compulsory process to obtain records of Members of Congress or congressional staffers from third parties.[66] Although Department policy required consultation with the Department's Public Integrity Section (PIN), which is within DOJ's Criminal Division at Main Justice, prior to taking certain steps in investigations involving a Member of Congress or congressional personnel, the policy did not require

[66] The relevant timeframe for this aspect of our review begins in September 2017, when the first compulsory process was issued for congressional staffers in the investigations under our review, and extends through June 2020, when the last Congress-related compulsory process was issued.

consultation with PIN, or any supervisory approval, before a prosecutor issued compulsory process to third parties for records of a Member of Congress or congressional staffers.[67]

While our review was ongoing, in November 2023, the Department revised its policies to address the use of compulsory process to obtain records of a Member of Congress, congressional office, or congressional staffer held by third parties. We describe below the policies that were in effect at the time of the investigations we reviewed, as well as the revised policies, including changes the Department made after reviewing a draft of this report, which are currently in effect.

From 2007 until April 2018, the Department's policy relating to congressional investigations was governed by a 2007 Memorandum from then Acting Deputy Attorney General Craig Morford, issued in the wake of a decision by the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Rayburn House Office Building,* which found that the Speech or Debate Clause prohibits the compelled disclosure of materials protected by the Speech or Debate Clause in the course of a criminal investigation.[68] The Morford memorandum required all federal prosecutors to contact the PIN Chief or Deputy Chief in "an investigation involving a federal congressional official, including a Member of Congress, or a staff member" where the prosecutor planned "to conduct a voluntary interview with or issue a grand jury subpoena to a congressional official, apply for a search warrant at a location where legislative materials may be located, or engage in electronic surveillance of staffers or members, including consensual recordings."[69]

In April 2018, the Department added Section 9-85.110 to the Justice Manual (JM), titled "Investigations Involving Members of Congress," (Congressional Investigations Policy) that required "[c]onsultation with the Public Integrity Section…in all investigations involving a Member of Congress or congressional staff member." Among other things, the new section required that PIN "be consulted prior to taking any of the following steps: (1) interviewing a Member of Congress or congressional staff member; (2) subpoenaing a Member of Congress or congressional staff member; or (3) applying for a search warrant for a location or device in which legislative materials are likely to be found."[70] However, the April 2018 JM provision did not require PIN consultation, or any supervisory approval, before a DOJ prosecutor issued a subpoena to a third party for records of a Member of Congress or congressional staffers, or obtained an order pursuant to 18 U.S.C. § 2703(d) (2703(d) order) requiring a third party

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[67] In 1976, the Department created PIN in order to consolidate the Department's "oversight responsibilities for the prosecution of criminal abuses of the public trust by government officials." In addition to prosecuting public integrity cases, PIN provides consultation to U.S. Attorney's Offices on matters involving a Member of Congress or congressional staffer. *See* U.S. Department of Justice, Criminal Division, Public Integrity Section, "About the Public Integrity Section," available at www.justice.gov/criminal/criminal-pin/about (accessed on August 20, 2024).

[68] U.S. Department of Justice, Office of the Deputy Attorney General, Craig S. Morford, Acting Deputy Attorney General, Memorandum for All Federal Prosecutors, Subject: "Recent Opinion Regarding the Speech or Debate Clause from the Court of Appeals for the District of Columbia Circuit: *United States* v. *Rayburn House Office Building, Room 2113*," September 12, 2007; *United States* v. *Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007).

[69] DOJ, Memorandum for All Federal Prosecutors, Speech or Debate Clause.

[70] JM 9-85.110 Investigations Involving Members of Congress, Added April 2018.

communication service provider to provide records (content or non-content) of a Member of Congress or congressional staffer.

In November 2023, the Department substantially revised JM 9-85.110. The revised Congressional Investigations Policy, which, as described further below, was modified again in September 2024 after the Department reviewed a draft of this report, now expressly requires PIN and U.S. Attorney approval when seeking records held by third parties for a Member of Congress, congressional office, or congressional staffer when related to the staffer's congressional duties. The revised policy also requires PIN consultation when seeking records of a staffer in an investigation unrelated to the staffer's congressional duties. In addition, the revised policy requires consultation with PIN when applying for a pen register or trap and trace surveillance device for accounts belonging to a congressional staffer when unrelated to the staffer's duties. Further, the revised policy states that "U.S. Attorney's Offices should also apply elevated internal review and approval requirements for all investigative steps identified [in the policy], with U.S. Attorney approval required where PIN approval is required." No such internal review and approval requirements were in place at the time the Congress-related compulsory process was issued in the unauthorized disclosure investigations that we examined.

The November 2023 Congressional Investigations Policy also referenced the Department's policy on filing "Urgent Reports," which are reports to inform Department leadership of "(1) major developments in significant investigations and litigation, (2) law enforcement emergencies, and (3) events affecting the Department that are likely to generate national media or Congressional attention."[71] The Congressional Investigations Policy did not unambiguously require the filing of Urgent Reports in matters covered by the Congressional Investigations Policy; rather, it provided that "when an investigative step governed by one of the requirements" of the Congressional Investigations Policy "warrants the filing of an Urgent Report, that report must still be submitted."[72] In addition, in referencing the Urgent Reports Policy, the Congressional Investigations Policy did not cite to the entirety of the Urgent Reports Policy, which begins with the general provision referenced above, found at JM 1-13.100, and instead cited to one specific subsection of the policy, JM 1-13.120, which is entitled "Major Development."[73] JM 1-13.120 does not define the term "Major Development" and just provides a list of non-exhaustive examples of "major developments," none of which are similar to the use of compulsory process to obtain non-content records of Members of Congress or congressional staffers. After reviewing a draft of this report, the Department revised the Congressional Investigations Policy in September 2024 to make explicit that, prior to taking one of the enumerated investigative steps specified in the policy, including issuing compulsory process and related NDOs for records of

[71] JM 1-13.100. The Urgent Reports Policy provides that Urgent Reports are required even when the U.S. Attorney's Office has provided "oral or written notice" to Department leadership. *Id.* The Urgent Reports Policy was in effect at the time of the investigations we reviewed but has since been revised as described in this report.

[72] *See* JM 9-85.110 Investigations Involving Members of Congress, updated November 2023. It also stated that the "Urgent Report should indicate whether PIN concurred with, or approved of, the planned investigative step." *Id.*

[73] JM 9-85.110 Investigations Involving Members of Congress, updated November 2023. *Compare* Deputy Attorney General Memorandum to All Federal Prosecutors, Policies and Procedures in Criminal Investigations Involving Members of Congress and Staff, November 7, 2023 (citing the Urgent Reports Policy generally (JM 1-13.000)).

Members of Congress or congressional staffers, the U.S. Attorney's Office or other prosecuting component must file an "Urgent Report" to Department leadership, including the Attorney General and Deputy Attorney General.[74] At the same time, the Department also revised the Urgent Reports Policy to, among other things, explicitly add "investigations involving elected or appointed officials" to the list of circumstances that require urgent reporting when there are major developments.[75]

The Department's revised Congressional Investigations Policy differs from the revised News Media Policy in two significant respects. First, the revised News Media Policy only allows compulsory process to be issued for the purpose of obtaining records of a member of the news media acting within the scope of newsgathering in a few circumstances, which require Attorney General approval unless the member of the news media consents to the use of the compulsory process or the information has already been published, in which instances DOJ officials subordinate to the Attorney General must approve.[76] By contrast, the revised Congressional Investigations Policy does not clearly require the Attorney General or Deputy Attorney General to approve a request to use compulsory process to obtain records of Members of Congress or congressional staffers in any circumstances (as described above, recent changes require that the Attorney General and Deputy Attorney General be made aware of such compulsory process, through the submission of Urgent Reports, before it issues). Second, the revised News Media Policy continues to include an exhaustion requirement for approval of the use of compulsory process to obtain news media records.[77] By contrast, the revised Congressional Investigations Policy does not include an exhaustion requirement.

The Congressional Investigations Policy is located in a chapter of the JM called "Protection of Government Integrity," and its first provision, JM 9-85.100 Supervisory Jurisdiction, states that the chapter "addresses crimes which affect government integrity, including bribery of public officials and accepting a gratuity, election crimes, and other related offenses."[78] The location of the Congressional Investigations Policy in the chapter addressing "Protection of Government Integrity" creates ambiguity as to whether the section's reference to "all investigations involving a Member of Congress or congressional staff member" means all investigations of any type or only those investigations into crimes that "affect government integrity." However, the unauthorized disclosure of classified information would appear to constitute a crime affecting government integrity, even though it is not referenced in the list of crimes specifically mentioned in JM 9-85.100.

B. DOJ Policies Concerning the Use of NDOs in Connection with Compulsory Process for Communications Records of Members of Congress and Congressional Staffers

Under § 2705(b) of the Stored Communications Act, when the Department uses compulsory process to obtain records from a communications service provider pursuant to § 2703 of the Stored

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[74] JM 9-85.110, updated September 2024.

[75] JM 1-13.130, updated September 2024.

[76] 28 C.F.R. § 50.10(c) (2022).

[77] *See* 28 C.F.R. § 50.10(g) (2022).

[78] JM 9-85.100 Supervisory Jurisdiction, updated April 2018.

Communications Act, it may seek a court order, known as a non-disclosure order or NDO, that precludes the communication service provider from notifying anyone, including the individual whose records are being sought, of the existence of that compulsory process.[79] At the time of the issuance of the compulsory process under our review, the Department had no policy pertaining to the use of NDOs specifically in connection with compulsory process issued to obtain records of Members of Congress and congressional staffers.[80] The only applicable policy at the time was the Department's general policy governing applying for NDOs pursuant to 18 U.S.C. § 2705(b). The policy was issued on October 19, 2017, in a memorandum from then Deputy Attorney General Rod Rosenstein.[81] In December 2017, the Department added JM 9-13.700, titled "Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)," to the JM, codifying the policy outlined in the October Rosenstein memorandum. This 2017 version of the policy remained in effect during the entire timeframe of our review. After reviewing a draft of this report, the Department revised JM 9-13.700 in September 2024 to require that, in cases where an NDO would delay notice to a Member of Congress, congressional office, or a congressional staffer, the prosecutor must disclose this fact in the application filed with the court.[82]

The revised Congressional Investigations Policy now requires PIN approval when applying for NDOs pursuant to § 2705(b) in connection with communications records of a Member of Congress or congressional staffer when related to the staffer's duties and consultation with PIN in connection with records belonging to a staffer when unrelated to a staffer's duties.[83] Unlike the Department's revised News Media Policy, it does not require approval by the Attorney General before seeking an NDO, or even clearly mandate advance notice to the Attorney General or Deputy Attorney General.[84] However, as described earlier, after reviewing a draft of this report, the Department made a revision to the Congressional Investigations Policy that requires, prior to issuing compulsory process and related NDOs for records of Members of Congress or congressional staffers (whether related or unrelated to

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[79] 18 U.S.C. § 2705(b). The statute provides that "the court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena or court order will result in (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.*

[80] In contrast, as noted above, the Department's News Media Policy at the time required Attorney General authorization prior to applying for an NDO in connection with compulsory process issued for records of members of the news media in certain contexts. JM 9-13.400(C)(7), updated October 2016.

[81] Although most of the NDOs obtained in connection with the Congress-related compulsory process in the investigations under our review were obtained under 18 U.S.C. § 2705(b), one NDO and its renewals were sought under 28 U.S.C. § 1651(a). We have not identified any Department policies that address applying for NDOs under that statute.

[82] JM 9-13.700, Item 2, updated September 2024.

[83] The Congressional Investigations Policy requires PIN approval for "Applications, Pursuant to 18 U.S.C. §§ 2703(d) or 2705(b), for Records Belonging to a Congressional Office Member of Congress, or Congressional Staffer When Related to the Staffer's Duties." Although applications pursuant to 18 U.S.C. § 2705(b) are for NDOs, not for records, we understand the policy to require PIN approval when an attorney applies for an NDO in connection with compulsory process seeking records of a Member of Congress or congressional staffer when related to the staffer's duties.

[84] 28 C.F.R. § 50.10(k) (2022).

a staffer's duties), the U.S. Attorney's Office or other prosecuting component to file an "Urgent Report" to Department leadership.[85]

II. Facts

In an investigation into the unauthorized disclosure of classified information to the news media, the originating USIC agency typically provides the Department with a list of individuals that had been given or gained access to the information prior to its publication, which helps investigators decide which individuals' records should be sought. The Department then conducts further investigation to identify other individuals who had or may have been given or gained access to the information either in its original form or through briefings, meetings, or other reporting mechanisms. The individuals who had access to the classified information in the relevant timeframe are considered part of the subject pool based solely on the fact of their access—there need not be any additional basis for the individual to be included in the subject pool.

After developing the subject pool, the Department can use several tools to determine whether an individual in the subject pool may have disclosed the classified information to the news media, including interviews, review of government phone and email records, and issuance of compulsory process to third parties in order to obtain personal and government phone records and personal email information. Decisions about which techniques to use are fact specific and based on factors such as the size of the subject pool, the availability of government records, and the ability to identify phone and email accounts likely associated with individual subjects.

A. The Compulsory Process Issued for Records of Members of Congress and Congressional Staffers, and the Records Sought

As described below, in the investigations under our review, the Members and staffers were identified as part of the subject pools by the originating USIC agency or through Department investigation due to their access to the classified information in connection with their congressional responsibilities. At the time the initial compulsory process was issued, for most of the congressional staff for which non-content records were sought, the decision was made to seek their records solely based on the fact that the Department or originating USIC agency determined that they had been given access to the classified information as part of their responsibilities as congressional staff close in time to publication of the articles containing the classified information. For the remaining staffers, prior to the issuance of the compulsory process, a witness had provided information to the FBI, which we describe below, indicating the staffers had access to the classified information or the Department otherwise determined that the staffer may have had access to the classified information. The compulsory process was used as part of an effort to determine whether the Members and staffers had contact, either directly or indirectly, with the reporters who authored the articles in which certain classified information appeared.

In the two investigations of unauthorized disclosures of then classified information to *The Washington Post* (**Washington Post 1** and **Washington Post 2**), the USAO-DC issued compulsory process to third party communication service providers to obtain subscriber information, including local and long

[85] JM 9-85.110, updated September 2024; JM 1-13.130, updated September 2024.

distance telephone connection records, and other non-content communications records, for 2 Members of Congress and 43 individuals who were congressional staffers at the time the articles containing the classified information were published.[86] The records of the two Members of Congress were sought in **Washington Post 2** while the staffers' records were sought in **Washington Post 1**, **Washington Post 2**, or in both investigations, which is in part why the investigations became consolidated. The staffers were affiliated with HPSCI, SSCI, the House Judiciary Committee, the Senate Judiciary Committee, Senate leadership staff, or House leadership staff. Both Members of Congress were affiliated with the Democratic party, while most of the staffers worked for either Democratic or Republican Members of Congress or the Democratic or Republican staffs of congressional committees or leadership offices. Two staffers worked in nonpartisan committee roles. With the exception of compulsory process seeking records for the Senior Committee Staffer, the compulsory process was issued between September 2017 and March 2018.[87]

In **Washington Post 1**, after the Department had sought and reviewed communications records of executive branch employees, the Department sought non-content communications records by compulsory process for 22 current or former congressional staffers from both parties in September 2017.[88] These records included subscriber information for all 22 staffers. The Department issued the compulsory process after determining that the 22 staffers previously had been given access to

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[86] After reviewing a draft of our report, the Department submitted comments to the OIG, including from the lead Assistant U.S. Attorney (AUSA) in **Washington Post 1**, who stated that the government did not seek local and long-distance telephone records for the two Members of Congress. According to the lead AUSA, although the compulsory process to Apple for the two Members' records included standard language requesting "local and long distance telephone connection records," the USAO-DC had no expectation that it would receive such records from Apple, which was not a telephone provider, and they did not in fact receive such records.

[87] The USAO-DC issued additional compulsory process for both the non-content and content communications records of the Senior Committee Staffer through June 2020 because of witness information they received, which we discuss below, alleging that the Senior Committee Staffer was a likely source of the unauthorized disclosure and compulsory process returns showing that the Senior Committee Staffer had communications with the reporters who published the classified information in the relevant timeframe. The compulsory process obtained by the USAO-DC included a 2703(d) order seeking records associated with the Senior Committee Staffer's personal email address and an order to install and use a pen register and trap and trace device on their personal telephone number. The USAO-DC also executed search warrants on their personal Apple [redacted] and Gmail accounts, which included the contents of their communications. At the time the USAO-DC obtained these orders, the Senior Committee Staffer no longer worked for Congress; however, the orders covered time periods both during and after their congressional employment. After interviewing the Senior Committee Staffer (after they had left their congressional employment), the FBI and the USAO-DC determined that the Senior Committee Staffer likely did not leak the classified information to the reporters, and the investigation was later closed.

[88] Compulsory process was also issued for the records of a 23rd staffer, then Director of Security at SSCI, James Wolfe, in **Washington Post 1**. In late 2017, based in part on information obtained during **Washington Post 1**, the Department opened a separate, derivative investigation into Wolfe, who the Department suspected was sharing sensitive information with a reporter or reporters. In October 2018, Wolfe pleaded guilty to one count of making a false statement to FBI agents about his contacts with reporters. Wolfe was never charged with the unauthorized disclosure of national security information. Although we do not further examine the Wolfe investigation in this report because, among other things, it resulted in his prosecution and conviction, we note that the Department sought records of a Republican Member of Congress in connection with that investigation during the same month in which it sought records for the Democratic Members of Congress in **Washington Post 2**.

relevant classified information by the Department in connection with the staffers' congressional oversight work.

In Washington Post 2, the Department sought non-content communications records by compulsory process for 32 current or former congressional staffers from both parties and in nonpartisan positions; as explained below and as referenced in Footnote 87 above, due in part to the FBI's receipt of additional allegations from a committee staffer (Committee Witness) (which were not ultimately substantiated), the Department also sought records for one of these staffers, the Senior Committee Staffer, via search warrants, a 2703(d) order, and a pen register and trap and trace device. Of the 32 staffers, 27 were on the list from the originating USIC agency of people who had access to the classified information in connection with their congressional responsibilities. As described below, the Department sought the records of four additional staffers who, although not on the list from the originating USIC agency, the Committee Witness identified as having been briefed, in connection with their job responsibilities, on the general topic area of the classified information that was leaked.[89] The Department sought the records of a fifth staffer after determining that this staffer, who also was not on the list from the originating USIC agency, was in a position that might have allowed the staffer to gain awareness of the classified information.

Although the FBI had attempted to identify phone numbers and email addresses associated with the Members of Congress and staffers who were in the subject pool, some of the compulsory process returns showed that the phone number or email address for which records were sought was not actually associated with the intended Member of Congress or staffer, and, therefore, some of the returns included information about individuals who were not part of the subject pool. As noted below, compulsory process issued for the telephone subscriber information and local and long distance telephone connection records of one Member of Congress in Washington Post 2 returned subscriber information for the Member's spouse and child. The Department issued no further compulsory process for records of the Member's spouse or child. On three occasions, compulsory process returns in Washington Post 2 showed that the phone numbers or email addresses the FBI identified as likely belonging to a particular congressional staffer were used by a different staffer, whose records the Department had not intended to seek.[90] Compulsory process for non-content telephone subscriber information, including local and long distance telephone connection records, issued for at least two staffers in Washington Post 1 returned results showing that the phone numbers were registered to the staffers' spouses, one of whom was a former staffer. The Department issued no further compulsory process for records of either spouse. The lead Assistant U.S. Attorney (AUSA) in Washington Post 2 told us that whenever certain types of compulsory process are issued, investigators receive material that is not relevant and, therefore, they anticipated that records of other Members' or staffers' relatives also likely were inadvertently obtained with the compulsory process

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[89] The Committee Witness expressed concern that the information should not have been shared with one of the staffers, who the witness believed did not have the requisite security clearance.

The Committee Witness also identified an additional staffer who was not on the list from the originating USIC agency but had been briefed on the classified information. However, the Department did not seek this staffer's records.

[90] The returns also showed that some of the numbers that had been identified as belonging to particular staffers were instead committee phone lines.

issued in Washington Post 2. They further stated that if those returns contained information related to anyone other than the intended target of the process, investigators would not have taken steps to identify those individuals as investigators ignore such extraneous material.

During their OIG interviews, career prosecutors and agents from the FBI, PIN, and the USAO-DC stated that the compulsory process issued for non-content records of Members of Congress and congressional staffers in Washington Post 1 and Washington Post 2 were sought based on investigative need and not based on party affiliation. None of these witnesses told us that higher level DOJ officials directed the decisions regarding whose non-content records to seek by compulsory process, and none expressed concern that the Department used the compulsory process seeking non-content records to target certain individuals or groups for political reasons. The lead AUSA in Washington Post 1 told the OIG that in leak investigations, because the leakers' motivations are unknown, prosecutors must explore all possibilities and cannot assume political motives one way or the other. They added that Washington Post 1 was a good example of that principle because both parties had potential political motivations to leak the information. An FBI supervisor also stated that despite the sensitivities, investigators could not be afraid to take a logical investigative step because it involved a politician, and one of the supervisory AUSAs expressed concerns that it would appear political if they did not seek records of a Member of Congress where they would otherwise have pursued those records if they were not associated with a Member.

