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U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

DEC 09 2014

PRIVATE AND CONFIDENTIAL

MEMORANDUM

TO: Eric H. Holder, Jr.
Attorney General
Office of the Attorney General

FROM: Robin C. Ashton
Counsel

SUBJECT: Report of Investigation Into Allegations that the Department of Justice Violated 28 C.F.R. Section 50.10 When It Subpoenaed the Telephone Toll Records Associated With (b)(5) (b)(6) (b)(7)(C) [redacted]

Enclosed is the Office of Professional Responsibility (OPR) Report of Investigation into allegations that the Department of Justice (Department) violated 28 C.F.R. Section 50.10 when it subpoenaed the telephone toll records associated with (b)(5) (b)(6) (b)(7)(C) [redacted] OPR has concluded that the Department attorneys involved in the decision to subpoena those records did not engage in misconduct or exercise poor judgment.

(b)(5) (b)(6) (b)(7)(C) [redacted]

As you know, the subpoenas for telephone toll records associated with (b)(5) (b)(6) (b)(7)(C) [redacted] related to an investigation into unauthorized disclosures of classified information, some at the Sensitive Compartmented Information level. OPR prepared its report relying on only unclassified documents or unclassified portions of classified documents. OPR therefore believes that its report need not be classified and has not placed any classification markings on the attached report. (b) (5) [redacted]

cc: Principal Associate Deputy Attorney General Stuart Goldberg (w/enclosure)
Associate Deputy Attorney General David Margolis (w/enclosure)

Enclosure

DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation Into Allegations
That The Department Of Justice Violated
28 C.F.R. Section 50.10 When It Subpoenaed
The Telephone Toll Records Of The Associated Press

December 9, 2014

NOTE: THIS REPORT CONTAINS SENSITIVE AND CONFIDENTIAL INFORMATION. DO NOT DISTRIBUTE THE REPORT OR ITS CONTENTS WITHOUT THE PRIOR APPROVAL OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY.

INTRODUCTION

On May 13, 2013, Gary B. Pruitt, the President and Chief Executive Officer (CEO) for The Associated Press, sent a letter to Attorney General Eric H. Holder, Jr. in which Pruitt alleged that Department of Justice (Department) attorneys had obtained telephone toll records for The Associated Press in violation of Department guidelines. Beginning on May 7, 2012, The Associated Press reported in several articles that United States intelligence agencies had interrupted a terrorist plot by members of al-Qaeda in Yemen to use an improvised explosive device (IED) to destroy a United States-bound aircraft. Reports further recounted that the Federal Bureau of Investigation (FBI) had obtained and was examining the IED that was to have been used in the terrorist attack. Criminal investigators later referred to this incident as "the Yemen bomb plot."[1] The Associated Press publications contained classified material, the dissemination of which had not been authorized by persons with authority to grant such dissemination (hereinafter, the "leak").

(b)(5) [redacted]

In February 2013, Deputy Attorney General James Cole[2] approved a request by the USAO and the Department's Criminal Division, pursuant to 28 C.F.R. § 50.10 (Section 50.10), to subpoena telephone toll records (b)(5) (b)(6) (b)(7)(C) [redacted].[3] The USAO thereafter subpoenaed the telephone toll records for the period from April 1, 2012 to

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[1] Shortly after The Associated Press articles were published, the FBI issued a public statement indicating that it had obtained from overseas an IED designed to carry out a terrorist attack, and that the device was undergoing technical and forensic analyses. The FBI stated that the device was similar to IEDs previously used by al-Qaeda in the Arabian Peninsula in other attempted terrorist attacks.

[2] Attorney General Holder recused himself from the criminal investigation because he was within the universe of people having access to the classified material before it was leaked, and had engaged in communications with reporters during the time period immediately before the unauthorized dissemination occurred. After Attorney General Holder recused himself, Deputy Attorney General Cole became the Acting Attorney General for purposes of the Department's handling of the leak investigation. *See infra* Section III(H).

[3] A copy of Section 50.10 in effect in February 2013 is attached at Exhibit A. Pursuant to Section 50.10 in effect in February 2013, in order to issue subpoenas to obtain the telephone toll records of The Associated Press reporters and editors, the Department was required to: (1) take "all reasonable alternative investigative steps" prior to issuing subpoenas; (2) pursue negotiations with The Associated Press if the responsible Assistant Attorney General determined that such negotiations "would not pose a substantial threat to the integrity of the investigation," a determination the Attorney General was required to review; (3) determine that there was "reasonable ground to believe that a crime had been committed" and that the information sought was "essential to the successful investigation of the crime"; and (4) ensure that the subpoenas were "as narrowly drawn as possible," "directed at relevant information regarding a limited subject matter," and "cover[ed] a reasonably limited time period." Section 50.10 required that the issuance of such subpoenas receive "the express authorization of the Attorney General."