See Appendix 2 for a table summarizing what the Department sought for each Member of Congress and congressional staffer, excluding the compulsory process issued for James Wolfe and the additional compulsory process issued for the Senior Committee Staffer described in Footnote 87.

B. Basis for Seeking Records

1. Washington Post 1

In Washington Post 1, the Department identified approximately 155 individuals who had or may have had access to the leaked classified information, including members of both the executive and legislative branches. Because the FBI was the originating USIC agency and initiated its own investigation, the FBI identified the subject pool by determining who had or may have had access to the information.

The Department initially focused its investigation on executive branch employees, primarily Department employees. The FBI reviewed email communications from both the classified and unclassified government accounts of various Department employees, as well as employees' telephone toll records, and possibly text messages, associated with their government devices, and conducted interviews of some FBI personnel who had access to the pertinent classified information.

Subsequent to this initial focus on executive branch employees, the FBI learned through a witness interview that DOJ's Office of Legal Affairs (OLA) had allowed at least 6 Members of Congress and 22 congressional staffers to review, consistent with their congressional oversight responsibilities, copies of some of the classified information in the spring of 2017. The FBI also learned that one of the reporters who wrote the article that contained the classified information had reached out to the FBI

for comment on related classified information hours after Members of Congress and congressional staffers reviewed the classified information.

One of the FBI case agents told the OIG that based on that information, the FBI shifted the focus of its investigation to congressional personnel and issued compulsory process to obtain non-content communications records of the 22 congressional staffers (but not the Members of Congress) who OLA had allowed to review the classified information prior to its publication. The lead AUSA on **Washington Post 1** also told us that the Department shifted the focus of its investigative efforts to Congress given that the press published the classified information shortly after it was made available for congressional review, whereas executive branch staff had access to the information long before its publication.

The Department did not seek to obtain records of the at least six Members of Congress who reviewed the classified material prior to publication of *The Washington Post* article that contained the classified information. One of the FBI case agents told the OIG that when the investigative team discussed shifting the focus to Congress, they decided to start with issuing compulsory process for the congressional staffers' records and to only consider obtaining the Members' records if the compulsory process for the staffers failed to identify a potential suspect. However, this case agent told the OIG that the investigative focus shifted to the derivative investigation into SSCI Security Director James Wolfe, and the six Members' records were never pursued in **Washington Post 1**.[91]

2. Washington Post 2

In **Washington Post 2**, the originating USIC agencies and the Department determined that "substantially more than 200 individuals" had access to the leaked classified information, including members of both the executive and legislative branches. The Department took a variety of investigative steps to determine if Department or USIC agency employees may have been the sources of the unauthorized disclosures in **Washington Post 2** and in other investigations in **Consolidated Leaks**. These steps included searching all Department and originating USIC agency hardline phone and email records for contacts with reporters' known phone numbers and email addresses; reviewing phone records, including over 75,000 text messages of more than 40 FBI cell phones and work phones used by FBI employees who had access to the classified information; interviewing more than 96 current and former Department and USIC employees; reviewing email communications from more than 35 Department accounts; and issuing compulsory process and reviewing the returns for over 175 electronic communication facilities of current and former Department employees.[92] The Department also issued compulsory process for communications records of both former and then current high-ranking officials at the Department (including at the FBI), a senior USIC official, a high-ranking Obama Administration official, and at least one Obama White House advisor in connection with **Washington**

[91] DOJ investigators told us, and prosecution-related documents reflect, that the Department determined that Wolfe was aware of the classified information that was leaked in **Washington Post 1** and therefore issued compulsory process for his non-content records. The returns on the compulsory process revealed extensive contact between Wolfe and a reporter (although not a *The Washington Post* reporter) who covered SSCI at the time. Partly as a result of those returns, the Department opened an investigation into Wolfe, as described above.

[92] The Department was unable to state whether all of these steps were taken exclusively in furtherance of **Washington Post 2** or more generally in **Consolidated Leaks**, of which **Washington Post 2** was a part.

Post 2 and another investigation in Consolidated Leaks; at least some of the legal process sought records for personal accounts.

The classified information that was the subject of Washington Post 2 had been provided by the USIC to one of the congressional committees in connection with that committee's inquiry concerning the underlying subject matter of the leaked material. The USIC also provided the classified information to an additional committee and to House and Senate leadership personnel. Because the classified information was included in news articles not long after it was made available to certain Members and congressional staffers to review, Department personnel told us that, as in Washington Post 1, they decided to focus investigative efforts on congressional personnel in Washington Post 2. In addition, as described in more detail below, the Committee Witness, who had been a staffer on the Democratic staff of one of the congressional committees that had been given access to the classified information, voluntarily told the FBI that the Committee Witness suspected that two Democratic Members of Congress (Member 1 and Member 2) and a number of Democratic staffers could be leaking classified information on the same general subject matter as the classified information at issue in the Washington Post 2 leak. However, the witness did not specifically allege that these Members and staffers leaked the information in Washington Post 2.

After all of the compulsory process that had relied on the Committee Witness's statements to the FBI had been issued, other than for one then former staffer from the same committee (the Senior Committee Staffer whom the Department suspected of being the source of the unauthorized disclosure for other reasons as well), USAO-DC prosecutors conducted a probing interview of the Committee Witness and determined that the Committee Witness had little support for their contentions that certain individuals could be leaking classified information and may not have been credible. Subsequently, in its search warrant applications for the Apple and Google accounts of the Senior Committee Staffer, the Department noted that the Committee Witness was of "unknown reliability."

a. Congressional Staffers

As noted above, at the time the article at issue in Washington Post 2 was published, one of the congressional committees that was provided access to the classified information was conducting an inquiry that concerned the underlying general subject matter of the leaked material. In furtherance of that committee's inquiry, some committee staffers either reviewed or were briefed by fellow committee staffers on classified information relating to the general subject matter of the leaked information. Most of these staffers were on the list of individuals identified by the originating USIC agency as having been provided or gained access to the classified information prior to its publication.[93] The Committee Witness identified five additional staffers, who were not on the list of individuals identified by the originating USIC agency, but who the Committee Witness said had been briefed on the classified information. The USAO-DC issued compulsory process for the non-content communications records of four of these five staffers based on the information from the Committee

[93] The Department also issued compulsory process for non-content records of staffers from another committee and from the offices of House and Senate senior leadership who were also on the list of individuals identified by the originating USIC agency as having been provided or gained access to the classified information prior to its publication.

Witness.[94] In addition, the USAO-DC sought the non-content records of a fifth staffer, also referenced by the Committee Witness, who also was not on the list of individuals identified by the originating USIC agency, because the USAO-DC determined the staffer would have had a significant role in storing and handling the classified information.

The Department nonetheless continued to suspect the Senior Committee Staffer of potentially being the source of the unauthorized disclosure. Records showed that the Senior Committee Staffer visited the room where the classified material was made available to Members of Congress and congressional staff (Read Room) on at least one and possibly two occasions in early 2017, while still working for the committee. Because the Senior Committee Staffer also had been on the original list provided by the USIC agency of individuals who had access to the classified information, the Department obtained the Senior Committee Staffer's local and long distance telephone connection records. The records showed that immediately before accessing the Read Room and continuing through shortly after publication of the articles containing the relevant classified information, the Senior Committee Staffer's phone number was in contact with telephone numbers used by all three of the reporters who authored the articles that disclosed the classified information.

Based on information from the USIC agency, the compulsory process returns showing contact with the reporters in the relevant timeframe, and the Committee Witness's statements, the Department focused its investigation on the Senior Committee Staffer as the potential source of the leak. In furtherance of the investigation, the Department obtained a 2703(d) order seeking records associated with the Senior Committee Staffer's personal email address, an order to install and use a pen register and trap and trace device on their personal telephone number, and search warrants for their personal Apple and Gmail accounts to obtain, among other information, the contents of the Senior

[94] Two of these staffers also had their records sought in **Washington Post 1**.

Committee Staffer's electronic communications. To avoid gathering information that would be protected by the Speech or Debate Clause, the Google search warrant sought records beginning on the date the Senior Committee Staffer departed from government service. However, the search warrant to Apple covered a period when the Senior Committee Staffer still worked for Congress; therefore, the Department used filter procedures to review the contents of the search warrant returns to segregate Speech or Debate material and attorney-client privileged material. The records obtained in response to the search warrant on the Senior Committee Staffer's Gmail account showed communications with at least one of the reporters who authored the articles containing the leaked classified information in **Washington Post 2**.[95]

In mid-2020, the Department interviewed the Senior Committee Staffer and determined that they "likely did not leak" the classified information to the news media. After the interview, the Department issued compulsory process seeking toll records for the Senior Committee Staffer's committee-issued cell phone and committee desk phone in an attempt to corroborate statements the Senior Committee Staffer made during the interview that they had been in contact with two of the reporters well before the time of the unauthorized disclosures. The cell phone records corroborated the Senior Committee Staffer's statements as to prior contacts with the two reporters.

b. Members of Congress

Both Member 1 and Member 2 were on the list of individuals the originating USIC agency identified as having been given authorized access to the classified information that was subsequently disclosed in **Washington Post 2**. In addition, in an FBI interview, the Committee Witness told the FBI that the Committee Witness suspected that Member 1 had previously leaked classified information and that Member 2 wanted to influence public opinion via the release of classified information on the general subject matter area of the information leaked in the **Washington Post 2** article. However, the Committee Witness offered no direct evidence that the Members disclosed the specific classified information that appeared in the article.

According to documents and witness statements, because Member 1 and Member 2 were on the list of those who had access to the classified information at issue and because of the information from the Committee Witness, in February 2018, the USAO-DC issued compulsory process to Apple [redacted] for non-content records associated with telephone numbers and email addresses that the FBI identified as being associated with Member 1 and Member 2. The compulsory process did not seek

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[95] As noted above, the Department issued compulsory process seeking non-content records for an email address associated with the Senior Committee Staffer's spouse and for a phone number identified as being associated with both the Senior Committee Staffer and the spouse. According to witness testimony, the decision to issue compulsory process for the spouse's records was based on indicators that the Senior Committee Staffer and their spouse sometimes used each other's accounts and information from the Committee Witness, who, in an August 2017 interview with the FBI stated that they thought some individuals may be using their spouses' phones to contact the news media; and, in a December 2017 interview, stated that they overheard the Senior Committee Staffer tell other staffers that the Senior Committee Staffer would use their spouse's cell phone to make calls, which the Committee Witness believed was intended to conceal the Senior Committee Staffer's activity. However, the Committee Witness later admitted that they had little foundation for the belief that the Senior Committee Staffer used their spouse's phone. The Department first issued compulsory process for records for the phone number associated with both the Senior Committee Staffer and their spouse in November 2017.

the content of any communications.[96] The Department was provided data on whether or not there were Apple accounts for the phone numbers and email addresses provided, and, if so, available data about the account, including Apple device serial or IMEI numbers; Apple ID numbers; device registration information (such as name, Apple Logon ID, email, phone, address) possibly associated with the customer; whether or not an account was associated with an [redacted] account; Apple purchase transactions; a device's connection logs to Apple services such as [redacted] and Internet protocol addresses. The returns from Apple indicated that the spouse and child of Member 2 were associated with at least one of the accounts for which records were sought by compulsory process or with an account linked with one of the accounts for which records were sought by compulsory process.

C. Supervisory Knowledge of and Approval for Seeking the Compulsory Process for Non-Content Communications Records of Members of Congress and Congressional Staff

1. The U.S. Attorney's Office for the District of Columbia

During the relevant time period, no Department or USAO-DC policies required supervisory approval to issue compulsory process to third party service providers for the records of Members of Congress or congressional staffers. Although not required by policy, multiple witnesses told the OIG that USAO-DC supervisors were aware that compulsory process was being issued for non-content communications records of Members of Congress and congressional staffers in the investigations we examined in our review and that the direct supervisor, the Deputy Chief of the USAO-DC's National Security Section (NSS) with oversight responsibility for media leak investigations (NSS Deputy Chief), had approved the issuance of this process. We verified that the NSS Deputy Chief approved some of the compulsory process related to the congressional staffers, but due to conflicting recollections, we were unable to determine whether the NSS Deputy Chief or any other supervisor at the USAO-DC approved issuing compulsory process for the non-content communications records of the two Members of Congress in **Washington Post 2**.

The lead AUSAs for **Washington Post 1** and **Washington Post 2**, who were both career prosecutors, told the OIG that they consulted with their direct USAO-DC supervisor, the NSS Deputy Chief—also a career prosecutor—before issuing compulsory process for records of Members of Congress and congressional staff. The NSS Deputy Chief told the OIG that she was not certain her approval had been obtained in every instance in which legal process was sought for records of congressional staffers and did not recall approving the compulsory process for the non-content records of Member 1 and Member 2, although she did not rule out the possibility that she had.

Although the NSS Deputy Chief's approvals could have been conveyed orally, we asked the USAO-DC to provide us with samples of any documentary evidence demonstrating the NSS Deputy Chief's approval of the Congress-related compulsory process. The USAO-DC produced to us emails

[96] By its terms, the compulsory process sought "local and long distance telephone connection records." In comments submitted to the OIG after reviewing a draft of this report, the Lead AUSA in **Washington Post 1** stated that because the USAO-DC did not issue the compulsory process to a telephone service provider, prosecutors had no expectation that they would receive such records. As noted earlier, the Department did not receive any call detail records from Apple in response to this compulsory process.

documenting that the NSS Deputy Chief approved issuing 1 round of compulsory process for the non-content records of the 27 staffers who were on the list of individuals that the originating USIC agency had identified as having access to the classified information before its publication in **Washington Post 2**. A targeted search of the NSS Deputy Chief's email for references to Member 1 and Member 2 did not yield any communications related to the Department's seeking of their non-content records in **Washington Post 2**.

The NSS Deputy Chief told the OIG that, in those instances when she was consulted about the compulsory process, she would have talked to the Chief of NSS (NSS Chief) and probably with the then USAO-DC Chief of the Criminal Division (Criminal Chief) before approving compulsory process for congressional personnel.[97] The NSS Chief told the OIG that although he did not specifically recall the compulsory process for the non-content records of the Members of Congress, he thought he knew about the compulsory process for Member 2 at the time it was issued. The NSS Chief stated that he was involved in discussions about categories of people whose records would be sought by compulsory process, including congressional personnel, but that nobody at his level or above was looking at the requests for each staffer individually. The NSS Chief also told us that nobody at his level or the Deputy Chief's level would have made the decision to issue compulsory process for Members' records "without being told from above" that it had been "vetted" and everyone was comfortable with the decision. He described a process in these investigations in which a proposal to issue compulsory process to obtain records of Members of Congress or congressional staff would have filtered up to him and to the Criminal Chief, who would have then discussed the matter with NSD and the Deputy Assistant Attorney General in the Department's Criminal Division who supervised PIN, who both would then have discussed the matter with someone in the Office of the Deputy Attorney General, and then the message would have filtered back down the chain that it was fine to issue the process. The NSS Chief did not recall specific conversations about the Congress-related compulsory process but recalled that "the command signal came down from above" to "go forward" and issue compulsory process for everyone on the list of individuals identified as having access to the classified information prior to its publication, including Members of Congress, congressional staffers, and executive branch personnel.

The lead AUSA on **Washington Post 1** also told the OIG that the Criminal Chief "knew of and approved of" the compulsory process for non-content communications records of congressional personnel. The lead AUSA on **Washington Post 2** also stated that the Criminal Chief was "very involved" in the seeking of compulsory process for records of Members of Congress and congressional staffers. In an interview with the OIG, the Criminal Chief recollected process "directed at Congress" in the context of the Wolfe investigation, but he had no memory of compulsory process being issued for Members of Congress or congressional staffers in **Washington Post 1** or **Washington Post 2**. The Criminal Chief allowed for the possibility that he had been made aware of the process at the time but said that given the passage of time and his active engagement at the time in investigative steps in the Wolfe

[97] As noted earlier, the Criminal Chief from the time these investigations were initiated through early April 2018—the period in which most of the compulsory process was issued for non-content communications records of Members of Congress and congressional staff in **Washington Post 1** and **Washington Post 2**, but before compulsory process was issued for non-content communications records of members of the news media in **Washington Post 2** and **New York Times**—currently serves in a senior position in the OIG. Because of his involvement in the relevant investigations, he was recused and not involved with this review other than as a witness.

investigation, which he viewed as more significant—including obtaining and executing a search warrant to surreptitiously image Wolfe's phone—he could not be confident that he would remember the compulsory process at this time.[98]

Given the evidence outlined above, we were unable to verify whether a USAO-DC supervisor approved the issuance of compulsory process for the Members of Congress and some of the staffers; however, as described earlier, no Department or USAO-DC policies in effect at the time required supervisory approval to issue or obtain compulsory process for the records of Members or Congress or congressional staffers.

2. Department Leadership

As noted above, Department policies at the time did not require approval by, or unambiguously require notice to, DOJ leadership, including the Attorney General or the Deputy Attorney General. With one exception discussed below concerning the search warrants of the Senior Committee Staffer's accounts, no witness told us during our review that they had direct or specific knowledge that Department leaders, including the Attorney General or the Deputy Attorney General, were made aware of the compulsory process issued for records of Members of Congress and congressional staffers in the investigations we examined. Moreover, the Department was unable to locate any Urgent Reports from the USAO-DC regarding the compulsory process that was issued, or the related NDOs obtained pursuant to 18 U.S.C. § 2705(b), seeking records of Members of Congress and congressional staffers in **Washington Post 1** and **Washington Post 2**. In response to our request to the Department for any Urgent Reports submitted in these matters, the USAO-DC stated that it generally did not send Urgent Reports in these matters because many of the normal recipients of Urgent Reports were recused from the investigations.

The USAO-DC's NSS Chief and NSS Deputy Chief responsible for leak investigations both told the OIG that investigative steps in **Consolidated Leaks** were being briefed to Deputy Attorney General Rosenstein, who was for a time acting as Attorney General due to Attorney General Jeff Session's and his staff's recusal from these cases. As explained above, the Chief of NSS also told us that senior Department leadership approved the use of compulsory process to obtain non-content communications records of congressional personnel and that requests to issue such compulsory process would have been filtered through NSD and the Criminal Division to the Office of the Deputy Attorney General. However, the Chief of NSS was not present for any such discussions. The lead AUSA in **Washington Post 2** told us that Department leadership would have been made aware of the compulsory process for the records of the two Members in regular briefings NSD provided to Rosenstein and his office. However, although an NSD attorney involved in the briefings recalled discussing the search warrants of the Senior Committee Staffer at some of these briefings, they did

[98] After reviewing a draft of this report, the Department provided us with an email sent to the Criminal Chief in March of 2018 referencing some of the compulsory process that had already been issued for the Senior Committee Staffer and noting that additional process for the Senior Committee Staffer may be issued. We confirmed that the additional process referenced in that email was issued a few days later. The Criminal Chief's review of this email did not refresh his recollection as to the compulsory process issued for the Senior Committee Staffer or any other congressional personnel.

not otherwise recall discussing compulsory process for Members of Congress or congressional staffers.[99]

Barr became Attorney General after all of the Congress-related compulsory process was issued, except for some of the compulsory process concerning the Senior Committee Staffer. Barr did not agree to be interviewed by the OIG regarding this matter; however, after the news media reported in 2021 that the Department had issued compulsory process for records of two Members of Congress, Barr told a reporter that he was "'not aware of any congressman's records being sought in a leak case'" during his tenure as Attorney General.[100] Although a memorandum from the Criminal Division to Barr recommending that the Attorney General authorize prosecutors to obtain records of members of the news media in **Washington Post 2** (which memorandum we discuss in Chapter Three) referenced that the Department had obtained the phone records of "potential congressional sources," the memorandum did not specifically reference the fact that the Department obtained records of Members of Congress. The primary drafter of the memorandum from NSD to the Criminal Division, upon which the Criminal Division's recommendation memorandum to the Attorney General was based, told the OIG that he had never been made aware that the Members' records had been sought.

D. Consultation with the Public Integrity Section Regarding the Seeking of Compulsory Process for Non-Content Communications Records of Members of Congress and Congressional Staff

Although Department policy at the time did not expressly require any consultation with PIN prior to issuing compulsory process to a third party provider for non-content communications records of Members of Congress and congressional staff, USAO-DC personnel told the OIG that they sought PIN's input and participation in the investigations on the question of the applicability of the Constitution's Speech or Debate Clause' and the court's ruling in *Rayburn*, discussed in Section I.A. above. The Constitution's Speech or Debate Clause states that "for any Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place."[101] In practice, this clause creates a broad evidentiary privilege for Members of Congress and congressional staffers that provides immunity from direct liability for legislative acts; prohibits the use of legislative-act evidence in the

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[99] This NSD attorney was not assigned to **Consolidated Leaks** at the time compulsory process was issued for non-content records of congressional staffers in **Washington Post 1**. Although they were assigned to **Consolidated Leaks** during the period when compulsory process was issued for non-content records of Members of Congress and when some of the compulsory process was issued for non-content records of staffers in **Washington Post 2**, they did not recall that compulsory process had been issued for Member 1 or for staffers other than the Senor Committee Staffer; they were not sure whether they had known about the compulsory process for Member 2. The NSD Attorney told the OIG that it was possible they were aware of the compulsory process at the time but did not recall; they also told the OIG they had been recused from the investigation for a period after being assigned, although they were not sure when.

[100] "Barr distances himself from Trump-era subpoenas of Democratic lawmakers," *Politico*, June 11, 2021, www.politico.com/news/2021/06/11/barr-distances-democratic-subpoenas-493491 (accessed August 21, 2024).

[101] U.S. Const. Art I, § 6, cl.1.

course of litigation; and protects Members from being compelled to respond to questioning regarding their legislative acts.[102]

The lead AUSA on **Washington Post 2** told the OIG that a "prudent prosecutor" would consult with PIN before seeking records of a Member of Congress or a congressional staffer, despite the lack of a policy requirement to do so. The lead AUSA on **Washington Post 1** explained that they consistently consulted with PIN not only because it was the "right thing" to do, but because former PIN attorneys working at the USAO-DC at the time repeatedly advised them to do so. The PIN Trial Attorney assigned to the investigative team in **Washington Post 2**, as explained below, told the OIG that the USAO-DC AUSAs were "very concerned," "cautious," and "really conscientious" about Speech or Debate issues and "wanted to do the right thing." Witnesses from the investigative team at the USAO-DC and the FBI also told us that they were aware of, and sought to appropriately address, the constitutional issues throughout **Washington Post 1** and **Washington Post 2**.

As described in this section, the USAO-DC consulted with PIN on Speech or Debate Clause issues before obtaining Congress-related compulsory process in **Washington Post 1** and **Washington Post 2**.

1. USAO-DC Consultations with PIN in Washington Post 1 and 2

Email correspondence and testimony from USAO-DC prosecutors and DOJ Criminal Division leadership reflected a desire from the USAO-DC not only to consult with PIN on the applicability of the Speech or Debate Clause, but also to have someone from PIN added to the investigative team. The USAO-DC's then NSS Deputy Chief told the OIG that while the leak investigations were progressing, she was concerned that the Department did not have a policy on seeking records of Members and congressional staff similar to the one that applied to seeking records relating to members of the news media, given that both implicated constitutional issues. She told us that she "begged and pleaded to have someone from PIN put on the team" so that they would know what approvals were necessary and what was appropriate when it came to seeking records of congressional personnel. The USAO-DC's NSS Chief told the OIG that their thinking at the time was that they did not want to simply "get a quick…yes" from PIN, but rather they wanted to "make PIN part of the team"; have PIN "sit" with them at the meetings where they would discuss what they were doing in the investigation; and have a line person assigned, which would also entail the involvement of their chain of command, so that PIN was "part of the team," not merely approving the issuance of the compulsory process.

In late August 2017, the USAO-DC began consulting with PIN about potential Congress-related compulsory process in **Washington Post 1** and **Washington Post 2**, as well as in the **Washington Post 1** derivative investigation into SSCI Director of Security James Wolfe. These early consultations were with a then PIN Trial Attorney and then PIN Chief. However, the PIN Trial Attorney was recused from any involvement in the investigations in around late 2017 due to the emergence of a personal conflict of interest. According to witness testimony and documentary evidence, in late 2017, a second PIN Trial Attorney (PIN Trial Attorney 2) began consulting on Congress-related compulsory process sought in the media leak investigations, and PIN Trial Attorney 2 was formally added to the **Consolidated Leaks** investigative team around January 2018. According to the NSS Chief, PIN Trial Attorney 2

[102] Congressional Research Service, "Understanding the Speech or Debate Clause," pp. 3-5, updated December 1, 2017, https://crsreports.congress.gov/product/pdf/R/R45043 (accessed July 5, 2024).

remained a part of the investigative team until at least March 2018, and they were included on investigation updates until at least early April 2018, by which point all of the Congress-related compulsory process in **Washington Post 2** had been issued, other than for the Senior Committee Staffer.[103]

PIN Trial Attorney 2 told the OIG that "the U.S. Attorney's Office had questions about whether or not collecting toll records of Members of Congress was permissible under the Speech or Debate Clause," and they specifically recalled consulting on the search warrant for James Wolfe's Verizon account. Although PIN Trial Attorney 2 did not otherwise remember the specifics of whose records were sought or why, they told the OIG that, after the USAO-DC began consulting her in December of 2017, they would have been consulted throughout the investigation. PIN Trial Attorney 2 also told the OIG that when they became a member of the investigative team, they attended regular team meetings but could not recall precisely how often they attended. PIN Trial Attorney 2 told the OIG that their consultations were limited to whether an investigative step would implicate the Speech or Debate Clause.

Statements from other witnesses and contemporaneous email communications corroborated that PIN Trial Attorney 2 provided guidance regarding the applicability of the Speech or Debate Clause for the Congress-related compulsory process sought in **Washington Post 2**, as well as in the **Washington Post 1** derivative investigation into SSCI Director of Security James Wolfe. PIN Trial Attorney 2 had no involvement in the Congress-related compulsory process in **Washington Post 1** because it was issued in September 2017, prior to the assignment of PIN Trial Attorney 2 to the matter. Email communications we reviewed reflected that PIN was regularly consulted on the Speech or Debate Clause question but do not reflect whether there was discussion on the broader question of the potential impact the compulsory process might have on the legislative branch's constitutional authority to oversee the executive branch.

2. USAO-DC Consultation with PIN Specifically Concerning Compulsory Process for the Non-Content Communications Records of Two Members of Congress in Washington Post 2

According to witness testimony and documentary evidence that we reviewed, the USAO-DC sought and obtained approval from PIN Trial Attorney 2 before issuing compulsory process for the non-content communications records of the two Members of Congress in **Washington Post 2**. Specifically, on January 30, 2018, the lead AUSA on **Washington Post 2** sent an email to PIN Trial Attorney 2 requesting feedback on proposed compulsory process to Apple for subscriber information for accounts associated with email addresses and phone numbers linked to the 2 Members of Congress and 14 staffers.[104] In response, PIN Trial Attorney 2 wrote that they were "ok to proceed" and noted that they were "cleared all the way up to" the Deputy Assistant Attorney General (DAAG) of the Criminal Division, who previously served as the Chief of PIN. PIN Trial Attorney 2 told the OIG that the DAAG "was the Justice Department's resident expert on Speech or Debate issues" and would have

[103] Compulsory process continued to be issued for SSCI Security Director James Wolfe, one Senator, and three staffers in the derivative Wolfe investigation through June 2018.

[104] This process to Apple was the only compulsory process the Department issued for records of the two Members of Congress.

generally been included in Speech or Debate questions. However, PIN Trial Attorney 2 also stated that PIN Trial Attorney 2 may have only informally discussed questions related to Speech or Debate with the DAAG rather than making formal requests for his input. We found no evidence that PIN Trial Attorney 2 consulted with the DAAG via email in connection with the seeking of Members' records in Washington Post 2.

The Criminal Division DAAG told the OIG that he did not recall being consulted in connection with the issuance of compulsory process for non-content communications records of the two Members of Congress. He also told the OIG that PIN line attorneys would typically bring questions regarding the Speech or Debate Clause to the attention of the Chief or the Principal Deputy Chief of PIN.

E. The Use of Non-Disclosure Orders

As previously described, when the Department issues compulsory process under the Stored Communications Act to obtain records from a communications service provider, it may seek a court order, known as a non-disclosure order or NDO, that prohibits the communication service provider from notifying anyone, including the individual whose records are being sought, of the existence of the compulsory process. Under § 2705(b) of the Stored Communications Act, a prosecutor seeking an NDO must submit an application to the court, which can be included as part of the application for a 2703(d) order, demonstrating that there is "reason to believe" that disclosure of the compulsory process could result in, among other things, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to an investigation, as well as stating the duration of time for which the order is being sought.[105] If the federal judge or magistrate finds that the standard has been met, the judge or magistrate will issue the NDO and state the length of its duration.

In Washington Post 1 and Washington Post 2, the Department sought NDOs under § 2705(b) in connection with the February 2018 compulsory process for the non-content communications records of the 2 Members of Congress, which compulsory process also included phone numbers or email addresses for 14 staffers, and in connection with much of the other compulsory process issued for non-content communications records of congressional staffers.[106] In addition, the Department sought NDOs in connection with the search warrants for the Senior Committee Staffer's Apple and Google accounts, and the 2703(d) order issued for records associated with the Senior Committee Staffer's Google account and email address.[107] Most of the NDOs obtained in connection with the compulsory process for non-content records of Members of Congress and congressional staffers in the

[105] 18 U.S.C. § 2705(b).

[106] The Department also sought NDOs in connection with at least some of the compulsory process issued for the non-content communications records of non-congressional personnel.

[107] NDOs of indefinite duration are automatic with pen register and trap and trace orders, unless otherwise ordered by the court, so the Department did not separately seek an NDO in connection with the pen register and trap and trace order they obtained for the Senior Committee Staffer's phone.

investigations under our review were obtained under 18 U.S.C. § 2705(b), although one NDO and its renewals were sought under 28 U.S.C. § 1651(a).[108]

The applications the Department submitted to the court for NDOs provided several rationales for seeking non-disclosure. Although there were some variations in the text of the applications, they generally did not address case-specific information but rather appeared to use general language describing the risks that could arise if the compulsory process was disclosed, similar to those outlined in the then applicable DOJ policy.[109] The applications did not indicate that some of the accounts associated with the underlying compulsory process belonged to Members of Congress or congressional staff, which Department policy at the time did not require. The following is a representative example of the rationales provided in one such application, [redacted]

> If informed about such confidential legal requests, the subject(s) responsible for the criminal activity may become aware of this investigation and be likely to flee from prosecution, destroy or tamper with evidence (such as by deleting or encrypting digital evidence), intimidate potential witnesses, and otherwise seriously jeopardize this investigation.
>
> ...
>
> Disclosing [the legal request] may reveal the existence, scope, and direction of this investigation. Once alerted to this investigation, the potential target(s) could be immediately prompted to destroy or conceal incriminating evidence, alter their operational tactics to avoid future detection, and otherwise take steps to undermine the investigation and avoid future prosecution. In particular, given that they are known to use electronic communication and remote computing services, the potential target(s) could quickly and easily destroy or encrypt digital evidence relating to their criminal activity. Notification could also result in the target(s) avoiding travel to the United States or other countries from which they may be extradited.
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> ...

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[108] 28 U.S.C. § 1651(a), known as the All Writs Act, allows "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[109] Department policy at the time the NDOs were issued stated that "[w]hen applying for a § 2705(b) order to accompany [certain compulsory process] seeking basic subscriber information in an ongoing investigation that is not public or known to the subject(s) of the investigation, stating the reasons for protection from disclosure under § 2705(b)—such as the risk that subject(s) will flee, destroy or tamper with evidence, change patterns of behavior, or notify confederates—-usually will suffice. At a later stage of the investigation, for example, when a search warrant is being sought, the prosecutor should include more specific facts, as available, in support of the protective order." JM 9-13.700(2) (added December 2017). Although a 2022 memorandum from the Deputy Attorney General on the use of NDOs did not contain this language, the current version of this policy, which was updated in November 2023, contains virtually the same language. Memorandum for Heads of Department; Law Enforcement Components; Department Litigating Components; Director, Executive Office for U.S. Attorneys; All United States Attorneys, From Deputy Attorney General Lisa Monaco, Subject: Supplemental Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b), May 27, 2022; JM 9-13.700(2) (2023).

> Given the complex nature of the criminal activity under investigation and likely involvement of foreign-based coconspirators and evidence, and also given that the criminal scheme may be ongoing, the United States anticipates that this confidential investigation will continue for the next year or longer.
>
> …
>
> Therefore, based on the foregoing, there are reasonable grounds to believe that disclosure of the Legal Request directed to PROVIDER concerning this investigation would result in flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to this investigation. *See* 18 U.S.C. § 2705(b)(2)-(5).

As noted below, the witnesses we spoke to indicated that the use of NDOs was "standard practice" in many criminal investigations, including leak investigations, and the Department did not modify this practice because the subjects of the investigation included Members of Congress and congressional staff.

We reviewed the vast majority of the NDOs issued in connection with the compulsory process for records of congressional staff and determined that they were all initially for a period of 1 year, with the earliest NDOs issued in September 2017.[110] However, of the 40 initial NDOs, approximately 30 were renewed at least once and most were repeatedly renewed, with some extended for up to 4 years.[111] Most of the NDOs lapsed by November 2021; however, we determined that the last NDO renewals occurred in August 2021—after news stories appeared in June 2021 regarding the compulsory process—and did not expire until August 2022.[112] This NDO was issued in connection with compulsory process seeking records of the Senior Committee Staffer, among others. Despite the Department's determination that the Senior Committee Staffer likely did not leak the classified information and the news media reporting about compulsory process issued for non-content communications records of Members of Congress and congressional staffers in June 2021, the August 2021 NDO renewal application maintained similar language and assertions to those that had been made in the initial 2017 applications. The NDO associated with the compulsory process issued for

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[110] Although all of the applications we reviewed sought, and orders granted, non-disclosure for 1 year, some providers granted 30-day grace periods on extensions during the COVID-19 pandemic; therefore, some of the NDOs were renewed after approximately 13 months rather than the 12 months granted by the court. In other instances, the NDOs were renewed after expiration of the prior order, causing the duration of the non-disclosure period to exceed a year by approximately 1 week.

[111] The last of the **Consolidated Leaks** investigations were closed in September 2021, after which the NDOs were no longer renewed and were allowed to lapse.

[112] The August 2021 renewal application covered compulsory process issued to three different service providers. Each item of compulsory process included multiple phone numbers and email addresses, including some associated with the Senior Committee Staffer and some associated with individuals who had worked for the executive branch at the time of the unauthorized disclosure in **New York Times**, which investigation was ongoing at the time. As noted above, in mid-2020, the Department interviewed the Senior Committee Staffer and determined that they "likely did not leak" the classified information to the news media. The court approved the application but was not informed that some of the accounts belonged to a congressional staffer or of the Department's determination about that staffer.

non-content communications records of Member 1 and Member 2, along with several staffers, was issued in February 2018 and was extended twice, expiring in January 2021.[113]

Multiple witnesses from the USAO-DC told the OIG that NDOs were sought in some instances but not others because prosecutors knew which communication service providers had a practice of notifying their customers when the government sought their records. The USAO-DC generally did not seek NDOs for compulsory process issued to providers that did not have a practice of notifying their customers. However, we identified some instances where compulsory process was issued to the same service provider on multiple occasions, sometimes accompanied by an NDO and other times not.

The witnesses we spoke with did not express any concern about the Department's use of NDOs in connection with the Congress-related compulsory process and told us it is standard practice to use NDOs in ongoing criminal investigations, including in leak investigations. The USAO-DC's NSS Chief told the OIG that he knew at the time that the USAO-DC was seeking NDOs in **Washington Post 1** and **Washington Post 2** in connection with compulsory process issued for non-content communications records of congressional personnel and thought doing so was appropriate to protect the integrity of the investigations. The NSS Chief also told us that "certainly in any leak case…you have to get an NDO because your whole investigation is going to get blown if it gets out what you're doing and who you're looking at"; he also specifically expressed concern about destruction of evidence should the investigation become known. The lead AUSA on **Washington Post 2** stated that NDOs are used to protect the integrity of an investigation and to protect against reputational harm for individuals whose records are sought but who are not identified as subjects or targets.

III. Analysis

In an effort to identify the potential leakers of the classified information in **Washington Post 1** and **Washington Post 2**, the Department issued compulsory process for the non-content communications records of 2 Members of Congress and 43 individuals who were congressional staffers at the time the articles containing the classified information were published.[114] All of the Members and staffers were provided or gained access to the classified information in connection with their congressional responsibilities. The basis for the Department's decision to include most of the staffers in the subject pool was that they had been provided or gained, consistent with their job responsibilities, access to the classified information by the Department, a USIC agency, or another congressional staffer; the decision to issue most of the compulsory process for their records was based on the close proximity in time between that access and the subsequent publication of the news articles. As a result, dozens of congressional staffers became part of the subject pool in a federal criminal investigation for doing

[113] In comments submitted after reviewing a draft of this report, the Department stated that Department policy in effect at the time did not require termination of an NDO when an investigation became public or was closed. The Department also noted that at the time news stories appeared in June 2021, portions of **Consolidated Leaks** remained open.

[114] As noted earlier in Footnotes 23 and 25, this report does not address (and we do not include among our data) the Department's issuance of compulsory process in **Washington Post 1** for the records of a 44th staffer, James Wolfe, who was then the Director of Security at SSCI and who pleaded guilty to one count of violating 18 U.S.C. § 1001 for making a false statement to FBI agents about his repeated contacts with reporters.

nothing more than performing constitutionally authorized oversight of the executive branch. For the two Members of Congress, the one additional piece of information was that a congressional committee employee—later determined by the Department to have little support for their contentions and to be of uncertain credibility—had identified them to investigators as potential leakers but without providing any evidentiary support for the claim.

Members of Congress and congressional staffers also expressed serious concerns about the Department's use of NDOs, which prevented the Members of Congress and congressional staffers from learning about the Department's use of related compulsory process to obtain non-content communications records and potentially having an opportunity to challenge them. We determined that the Department obtained 40 NDOs related to the compulsory process that was issued for non-content communications records of Members of Congress and congressional staffers, of which approximately 30 were renewed at least once and most of which were repeatedly renewed, with some extended for up to 4 years. The NDO applications filed with the courts—both in original and renewal applications—did not reference the fact that the compulsory process sought records of Members of Congress or congressional staffers and relied on general assertions about the need for non-disclosure rather than on case-specific justifications. Department policy at the time did not require including information in applications about whose records are at issue.

Department policy also permitted and continues to permit prosecutors to make boilerplate statements in NDO applications; in fact, DOJ policy expressly contemplates doing so in connection with compulsory process seeking basic subscriber information in the initial stages of investigations that are not public or known to the subjects. However, Department policy also expects that in the later stages of investigations, applications will include more specific facts relevant to the requests "as available" to extend non-disclosure. The renewal applications in these investigations, including a renewal application filed in August 2021 after news broke about the Department's issuance of compulsory process for non-content congressional records and after the Department determined that the Senior Committee Staffer, whose records were among those sought, likely did not leak the classified information, contained the same boilerplate assertions about the need for non-disclosure that were contained in the original applications.

The decision by the Department to seek the non-content communications records of these Members of Congress and congressional staffers in the media leak investigations implicated the constitutional rights and authorities of a co-equal branch of government. The classified intelligence information made available to them was related to their constitutional oversight duties that are also enshrined in federal law. Members of Congress and congressional staffers are not immune from prosecution for criminal conduct, including the unauthorized disclosure of classified information. However, issuing compulsory process for records of Members of Congress and congressional staffers solely because they reviewed information made available to them as part of their oversight responsibilities close in time to the publication of the articles containing the classified information—which was the case with most of the process issued for non-content communications records of congressional staff in the investigations we examined—risks chilling Congress's ability to conduct oversight of the executive branch because it exposes congressional officials to having their records reviewed by the Department solely for conducting Congress's constitutionally authorized oversight duties. Even non-content communications records—such as those sought here—can reveal the fact of sensitive communications of Members of Congress and staffers, such as communications with colleagues with

whom they may be discussing legislative matters; with executive branch whistleblowers (including those from the Department itself) who may be reporting on agency misconduct; or with fundraising committees, donors, or interest groups who may be engaging in First Amendment organizing activity.

Moreover, issuing compulsory process for records of a Member of Congress or congressional staffer based solely on their access to information as part of their oversight responsibilities and the timing of that access risks creating, at a minimum, the appearance of inappropriate interference by the executive branch in legitimate oversight activity by the legislative branch. To be clear, we did not find any evidence of retaliatory or political motivation by the career prosecutors who issued the compulsory process that we reviewed. Nonetheless, when news broke about the compulsory process, concerns were raised, unsurprisingly, by Members of Congress and congressional staffers in both parties that they may have been politically targeted during the investigation.

In many areas of substantial sensitivity, such as the issuance of compulsory process to members of the news media that we discuss in the next chapter, the Department has wide-ranging and extensive policies and procedures to ensure that it has controls and high-level oversight in place so that the Department can appropriately exercise its significant investigative authorities. We were therefore troubled to find that, during the relevant timeframe of this review, the Department did not have a policy that expressly or clearly addressed the use of compulsory process to obtain from third parties the non-content communications records of Members of Congress or congressional staffers, or the use of NDOs in connection with such compulsory process. Further, Department policy did not require any supervisory approval before a prosecutor issued such compulsory process or sought such NDOs. In the matters we reviewed, despite not having an obligation to do so, the line attorneys had an appreciation for the fact that, before issuing compulsory process for records of Members of Congress and staffers, they should consult with their supervisors and seek advice from PIN about the permissibility of seeking such records. However, in the absence of any Department policy or guidance on how investigators should assess the important constitutional interests at stake when issuing compulsory process to third parties for non-content communications records of Members of Congress or congressional staffers—interests that go beyond the question of legal permissibility—we concluded that DOJ policy left these decisions, and the decisions to seek NDOs, entirely to the discretion of the line prosecutors. Indeed, with a News Media Policy that actually required prosecutors to exhaust all other reasonable investigative avenues before seeking compulsory process for records of members of the news media, but with no corresponding exhaustion requirement to satisfy with regard to records of Members of Congress and congressional staffers, the policy arguably encouraged prosecutors to seek records from congressional personnel first.[115]

[115] Although outside the scope of this review, we sought to determine whether the Department had a policy, then or now, that specifically addressed the issuance of compulsory process for records of members of the judiciary, another co-equal branch of government. Federal judges and their staffs have occasion to review classified information provided to them by Department officials as part of their judicial duties, including the federal judges serving on the Foreign Intelligence Surveillance Court. As such, a Department prosecutor conducting a leak investigation could encounter a situation in which federal judges are among the individuals in the "subject pool" due to their access to the classified information as part of their official duties, but without any reliable additional foundation. We are unaware of any specific Department guidance or policies governing the use of compulsory process (or NDOs) for records of federal judges or their staffs.