May 10, 2012, for 30 telephone numbers believed to be those of (b)(5), (b)(6), (b)(7)(C) [redacted]s.[4]

Analyses of the subpoenaed telephone toll records ultimately led to the identification of an FBI contractor, Donald Sachtleben. It was determined that Sachtleben was physically present near the room in the FBI facility when and where the IED was being examined, and also that he had communicated by telephone with one of The Associated Press reporters on May 2, 2012, the date Associated Press reporters and editors first began asking United States government officials questions and seeking statements about the Yemen bomb plot.[5]

On May 10, 2013, the USAO notified The Associated Press that pursuant to Section 50.10, it had subpoenaed 21 Associated Press telephone toll records from April and May 2012. The USAO's notification to The Associated Press generated substantial media attention.

In his May 13, 2013 letter to Attorney General Holder, The Associated Press CEO Pruitt alleged that the Department had obtained telephone toll records for "[a]n AP general phone number in New York City . . . and at the House of Representatives." Pruitt further alleged that there was:

> no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP . . . and disclose information about AP's activities and operations that the government has no conceivable right to know.

Pruitt alleged that by not complying with the requirements of Section 50.10, the Department had "serious[ly] interfered with AP's constitutional rights to gather and report the news." Many other news media organizations also alleged that the Department had violated Section 50.10 when it obtained The Associated Press telephone toll records.

During a May 23, 2013 speech, President Barack Obama stated that he was "troubled" that investigative journalism might be "chill[ed]" as a result of several recent instances in which the Department of Justice had obtained information about news media personnel, including

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[4] As noted, the USAO issued 30 subpoenas to obtain telephone toll records for 30 unique telephone numbers. (b)(5) (b)(6) (b)(7)(C) [redacted]

[5] On September 23, 2013, Sachtleben pled guilty to one count of Unauthorized Disclosure of National Defense Information, 18 U.S.C. § 793(d), and one count of Unauthorized Possession and Retention of National Defense Information, 18 U.S.C. § 793(c). *See United States v. Sachtleben*, 1:13-cr-00200 (S.D. Ind.).

through subpoenas of The Associated Press telephone toll records.[6] The President therefore directed Attorney General Holder to initiate "a comprehensive evaluation of the Department of Justice's policies and practices governing the use of law enforcement tools . . . to obtain information or records from or concerning members of the news media. . . ."[7] On July 12, 2013, Attorney General Holder announced revisions to the Department's media subpoena guidelines.[8] Those revisions make it more difficult for the Department to issue subpoenas to obtain information from the news media.

After receiving Pruitt's letter alleging misconduct by Department attorneys, the Office of Professional Responsibility (OPR) commenced an investigation into whether the Department violated provisions of Section 50.10 in the manner in which it approved and obtained subpoenas for the telephone toll records (b)(5) (b)(6) (b)(7)(C) [redacted].[9]

Although much of the underlying material regarding the Department's subpoenas of Associated Press telephone toll records is classified, OPR prepared this report using only unclassified material.

As a result of its investigation, OPR reached the following conclusions as to whether the Department complied with the requirements of Section 50.10 when it subpoenaed telephone toll records for 30 telephone numbers it believed to be those of The Associated Press reporters and editors:

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[6] *See, e.g.*, AP.org: *Obama: Policy in Leaks Investigations Under Review*, May 23, 2013; NYT.com: *Obama, in Nod to Press, Orders Review of Inquiries*, May 23, 2013.

[7] *Department of Justice Report on Review of News Media Policies*, July 12, 2013, at 1.

[8] Section 50.10 was formally revised on February 21, 2014.

[9] (b)(5) (b)(6) (b)(7)(C) [redacted]

(1) Before they requested authority to subpoena The Associated Press telephone toll records, criminal investigators interviewed more than 550 witnesses, and requested, received, and reviewed thousands of documents from numerous U.S. government agencies. Those investigative measures failed to produce investigative leads concerning the source of the leak of the classified information in question. The Deputy Attorney General was provided sufficient information to allow him to reasonably conclude that the Department had taken "all reasonable alternative investigative steps" before it subpoenaed The Associated Press telephone toll records, as required by 28 C.F.R. § 50.10(b) and (g)(1).

(2) The Associated Press published material that was classified, the dissemination of which was not authorized, and thus unlawful. Therefore, prior to issuing the subpoenas, the Department had "reasonable ground to believe that a crime had been committed." *See* § 50.10(g)(1).

(3) (b) (5) [redacted]

(4) (b) (5) [redacted]

(5) Although the Department subpoenaed telephone toll records for several telephone numbers that subsequently were discovered not in fact to relate to an Associated Press reporter or editor, OPR found that at the time when the subpoenas were sought, investigators had a factual basis for believing that those telephone numbers did relate to Associated Press personnel.

(6) The 30 subpoenas sought telephone toll records for the period from April 1, 2012 through May 10, 2012. A full explanation for this date range would necessarily involve a discussion of classified material, and is therefore not provided in OPR's unclassified report. In sum, the date range began when communications concerning the general subject matter of the investigation could have begun between The Associated Press and the source of the leak, and ended shortly after the articles containing the classified material were first published. Obtaining telephone toll records for 40 days therefore covered "a reasonably limited time period." *See* § 50.10(g)(1).