In exercising their discretion, we found that prosecutors pursued non-content communications records of the Members of Congress and congressional staffers consistent with their approach to obtaining the records of members of the executive branch. In both cases, prosecutors determined which executive and legislative branch officials had been provided access or gained access to the classified information due to their job responsibilities, and we found the prosecutors did so without regard to political affiliation. Although we identified some evidence that supervisors in the USAO-DC approved the issuance of at least some of the compulsory process for the non-content communications records of congressional staff, we were unable to confirm whether any USAO-DC supervisor approved the compulsory process issued for the non-content communications records of the Members of Congress. Nonetheless, as we noted above, no supervisory approval, consultation, or review was required by DOJ policy before issuing compulsory process to third party service providers for non-content communications records of Members of Congress or congressional staffers or seeking a related NDO. In addition, DOJ had no specific guidance for prosecutors on when it was appropriate to obtain non-content communications records of legislative branch officials, or to seek or renew a corresponding NDO; what factors should be considered before doing so; what records were appropriate to seek; or how such records should be handled once they were obtained.

The Department's revised Congressional Investigations Policy now requires approval of PIN and the U.S. Attorney before issuing a subpoena or obtaining a 2703(d) order directed to a third party for records of a Member of Congress or congressional staffer when related to the staffer's duties, as well as for seeking an NDO pursuant to § 2705(b); however, prior to changes the Department made to the policy in September 2024 after reviewing a draft of this report (which we describe below), the policy merely stated that PIN "should" notify the Criminal Division's Assistant Attorney General of approvals, and it did not unambiguously require advance notice to the Deputy Attorney General or Attorney General. In our view, more needed to be done. We recognized that, prior to the September 2024 revisions, the Congressional Investigations Policy highlighted and cross-referenced to the "Major Developments" section of the Urgent Reports Policy, and that the filing of an Urgent Report would have provided notice to Department leadership in advance of the issuance of the compulsory process or any corresponding NDOs. However, we did not read either policy as clearly requiring notification to Department leadership before compulsory process, and any corresponding NDOs, were sought. Rather than include a clear mandate that an Urgent Report be filed, JM 9-85.110 provided that an Urgent Report should be submitted "when" an investigative step governed by the Urgent Reports Policy "warrants" that it be filed. Further, the section of the Urgent Reports Policy referenced in the revised Congressional Investigations Policy, JM 1-13.120 entitled "Major Development," did not unambiguously apply to the use of compulsory process.[116] Reading these provisions together, we did not believe it would be unreasonable for a DOJ lawyer to conclude that the policy required the exercise of a judgment in deciding whether to submit an Urgent Report, particularly given the

[116] We noted that the memorandum from the Deputy Attorney General announcing the revised Congressional Investigations Policy references the Urgent Reports Policy generally by citing to JM 1-13.000, rather than to the "Major Development" subsection, JM 1-13.120. *See* Deputy Attorney General Memorandum to All Federal Prosecutors, Policies and Procedures in Criminal Investigations Involving Members of Congress and Staff, November 7, 2023. However, in our view, the language of JM 1-13.000 still requires a judgment by a DOJ prosecutor as to whether the Urgent Reports Policy applies to the use of compulsory process.

Department's decision to not include a clear mandate in the revised Congressional Investigations Policy.

Our concerns about the absence of required senior level DOJ advance notification in the Department's Congressional Investigations Policy are similar to those we addressed in our *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Crossfire Hurricane Review), where we found that then existing DOJ and FBI policies did not require senior Department officials to be notified when investigations were opened of "prominent members" of a presidential campaign.[117] In recommending that the Department and FBI evaluate whether advance notification to a senior Department official, such as the Deputy Attorney General, should be required "for case openings that implicate core First Amendment activity and raise policy considerations or heighten enterprise risk," we noted that "current Department and FBI policies require high-level notice and approval in other circumstances where investigative activity could substantially impact certain civil liberties."[118] We further noted that the "purpose of such notice and approval is to allow senior Department officials to consider the potential constitutional and prudential implications of [these decisions], even where there is sufficient predication to do so."[119] We believe there are circumstances where the Department's issuance of compulsory process to obtain the records of Members of Congress or congressional staffers and seeking corresponding NDOs present similarly sensitive concerns requiring similar accountability, and that, as Attorney General Garland stated publicly in 2021 when referring this issue to the OIG, "Consistent with our commitment to the rule of law, [the Department] must ensure that full weight is accorded to separation-of-powers concerns moving forward."[120] Therefore, in order for senior leadership to be able to consider and decide matters potentially raising constitutional separation of powers issues, we recommend that the Department evaluate when advance notification to a senior Department official, such as the Deputy Attorney General or Attorney General, should be required before compulsory process is issued, and any corresponding NDOs are sought, for records of a Member of Congress or congressional staffers and establish, as necessary, implementing policies and guidance.[121]

After reviewing a draft of this report, the Department made several changes to the Congressional Investigations Policy and the Urgent Reports Policy in response to the specific concerns we identified and that are reflected in our recommendations. The newly revised Congressional Investigations Policy now requires—not merely encourages—PIN to notify the Criminal Division's Assistant Attorney

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[117] *See* DOJ OIG, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, Oversight and Review Division Report No. 20-012 (Dec. 2019).

[118] *Id.*

[119] *Id.*

[120] U.S. Department of Justice, Office of Public Affairs, "Statement from Attorney General Merrick B. Garland," June 14, 2021, available at www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland#:~:text=Consistent%20with%20our%20commitment%20to,%2Dpowers%20concerns%20moving%20forward.%E2%80%9D (accessed August 20, 2024).

[121] Although the revised Congressional Investigations Policy contemplates notification to Department leadership through Urgent Reports, we believe the Department should consider whether providing notification through Urgent Reports before issuing compulsory process, and any corresponding NDOs, for records of a Member of Congress or congressional staffer is the best mechanism for providing notification of such sensitive information.

General of all consultations and approvals undertaken by PIN in connection with investigations involving Members of Congress or congressional staffers, including concerning the issuance of compulsory process to a third party for the communications records of a Member of Congress or congressional staffer and related NDOs. The Congressional Investigations Policy now also makes explicit that, prior to taking any of the enumerated investigative steps specified in the policy, including issuing compulsory process and related NDOs for records of Members of Congress or their staff, the U.S. Attorney's Office or other prosecuting component must file an "Urgent Report" to Department leadership, including the Attorney General and Deputy Attorney General. In addition, the Department made revisions to the Urgent Reports Policy that, among other things, explicitly adds "investigations involving elected or appointed officials" to the list of circumstances that require urgent reporting when there are major developments. We believe that these revisions to the Congressional Investigations Policy and Urgent Reports Policy are significant improvements.

One of the benefits of the Congressional Investigations Policy's placement of the consultation and approval requirement with PIN is that it allows the decisions to be made by career DOJ prosecutors with extensive experience in public corruption investigations, rather than by the Department's political appointees in investigations involving Members of Congress and congressional staffers who may be from the opposite political party. In addition, there is significant value of having experienced, career prosecutors from PIN carefully review and provide their views on such requests prior to approval, much like the value gained from having multiple experts from the Department provide their views before approval is granted under the Department's News Media Policy. However, as we noted in our Crossfire Hurricane Review, the Department's leadership, which is nominated by the President and confirmed by the Senate, is ultimately answerable for the investigations, prosecutions, and activities of the Department, whether politically sensitive or routine. Indeed, even before the Department's recent revisions, the Congressional Investigations Policy already required the U.S. Attorney, a political appointee, to approve the subpoena or 2703(d) order request where the policy requires PIN approval. We believe the revisions the Department made to the policy after reviewing a draft of this report will help to ensure the Department's leaders can fulfill their management responsibilities and be held accountable for the Department's actions by making leadership aware of, and providing an opportunity to decide, matters potentially raising constitutional separation of powers issues, even when they involve politically sensitive issues.

We also recommend that the Department consider the circumstances in which NDO applications and renewals should identify for the reviewing judge that the records covered by a proposed NDO are records of Members of Congress or congressional staffers. After reviewing a draft of this report, the Department revised the Congressional Investigations Policy to require that, in cases where an NDO would delay notice to a Member of Congress, congressional office, or a congressional staffer, the prosecutor must disclose this fact in the application filed with the court.

Like prior versions of the policy, the newly revised Congressional Investigations Policy also does not contain specific guidance on when it is appropriate to obtain communications records of legislative branch officials, or to seek or renew a corresponding NDO; what factors should be considered before doing so; what records are appropriate to seek; or how such records should be handled once they are obtained. By contrast, the Department's current News Media Policy provides such guidance in the news media context and now only allows compulsory process to be issued for the purpose of obtaining records of a member of the news media acting within the scope of newsgathering in a few

circumstances, which require Attorney General approval (including for a related NDO) unless the member of the news media consents to the use of the compulsory process or the information has already been published, in which instances DOJ officials subordinate to the Attorney General must approve.

We were similarly concerned about another continuing disparity between the Department's current News Media Policy and its Congressional Investigations Policy, namely the requirement in the News Media Policy—not found in the Congressional Investigations Policy—that the government exhaust "all reasonable avenues to obtain the information from alternative, non-news-media sources" before seeking approval to issue compulsory process for news media records (with limited exceptions). Consistent with a similar exhaustion requirement in the then existing News Media Policy, in the investigation we reviewed in which DOJ prosecutors issued compulsory process for records of Members of Congress, congressional staffers, and members of the news media, they sought the records for the Members and staffers approximately 3 years before issuing similar process for records of the news media.[122] The Department's exhaustion requirement in the context of seeking records of a member of the news media acting within the scope of newsgathering is a prudential requirement that the Department has placed on its prosecutors to ensure that, before a request is made for approval to issue compulsory process for records of a member of the news media, prosecutors can demonstrate a compelling need for them. In our view, the Department should consider whether there are circumstances in which a similar exhaustion requirement should be a prerequisite for issuing compulsory process to obtain records of Members of Congress and congressional staffers.

IV. Conclusion and Recommendations

We recognize that among the Department's most important responsibilities is to investigate allegations of corruption by public officials, including by Members of Congress and congressional staffers. In doing so, the Department must be able to lawfully use the tools that it has been given to investigate criminal wrongdoing, including the issuance of compulsory process and the use of NDOs. Nonetheless, the Department has developed a series of policies and procedures that places limits on the use of these authorities in areas where they could implicate constitutional and civil liberties concerns. The Department's revised Congressional Investigations Policy, including the September 2024 revisions the Department made to it and to other relevant policies after reviewing a draft of this report, represents an improvement over its prior policy and more fully recognizes that Congress's constitutional authority to oversee the executive branch can be implicated when the Department seeks records of Members of Congress or congressional staffers, particularly where, as here, the basis for seeking those records is the fact that Members or staff were provided or gained access to classified information in the exercise of their constitutional oversight duties close in time to subsequently published news articles. Based on our review of its use of compulsory process in the matters we reviewed in this chapter, we believe the Department should continue to carefully assess its policies to ensure that appropriate constitutional and prudential questions are considered before it issues compulsory process for records of Members of Congress and congressional staffers or seeks NDOs related to them.

[122] Were the same situation to arise today, DOJ's current News Media Policy would prohibit the Department from seeking records of the members of the news media.

We make three recommendations to help address the concerns described in this chapter, some of which, as noted, the Department has begun to address through revisions to Department policy. First, in order for senior leadership to be able to consider and decide matters potentially raising constitutional separation of powers issues, we recommend that the Department evaluate when advance notification to a senior Department official, such as the Deputy Attorney General or Attorney General, should be required before compulsory process is issued, and any corresponding NDOs are sought, for records of a Member of Congress or congressional staffer and establish, as necessary, implementing policies and guidance. Second, we recommend that the Department consider the circumstances in which NDO applications and renewals should identify for the reviewing judge that the records covered by a proposed NDO are records of Members of Congress or congressional staffers. Third, we recommend that the Department consider whether there are circumstances in which an exhaustion requirement should be a prerequisite for issuing compulsory process to obtain records of Members of Congress and congressional staffers. As described in this chapter, after reviewing a draft of this report, the Department took steps to begin implementing these recommendations by making several revisions to applicable policies. Consistent with our ordinary practice, we will evaluate these and any further policy revisions to ensure that each of the recommendations is fully implemented.

Chapter Three: Issuance Of Compulsory Process To Obtain Records Of Members Of The News Media

As described in Chapters One and Two, the Department undertook various investigative efforts between 2017, when CNN, New York Times, and Washington Post 2 were opened, and 2020 in an attempt to identify who leaked the classified information contained in the articles that triggered the investigations. In Washington Post 1 and Washington Post 2, compulsory process was issued during this time period for records of Members of Congress and congressional staffers, as described in Chapter 2. In 2020, in a further effort to identify the sources of the unauthorized disclosures, the Department issued compulsory process to third party providers seeking non-content communications records of the *CNN*, *The New York Times,* and *The Washington Post* reporters who authored the articles that contained the classified information.

In this chapter, we first describe the Department policies and procedures then applicable to the compulsory process sought for the non-content communications records of the reporters in these three news media leak investigations; we then summarize our factual findings; and we conclude with our analysis of the Department's compliance with the then applicable policies.[123]

The Department has long recognized that a "free and independent press is vital to the functioning of our democracy."[124] For many years, Department policy has been "intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities" and has called for the Department to consider "several vital interests" when deciding whether to use such tools, namely "protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society."[125] As such, for over 4 decades, the Department's News Media Policy has required the Attorney General's authorization to seek compulsory process for telephone toll records of members of the news media and, beginning in 2014, for other communications records of members of the news media.[126] When concerns have been raised about specific uses of compulsory process to obtain records of members of the news media, the Department has responded by establishing or revising procedures in its News Media Policy that are intended to further safeguard the important interests at stake.

In February 2014 and January 2015, following an Attorney General review prompted by concerns that the Department had sought communications records for various journalists in connection with leak

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[123] We opened our review in June 2021, the month after the compulsory process issued for the communications records of these reporters was first publicly reported. As explained in Chapter Two, we did not examine the compulsory process issued in 2017 for the communications records of another reporter in a fourth investigation that resulted in the conviction of the former Director of Security at SSCI, James Wolfe, for making a false statement to investigators.

[124] 28 C.F.R. § 50.10(a)(1) (2022).

[125] 28 C.F.R. §§ 50.10(a)(1) and (3) (2015).

[126] *See* 45 Fed. Reg. 76,435 (Nov. 19, 1980); 79 Fed. Reg. 10,989-01 (Feb. 27, 2014).

investigations, the Department modified its News Media Policy by adding additional processes to "ensure the highest level of oversight when members of the Department seek to obtain information from, or records of, a member of the news media."[127] As we describe in this chapter, the Department complied with some but not all of the then applicable provisions of the News Media Policy in **CNN**, **New York Times,** and **Washington Post 2,** many of which provisions had been put in place beginning just 6 years earlier. In our judgment, this deviation from the Department's own requirements indicates a troubling disparity between, on the one hand, the regard expressed in Department policy for the vital role of the news media in American democracy and, on the other hand, the Department's commitment to complying with the limits and requirements that it intended to safeguard that very role.

I. Applicable Policies

A. News Media Policy, 28 C.F.R. § 50.10, and its Justice Manual Provisions

The Department's News Media Policy provides requirements and procedures regarding investigative or prosecutive steps affecting members of the news media, including the issuance of compulsory process to third parties for records relating to their accounts. Through the years, the Department has revised the News Media Policy, which is found at 28 C.F.R. § 50.10, on several occasions. Section 9-13.400 of the Department's Justice Manual (JM) supplements § 50.10 by providing guidance on the application of the News Media Policy and contains additional requirements.

The version of § 50.10 in effect during the relevant time period for the investigations we reviewed was promulgated in January 2015 following a comprehensive review initiated by then Attorney General Eric Holder in May 2013 of the Department's policies and practices regarding the use of certain law enforcement tools directed at members of the news media, including compulsory process to obtain communications records of members of the news media.[128] That review was prompted by concerns raised by the news media, Congress, and the public after news broke that the Department had sought communications records for more than 20 Associated Press telephone lines and had obtained a warrant for the emails of a Fox News journalist.[129] The version of JM 9-13.400 in effect during the

[127] *See* Attorney General Memorandum to All Department Employees, Updated Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, February 21, 2014; Attorney General Memorandum to all Department Employees, Updated Policy Regarding Obtaining Information From, or Record of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, January 14, 2015 at 1.

[128] *See* Attorney General Memorandum to All Department Employees, Updated Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, February 21, 2014; Attorney General Memorandum to all Department Employees, Updated Policy Regarding Obtaining Information From, or Record of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, January 14, 2015.

[129] *See* Reporters Committee for Freedom of the Press, "Strengthening and preserving the attorney general guidelines for media subpoenas," undated, www.rcfp.org/resources/the-department-of-justice-guidelines-on-subpoenas/ (accessed July 10, 2024).

relevant period was issued in March 2016. Therefore, unless otherwise indicated, all references in this report to § 50.10 are to the 2015 version, and all references to JM 9-13.400 are to the 2016 version.

The 2015 version of the News Media Policy, which required Attorney General authorization to issue compulsory process to third party communication service providers to obtain the communications records of members of the news media in most circumstances, was in effect until Attorney General Merrick Garland issued a memorandum on July 19, 2021, in response to the revelation of the compulsory process at issue in this report.[130] Following Department review of the policy, the Department issued a revised version of § 50.10 that became effective on November 3, 2022.[131] The July 2021 memorandum and the 2022 version of § 50.10 prohibit the use of compulsory process to obtain records of members of the news media acting within the scope of newsgathering activities, except under limited circumstances such as when "necessary to prevent an imminent or concrete risk of death or serious bodily harm," and therefore appear to effectively end the ability of Department employees to seek to obtain the compulsory process that the Attorney General authorized in the investigations that are the subject of this review.[132]

1. Authorizations by the Attorney General for Compulsory Process to Obtain from Third Parties Communications Records of Members of the News Media

In CNN, New York Times, and Washington Post 2, the Department sought non-content communications records of members of the news media through compulsory process, including court orders, pursuant to 18 U.S.C. § 2703(d) (2703(d) order), issued to third party communication service providers. As describe above, § 50.10(c)(5) of the News Media Policy required the Attorney General's authorization to issue compulsory legal process to obtain from third parties the communications records, including non-content records, of a member of the news media who is not a subject or target of the investigation.

Sections 50.10(c)(5)(ii) to (viii) set forth "considerations" for the Attorneys General to weigh in exercising their discretion whether to authorize the use of compulsory process. For example, § 50.10(c)(5)(ii) included a consideration that in criminal matters "the information sought [be] essential to the successful investigation or prosecution of that crime" and the compulsory process "should not be used to obtain peripheral, nonessential, cumulative, or speculative information." And § 50.10(c)(5)(iii) specified that the compulsory process "be pursued only after the government has made all reasonable attempts to obtain the information from alternative sources." What constituted information that was sufficiently "essential" to a successful investigation or prosecution or the making of "all reasonable attempts to obtain the information from alternative sources" were examples of the considerations in § 50.10(c)(5) that were within an Attorney General's discretion to assess and weigh.

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[130] Attorney General Memorandum for The Deputy Attorney General, The Associate Attorney General, Heads of Department Components, United States Attorneys, Federal Prosecutors, Use of Compulsory Process to Obtain information From, or Records of, Members of the News Media, July 19, 2021.

[131] *See* 87 Fed. Reg. 66,239-01 (Nov. 3, 2022). This report does not assess these November 2022 policies.

[132] Section 50.10(c)(3) (2022).

Our role in this review was not to second-guess discretionary judgments by the Attorney General about whether to authorize the compulsory process when those decisions complied with or were authorized by Department rules, policies, or procedures. Accordingly, we did not review the Attorney General's application of the discretionary elements of § 50.10(c)(5). For the same reasons, we did not assess discretionary decisions by the Attorney General to delay notice to the affected members of the news media pursuant to § 50.10(e) where such discretionary delayed notice decisions complied with Department rules, polices, or procedures.[133]

Below, we describe the non-discretionary elements of § 50.10 and its corresponding JM provisions. Our review focused on compliance with these non-discretionary provisions.

a. Attorney General Authorization Required to Issue Compulsory Process to Obtain from Third Parties Communications Records of Members of the News Media

Section 50.10(c)(1) required that, with certain exceptions that do not apply in the investigations and compulsory process we reviewed, "members of the Department must obtain the authorization of the Attorney General to issue a subpoena to a member of the news media; or to use a subpoena [or] 2703(d) order…to obtain from a third party communications records or business records of a member of the news media."[134]

b. Personal Endorsement of the Request by Responsible U.S. Attorney or Assistant Attorney General

Section 50.10(c)(2) required that requests for the Attorney General's authorization to issue compulsory process to obtain communications records of a member of the news media "must be personally endorsed by the United States Attorney or Assistant Attorney General responsible for the matter."

c. Director of National Intelligence Certification Required in Matters Concerning the Unauthorized Disclosure of National Defense Information or Classified Information

Section 50.10(c)(5)(v) required that in investigations or prosecutions of unauthorized disclosures of national defense information or classified information, the Director of National Intelligence (DNI) certify to the Attorney General "the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and [reaffirm] the intelligence community's continued support for the investigation or prosecution."[135]

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[133] We also did not assess the Department's use of "filter teams" to review records received, pursuant to § 50.10(c)(5)(viii). We note that the current News Media Policy changed the filter protocols to generally require their use "when the compulsory legal process relates to a member of the news media acting within the scope of newsgathering or the compulsory legal process could potentially encompass newsgathering-related materials that are unrelated to the conduct under investigation."