(7) For the reasons set forth in Sections III(F) and (G) below, the Department had a reasonable basis for: (a) not concluding that providing advance notification to The Associated Press concerning the issuance of the subpoenas would not pose "a substantial threat to the integrity of the investigation"; and (b) extending by 45 days the period during which The Associated Press would not be notified about the subpoenas. *See* Section 50.10(d) and (g)(3).

(8) Upon Attorney General Holder's recusal, Deputy Attorney General Cole, as the Acting Attorney General, had the authority to approve requests for subpoenas to obtain The Associated Press telephone toll records. *See* Section 50.10(e).

(9) Federal courts have never recognized an absolute right for news media organizations to shield from disclosure information relevant to a criminal investigation, when investigators have a legitimate need for such information. (b) (5) [redacted] OPR therefore concludes that when they obtained The Associated Press telephone toll records Department attorneys did not violate the First Amendment rights of The Associated Press (b)(5), (b)(6), (b)(7)(C), (b)(7)(E) [redacted]

Based on an exhaustive review of all information adduced during its investigation, OPR concludes that the attorneys involved in the decision to subpoena the telephone toll records of The Associated Press did not engage in professional misconduct or exercise poor judgment.

I. FACTUAL BACKGROUND

A. Personnel Assigned to Investigate the Yemen Bomb Plot Criminal Leak and Process the Section 50.10 Request

1. The USAO's Criminal Investigative Team

(b)(5) (b)(6) (b)(7)(C) [redacted][10] U.S. Attorney Machen signed and approved the USAO's memorandum to Deputy Attorney General Cole (the Machen memorandum) seeking authorization to issue subpoenas for The Associated Press telephone toll records.

2. The Criminal Division Personnel Who Processed the USAO's Section 50.10 Request to Subpoena The Associated Press Telephone Toll Records

All requests made by Department components for approval to issue subpoenas for news media telephone toll records are initially processed by the Policy and Statutory Enforcement Unit

[10] In order to protect personal privacy interests, OPR has not named Department attorneys whose conduct is discussed in this report (b)(6) (b)(7)(C) [redacted]. For the same reason OPR has not named The Associated Press reporters and editors whose telephone toll records were subpoenaed. OPR refers to those persons using numbers (*i.e.*, AUSA #1) or job titles instead of their names.

(PSEU) of the Criminal Division's Office of Enforcement Operations (OEO). A PSEU Deputy Chief was the USAO's primary point of contact regarding the USAO's request to obtain The Associated Press telephone toll records. (b) (5) [redacted] The PSEU Deputy Chief wrote the first draft of then-Criminal Division Assistant Attorney General Lanny Breuer's memorandum to Deputy Attorney General Cole (the Breuer memorandum) recommending that he approve the USAO's request for the subpoenas.

The PSEU Deputy Chief's direct supervisor at the time was the PSEU Chief, (b) (5) [redacted] One Criminal Division Deputy Assistant Attorney General's portfolio included supervision of OEO. That Deputy Assistant Attorney General reviewed the Machen memorandum and reviewed and revised the Breuer memorandum. In January 2013, when the Machen and Breuer memoranda were drafted, the Deputy Assistant Attorney General reported to Mythili Raman, at that time serving as the Criminal Division Principal Deputy Assistant Attorney General and Chief of Staff, who also reviewed the Machen memorandum and reviewed and revised the Breuer memorandum.

Breuer left the Department on March 1, 2013, at which time Raman became the Acting Assistant Attorney General for the Criminal Division. It was Raman who approved a 45-day extension of the date when the USAO was required to inform The Associated Press that the Department had subpoenaed its telephone toll records.

3. The ODAG Personnel Who Reviewed and Approved the USAO's Section 50.10 Request to Subpoena The Associated Press Telephone Toll Records

The Machen and Breuer memoranda were first reviewed by an Associate Deputy Attorney General, and then subsequently were reviewed by the Principal Associate Deputy Attorney General. Both the Associate Deputy Attorney General and the Principal Associate Deputy Attorney General recommended that Deputy Attorney General Cole approve the USAO's request to issue subpoenas for The Associated Press telephone toll records.

4. FBI Criminal Investigative Team

Eight FBI special agents and seven analysts from the FBI's Washington Field Office were assigned to the Yemen bomb plot leak investigation.[11] They were assisted by an additional 40 FBI special agents and analysts during the course of the investigation.

B. Unauthorized Dissemination of Classified Material Regarding the Yemen Bomb Plot and Recovery of an Improvised Explosive Device

In April 2012, authorities disrupted a suicide bomb plot by the terrorist organization al-Qaeda in the Arabian Peninsula, and obtained the IED that was to be used in the suicide plot.

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[11] Washington Field Office (b)(6), (b)(7)(C), (b)(7)(E) [redacted] was assigned to the Yemen bomb plot leak investigation.

The FBI took possession of the IED, and on April 30, 2012, began analyzing the device at the FBI laboratory in Quantico, Virginia.

On May 2, 2012, several Associated Press reporters and editors began calling or sending text messages to multiple U.S. government officials, informing them that The Associated Press had learned that the United States had intercepted a bomb from Yemen and that the FBI was analyzing the bomb, and stating that The Associated Press believed that the bomb was linked to the premier bomb-maker for al-Qaeda in the Arabian Peninsula (AQAP). After discussions with high-ranking U.S. government officials, The Associated Press agreed not to immediately publish the information it said it had obtained about the Yemen bomb plot.

The Associated Press withheld publication of the story for several days. It published its first story during the afternoon of May 7, 2012. The story contained information about the Yemen bomb plot and the FBI's possession and analysis of the IED. The Associated Press published several different versions of the same basic story on May 7.[12] OPR was told that the initial Associated Press story and those that followed contained highly classified material that was of critical significance to national security.[13] On May 7, 8, and 9, 2012, after The Associated Press published the first article about the Yemen bomb plot, several other news media organizations, including *The Washington Post*, ABC News, and *The New York Times*, also published articles about the Yemen bomb plot.[14] OPR was told that some of those articles contained classified material that had not been included in the initial Associated Press articles, and that the classified material contained in the articles published by the other news media organizations was of greater sensitivity and significance than the classified material contained in the initial Associated Press publications.[15]

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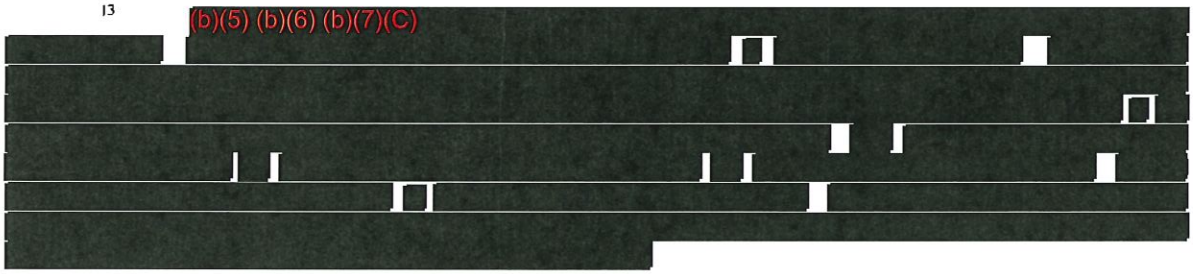
[12] *See, e.g.*, The Associated Press: *US: CIA thwarts new al-Qaida underwear bomb plot*, May 7, 2012; The Associated Press: *CIA Thwarts 'Undetectable' al-Qaeda Bomb Plot*, May 7, 2012.

[13] 

[14] *See, e.g.*, Washingtonpost.com: *Al-Qaeda Airline Bomb Plot Disrupted, U.S. Says*, May 7, 2012; NYT.com: *Double Agent Disrupted Bombing Plot, U.S. Says*, May 8, 2012; ABCnews.com: *Al Queda Bomb Cell Infiltrated By Insider Who Foiled New Airline Plot: Officials*, May 8, 2012.

[15] OPR was told that shortly after the first Associated Press articles were published, senior government officials provided information about the Yemen bomb plot to reporters and commentators. For example, late in the afternoon of May 7, 2012, John Brennan, then-White House Deputy National Security Advisor for Homeland Security and Counterterrorism, briefed several television news commentators on the Yemen bomb plot. *See, e.g.*, Reuters.com: *Exclusive: Did White House "Spin" Tip A Covert Op?*, May 18, 2012; thewire.com: *Tracing the CIA Underwear Bomb Leak Back to the White House*, May 18, 2012.

Many of the initial news articles about the Yemen bomb plot stated that The Associated Press had first reported the story and that The Associated Press withheld publication of the story for several days at the government's request.[16]

C. The Department Publicly Announces the Initiation of the Criminal Investigation Into the Yemen Bomb Plot Leak to be Led By the USAO

On May 16, 2012, then-FBI Director Robert Mueller announced publicly that the FBI had initiated a criminal investigation into the unauthorized disclosure of classified information relating to the Yemen bomb plot. Director Mueller's announcement was widely publicized.[17] (b)(5) [redacted]
On June 9, 2012, the Department publicly announced that the USAO and the United States Attorney's Office for the District of Maryland had been assigned to lead criminal investigations into two different unauthorized disseminations of classified information. That announcement was widely publicized.[18] The June 9 announcement did not specify which leak the USAO would be investigating. On January 26, 2013, while the USAO's request to subpoena The Associated Press telephone toll records was pending with the ODAG, *The Washington Post* reported that the USAO was investigating a leak of classified material to The Associated Press about the Yemen bomb plot.[19]

D. Investigative Measures Taken Before the USAO Requested Authority to Issue Subpoenas for The Associated Press Telephone Toll Records