[134] *See* also JM 9-13.400(C)(1).

[135] *See* also JM 9-13.400(C)(5)(ii).

The DNI certification was one of the "considerations" for the Attorney General in determining whether to authorize compulsory process to obtain from third parties the records of a member of the news media. Although the extent to which the Attorney General considered the DNI certification along with the other considerations in § 50.10(c)(5) was discretionary, § 50.10(c)(5)(v) required that the DNI certification be "*sought* not more than 30 days prior to the submission of the approval request to the Attorney General." (Emphasis added). Section 50.10(c)(5)(v) did not expressly state that the DNI certification must be *obtained* prior to the Attorney General's authorization. However, as a practical matter, a DNI certification would need to have been obtained prior to the Attorney General's authorization so that the Attorney General would have the opportunity to consider this element of § 50.10(c)(5) when making the determination. This interpretation is in accord with the corresponding JM provision, JM 9-13.400(C)(5)(ii), which states that that the "member of the Department requesting Attorney General authorization" to use compulsory process to obtain a member of the news media's records "*shall obtain* from the [DNI] a document certifying" the three factors described. (Emphasis added). In addition, the Deputy Assistant Attorney General for the Criminal Division, who oversaw the work of the unit charged with analyzing requests under the News Media Policy, told us she viewed the DNI certification provision as a requirement in the News Media Policy that was "part of the package."[136]

Further, § 50.10(c)(5)(v) and JM 9-13.400(C)(5)(ii) contained conflicting references on the timing of the DNI certification. Section 50.10(c)(5)(v) stated that the DNI certification "will be sought not more than 30 days prior to the submission of the approval request to the Attorney General." Yet, JM 9-13.400(C)(5)(ii) stated that the members of the Department who are seeking the compulsory process are "encouraged to initiate the process" to request a DNI certification "at least 30 days in advance of seeking the Attorney General's authorization" of the compulsory process. Given the conflicting language in the DNI certification provisions, we did not assess compliance with the timing of the DNI certification.[137]

2. Additional Requirements Contained in the JM

Although most of JM 9-13.400 simply reiterated or reinforced the provisions of § 50.10, the JM contained additional requirements applicable to the review and approval of requests for authorization to issue compulsory process for records of members of the news media. Below we describe the JM provisions applicable to the compulsory process the Attorney General authorized in the three investigations we reviewed.

a. Criminal Division Review and Evaluation

JM 9-13.400(K)(1) required that the Criminal Division "review and evaluate" all requests for Attorney General authorization to issue compulsory process to obtain records of members of the news media. The provision stated: "Such requests should be submitted to the [Criminal Division's Policy and

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[136] The Criminal Division's then Chief of the Policy and Statutory Enforcement Unit, which analyzes requests under the News Media Policy, told us that although she believed § 50.10(c)(5)(v) could be read "as a consideration and not a requirement" that a DNI certification be obtained, the Criminal Division generally required a DNI certification to be obtained prior to the Attorney General's authorization.

[137] The 2022 News Media Policy no longer contains a DNI certification requirement, making the conflicting language on timing no longer an issue.

Statutory Enforcement Unit] at least 30 business days before the anticipated use of the law enforcement tool, and shall address all applicable considerations identified in 28 C.F.R. 50.10(c)(4) and (c)(5)." (Emphasis in original).

b. Review and Comment by the Director of the Office of Public Affairs

JM 9-13.400(K)(4) required that, other than in exigent circumstances or when "directed otherwise by the Attorney General, the Assistant Attorney General for the Criminal Division shall forward to the Director of the Office of Public Affairs for review and comment the Criminal Division's recommendation regarding any requests requiring a decision by the Attorney General."

c. News Media Review Committee

Then Attorney General Holder created a News Media Review Committee in February 2014 "to assist in balancing the investigative imperatives with the protection of the public's interest in the freedom of the press."[138] The committee was comprised of "the Department's Chief Privacy and Civil Liberties Officer, the Director of the Office of Public Affairs, and Associate Deputy Attorney General, and two senior career Assistant United States Attorneys (AUSAs) with relevant expertise and experience but no involvement (supervisory or otherwise) in the case under consideration."[139]

JM 9-13.400(K)(5) required that other than in exigent circumstances or "unless directed otherwise by the Attorney General or Deputy Attorney General, the Assistant Attorney General for the Criminal Division shall…forward to the News Media Review Committee for its review and comment the Criminal Division's recommendation" in the following circumstances: (1) "If the request relates to the investigation of unauthorized disclosure of sensitive law enforcement or national defense information"; (2) "If Department attorneys request authorization to seek communications records or business records of a member of the news media without first negotiating with, or providing notice to, the affected member of the news media"; (3) "If Department attorneys request authorization to seek information from, or records of, a member of the news media that would reveal the identity of a confidential source"; or (4) "At the request of the Attorney General or Deputy Attorney General."

3. Requirement of Notice to Members of the News Media

Section 50.10(e)(2) required, with one exception not applicable here, that when the Attorney General has authorized the use of compulsory process to obtain from a third party communications records of a member of the news media, the member of the news media "shall be given reasonable and timely notice of the Attorney General's determination" before the use of the compulsory process, "unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and

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[138] JM 9-13.400(K)(5), citing Memorandum from Attorney General to All Department Employees (Feb. 21, 2014); Memorandum from Deputy Attorney General James M. Cole to Heads of Department Components (Feb. 28, 2014).

[139] JM 9-13.400(K)(5).

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."[140]

Although such a determination by the Attorney General was discretionary, the notice provision contained non-discretionary elements that were triggered by the Attorney General's determination to delay notice. Section 50.10(e)(3) required that when notice was not provided to a member of the news media pursuant to paragraph (e)(2),

> the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the affected member of the news media notice of the order or warrant as soon as it is determined that such notice will no longer 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.

The provision also required that in all circumstances:

> notice shall occur within 45 days of the government's receipt of any return made pursuant to the subpoena, court order, or warrant, except that the Attorney General may authorize delay of notice for an additional 45 days if he or she determines that, for compelling reasons, such 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. No further delays may be sought beyond the 90-day period.[141]

This provision of the 2015 version of § 50.10 was interpreted in a March 31, 2021 memorandum from the Criminal Division to Attorney General Garland, discussed further below, as to when the 45-day period commenced in a situation where the Attorney General authorized delayed notice for multiple forms of compulsory process concerning the same member of the news media. The memorandum provided an interpretation of the delayed notice period as follows:

> The News Media Policy does not expressly address how to determine the commencement of the delayed notice period when the Attorney General authorizes multiple forms of process with respect to a [member of the news media] in a single authorization. The Criminal Division maintains that the Policy should be read to not require notice to the [member of the news media] until 45 days after the complete return on *all* forms of processes authorized in a single request by the Attorney General. Read strictly, the language of the Policy could require that notice occur within 45 days of the government's receipt of "*any* return made pursuant to the subpoena, court order, or warrant." 28 C.F.R. § 50.10(c)(3) (emphasis added). However, this reading would defeat the purpose of the Policy in allowing for delayed notification by forcing notice to the [member of the news media] before return on all process regarding that [member of the news media] has been received, thereby risking "a clear and substantial threat to the integrity of the investigation" or other serious harms. *See id*.

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[140] *See also* JM 9.13-400(A)(4) and (E)(2).

[141] *See also* JM 9.13-400(E)(3).

As discussed further below, Attorney General Garland approved the March 31, 2021 memorandum's request to delay notice for the additional period, thereby appearing to adopt the Criminal Division's interpretation of the delayed notice period provision.[142]

B. Requirement Regarding Seeking Non-Disclosure Orders Directed to Third Party Communication Service Providers for Records of a Member of the News Media

The JM contained two requirements applicable to the seeking of non-disclosure orders directed at a third party for records of a member of the news media. First, when seeking the Attorney General's authorization for compulsory process to obtain from a third party the records of a member of the news media pursuant to § 50.10(c), "members of the Department must indicate whether they intend to seek an order directing the recipient of the subpoena or court order, if authorized, not to disclose the existence of the subpoena or court order to any other person or entity, and shall articulate the need for such non-disclosure order."[143] Second, any such "authorization must expressly indicate whether a non-disclosure order may be sought."[144]

II. Facts

In this section, we summarize our factual findings. We first describe how the authorization from then Attorney General William Barr for the compulsory process was sought and obtained, including our findings regarding certain aspects of the authorization process. We then describe the reporters' non-content communications records that were sought and obtained from the communications providers. Next, we describe the non-disclosure orders the Department obtained pursuant to 18 U.S.C. § 2705(b). We conclude this section by describing the facts and timelines of the delayed notice to the reporters of the compulsory process.

A. Authorization From the Attorney General Was Sought and Obtained

In 2020, the Department sought and obtained then Attorney General Barr's authorization in **CNN**, **New York Times,** and **Washington Post 2** to issue compulsory process to third party communication service providers for the non-content communications records of the reporters who wrote the articles that contained the classified information. In the three investigations, Barr signed memoranda memorializing his approval of the compulsory process sought. Below we describe the process undertaken by Department officials to request the Attorney General's authorization and summarize the facts relevant to the requirements of the aspects of § 50.10 and the JM under our review.

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[142] The Department incorporated the Criminal Division's interpretation in the March 31, 2021 memorandum into the 2022 revisions to § 50.10. *See* § 50.10(j)(4). While the interpretation in the March 31 memorandum addressed the circumstance of a request for authorization for one reporter's communications records, its rationale would logically extend to a single request for authorization for multiple forms of compulsory process to obtain the communications records of multiple reporters. This interpretation also is consistent with the 2022 revisions to § 50.10. *See* § 50.10(j)(4) ("[N]otice must be given to the affected member of the news media within 45 days of the Government's receipt of a complete return made pursuant to all forms of compulsory legal process included in the same authorizing official's authorization").

[143] JM 9-13.400(C)(7)(i).

[144] *Id.*

1. Authorization Process

a. The National Security Division Sent Memoranda to the Criminal Division Requesting Attorney General Authorization

1) Barr Informs National Security Division Assistant Attorney General about Assigning a Detailee to the National Security Division to Work on Leak Investigations

In early 2020, the Department assigned to the National Security Division (NSD) a career AUSA to work on the leak investigations. The then Assistant Attorney General for NSD (NSD AAG), John C. Demers, told us that he first heard about the detailee's assignment to NSD from Attorney General Barr himself, who Demers said told him, "I got this great guy for you, [the detailee]. I want him to work on these leak cases." Demers told us that Barr did not know the detailee, but that the U.S. Attorney in the detailee's home district recommended the detailee. According to Demers, Barr said the detailee should be assigned to NSD's Office of the Assistant Attorney General, where the detailee ultimately served as "a counsel." Demers told us that both Attorneys General Jeff Sessions and Barr had "made it very clear leak investigations were a priority of the Department." Demers said that, at the start of Barr's tenure, Barr noted that the leak investigations had been ongoing for 2 years and that Demers needed more personnel to conduct the investigations.

The detailee told us that the U.S. Attorney in his home district asked him to consider taking on the detail in January 2020. According to the detailee, the U.S. Attorney told him that he had received a call from Department headquarters about a detail opportunity involving "high-profile" leak investigations that would require working in Washington, D.C. The detailee told us he had not met Attorney General Barr before the detail assignment, and he did not have any conversations with Attorney General Barr before agreeing to the detail assignment.

Before accepting the detail, the detailee said he sought to learn more about the assignment from discussions with personnel in the Office of the Deputy Attorney General (ODAG) and high-ranking NSD officials, and to obtain advice from "trusted mentors, who had served at senior levels of government in a variety of administrations." The detailee said an ODAG attorney told him that "no one was looking to put a thumb on the scale" and that for "bureaucratic reasons" the investigations were not "moving as quickly as…they should have." The detailee also told us that he said to an ODAG official that if he accepted the assignment he would "vigorously follow the facts, wherever they might lead, and [he] would investigate the case, pursuant to the law and the Justice Manual." He said he asked the ODAG official for "his assurance that any recommendation that [the detailee] made on the [investigations] would be viewed and processed apolitically" and that the ODAG official said in response: "absolutely." After these discussions, the detailee accepted the assignment and began work full time in Washington, D.C. for a 6 month period.

The detailee told us that, during his detail, he met at least four times with Attorney General Barr—in two instances to brief him on the **New York Times** and **Washington Post 2** investigations and in two

other instances for "meet-and-greets," one in which the Attorney General thanked him for taking the assignment upon arrival and, in the other, said "good-bye" to him upon departure.[145]

Some career attorneys who worked with the detailee told us that they found the assignment highly irregular and believed it created an appearance of political influence in the investigations. However, several career attorneys, including some who viewed the assignment as irregular, stated that they did not witness the detailee engage in conduct that they viewed as politically motivated, and none described the detailee's conduct as indicating bias or that his actions in the investigations were motivated by improper or political considerations.[146] We found no testimonial or documentary evidence to suggest that the detailee's work in the investigations and in seeking the compulsory process of the members of the news media was based on bias or any improper or political considerations.

2) The NSD Memoranda and Authorization Request Submission Process

NSD sent to the Criminal Division memoranda requesting Attorney General authorization for the compulsory process sought for the reporters' non-content communications records in **CNN**, **New York Times,** and **Washington Post 2**, on January 24, 2020, May 6, 2020, and July 8, 2020, respectively.[147] The detailee was the primary drafter of the NSD memoranda in **New York Times** and **Washington Post 2**. The NSD memoranda in the three investigations included a summary of the facts and investigative steps taken, described the compulsory process sought for the reporters, and addressed the requirements in the News Media Policy for the Attorney General's authorization to issue compulsory process to third parties for the communications records of members of the news media.

NSD submitted the memoranda requesting Attorney General authorization in the three investigations to the Criminal Division's Policy and Statutory Enforcement Unit (PSEU), which is located within the Office of Enforcement Operations (OEO) and is the Criminal Division unit that handles such requests.[148] The NSD memoranda were submitted at least 30 business days before the anticipated use of the compulsory process and addressed all applicable considerations identified in § 50.10(c)(5).

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[145] Another witness told us that Attorney General Barr also met with NSD attorneys, one and possibly two times, and they discussed **CNN** and the option of seeking Barr's authorization to issue compulsory process for reporters' communications records, and the Attorney General did not direct or pressure them to seek his authorization.

[146] In addition, the detailee obtained guidance from the Department's ethics office regarding his participation in one of the investigations.

[147] The NSD memorandum in **CNN** stated it was from an NSD Deputy Assistant Attorney General and the NSD attorneys and the Assistant U.S. Attorney assigned to the investigation from the U.S. Attorney's Office for the Eastern District of Virigina. The NSD memorandum in **New York Times** stated it was from the NSD Assistant Attorney General (AAG), Principal Deputy AAG, and the NSD attorneys and the Assistant U.S. Attorneys assigned to the investigation from the U.S. Attorney's Office for the District of Columbia. The NSD memorandum in **Washington Post 2** stated it was from the NSD AAG and the NSD attorneys assigned to the investigation but did not include the Assistant U.S. Attorneys assigned to that investigation.

[148] Although the NSD memoranda were submitted to PSEU for its review, they were addressed to the Attorney General in the **CNN** request and to the Attorney General and Deputy Attorney General in the **New York Times** and **Washington Post 2** requests.

As described in further detail below, PSEU reviewed the NSD memoranda and used them as starting points for drafting the Criminal Division's recommendation memoranda to request authorization from the Attorney General for the requested compulsory process.

b. PSEU Prepared the Criminal Division's Memoranda with Its Recommendations to the Attorney General

In the three investigations, PSEU prepared draft recommendation memoranda on behalf of the Criminal Division to Barr providing a summary of the facts and investigative steps taken, describing the compulsory process sought for the reporters, addressing most of the requirements in the News Media Policy, and providing the Criminal Division's recommendation to approve the requested compulsory process. In their OIG interviews, the then PSEU Chief and PSEU line attorneys who handled the requests described an iterative process in which they drafted the recommendation memoranda after reviewing the information NSD submitted, which they supplemented with additional information that they obtained from the NSD attorneys over the course of weeks.

c. Criminal Division Recommendation Memoranda Finalized and Sent to the Attorney General Who Approved the Requests for Compulsory Process

After PSEU completed its review and drafting process, it sent the draft Criminal Division memoranda to OEO management for review. OEO management then sent the memoranda to the Criminal Division's Office of the Assistant Attorney General, which finalized the recommendation memoranda and submitted them to the Deputy Attorney General and Attorney General. The then Assistant Attorney General of the Criminal Division signed the final recommendation memoranda in **CNN** and **New York Times**, which were sent forward through the Deputy Attorney General to the Attorney General on April 14, 2020, and July 2, 2020, respectively; and Brian Rabbitt, the then Acting Assistant Attorney General of the Criminal Division, signed the final recommendation memorandum in **Washington Post 2**, which was sent forward through the Deputy Attorney General to the Attorney General on September 18, 2020. Each Criminal Division memorandum concluded with a summary recommendation regarding the various aspects of the request for Attorney General approval and a space for the Attorney General to sign to indicate whether he approved or disapproved the request.[149]

Barr signed the final recommendation memoranda authorizing issuance of the requested compulsory process to service providers for non-content communications records of the *CNN*, *The New York Times,* and *The Washington Post* reporters on May 13, 2020, September 15, 2020, and November 13, 2020, respectively.

2. Findings Regarding Certain Aspects of the Authorization Process

Below we describe our factual findings regarding five non-discretionary elements of the News Media Policy and the JM.

[149] The **New York Times** and **Washington Post 2** memoranda also contained a space called "other," where the Attorney General could sign.

a. Personal Endorsement by U.S. Attorney or Assistant Attorney General

In **CNN**, the Criminal Division's recommendation memorandum stated that the then NSD AAG John C. Demers and G. Zacharay Terwilliger, the then U.S. Attorney for the Eastern District of Viriginia, personally endorsed the request for Attorney General authorization to issue compulsory process for the non-content communications records of a *CNN* reporter. In **New York Times** and **Washington Post 2**, the recommendation memoranda stated that Demers personally endorsed the request for Attorney General authorization to issue compulsory process for the non-content communications records of the reporters of those publications.

b. DNI Certification Was Obtained in Two of the Investigations But Was Not Obtained in the Third

As described above, § 50.10(c)(5)(v) required that the DNI certify the significance of the harm caused by the unauthorized disclosure of the classified information and that the information remained classified, as well as reaffirm that the intelligence community continued to support the investigation or prosecution. Records we reviewed in **CNN** and **New York Times** demonstrated that NSD obtained the DNI certifications prior to the Attorney General's authorization of the requests. In **Washington Post 2**, records we reviewed revealed that NSD sought the DNI certification, but an NSD supervisor told us that it was never received.

In the **CNN** request, the DNI certification was included in the classified attachment to the memorandum that was sent to Attorney General Barr for his signature, as noted in a footnote in the memorandum. In the **New York Times** request, NSD obtained the DNI certification after Brian Benczkowski, the Assistant Attorney General for the Criminal Division, signed the memorandum, but we were unable to confirm whether it was provided to Attorney General Barr before he authorized the request.

In the **New York Times** request, the memorandum that the Attorney General signed stated: "NSD has advised the Criminal Division that it is in the process of obtaining a certification from the Director of National Intelligence, pursuant to 28 C.F.R. § 50.10(c)(5)(v)…." The Office of the DNI sent the DNI certification in **New York Times** to the NSD attorneys working that investigation on August 5, 2020, just over 1 month after Benczkowski signed the memorandum on July 2, 2020, and just over a month before Attorney General Barr signed the memorandum on September 15, 2020. Even so, the Criminal Division memorandum was not revised to specify that NSD had obtained the DNI certification, or to attach the certification, and the Criminal Division witnesses we spoke with did not recall receiving a DNI certification from NSD or being told NSD had obtained one. We did not find evidence that Barr was sent the certification for his consideration, pursuant to § 50.10(c)(5)(v), prior to his authorization of the compulsory process for *The New York Times* reporters in September 2020.

The September 18, 2020 memorandum sent to the Attorney General requesting authorization to issue compulsory process in **Washington Post 2** stated, similar to the **New York Times** memorandum, that "NSD has advised the Criminal Division that it is in the process of obtaining a certification from the Director of National Intelligence, pursuant to 28 C.F.R. § 50.10(c)(5)(v)…." It also stated, as did the **New York Times** memorandum, that "NSD further advises that it will have the appropriate certification in hand prior to the submission of this recommendation memorandum to the Office of the Attorney General." On August 4, 2020, the NSD detailee sent a letter to the Office of the DNI pursuant to

§ 50.10(c)(5)(v), requesting a DNI certification in **Washington Post 2**. This letter was sent more than a month before the Criminal Division finalized its recommendation memorandum to the Attorney General on September 18, 2020. Nonetheless, unlike the **New York Times** request, NSD did not receive a DNI certification in **Washington Post 2**. The NSD detailee told us he sent the August 4, 2020 letter on the last week of his detail in an email to the Office of the DNI, and he was not aware that the DNI did not provide a certification in **Washington Post 2** in response to the letter request. The Criminal Division witnesses we spoke to did not recall receiving a DNI certification from NSD or being told NSD had obtained one. An NSD supervisor told us that that NSD did not receive a DNI certification prior to the submission of the recommendation memorandum to the Attorney General as the memorandum indicated.

c. The Office of Public Affairs Reviewed the Criminal Division's Recommendations

JM 9-13.400(K)(4) required that, with exceptions not applicable here, the Criminal Division's recommendation be forwarded to the Director of the Office of Public Affairs (OPA) for review and comment. The Director of OEO stated in response to an OIG request for information that the Director of OPA "was consulted and expressly concurred" with the Criminal Division's recommendation memoranda. In the memoranda sent to the Attorney General for his authorization of the compulsory process sought in **CNN** and **Washington Post 2**, the then Director of OPA signed a "Concurring Components" signature block. The authorization memorandum in **New York Times** contained a "Concurring Components" signature block with the electronic signature of the then Principal Deputy Director of OPA.

d. The Criminal Division Recommendations Were Not Sent to the News Media Review Committee for Its Review and Comment

In the three investigations we reviewed, the Criminal Division did not forward its recommendations to the New Media Review Committee for its review and comment pursuant to JM 9-13.400(K)(5). The Director of OEO stated in a written response to the OIG that its "understanding is that referral to the Committee did not arise during Criminal Division consideration of these requests." The PSEU line attorneys we interviewed told us that they were not aware of the requirement in the JM for committee review of the Criminal Division's recommendation, the existence of the committee, or any internal discussions about the committee. The then Chief of PSEU told us she "probably" was aware of the JM requirement at the time but did not recall "specifically focusing on this particular provision" and did not recall any internal discussions about it. The Criminal Division's Deputy Assistant Attorney General (DAAG) who oversaw the work of PSEU told us that she believes that no one in the Criminal Division considered the referral of the Criminal Division's recommendations to the committee and acknowledged that they should have considered it. The DAAG did not recall discussions about submitting the authorization requests to the committee.

The JM provided that the Attorney General or the Deputy Attorney General could waive the requirement of committee review of the Criminal Division's recommendation.[150] The Criminal Division

[150] *See* JM 9-13.400(K)(5)(i).

and ODAG were not able to locate any record that the Attorney General or Deputy Attorney General waived the requirement that the committee review the Criminal Division's recommendations.

e. The Memoranda Did Not Explicitly Indicate that Non-Disclosure Orders Would be Sought and the Attorney General Did Not Authorize the Use of Them

Non-disclosure orders (NDO) pursuant to 18 U.S.C. § 2705(b) were sought and obtained from federal judges by Department prosecutors in the three investigations we reviewed. JM 9-13.400(C)(7) required Department employees to both advise the Attorney General in any request for authorization to issue compulsory process whether prosecutors intended to seek an NDO and, if they did, to articulate the need for the NDO and to obtain the Attorney General's authorization to seek one.[151]

None of the three memoranda sent to the Attorney General for authorization to issue compulsory process in **CNN**, **New York Times**, and **Washington Post 2** sought the Attorney General's authorization to request from federal judges the NDOs that were ultimately obtained. Although the Criminal Division recommendation memorandum sent to the Attorney General for his signature in **CNN** attached the proposed orders as exhibits, which proposed orders included non-disclosure language, it failed to state in the memorandum that NDOs would be sought. Other than the proposed orders attached to the memorandum as exhibits, we were unable to find any document directly and clearly informing the Attorney General that an NDO would be sought in **CNN**.[152] Further, we did not identify any documentation reflecting the Attorney General's approval to seek an NDO in **CNN**.

The memorandum NSD submitted to the Criminal Division in **New York Times** did not indicate an intent to seek an NDO nor was there such a reference in the Criminal Division's recommendation memorandum to the Attorney General. In **New York Times**, the NSD and Criminal Division memoranda did not attach proposed § 2705(b) NDOs as had been done in the **CNN** memorandum, and the memorandum to the Attorney General did not reference an intent to seek an NDO. We did not identify any documentation reflecting the Attorney General's approval to seek an NDO in **New York Times**.

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[151] JM 9-13.400(C)(7).

[152] After reviewing a draft of this report, the Department submitted comments to the OIG in which it disagreed with our conclusion that the Attorney General was not "directly and clearly informed" of or did not approve the NDO that was attached to the memorandum in **CNN**. The Department asserted that because the NDO and underlying § 2703(d) application were provided to the Attorney General as attachments to the memorandum seeking authorization to pursue the reporter's records, it should be presumed that the Attorney General read those materials. We do not believe such a presumption is sufficient to satisfy the News Media Policy's express requirement that the memorandum submitted to the Attorney General state that an NDO would be sought and that the Attorney General approve such a request. Indeed, the signature page of the memorandum included a recommendation from the Criminal Division to the Attorney General that he authorize NSD to issue compulsory process, forego negotiations with the reporter and with *CNN*, and delay the Department's notice to the reporter (which was required by Department policy), but made no mention of authorizing the use of an NDO to prohibit the recipient from disclosing the existence of the compulsory process to the reporter or anyone else. To ensure compliance with the News Media Policy, we believe authority to seek an NDO should be stated as expressly as authority to take (or not take) the other investigative steps.

In **Washington Post 2**, a footnote in the Criminal Division's recommendation memorandum to the Attorney General stated that NSD was awaiting return on compulsory process it issued to determine the identity of the service provider for the reporters' email accounts. It further stated that if it learned that *The Washington Post:*

> uses its own email system, rather than contracting with an email-hosting service provider, then any 2703(d) order would need to be served on the lawyers for The Washington Post, making it highly likely that the Reporters would learn of the process. Should that be the case, NSD then will apply for a section 2705(b) non-disclosure order to prohibit the newspaper's lawyer from notifying the Reporters.

Although the footnote suggested the Department would apply for an NDO only if *The Washington Post* used its own email system, it nonetheless sought and obtained an NDO in **Washington Post 2** for an entity it believed was *The Washington Post*'s email service provider. We did not identify any documentation reflecting the Attorney General's approval to seek an NDO in **Washington Post 2**.

Witnesses from the Criminal Division told the OIG they did not recall discussing or considering adding to the memoranda references to the requirement in JM 9-13.400(C)(7) to indicate an intent to seek an NDO or to indicate the Attorney General's authorization for an NDO. We asked several witnesses whether they were aware of separate memoranda or other communications submitted to indicate the intent to seek an NDO or containing the Attorney General's authorization for an NDO, and they stated they were not aware of any such documentation addressing this requirement.

B. The Communications Records Obtained for the *CNN*, *The New York Times,* and *The Washington Post* Reporters

Below we describe generally the non-content communications records that NSD requested approval to obtain and the Attorney General authorized, and those that the Department obtained in **CNN**, **New York Times,** and **Washington Post 2**.

1. Records Sought and Obtained for a CNN Reporter

As described above, on May 13, 2020, the Department obtained Attorney General Barr's authorization to seek compulsory process for third party non-content communications records of a *CNN* reporter (CNN Reporter) whose articles contained classified information. The CNN Reporter was not considered a target or treated as a subject of the investigation.

The Department sought non-content communications records from June 1 to July 31, 2017, dates that the memorandum to the Attorney General described as being of investigative relevance in identifying the CNN Reporter's potential sources of the classified information. The Criminal Division's memorandum described the compulsory process sought for these dates. The information and records described in the memorandum included the following:

- Telephone toll information for the CNN Reporter's personal phone and the reporter's *CNN*-provided cell phone.

- Telephone toll information for two *CNN*-maintained landline desktop phones that the CNN Reporter may have used that were in *CNN*'s provided workspace inside a federal agency (the CNN booth).[153]
- Email header and other account usage and subscriber information, including date, time, method, source, and destination of the communications sent to or received by the CNN Reporter's work email account.
- Email header and other account usage and subscriber information, including date, time, method, source, and destination of the communications sent or received by the CNN Reporter's personal email account.

After Attorney General Barr authorized the compulsory process, the prosecutor assigned to **CNN** issued compulsory process for the four telephone numbers referenced in the memorandum to the Attorney General and applied for and obtained 2703(d) orders for the two email accounts referenced in the memorandum to the Attorney General. The compulsory process for the four telephone numbers and the 2703(d) orders sought the information described in the Criminal Division's memorandum signed by the Attorney General for the date range identified in the memorandum.[154] The telephone service providers complied with the compulsory process and provided responsive records. The service provider for the CNN Reporter's personal email account complied with the 2703(d) order for the account. As for the CNN Reporter's work email account, the Department first served a 2703(d) order on a service provider. However, the service provider did not possess the records sought in the 2703(d) order for the CNN Reporter's work email account.

Consequently, on July 17, 2020, the Department served a 2703(d) order on Warner Media, the parent company of *CNN* during the relevant time period, for the information from the CNN Reporter's work email account. On September 11, 2020, Warner Media moved to quash or modify the 2703(d) order, triggering litigation over the scope of the records sought.[155] On January 26, 2021, the parties entered into an agreement resolving the litigation and providing that Warner Media would produce a subset of

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[153] According to the Criminal Division's memorandum, the FBI obtained information indicating that the federal agency provided the workspace to *CNN* in a location in its building for members of the media. The memorandum also stated that a public affairs official advised the FBI that the official used one of the telephone numbers in the CNN booth to contact the CNN Reporter, and another public affairs official advised the FBI that the CNN Reporter told the official that the other telephone number in the CNN booth "belonged to [the reporter]."

[154] However, the 2703(d) orders, while specifying that the service providers were to produce records and information "not including the contents of communications," listed "subject headers" among the information to be produced. Subject headers were not referenced in the memorandum and would constitute content if produced. *See Optiver Australia Pty. Ltd. & Anor.* v. *Tibra Trading Pty. Ltd. & Ors.*, No. C 12–80242 EJD (PSG), 2013 WL 256771, at *2 (N.D. Cal. Jan. 23, 2013) (finding that subject line of an email is "content" protected by the Stored Communications Act); *see also Xie* v. *Lai*, No. 19-mc-80287-SVK, 2019 WL 7020340, at *5 (N.D. Cal. Dec. 20, 2019). The prosecutor who obtained the 2703(d) orders told us that the reference to "subject headers" likely remained in the 2703(d) order in **CNN** because he used a 2703(d) order from another case that contained such a reference. We confirmed with the FBI that the returns from the 2703(d) order to the service provider did not include subject headers. In the subsequent litigation with Warner Media described below, the government withdrew its demand for "subject headers." In sum, the Department did not obtain subject headers from the work and personal email accounts of the CNN Reporter.

[155] According to the Department, the 2703(d) order and the motion to quash or modify the 2703(d) and related pleadings were unsealed and are now public.

the records sought in the 2703(d) order. On February 16, 2021, Warner Media completed production of the records the parties agreed it would produce, completing production of all the outstanding compulsory process the Department had issued for the CNN Reporter's non-content communications records.

2. Records Sought and Obtained for Four The New York Times Reporters

As described above, on September 15, 2020, the Department obtained Attorney General Barr's authorization to issue compulsory process to obtain from third party service providers the non-content communications records of the four *The New York Times* reporters (NYT Reporter 1, 2, 3, and 4) with bylines on *The New York Times* articles containing classified information. *The New York Times* reporters were not considered targets or treated as subjects of the investigation.

The Department sought non-content communications records from January 14 to April 30, 2017, dates that the Criminal Division's memorandum to the Attorney General described as being of investigative relevance in identifying *The New York Times* reporters' potential sources of the classified information. The Criminal Division's memorandum described the compulsory process sought for this time period. The information and records described in the memorandum included the following:

- Telephone toll information for six different telephone numbers as follows: two telephone numbers associated with NYT Reporter 1; one telephone number associated with NYT Reporter 2; one telephone number associated with NYT Reporter 3; and two telephone numbers associated with NYT Reporter 4.
- Email header information and other account usage and subscriber information, including the date, time, method, source, and destination of the communications sent or received by one email account each for NYT Reporters 1 and 3, and two email accounts each for NYT Reporters 2 and 4.

After the Attorney General authorized the compulsory process requested, the prosecutors assigned to New York Times issued compulsory process to the service providers for the toll records of the six telephone numbers associated with the four *The New York Times* reporters, and they applied for and obtained 2703(d) orders directed to the service provider for the six emails accounts associated with *The New York Times* reporters. The compulsory process for the telephone toll records and the 2703(d) order for the nytimes.com email accounts sought the above-described information in the Criminal Division's memorandum to the Attorney General for the date range identified in the memorandum.[156]

The telephone service providers complied with the compulsory process and produced the toll records and subscriber information. The 2703(d) order and corresponding § 2705(b) NDO for the six email accounts was served on Google. Following discussions with Google and counsel for *The New York*

[156] In addition to the telephone toll information for the six telephone numbers that the Attorney General authorized, the compulsory process also sought customer or subscriber information identified in 18 U.S.C. §§ 2703(c)(2)(A),(B),(D),(E), and (F) for the six telephone numbers. However, because such subscriber information was not considered to be a communications record under the News Media Policy, Attorney General authorization was not required to obtain it. *See* §§ 50.10(b)(3)(i)(B) and (c)(5).

Times concerning the NDO (after counsel for *The New York Times* were brought within the scope of the NDO), as described further below, a federal judge granted the Department's motions to withdraw its application for the 2703(d) order and quash the order, and thus no records were obtained from the email accounts of *The New York Times* reporters.[157]

3. Records Sought and Obtained for Three The Washington Post Reporters

As described above, in Washington Post 2, on November 13, 2020, the Department obtained Attorney General Barr's authorization to seek compulsory process for the non-content communications records of three *The Washington Post* reporters (WP Reporter 1, 2, and 3) who wrote articles containing classified information. *The Washington Post* reporters were not considered targets or treated as subjects of the investigation.

The Department sought non-content communications records from April 15 to July 31, 2017, dates that the Criminal Division's memorandum to the Attorney General described as being of investigative relevance in identifying *The Washington Post* reporters' potential sources of the classified information. The Criminal Division's memorandum described the compulsory process sought for these dates. The information and records described in the memorandum included the following.

- Telephone toll information for one telephone number associated with WP Reporter 1; three telephone numbers associated with WP Reporter 2; and two telephone numbers associated with WP Reporter 3.
- Email header information and other account usage and subscriber information, including the date, time, method, source, and destination of the communications, sent or received by one email account each for WP Reporters 1, 2, and 3.

After the Attorney General authorized the compulsory process requested, the prosecutors assigned to Washington Post 2 issued compulsory process for the six telephone numbers associated with the three *The Washington Post* reporters, and they applied for and obtained a 2703(d) order for the three emails accounts associated with *The Washington Post* reporters. The compulsory process for the six telephone numbers and the 2703(d) order for the three email accounts sought the information described in the Criminal Division's memorandum to the Attorney General.[158] The information was sought for the date range identified in the memorandum, with one exception: compulsory process for one telephone number of WP Reporter 2 and one telephone number of WP Reporter 3 requested the

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[157] During this review, we received information questioning whether one of the four NYT reporters was targeted due to an improper motive or animus. We did not find evidence in the materials we obtained that improper motive or animus impacted the issuance of the compulsory process for the particular reporter's communications records.

[158] In addition to the telephone toll information for the six telephone numbers that the Attorney General authorized, the compulsory process also sought customer or subscriber information identified in 18 U.S.C. §§ 2703(c)(2)(A),(B),(D),(E), and (F) for the six telephone numbers. As noted above, because such subscriber information was not considered to be a communications record under the News Media Policy, Attorney General authorization was not required to obtain it. *See* §§ 50.10(b)(3)(i)(B) and (c)(5).

information for one additional day, April 14, 2017, that was not requested in the memorandum to the Attorney General.[159]

The telephone service providers complied with the compulsory process. As discussed further below, after the Department learned on January 15, 2021, that the entity on which it had served the 2703(d) order for the three email accounts was not the email service provider for *The Washington Post*, the Department did not apply for a 2703(d) order to serve on any other service provider. Thus, no records were obtained from the email accounts of *The Washington Post* reporters.

C. Department Obtained NDOs Pursuant to 18 U.S.C. § 2705(b)

In CNN, New York Times, and Washington Post 2, the Department obtained § 2705(b) NDOs when it obtained the 2703(d) orders that required third party service providers to produce the email account information of the reporters. The Department did not subsequently seek extensions of any of the § 2705(b) NDOs it obtained. Although the Department's cover letters to the telephone service providers enclosing the compulsory process for telephone toll records of the reporters requested that they not disclose the existence of the compulsory process because the letter said doing so might impede the investigation, the Department did not seek NDOs for the compulsory process. One of the prosecutors assigned to the New York Times and Washington Post 2 investigations told us that NDOs were not obtained for the telephone companies because the providers typically do not notify subscribers when their records are sought. Below we describe the NDOs obtained in each investigation.

1. Non-Disclosure Orders Related to the CNN Reporter's Records

On May 19, 2020, the Department obtained 2703(d) orders for the information described above from the CNN Reporter's email accounts that included § 2705(b) NDOs prohibiting disclosure for 2 years. However, as discussed above, on July 15, 2020, the Department obtained a second 2703(d) order for the email account information that it served on Warner Media, the entity that resulted from the Time Warner-AT&T merger. The 2703(d) order served on Warner Media also included a 2-year § 2705(b) NDO. On January 26, 2021, the Warner Media litigation described above was resolved when the parties entered into an agreement on the records that would be produced.[160]

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[159] However, additional compulsory process for other telephone numbers of Reporters 2 and 3 requested information for the date range authorized by the Attorney General.

[160] Although JM 9-13.700(4) required, barring exceptional circumstances, "the written concurrence of a supervisor designated by the United States Attorney" before seeking an order delaying notice beyond 1 year, ODAG gave the U.S. Attorney's Office for the Eastern District of Virginia (USAO-EDVA) permission to instead seek 3-year NDOs in a certain category of cases and 2-year NDOs for all other cases, based on an agreement between the USAO-EDVA and the Chief U.S. District Judge for the Eastern District of Virginia approving those terms. Therefore, USAO-EDVA did not need "written concurrence" to apply for 2-year NDOs. We also note that the Department notified the CNN Reporter that her communications records had been obtained, as required by § 50.10(e), within 1 year of obtaining the 2703(d) orders.

2. Non-Disclosure Order Related to The New York Times Reporters' Records

On January 5, 2021, the Department served an order under §§ 2703(d) and 2705(b) (an NDO prohibiting disclosure for 1 year) on Google for the information (described above) in the six email accounts of the four *The New York Times* reporters. The parties responded by negotiating with the Department for a series of modifications to the NDO and extensions of time to produce material responsive to the 2703(d) aspect of the order. In March 2021, the court granted the Department's three successive motions to amend the NDO. In the first amended order, the court allowed Google to disclose the January 5, 2021 2703(d) aspect of the order to the Deputy General Counsel of *The New York Times*; in the second amended order, the court permitted Google to disclose the 2703(d) aspect of the order to the General Counsel for *The New York Times* and outside counsel for *The New York Times*; and finally, in the third amended order, the court allowed Google to disclose the 2703(d) aspect of the order to the Publisher and Chairman, and the President and CEO of The New York Times Company. On June 2, 2021, the Department filed a motion to withdraw its application and quash the January 5, 2021 §§ 2703(d) and 2705(b) order and subsequent modifications of this order, which the court granted on June 4, 2021.[161]

3. Non-Disclosure Order Related to The Washington Post Reporters' Records

As described above, a footnote in the Criminal Division's memorandum to the Attorney General seeking authorization for the compulsory process stated that, if NSD learned that *The Washington Post* "uses its own email system, rather than contracting with an email-hosting service provider," it would then "apply for a section 2705(b) non-disclosure order to prohibit the newspaper's lawyers from notifying the Reporters." Nonetheless, on January 5, 2021, the Department obtained an order under §§ 2703(d) and 2705(b) (an NDO prohibiting disclosure for 1 year) for the information (described above) in the three email accounts of the three *The Washington Post* reporters.[162] In a January 15, 2021 letter, that service provider informed the FBI that it was not an email provider. However, the Department did not apply for a 2703(d) order and a corresponding § 2705(b) NDO to serve on any other service provider.

D. Delayed Notice to the Reporters of the Compulsory Process

Under then applicable News Media Policy, when the Attorney General authorized the use of compulsory process to obtain from a third party the records of a member of the news media, the Department was required to provide reasonable and timely notice of the Attorney General's determination before use of the compulsory process, unless the Attorney General determined that, "for compelling reasons, such 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," which would justify delaying this notice.[163] Section 50.10(e)(3) further provided that, when the Attorney General authorized delayed notice, the Department was required to notify members of the news media when the compelling reasons were no longer present and/or, "[i]n any event," within 45 days of the government's receipt "of any return" made pursuant to the compulsory process. Section 50.10(e)(3) authorized the Attorney General to delay notice for an additional 45 days

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[161] The 2703(d) order and the motions and orders described in this paragraph were unsealed and are now public.

[162] According to the Department, the 2703(d) order was unsealed and is now public.