The FBI initiated the criminal investigation into the unauthorized leak of classified material related to the Yemen bomb plot before the USAO was assigned to lead the investigation. On May 24, 2012, the FBI requested information from multiple U.S. government agencies about employee contacts with news media personnel from The Associated Press, *The Washington Post*, and ABC News, for a date range of April 1, 2012 to May 8, 2012. After the USAO was assigned to lead the criminal investigation, (b) (5) [redacted]

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[16] *See, e.g.*, The Associated Press: *US: CIA thwarts new al-Qaida underwear bomb plot*, May 7, 2012 ("The AP learned about the thwarted plot last week but agreed to White House and CIA requests not to publish it immediately . . . . Once officials said those concerns were allayed, the AP decided to disclose the plot. . . ."); The Associated Press: *CIA Thwarts 'Undetectable' al-Qaeda Bomb Plot*, May 7, 2012 (contains same language as prior article about AP holding story several days); Washingtonpost.com: *Al-Qaeda Airline Bomb Plot Disrupted, U.S. Says*, May 7, 2012 ("the disclosure of the plot, first reported by the Associated Press"); NYT.com: *Double Agent Disrupted Bombing Plot, U.S. Says*, May 8, 2012 ("the disclosure of the Qaeda plot, first reported Monday by the Associated Press, which had held the story for several days at the request of the C.I.A.").

[17] *See, e.g.*, ABCnews.com: *FBI Investigates Media Leaks in Yemen Bomb Plot*, May 16, 2012; CBSnews.com: *FBI Director Mueller confirms bureau probing leak of foiled Qaeda underwear bomb plot*, May 16, 2012; NYT.com: *FBI Chief Says Leak on Queda Plot is Being Investigated*, May 16, 2012.

[18] *See, e.g.*, AP.org: *Holder appoints 2 US attorneys to lead leak probes*, June 9, 2012.

[19] The Washington Post: *FBI is increasing pressure on suspects in Stuxnet inquiry*, January 26, 2013 ("Holder named [Machen] to head a criminal investigation into leaks concerning the disruption of a bomb plot by al-Qaeda in the Arabian Peninsula . . . Machen is examining a leak to the Associated Press that a double agent inside al-Qaeda's affiliate in Yemen allowed the United States . . . to disrupt the plot to bomb an airliner using explosives and a detonation system that could evade airport security checks.").

(b) (5)

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(b)(5) (b)(6) (b)(7)(C)

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(b)(5) (b)(6) (b)(7)(C)

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(b)(5) (b)(6) (b)(7)(C)

[20] (b) (5)

[21] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[redacted]

E. The USAO and Criminal Division Request Authority to Subpoena Telephone Toll Records for (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[redacted]

(b) (5)

[redacted][22]

(b)(5) (b)(6) (b)(7)(C)

[redacted][23] (b)(5) (b)(6) (b)(7)(C)

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22 Machen memorandum at 3.

23 (b)(5) (b)(6) (b)(7)(C)

[redacted]

(b)(5) (b)(6) (b)(7)(C)

AUSA #1 worked with a PSEU Deputy Chief to draft the USAO's memorandum, which was signed by U.S. Attorney Machen on January 10, 2013. The PSEU Deputy Chief drafted a separate Criminal Division memorandum, which was signed by Assistant Attorney General Breuer on January 25, 2013. Both memoranda were submitted to the ODAG on January 25, 2013.

(b)(5) (b)(6) (b)(7)(C)

telephone numbers and other contact information for the reporters and editors of The Associated Press, *The Washington Post*, *The New York Times*, and ABC News, who had worked on the articles containing classified material. At the time that the USAO sought to subpoena The Associated Press telephone toll records, investigators believed that they had identified 30 telephone numbers (b) (5) The USAO requested telephone toll records for the date range of April 1, 2012 to May 10, 2012.

(b)(5) (b)(6) (b)(7)(C)

[24]

(b)(5) (b)(6) (b)(7)(C)

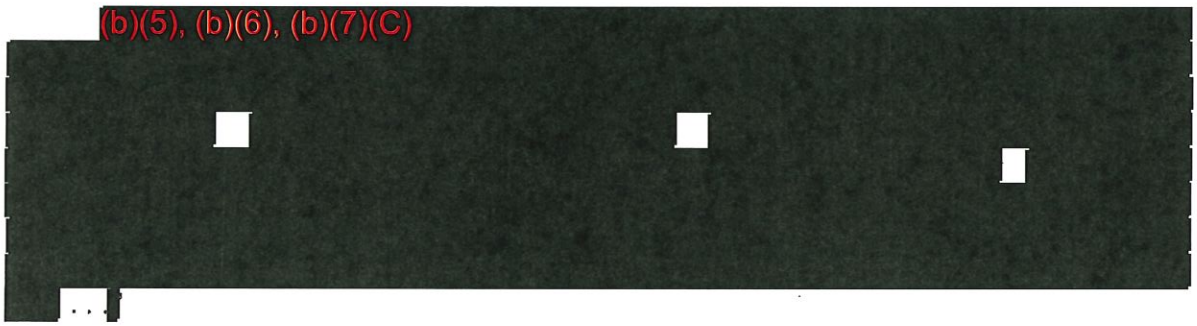
On February 6, 2013, Deputy Attorney General Cole, in his capacity as Acting Attorney General (as a result of Attorney General Holder's recusal), approved the USAO's request for authority to issue 30 subpoenas. Deputy Attorney General Cole concurred with the position of the USAO and Criminal Division that providing advance notice to The Associated Press about the issuance of the subpoenas would pose a substantial threat to the integrity of the investigation, pursuant to Section 50.10(d). Deputy Attorney General Cole therefore authorized that The Associated Press would not be notified in advance of the service of the subpoenas. Pursuant to

[24] (b)(5) (b)(6) (b)(7)(C)

Section 50.10, the Department was required to notify The Associated Press about the issuance of the subpoenas no later than 45 days after receipt of returns from those subpoenas, unless the Criminal Division's Assistant Attorney General were to authorize an additional 45-day delay.

F. FBI Contractor Donald Sachtleben is Identified as Having Communicated by Telephone With an Associated Press Reporter

After Deputy Attorney General Cole approved the USAO's request to issue The Associated Press subpoenas, the USAO immediately served the subpoenas on the telephone carriers associated with the numbers. Within a few days, recipients of the subpoenas began providing investigators with the returns from the subpoenas, and the FBI began analyzing the returns to determine if any of The Associated Press reporters and editors had been communicating by telephone with any U.S. government employee who had access to the classified material prior to the leak.



On February 27, 2013, while analyzing the subpoena returns, the FBI found evidence that Donald Sachtleben, a former FBI Supervisory Special Agent who was employed as an FBI contractor in May 2012, had been near the area of the FBI laboratory where and at the time when the IED was being examined. In addition, Sachtleben had on May 2, 2012 communicated several times by telephone with Associated Press Reporter #1, who had done some of the initial reporting about the Yemen bomb plot.[25] Sachtleben's May 2 telephone calls preceded by only a

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few hours The Associated Press's first queries to U.S. and foreign government officials about the Yemen bomb plot. The USAO also learned that Sachtleben had recently been indicted on federal criminal charges in the Southern District of Indiana.

The next day, February 20, 2013, the USAO notified Deputy Attorney General Cole and the Principal Associate Deputy Attorney General (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

After further investigation, the USAO developed sufficient evidence to charge Sachtleben with leaking classified material about the Yemen bomb plot to The Associated Press. On September 23, 2013, Sachtleben pled guilty to one count of Unauthorized Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(d), and one count of Unauthorized Possession and Retention of National Defense Information, in violation of 18 U.S.C. § 793(c). *See United States v. Sachtleben*, 1:13-cr-00200 (S.D. Ind.).

G. The Acting Criminal Division Assistant Attorney General Delays Notification About the Subpoenas to The Associated Press for an Additional 45 Days

As noted above, when Deputy Attorney General Cole, in his capacity as Acting Attorney General, authorized subpoenas for The Associated Press telephone toll records, he further authorized delayed notification to The Associated Press, as provided by Section 50.10. Section 50.10 nonetheless required that The Associated Press be notified of the subpoenas for its telephone toll records no later than 45 days after the returns from the subpoenas were received, unless the relevant Assistant Attorney General, in this case Criminal Division Acting Assistant Attorney General Raman, extended the period an additional 45 days. (b) (5)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

On March 22, 2013, the PSEU Deputy Chief sent a short memorandum to a Criminal Division Deputy Assistant Attorney General recommending that Raman authorize a 45-day extension of the period during which The Associated Press would not be informed of the subpoenas for its telephone toll records. The Deputy Assistant Attorney General agreed with the recommendation and forwarded the memorandum to Raman, who approved and signed the request that same day.

(b)(5) (b)(6) (b)(7)(C)

[26] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

H. (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[26] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[27] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

I. The Associated Press is Notified About the Subpoenas and Numerous News Media Organizations Allege a Section 50.10 Violation

On May 10, 2013, the USAO notified the Associated Press that it had subpoenaed the telephone toll records for 21 telephone numbers related to Associated Press reporters and editors

[27] (b)(5) (b)(6) (b)(7)(C)

for the period from April to May 2012.[28] Following the notification, The Associated Press alleged that the subpoenas had interfered with its First Amendment rights and violated Section 50.10. The Associated Press noted that among the telephone numbers subpoenaed were The Associated Press's general telephone numbers for its New York City, Washington, D.C., and Hartford, Connecticut, offices, and The Associated Press's telephone line located in the U.S. House of Representatives. The Associated Press asserted that because the government had obtained telephone toll records for these general numbers, it had obtained information about telephone calls to and from (b)(5), (b)(6), (b)(7)(C), (b)(7)(E) potentially for all Associated Press staff working in New York City, Washington, D.C., Hartford, Connecticut, and on Capitol Hill.