[163] 28 C.F.R. § 50.10(e)(2).

with a second determination that the "compelling reasons" described above continued to justify delaying the notice. No further delays could be sought beyond the 90-day period.[164]

In 2020, in **CNN**, **New York Times,** and **Washington Post 2**, prosecutors requested that Attorney General Barr approve delayed notice to the reporters of the compulsory process issued to third party service providers for their communications records, asserting that notification prior to obtaining the communications records "would pose a substantial threat to the integrity of the investigation."[165] In all three investigations, Barr authorized delayed notice to the reporters for the initial 45-day period after receipt of returns. In **CNN**, Attorney General Garland authorized the request for an additional 45 days, for a total of up to 90 days, after receipt of the returns. The Department did not make a request for an additional delayed notice period in **New York Times** or **Washington Post 2**. Below we discuss the delayed notice time periods in the three investigations.

1. Delayed Notice to CNN Reporter

The Criminal Division's memorandum to Attorney General Barr that requested authorization for the issuance of compulsory process for the CNN Reporter's communications records also requested delayed notice to the reporter pursuant to 28 C.F.R. § 50.10(e). The justification the memorandum provided for delaying notice to the CNN Reporter was that disclosing the investigation to the CNN Reporter or to *CNN* "may result in notification of the investigation to [the CNN Reporter's] source(s), posing a substantial threat to the integrity of the investigation."[166] The memorandum further stated: "Notifying [the CNN Reporter] or CNN of the NSD's interest in acquiring the information sought could well lead to the destruction of evidence relevant to the investigation, or to notification to [the CNN Reporter's] source(s), who, in turn, could destroy evidence." The recommendation section at the end of the Criminal Division's memorandum requested that the Attorney General authorize "45-day delayed notification to [the CNN Reporter] and CNN, pursuant to 28 C.F.R. § 50.10(e) (with the possibility of extending an additional 45 days, if the requisite findings are met), because premature notice likewise would pose a clear and substantial threat to the integrity of the investigation." On May 13, 2020, Attorney General Barr signed the memorandum, thereby authorizing delayed notice to the CNN Reporter.

As noted, when delayed notice was authorized, § 50.10(e)(3) required the member of the news media be provided notice within 45 days after "the government's receipt of any return" made pursuant to the authorized compulsory process. On June 1, 2020, June 17, 2020, and July 7, 2020, the service providers completed production of the telephone toll information for the four telephone numbers associated

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[164] 28 C.F.R. § 50.10(e)(3).

[165] We did not review the Attorney General's determination that the facts presented constituted "compelling reasons" to delay notice to the reporters, as this question generally requires a discretionary judgment.

[166] This justification was provided in a section of the memorandum requesting to forego negotiations with the reporters for voluntary production of the information sought, pursuant to § 50.10(c)(5)(iv). The section concluded by requesting that notice to the reporters be delayed pursuant to § 50.10(e) "for the same reasons." The justification for delaying notice to the reporters in the **New York Times** and **Washington Post 2** memoranda similarly was included in a section that focused on the request to forego negotiations with the reporters, which section similarly concluded with a request to delay notice to the reporters.

with the CNN Reporter.[167] On June 23, 2020, the service provider for the CNN Reporter's personal email account completed production of responsive materials. Lastly, on February 16, 2021, Warner Media completed production of the email records the parties agreed it would produce, completing production of all the outstanding compulsory process the Department had issued for the CNN Reporter's communications records.

As described in further detail in the "applicable policies section" above, the March 31, 2021 memorandum from the Criminal Division to Attorney General Garland interpreted the delayed notice provision to start the 45-day period "after the complete return of all forms of process authorized in a single request by the Attorney General." It then stated: "Therefore, the initial 45-day delayed notice period here commenced on February 16, 2021, when NSD received complete return[s] from Warner Media, the last provider to comply with the process authorized regarding [the CNN Reporter]." The March 31, 2021 memorandum recommended that Attorney General Garland authorize NSD to continue to withhold notice to *CNN* and the CNN Reporter pursuant to § 50.10(e)(3), "until such time as the investigative need is mooted, or for an additional and final 45 days, whichever occurs first."

The March 31, 2021 memorandum included as the justification for the request that Warner Media's production of the full set of responsive 2703(d) order materials was "voluminous," comprised of more than 7,500 records, and that the NSD and FBI's review of these materials had been "significantly constrained" by the COVID-19 pandemic. The memorandum stated that due to pandemic protocols, "key members of the reviewing team [had] been required to work on limited and rotating shifts, resulting in slower review than could be expected without such restrictions." It stated that notice to the CNN Reporter prior to completion of the review of the materials "could alarm [the CNN Reporter], causing her to publicly announce NSD's efforts to secure the information, resulting in warning the source(s) of the government's investigation, prompting the potential secretion or destruction of evidence, and/or interfering with future interviews of subjects, targets or suspects."

The memorandum described a "particular concern" that potential sources of the classified information, or those communicating with them, "could delete or destroy evidence critical to the ongoing investigation." Specifically, it asserted that the "integrity of the investigation would be jeopardized if the FBI conducts interviews of critical witnesses before it either (1) views the content of emails exchanged between [specified] email accounts and [the CNN Reporter's] work account and obtained from the [specified] accounts, because the FBI may wish to interview the holders of those [specified] accounts; or, in the alternative, (2) until [the relevant agency] can confirm for the FBI that such email communication records are no longer in [the agency's] possession and cannot be retrieved." The memorandum then stated that: "Providing notice of the [compulsory process] and Section 2703(d) orders prior to the review of all of the materials will pose a clear and substantial threat to the integrity of the investigation because it will hinder the investigative/prosecution team's ability to assess the information and develop leads that may advance the investigation before CNN and [the CNN Reporter] are made aware of it."

The recommendation section of the Criminal Division's memorandum concluded by stating that the Criminal Division recommended that "the Attorney General authorize NSD to continue to withhold

[167] One service provider produced the toll records for two telephone numbers.

notice to CNN and [the CNN Reporter], pursuant to 28 C.F.R. § 50.10(e)(3), of [compulsory process] for toll records of phones used by CNN and [the CNN Reporter], and orders obtained pursuant to 18 U.S.C. § 2703(d) for information relating to email accounts used by [the CNN Reporter], until such time as the investigative need is mooted, or for an additional and final 45 days, whichever occurs first."

On April 2, 2021, 45 days after Warner Media completed production of the CNN Reporter's records, Attorney General Garland approved the request to delay notice to the CNN Reporter, pursuant to § 50.10(e), for a second and final 45-day period. On May 13, 2021, the Department notified the CNN Reporter that her records were obtained, 41 days after Attorney General Garland approved the request to delay notice for the additional 45-day period.

2. Delayed Notice to The New York Times Reporters

The Criminal Division's memorandum to Attorney General Barr that requested authorization for the issuance of compulsory process for *The New York Times* reporters' communications records also requested delayed notice to the reporters pursuant to 28 C.F.R. § 50.10(e). The justification the memorandum provided for delaying notice to the reporters was that disclosing the "investigation to the Reporters may result in notification of the investigation to the source(s), posing a substantial threat to the integrity of the investigation." It also stated: "Notifying the Reporters of NSD's interest in acquiring the information sought could lead to the destruction of evidence relevant to the investigation, or to notification to the source(s) of the leak, who, in turn, could destroy the evidence." The recommendation section at the end of the Criminal Division's memorandum requested that the Attorney General authorize "delayed notification to [*The New York Times* reporters], of 45 days, pursuant to 28 C.F.R. § 50.10(e) (with the possibility of extending an additional 45 days, if the requisite findings are met), because premature notice likewise would pose a clear and substantial threat to the integrity of the investigation." On September 15, 2020, Attorney General Barr signed the memorandum, thereby authorizing delayed notice to *The New York Times* reporters.

According to the FBI, all returns for compulsory process issued for telephone toll records for NYT Reporter 1 were received on December 13 and 17, 2020; for NYT Reporter 2 on February 3 and 19, 2021; for NYT Reporter 3 on December 28, 2020; and for NYT Reporter 4 on December 17, 2020, February 3 and 19, 2021. Consequently, by February 19, 2021, the Department had complete returns for all *The New York Times* reporters for the compulsory process for the telephone toll records.

However, as described above, as of February 19, 2021, prosecutors had not obtained any of the email records of the four reporters that it was seeking pursuant to the authorization of the Attorney General, and the subsequent 2703(d) orders and NDOs issued on January 5, 2021. At that time, the Department was negotiating with Google and counsel for *The New York Times* over the scope of the NDO and the date by which to produce the records sought, which concluded with the court quashing the 2703(d) order and § 2705(d) NDO on June 4, 2021. The Department provided notice to the four *The New York Times* reporters that it had obtained their telephone toll records on June 2, 2021, the date the Department filed its motion quash the 2703(d) order.

3. Delayed Notice to The Washington Post Reporters

The Criminal Division's memorandum to Attorney General Barr that requested authorization for the issuance of compulsory process for *The Washington Post* reporters' communications records also

requested delayed notice to the reporters pursuant to 28 C.F.R. § 50.10(e). The justification the memorandum provided for delayed notice to the reporters was that disclosing the "investigation to the Reporters may result in notification of the investigation to the source(s), posing a substantial threat to the integrity of the investigation." It also stated: "Notifying the Reporters of NSD's interest in acquiring the information sought could lead to the destruction of evidence relevant to the investigation, or to notification to the source(s) of the leak, who, in turn, could destroy the evidence." The recommendation section at the end of the Criminal Division's memorandum requested that the Attorney General authorize "delayed notification to [*The Washington Post* reporters] of 45 days, pursuant to 28 C.F.R. § 50.10(e) (with the possibility of extending an additional 45 days, if the requisite findings are met), because premature notice likewise would pose a clear and substantial threat to the integrity of the investigation." On November 13, 2020, Attorney General Barr signed the memorandum, thereby authorizing delayed notice to *The Washington Post* reporters.

According to the FBI, all returns for the compulsory process issued for telephone toll records for WP Reporter 1 were received on December 11, 2020; for WP Reporter 2 on December 11, 2020, and March 19, 2021; and for WP Reporter 3 on December 11, 2020, and March 19, 2021. As noted previously, in a January 15, 2021 letter, a service provider informed the FBI that it was not an email provider for *The Washington Post,* and prosecutors did not subsequently seek 2703(d) orders for *The Washington Post* reporters. On May 3, 2021, the Department provided notice to the three *The Washington Post* reporters that the Department had obtained their telephone toll records and that "a Court had authorized an order to obtain non-content communication records for [their email accounts], but no records were obtained."[168] The May 3, 2021 date was 45 days after March 19, 2021, the latest date the Department received returns on the compulsory process issued for WP Reporters 2 and 3, thus completing production for all compulsory process issued for the communications records of *The Washington Post* reporters.

III. Analysis

In this section, we analyze whether the Department complied with its then existing News Media Policy when it issued compulsory process to third party providers seeking non-content communications records of *CNN*, *The New York Times,* and *The Washington Post* reporters. At that time, the News Media Policy included several processes the Department adopted in 2014 and 2015 following an earlier controversy about the Department's use of compulsory process to obtain communications records of members of the news media, processes the Department said were designed to "ensure the highest level of oversight when members of the Department seek to obtain information from, or records of, a member of the news media."[169] Although we found that the Department complied with some of the then applicable provisions of the News Media Policy in **CNN**, **New York Times,** and **Washington Post 2,** we were troubled to find that the Department, despite recognizing the important

[168] Although the service provider provided subscriber information to the FBI for the reporters, under the Department's then-existing News Media Policy, subscriber information was not considered to be a communications record. *See* § 50.10(b)(3)(i)(B).

[169] Attorney General Memorandum to all Department Employees, Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, January 14, 2015 at 1.

interests at stake, did not fully adhere to its own policy, including some of the processes it had put in place beginning just 6 years earlier.

A. Compliance with the Non-Discretionary Elements of the News Media Policy, 28 C.F.R. § 50.10, and its JM Provisions

In this section we analyze whether the Department complied with the non-discretionary elements of the News Media Policy and its JM provisions in seeking the communications records of the reporters in CNN, New York Times, and Washington Post 2.

1. Attorney General Authorization to Issue Compulsory Process

We found that in 2020 then Attorney General Barr memorialized his authorization for the compulsory process sought in CNN, New York Times, and Washington Post 2 by signing the three Criminal Division recommendation memoranda approval lines. We concluded that, in the three investigations, the Department complied with the requirement in § 50.10(c)(1) to obtain the authorization of the Attorney General before use of compulsory process to obtain from a third party service provider the communications records of members of the news media.[170]

2. Personal Endorsement of U.S. Attorney or Assistant Attorney General

The personal endorsement of the U.S. Attorney and/or the Assistant Attorney General for the NSD was memorialized in the Criminal Division's recommendation memoranda in the three investigations. Accordingly, we concluded that the Department complied with the requirement in § 50.10(c)(2) that the U.S. Attorney or the Assistant Attorney General responsible for the matter "personally endorse" the request for Attorney General authorization of the compulsory process for the communications records of the members of the news media in the three investigations.

3. Director of National Intelligence Certification

We found that in CNN and New York Times, the Department sought and obtained a DNI certification before the Attorney General authorized the compulsory process in those two investigations. In CNN, the DNI certification was attached, as noted in a footnote, to the Criminal Division's recommendation memorandum that was signed by Attorney General Barr; thus, we concluded that the Department fully complied with the DNI certification requirement in § 50.10(c)(5)(v) in that investigation.

However, in New York Times we were unable to determine whether the Attorney General was provided with, or made aware of, the DNI certification the Department had obtained before he authorized the compulsory process. Section 50.10(c)(5)(v) and JM 9-13.400(C)(5)(ii) required that the

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[170] As noted above, in Washington Post 2, compulsory process for one telephone number of WP Reporter 2 and one telephone number of WP Reporter 3 requested the information for one additional day, April 14, 2017, that was not requested in the memorandum to the Attorney General. Although the seeking of data for April 14 was not in compliance with the Attorney General's authorization, we did not find any evidence to suggest that the Department intended to exceed the Attorney General's authorization. We note that other compulsory process for other telephone numbers of Reporters 2 and 3 sought information for the precise date range the Attorney General authorized, suggesting that the data sought for April 14 was an error.

Department obtain a DNI certification in a leak investigation of national defense information or classified information, as the Department did here. Although the News Media Policy was silent on whether, how, or when the Department was to provide the DNI certification to the Attorney General, the policy stated that the Attorney General "should" take the DNI certification "into account along with the other considerations" in § 50.10(c)(5).[171] Because the DNI certification requirement was among the considerations that were within the Attorney General's discretion to weigh under § 50.10(c)(5), the intent of the policy likely was that the Attorney General, at a minimum, be informed that a DNI certification had been obtained before approval of the request.[172] Thus, while we found that the Department complied in New York Times with the requirement to obtain the DNI certification, we also concluded that it should have included the certification in the materials provided to the Attorney General so that the Attorney General was aware, before authorizing the compulsory process, of the DNI's position.[173]

In Washington Post 2, we found the Department sought but did not obtain a DNI certification. Because the Department was required to obtain a DNI certification for the Attorney General to have had the opportunity to consider this element of § 50.10(c)(5) when making his determination, we concluded that the Department did not comply with the DNI certification requirement in Washington Post 2.

4. Criminal Division Review and Evaluation of the Requests

We found that NSD submitted the requests for authorization to the Criminal Division at least 30 business days before the anticipated use of the compulsory process in the three investigations. Further, the Criminal Division prepared recommendation memoranda reflecting its review and evaluation of the requests and sent them to the Attorney General in the three investigations. We therefore concluded that the Department complied with the requirement in JM 9-13.400(K)(1) that the Criminal Division "review and evaluate" all requests for Attorney General authorization of the compulsory process for the communications records of the members of the news media in the three investigations.

5. Director of the OPA Review and Comment

We concluded that the Department complied with the requirement in JM 9-13.400(K)(4) that the Criminal Division forward its recommendation to the Director of OPA for review and comment on the authorization requests to the Attorney General in the three investigations. JM 9-13.400(K)(4) did not require the Director of OPA to approve the requests; rather, it only required that the Criminal Division forward the Criminal Division's recommendation to the Director of OPA "for review and comment." The Director of OEO stated in response to an OIG request for information that the Director of OPA "was consulted and expressly concurred" with the Criminal Division's recommendation memoranda.

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[171] *See* 28 C.F.R. § 50.10(c)(5)(v).

[172] The current version of the News Media Policy does not contain a DNI certification provision.

[173] We did not assess compliance with the timing of seeking the DNI certification; as discussed above, § 50.10(c)(5)(v) and JM 9-13.400(C)(5)(ii) contain conflicting references on when members of the Department seeking the compulsory process should request the DNI certification.

Given that OPA's concurrence was memorialized on the three final authorization memoranda, we did not explore further the extent of the review or comment by the Director of OPA.

6. News Media Review Committee Review and Comment

We found that the Criminal Division did not forward its recommendations in **CNN**, **New York Times**, and **Washington Post 2** to the New Media Review Committee for its review and comment pursuant to JM 9-13.400(K)(5). The Criminal Division stated that referral of its recommendations to the committee did not arise during its consideration of the authorization requests, and the Department was unable to locate any record that the Attorney General or Deputy Attorney General waived the committee review and comment requirement. Under JM 9-13.400(K)(5), if any of four factors are present, the Assistant Attorney General for the Criminal Division was required to send the Criminal Division's recommendation to the News Media Review Committee. For each of the investigations under our review, three of the four factors were present: (1) the investigations all related to the unauthorized disclosure of sensitive law enforcement or national defense information; (2) notice was not provided to the reporters prior to issuance of the compulsory process for their communications records; and (3) the requests sought authorization to seek information that would reveal the identities of news media reporters' sources. Consequently, we found that the policy required the Criminal Division's recommendation memoranda to have been referred to the committee in the three investigations. We thus concluded that the Department did not comply with the JM requirement for committee review of and comment on the requests for Attorney General authorization of the compulsory process issued to the members of the news media in **CNN**, **New York Times**, and **Washington Post 2**.

B. Compliance With the Requirement in the JM Regarding Seeking NDOs

In this section we analyze whether the Department complied with the requirement in the JM that those who request authorization to issue compulsory process to third parties for communications records of members of the news media state whether they intend to seek an NDO related to that compulsory process, articulate the need for an NDO, and obtain express authorization from the Attorney General to seek an NDO.[174] See JM 9-13.400(C)(7)(i). In **CNN**, **New York Times,** and **Washington Post 2**, the Department sought and obtained § 2705(b) NDOs.

In the three investigations, the NSD memoranda to the Criminal Division did not indicate an intent to seek § 2705(b) NDOs and none of the summary recommendations at the end of the Criminal Division's recommendation memoranda, where the Attorney General signs to indicate approval or disapproval of the request, referenced authorization to seek NDOs. Testimony from relevant witnesses did not reveal that separate memoranda or communications were submitted to indicate the intent to seek NDOs or memorialize the Attorney General authorizations for the NDOs in any of the three investigations. In **CNN**, the Criminal Division's memorandum to the Attorney General attached, but did not reference, the proposed § 2705(b) NDOs. We did not find that attaching the proposed NDOs

[174] We note that as with the NDOs associated with compulsory process for Members of Congress and congressional staffers, we did not evaluate whether the NDO applications were consistent with Department policies or guidelines concerning NDOs generally.

sufficiently complied with JM 9-13.400(C)(7)(i).[175] Because the Department did not obtain the express authorization of the Attorney General to seek NDOs in the three investigations, we concluded that the Department did not comply with the JM requirement.[176]

C. Compliance With the Requirement to Notify Members of the News Media of the Compulsory Process

In this section we analyze whether the Department complied with the requirement to notify members of the news media of the compulsory process authorized to obtain their communications records pursuant to § 50.10(e). As described above, in **CNN**, **New York Times,** and **Washington Post 2**, Attorney General Barr authorized that notice be delayed to the reporters for an initial 45-day period, pursuant to § 50.10(e)(2), upon a finding that "compelling reasons" justified it.[177]

In **CNN**, Attorney General Garland authorized an additional 45-day period of delayed notice as permitted by § 50.10(e)(3) when the Attorney General finds "compelling reasons" justify the further delay. Attorney General Garland approved this extension based on the Criminal Division's March 31, 2021 memorandum, which interpreted the initial 45-day non-disclosure period to start only "after the complete return on all forms of processes authorized in a single request by the Attorney General." Although the language of the then existing News Media Policy could be read to require the notice to occur within 45 days of the government's receipt of "any return made pursuant" to the compulsory process, the Department's current News Media Policy includes the Criminal Division interpretation in its comparable provision. See § 50.10(j)(4) ("[N]otice must be given to the affected member of the news media within 45 days of the Government's receipt of a complete return made pursuant to all forms of compulsory legal process included in the same authorizing official's authorization").

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[175] After reviewing a draft of this report, the Department submitted comments to the OIG in which it disagreed with our conclusion that the Attorney General was not "directly and clearly informed" of or did not approve the NDO that was attached to the memorandum in **CNN**. The Department asserted that because the NDO and underlying § 2703(d) application were provided to the Attorney General as attachments to the memorandum seeking authorization to pursue the reporter's records, it should be presumed that the Attorney General read those materials. We do not believe such a presumption is sufficient to satisfy the News Media Policy's express requirement that the memorandum submitted to the Attorney General state that an NDO would be sought and that the Attorney General approve such a request. Indeed, the signature page of the memorandum included a recommendation from the Criminal Division to the Attorney General that he authorize NSD to issue compulsory process, apply for 2703(d) orders, forego negotiations with the reporter and with *CNN*, and delay the Department's notice to the reporter (which was required by the News Media Policy), but made no mention of authorizing the use of an NDO to prohibit the recipient from disclosing the existence of the compulsory process to the reporter or anyone else. To ensure compliance with the News Media Policy, we believe authority to seek an NDO should be stated as expressly as authority to take (or not take) the other investigative steps.