In a May 13, 2013, letter to Attorney General Holder, The Associated Press President and CEO Gary Pruitt stated:

> There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations, and disclose information about AP's activities and operations that the government has no conceivable right to know.
>
> That the Department undertook this unprecedented step without providing any notice to the AP, and without taking any steps to narrow the scope of its subpoenas to matters actually relevant to an ongoing investigation, is particularly troubling.
>
> The sheer volume of records obtained, most of which can have no plausible connection to any ongoing investigation, indicates, at a minimum, that this effort did not comply with 28 C.F.R. § 50.10 and should therefore never have been undertaken in the first place. The regulations require that, in all cases and without exception, a subpoena for a reporter's telephone toll records must be "as narrowly drawn as possible." This plainly did not happen.

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[28] In its letter to The Associated Press, the USAO did not specify the date range of April 1 to May 10 for the subpoenas; thus, The Associated Press and other news media mistakenly believed that the USAO had obtained 60 days of telephone toll records, when the USAO actually had obtained only 40 days of such records. (b)(5), (b)(6), (b)(7)(C) (b)(5) (b)(6) (b)(7)(C) The Associated Press was notified about one subpoena that failed to return any telephone toll records, because that subpoena was for The Associated Press office in Hartford, Connecticut. OPR found no evidence to explain why that subpoena failed to produce any returns.

In a May 14, 2013, letter to Attorney General Holder and Deputy Attorney General Cole, the Reporters Committee for Freedom of the Press, speaking on behalf of 50 news media organizations, stated that the "nation's news media were stunned to learn . . . [about the] broad subpoenas of telephone records belonging to The Associated Press . . . [N]one of us can remember an instance where such an overreaching dragnet for newsgathering materials was deployed by the Department, particularly without notice to the affected reporters. . . ."[29] The Reporters Committee stated that the "scope" of the subpoenas raised issues about "the very integrity of [Department] policies towards the press." The Reporters Committee alleged that because the Department subpoenaed two months of records related to 20 telephone lines of "major AP bureaus and the home and cell phone records of individual journalists," the Department "appears to have ignored or brushed aside almost every aspect of [Section 50.10]."[30]

The Reporters Committee stated that although Section 50.10 requires that subpoenas be drawn as narrowly as possible, for a reasonably limited time, and directed at relevant information about a limited subject matter, the subpoenas appeared "to have covered *all* records that *could* be relevant so that prosecutors could plunder two months of newsgathering materials to seek information that might interest them."[31] The Reporters Committee asserted that the subpoenas appeared to be an "initial investigative step . . . to gather up even the most remote material when beginning an investigation."[32] The Reporters Committee alleged that the Department's decision not to provide The Associated Press with advance notice of the subpoenas "severely harmed its working relationship with the news media, which time and time again have undertaken good faith efforts to cooperate with government lawyers. . . ."[33]

J. The Department Revises 28 C.F.R. Section 50.10

Two weeks after The Associated Press was notified about the subpoenas, President Barack Obama publicly stated that he was "troubled" that recent actions by the Department, including issuing subpoenas for The Associated Press telephone toll records, may have "chill[ed]" investigative journalism.[34] The President therefore directed Attorney General Holder

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29 The letter was sent on behalf of The New York Times Company, The Washington Post, ABC, Inc., Cable News Network, Inc., NPR, Inc., and other news media organizations.

30 May 14 letter at 1.

31 *Id.* at 2 (emphasis in original).

32 *Id.*

33 *Id.*

34 *See, e.g.*, AP.org: *Obama: Policy in Leaks Investigations Under Review*, May 23, 2013; NYT.com: *Obama, in Nod to Press, Orders Review of Inquiries*, May 23, 2013. The President's directive to the Attorney General and the subsequent revisions to Section 50.10 resulted in part because of the public disclosure of the Department's authorization of multiple subpoenas to obtain telephone toll records for telephone numbers associated with The Associated Press, as well as the public disclosure in a separate matter of the Department's subpoena of telephone toll records of James Rosen, a Fox News reporter who had obtained classified material from State Department employee Anthony Kim. On February 14, 2014, Kim pled guilty to one count of Unauthorized Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(d). *See United States v. Kim*, 1:10-cr-00225 (D.D.C.).

to conduct a "comprehensive evaluation of the Department of Justice's policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations."[35]

On July 12, 2013, the Department issued a report containing the results of the evaluation it had conducted pursuant to the President's directive, and announced interim changes to the manner in which the Department would process and evaluate Section 50.10 requests. On February 21, 2014, the Department announced final revisions to Section 50.10, effective on the date of publication in the Federal Register. The following are among the significant changes to Section 50.10: (1) additional limits were placed on the use of information obtained from the news media; (2) the Department must report on an annual basis statistical data regarding information it has obtained from the news media; (3) the Department must provide news media organizations with prior notice of subpoenas and negotiate with news media organizations regarding requests for information, unless the Attorney General determines that "for compelling reasons, such negotiations 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";[36] (4) the Department added to Section 50.10 a standard by which to evaluate requests for a 45-day extension of the date by which notification about the subpoenas must be made (the standard is the same as the standard set forth immediately above); and (5) the fact that notifying the news media in advance of any subpoena might delay an investigation (because of, *inter alia*, litigation commenced by the news media) is "not, on its own, a compelling reason to delay notice."[37]