[176] We note that, as described above, the Attorney General authorized delayed notice to the reporters of the compulsory process issued based on § 50.10(e)(2)(i), which required a determination of "compelling reasons" to justify the delayed notice. The determination to delay notice was based on considerations substantially similar to those relevant to a determination whether to authorize the NDOs to the third party service providers.

[177] As previously noted, we did not review the Attorney General's determination that the justifications in the memoranda were sufficient under § 50.10(e)(2)(i) given they required discretionary judgments.

The Department did not make a request for an additional delayed notice period in **New York Times** or **Washington Post 2**. In **CNN** and **Washington Post 2**, as detailed above, the Department notified the reporters that their communications records were obtained within 45 days of having received completed returns for all the compulsory process. In **New York Times**, as detailed above, the Department did not receive any of the email records sought in the 2703(d) order during the period they were negotiating with Google and lawyers for *The New York Times*, and ultimately the Department did not receive any of the records after agreeing to a quashing of the 2703(d) order. The Department notified the reporters that their communications records were obtained on the same day the Department filed its motion to quash the 2703(d) order—the remaining compulsory process that was outstanding in that investigation. In **Washington Post 2**, as detailed above, the Department did not receive any of the email records sought in the 2703(d) order.

We therefore concluded that the Department, having adopted the interpretation in the Criminal Division memorandum, complied with the notice provision in § 50.10(e) in the three investigations.

IV. Conclusion

The Department has long recognized the vital role of a free and independent press in our democracy, and also the importance of careful oversight and meaningful safeguards to protect that role when compulsory process is sought to obtain the communications records of members of the news media. The Department has said that its News Media Policy serves to "provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities,"[178] and it has emphasized the need to "ensure the highest level of oversight when members of the Department seek to obtain information from, or records of, a member of the news media."[179]

Nevertheless, we found that the Department complied with some but not all of the then applicable provisions of the News Media Policy in the compulsory process it issued. Specifically, as detailed above, we found that the Department failed to convene the News Media Review Committee to consider the authorization requests in the three investigations; the Department did not obtain the required DNI certification in one investigation and we were unable to determine whether the Department provided the DNI certification it obtained in another investigation to the Attorney General for his consideration; and the Department did not obtain the Attorney General's express authorization for the NDOs in any of the three investigations.

Given the important interests at stake, we were troubled that these failures occurred, particularly given that only a few years had elapsed since the Department substantially overhauled its News Media Policy in 2014 and 2015 following serious criticisms concerning the Department's efforts to obtain communications records of members of the news media. In our judgment, the Department's deviation from its own requirements indicates a troubling disparity between, on the one hand, the

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[178] Section 50.10(a)(1).

[179] Attorney General Memorandum to all Department Employees, Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, January 14, 2015 at 1.

regard expressed in Department policy for the role of the news media in American democracy and, on the other hand, the Department's commitment to complying with the limits and requirements that it intended to safeguard that very role.

In 2022, the Department once again significantly revised its News Media Policy, this time in response to the revelations that led to this OIG review. We believe it is a matter of critical importance to the reputation of the Department and to the legitimate interests of the news media that, having once again revised its News Media Policy in response to significant criticism, the Department makes every effort to ensure full and exacting compliance with its new policy in the future.

Chapter Four: Summary of Recommendations

In Chapter Two, we noted that the Department's revised Congressional Investigations Policy, including the September 2024 revisions the Department made to it and to other relevant policies after reviewing a draft of this report, represents an improvement over its prior policy and more fully recognizes that Congress's constitutional authority to oversee the executive branch can be implicated when the Department seeks records of Members of Congress or congressional staffers, particularly where, as here, the basis for seeking those records is the fact that Members or staff were provided or gained access to classified information in the exercise of their constitutional oversight duties close in time to subsequently published news articles. Based on our review of its use of compulsory process in the matters we reviewed in Chapter Two, we believe the Department should continue to carefully assess its policies to ensure that appropriate constitutional and prudential questions are considered before it issues compulsory process for records of Members of Congress and congressional staffers or seeks NDOs related to them.

We made three recommendations in this report to help address the concerns described in Chapter Two:

1. In order for senior leadership to be able to consider and decide matters potentially raising constitutional separation of powers issues, we recommend that the Department evaluate when advance notification to a senior Department official, such as the Deputy Attorney General or Attorney General, should be required before compulsory process is issued, and any corresponding NDOs are sought, for records of a Member of Congress or congressional staffers and establish, as necessary, implementing policies and guidance.

2. We recommend that the Department consider the circumstances in which NDO applications and renewals should identify for the reviewing judge that the records covered by a proposed NDO are records of Members of Congress or congressional staffers.

3. We recommend that the Department consider whether there are circumstances in which an exhaustion requirement should be a prerequisite for issuing compulsory process to obtain records of Members of Congress and congressional staffers.

After reviewing a draft of this report, the Department took steps to begin implementing these recommendations by making several revisions to applicable policies. Consistent with our ordinary practice, we will evaluate these and any further policy revisions to ensure that each of the recommendations is fully implemented.

Appendix 1: The Department's Response to the Draft Report

U.S. Department of Justice

Office of the Deputy Attorney General

Office of the Deputy Attorney General

950 Pennsylvania Ave., N.W.
RFK Main Justice Bldg.
Washington, D.C. 20530

MEMORANDUM

TO: Michael S. O'Neil
Assistant Inspector General
Oversight and Review Division
Office of the Inspector General

FROM: Bradley Weinsheimer
Bradley Weinsheimer
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: November 27, 2024

SUBJECT: Department of Justice's Response to draft report, "A Review of the Department of Justice's Issuance of Compulsory Process to Obtain Records of Members of Congress, Congressional Staffers, and the News Media"

The Department of Justice (Department) has reviewed the above referenced draft report (Report). We appreciate the Office of the Inspector General's (OIG) work on this important matter and are grateful for the opportunity to respond to the Report and specifically to its three recommendations.

At the outset, we note and accept the Report's central premise that "[t]he use of compulsory process to obtain records of members of the news media and congressional personnel may implicate separate and important constitutional considerations—the First Amendment in connection with the news media, and separation of powers, including the Supreme Court's recognition of Congress's right to oversee the Executive Branch, and the Constitution's Speech or Debate Clause in connection with Members of Congress and congressional staff." We further note and accept the Report's central finding that the OIG "did not find any evidence of retaliatory or political motivation by the career prosecutors who issued the compulsory process" to Members of Congress and affiliated persons and members of the news media in any of the four cases that were the subject of the OIG review. As the Report sets out, the OIG found no indication in its review that the investigative steps of the career prosecutors in any of these cases were pursued for improper reasons or based on party affiliation or status.

The conduct at issue in the Report relates to use of compulsory process to obtain certain non-content records of members of the news media and congressional personnel relating to a leak of classified information in the spring and summer of 2017. Beginning in 2021, the Department revised its News Media Policy for obtaining records relating to the news media, including announcing in June 2021 that it would not seek compulsory process in leak investigations to obtain source information from members of the news media doing their jobs. In November 2023, the Department substantially revised its policy on congressional investigations to require, among other things, approval of the Department's Public Integrity Section and the U.S. Attorney before issuing compulsory process to a third party for records of a Member of Congress or their staffs when related to the staffer's duties.

In addition, more recently, the Department further updated its policies to address concerns raised by the OIG. In September 2024, the Department updated Justice Manual Sections 1-13.130 and 9-85.110 to make explicit that U.S. Attorney's Offices and Department litigating divisions must submit Urgent Reports to Department leadership prior to taking any investigative step subject to the Congressional Investigations Policy, thereby ensuring that the Attorney General and Deputy Attorney General receive advance notice of any action implicated by the Policy. The Department also updated Justice Manual Sections 9-13.700 and 9-85.110 to require that, if a non-disclosure notice would delay notice to a Member of Congress, Congressional Office, or a Congressional Staffer, the prosecutor must disclose such information in the application to the Court.

With respect to the Report's discussion of the use of compulsory process seeking records of members of the news media, the Report found that the Department "complied with some but not all of the then applicable provisions of the News Media Policy" then in existence. The Report goes on to acknowledge that the News Media Policy has been significantly revised since the events in question occurred and calls on the Department to make "every effort to ensure full and exacting compliance with its new policy in the future." The Department appreciates that the Report describes the significant revisions that have been made to the News Media Policy and notes that continuing efforts are being made to ensure that Department personnel are aware of the requirements of the policy and that it is being followed.

As to the Report's discussion of the use of compulsory process to obtain records of Members of Congress and congressional staffers – including the use of compulsory process issued to third parties – we appreciate the Report's engagement with the fact that in November 2023, the Department substantially revised its policy on congressional investigations to require additional approval before issuing compulsory process to a third party for records of a Member of Congress or their staffs when related to the staffer's duties and before seeking non-disclosure orders (NDOs) in connection with such compulsory process. While the Report characterizes the current policy as "an improvement over prior policy," it proposes that the Department adopt additional measures to ensure that senior leadership would be able to consider and decide matters potentially raising constitutional separation of powers issues in this sphere. And as noted above, the Department already has undertaken such efforts.

Much of the Report's discussion and analysis of the four cases at issue focuses on specific actions in the four matters that were undertaken before the Department's revised News Media and Congressional Investigations policies were put into place that changed the operative requirements.

Nonetheless, the Department concurs in the report's recommendations as more fully set forth below.

1. **The Department should evaluate when advance notification to a senior Department official, such as the Deputy Attorney General or Attorney General, should be required before compulsory process is issued, and any corresponding NDOs are sought, for records of a Member of Congress or congressional staffers, and establish, as necessary, implementing policies and guidance.**

   The Department has addressed this recommendation with its September 2024 revisions to Justice Manual Sections 1-13.130 and 9-85.110, which made explicit the requirement that U.S. Attorney's Offices and Department litigating divisions must submit Urgent Reports to Department leadership prior to taking any investigative step subject to the Congressional Investigations Policy. These revisions ensure that the Attorney General and Deputy Attorney General receive advance notice of any action implicated by the Policy

   As the Report notes, the updates to the Congressional Investigations Policy require consultation with – and in many instances approval of – the Public Integrity Section (PIN). The revisions to the policy were designed to ensure that career prosecutors had significant input into the issuance of legal process that implicates the equities of a coordinate branch of government. As was observed when the Congressional Investigations Policy was revised in 2023, the Department has both a duty to ensure that federal laws are faithfully enforced against those vested with the public's trust and that no one is above the law—but also has an obligation to respect the protections that apply to legislative materials under Article I of the Constitution and to ensure that cases or matters involving Members of Congress are handled with uniformity and consistency across the Department's offices and litigating divisions.

   The Department has taken a series of steps to ensure transmission of Urgent Reports to notify Department leadership of case-related developments and acknowledges the importance of leadership visibility and accountability for the actions of the Department.

2. **The Department should consider the circumstances in which NDO applications and renewals should identify for the reviewing judge that the records covered by a proposed NDO are records of Members of Congress or congressional staffers.**

   The Department has addressed this recommendation with its September 2024 revisions to Justice Manual Sections 9-13.700 and 9-85.110, which require that, if a non-disclosure notice would delay notice to a Member of Congress, Congressional Office, or a Congressional Staffer, the prosecutor must disclose such information in the application to the Court.

3. **The Department should consider whether there are any circumstances in which an exhaustion requirement should be a prerequisite for issuing compulsory process to obtain records of Members of Congress and congressional staffers.**

   The Department will evaluate this recommendation and whether this would be appropriate to institute in investigations of this nature. As noted above, any exhaustion requirement must be considered against the background principle that as do Executive Branch officials, Members of Congress and their staff hold positions of public trust and must not be above the law.

We appreciate OIG's recommendations on this important topic, which has been and remains an important priority of the Department.

Appendix 2: Table Summarizing What the Department Sought for Each Member of Congress and Congressional Staffer

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
Staffer/ Member Number	Party Affiliation of Congressional Role	Identified by the Originating Agency or the Department as Having Had Access to the Classified Information Prior to Publication (Washington Post 1 and Washington Post 2)	Identified by the Committee Witness (but not on list from originating USIC agency in Washington Post 2)	Otherwise Identified by Department as Possibly Having Access to the Classified Information (Washington Post 2)	Phone/ Email/ Account Identifier	Subscriber Information	Local and Long Distance Telephone Connection Records, Call Detail Records or Toll Records, and/or Text Message Logs[182]
Staffer 1	Democrat	X			Phone 1	x	
					Phone 2	x	x
					Phone 3	x	
					Email 1	x	x
					Email 2	x	x
Staffer 2	Democrat	X			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	
					Phone 4	x	x
					Phone 5	x	x
					Phone 6	x	x
					Phone 7	x	x
					Phone 8	x	x
					Phone 9	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
					Email 4	x	x
					Email 5	x	x
					Email 6	x	x
					Email 7	x	x
					Email 8	x	x
					Apple ID 1	x	x
					IMEI 1	x	x
					IMEI 2	x	x
					IMEI 3	x	x
					IMEI 4	x	x
					IMEI 5	x	x

[180] For each phone number, email address, or account identifier, the Department may have issued compulsory processes multiple times to various service providers or to the same service provider for multiple time periods. Each email address is included only once, regardless of letter capitalization.

[181] Xs indicate that information of this type was sought in at least one item of compulsory process for the phone number, email address, or account identifier.

[182] Some of the compulsory process requesting local and long distance telephone connection records were sent to service providers that did not provide telephone services. After reviewing a draft of our report, the Department submitted comments to the OIG, including from the lead AUSA in **Washington Post 1**, who explained that when USAO-DC issued compulsory process to a non-telephone provider for records of Members of Congress, they did not expect to receive local and long distance telephone connection records in the returns.

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
Staffer/ Member Number	Party Affiliation of Congressional Role	Identified by the Originating Agency or the Department as Having Had Access to the Classified Information Prior to Publication (Washington Post 1 and Washington Post 2)	Identified by the Committee Witness (but not on list from originating USIC agency in Washington Post 2)	Otherwise Identified by Department as Possibly Having Access to the Classified Information (Washington Post 2)	Phone/ Email/ Account Identifier	Subscriber Information	Local and Long Distance Telephone Connection Records, Call Detail Records or Toll Records, and/or Text Message Logs [182]
Staffer 3	Democrat	X			Phone 1	x	
					Email 1	x	x
Staffer 4*	Democrat	X	x		Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Phone 5	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 5	Democrat	X			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Phone 5	x	x
					Phone 6	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
					Email 4	x	x
					Email 5	x	x
Staffer 6	Democrat	X			Phone 1	x	
					Phone 2	x	
					Phone 3	x	
					Phone 4	x	x
					Phone 5	x	x
					Email 1	x	x
Staffer 7*	Democrat	X	x		Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 8	Democrat		x		Phone 1	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 9	Republican	X			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x

* Records were sought for Staffer 4 and Staffer 7 in Washington Post 1 because the Department identified them as having access to the classified information prior to publication and in Washington Post 2 because of the Committee Witness's statements. See Footnote 94.

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
Staffer/ Member Number	Party Affiliation of Congressional Role	Identified by the Originating Agency or the Department as Having Had Access to the Classified Information Prior to Publication (Washington Post 1 and Washington Post 2)	Identified by the Committee Witness (but not on list from originating USIC agency in Washington Post 2)	Otherwise Identified by Department as Possibly Having Access to the Classified Information (Washington Post 2)	Phone/ Email/ Account Identifier	Subscriber Information	Local and Long Distance Telephone Connection Records, Call Detail Records or Toll Records, and/or Text Message Logs[182]
Staffer 10	Democrat	X			Phone 1	x	x
					Phone 2	x	
					Phone 3	x	
					Email 1	x	x
					Email 2	x	x
Staffer 11	Democrat	X			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 12	Republican	X			Phone 1	x	x
					Email 1	x	x
Staffer 13	Democrat	X			Phone 1		
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
Staffer 14	Republican	X			Phone 1	x	x
					Email 1	x	x
					Email 3	x	x
					Email 4	x	x
Staffer 15	Democrat		x		Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Email 1	x	x
Staffer 16	Republican	x			Phone 1	x	x
					Phone 2	x	
					Phone 3	x	x
					Phone 4	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
					Email 4	x	x
Staffer 17	Republican	x			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x
Staffer 18	Republican	x			Phon 1	x	x
					Email 1	x	x
Staffer 19	Republican	x			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
					Email 4	x	x
					Email 5	x	x

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
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Staffer 20	Democrat	x			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Phone 5	x	x
					Phone 6	x	x
					Phone 7	x	x
					Phone 8	x	x
					Phone 9	x	x
					Phone 10	x	x
					Phone 11	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
					Email 4	x	x
Staffer 21	Republican	x			Phone 1	x	
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
Staffer 22	Republican	x			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	
					Email 1	x	
					Email 2	x	x
					Email 3	x	x
					Email 4	x	x
Staffer 23	Democrat	x			Phone 1	x	x
					Email 1	x	x
Staffer 24	Republican	x			Phone 1	x	
					Email 1	x	x
Staffer 25	Nonpartisan			x	Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Email 1	x	x
Staffer 26	Republican	x			Phone 1	x	x
					Phone 2	x	
					Phone 3	x	
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
Staffer/ Member Number	Party Affiliation of Congressional Role	Identified by the Originating Agency or the Department as Having Had Access to the Classified Information Prior to Publication (Washington Post 1 and Washington Post 2)	Identified by the Committee Witness (but not on list from originating USIC agency in Washington Post 2)	Otherwise Identified by Department as Possibly Having Access to the Classified Information (Washington Post 2)	Phone/ Email/ Account Identifier	Subscriber Information	Local and Long Distance Telephone Connection Records, Call Detail Records or Toll Records, and/or Text Message Logs[182]
Staffer 27	Republican	x			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 28	Democrat	x			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	
					Email 1	x	x
					Email 2	x	x
Staffer 29	Republican	x			Phone 1	x	
					Email 1	x	x
Staffer 30	Republican	x			Phone 1	x	
					Phone 2	x	
					Phone 3	x	
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
Staffer 31	Republican	x			Phone 1	x	x
					Phone 2	x	
					Phone 3	x	x
					Email 1	x	x
Staffer 32	Democrat	x			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 33	Democrat	x			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	
					Phone 4	x	x
					Email 1	x	x
Staffer 34	Republican	x			Phone 1	x	
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
Staffer 35	Republican	x			Email 1	x	x
Staffer 36	Nonpartisan	x			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x
Staffer 37	Democrat	x			Phone 1	x	x
					Email 1	x	x

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
Staffer/ Member Number	Party Affiliation of Congressional Role	Identified by the Originating Agency or the Department as Having Had Access to the Classified Information Prior to Publication (Washington Post 1 and Washington Post 2)	Identified by the Committee Witness (but not on list from originating USIC agency in Washington Post 2)	Otherwise Identified by Department as Possibly Having Access to the Classified Information (Washington Post 2)	Phone/ Email/ Account Identifier	Subscriber Information	Local and Long Distance Telephone Connection Records, Call Detail Records or Toll Records, and/or Text Message Logs[182]
Staffer 38	Democrat	x			Phone 1	x	x
					Email 1	x	x
					Email 2	x	x
Staffer 39	Democrat	x			Phone 1	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x
Staffer 40	Republican	x			Phone 1	x	
					Email 1	x	x
					Email 2	x	x
Staffer 41	Republican	x			Phone 1	x	x
					Phone 2	x	x
					Email 1	x	x
Staffer 42	Republican	x			Phone 1	x	
					Email 1	x	x
					Email 2	x	x
Staffer 43	Democrat	x			Phone 1	x	x
					Email 1	x	x
Member 1	Democrat	x			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Phone 5	x	x
					Phone 6	x	x
					Phone 7	x	x
					Phone 8	x	x
					Phone 9	x	x
					Phone 10	x	x
					Phone 11	x	x
					Phone 12	x	x
					Phone 13	x	x
					Phone 14	x	x
					Email 1	x	x
					Email 2	x	x
					Email 3	x	x

Individuals Whose Records Were Sought		Primary Basis for Inclusion in Subject Pool			Selectors[180]	Information Sought via Compulsory Process[181]	
Staffer/ Member Number	Party Affiliation of Congressional Role	Identified by the Originating Agency or the Department as Having Had Access to the Classified Information Prior to Publication (Washington Post 1 and Washington Post 2)	Identified by the Committee Witness (but not on list from originating USIC agency in Washington Post 2)	Otherwise Identified by Department as Possibly Having Access to the Classified Information (Washington Post 2)	Phone/ Email/ Account Identifier	Subscriber Information	Local and Long Distance Telephone Connection Records, Call Detail Records or Toll Records, and/or Text Message Logs[182]
Member 2	Democrat	x			Phone 1	x	x
					Phone 2	x	x
					Phone 3	x	x
					Phone 4	x	x
					Phone 5	x	x
					Phone 6	x	x
					Phone 7	x	x
					Phone 8	x	x
					Phone 9	x	x
					Phone 10	x	x
					Phone 11	x	x
					Phone 12	x	x
					Phone 13	x	x
					Phone 14	x	x
					Phone 15	x	x
					Email 1	x	x
					Email 2	x	x