II. STANDARDS OF CONDUCT

A. OPR's Analytical Framework

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, applicable rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

An attorney intentionally violates an obligation or standard when the attorney: (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable

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35 Department of Justice, *Report on Review of News Media Policies*, July 12, 2013, at 1.

36 This change essentially reversed the presumption set forth in the prior version of Section 50.10 that the Department would not provide news media organizations with advance notice of subpoenas, to a presumption that the Department would provide news media organizations with advance notice of subpoenas. *See* February 14, 2014 Updated Policy Regarding Obtaining Information From, Or Records Of, Members Of The News Media, at 6, 11, 13, 16 (repeated in various sections of revised Section 50.10) (memorandum from the Attorney General to all Department employees).

37 *Id.* at 16.

consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

An attorney acts in reckless disregard of an obligation or standard when: (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

B. 28 C.F.R. Section 50.10

28 C.F.R. § 50.10 sets forth the Department's policies regarding the issuance of subpoenas to members of the news media. As discussed more fully above, as a direct result of, *inter alia*, the Department's decision to subpoena The Associated Press telephone toll records, the Department substantially revised Section 50.10. In assessing the allegation that issuance of subpoenas in February 2013 for The Associated Press telephone toll records violated Section 50.10, OPR considered the requirements of Section 50.10 in effect in February 2013, which are set forth below.

The preamble to Section 50.10 as it existed in February 2013 stated that the Section was intended "to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." The preamble to Section 50.10 made clear that the Department's policies regarding media subpoenas were mandatory: "the following guidelines shall be adhered to by all members of the Department in all cases." Section 50.10 was intended to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).

Section 50.10 required compliance with the following standards as a condition for approval of a subpoena for telephone toll records for a member of the news media:

(1) "[A]ll reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media." *Id.* § 50.10(b).

(2) "Negotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. Such determination shall be reviewed by the Attorney General. . . ." *Id.* § 50.10(d).

(3) "No subpoena may be issued . . . for the telephone toll records of any member of the news media without the express authorization of the Attorney General." *Id.* § 50.10(e).

(4) "There should be reasonable ground to believe that a crime has been committed. . . ." *Id.* § 50.10(g)(1).

(5) "There should be reasonable ground to believe . . . that the information sought is essential to the successful investigation of that crime." *Id.*

(6) "The subpoena should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period." *Id.*

(7) "[P]rior to seeking the Attorney General's authorization, the government should have pursued all reasonable alternative investigation steps as required by paragraph (b) of this section." *Id.*

(8) "When the telephone toll records of a member of the news media have been subpoenaed without [] notice . . . notification of the subpoena shall be given the member of the news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation. In any event, such notification shall occur within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days." *Id.* § 50.10(g)(3). Section 50.10(g)(3) previously did not set forth any standard by which to assess a request for a 45-day extension of the date by which notification of the subpoenas must be made. The revisions to Section 50.10 added such a standard.

The standards set forth in Section 50.10 are not subject to precise measurement; whether conduct is "reasonable," or evidence is "substantial" or "clear," is a matter of subjective interpretation and judgment. Accordingly, OPR assesses whether Department attorneys' judgments deviated from what OPR would expect from a reasonable attorney in applying the requirements of Section 50.10.

C. Federal Case Law Regarding News Media Subpoenas

Federal courts have long held that there is no absolute constitutional or statutory impediment barring the federal government in a criminal investigation or prosecution from

obtaining relevant information from members of the news media or from third parties in possession of information about members of the news media, such as telephone service providers, when it has a legitimate need for such information. Although many states and some federal circuits recognize the existence of a "reporter's privilege," which allows a reporter to withhold his or her sources in response to a criminal or civil demand for such information, in federal courts that privilege either is not absolute or does not exist (depending on the circuit), and can be overcome by a sufficient showing of relevance and need.

The seminal case addressing whether news media organizations are shielded by the First Amendment or common law principles from providing information in criminal investigations or prosecutions is *Branzburg v. Hayes*, 408 U.S. 665 (1972). By a 5-4 majority, *Branzburg* held that "requiring newsmen to appear and testify before state or federal grand juries [does not] abridge[] the freedom of speech and press guaranteed by the First Amendment."[38] The Court rejected the claim that "the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."[39] Although the Court recognized that "news gathering" is afforded some "First Amendment protection," it found that "otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed."[40]

The Court in *Branzburg* noted that "at common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."[41] The Court refused therefore to create a reporter's privilege, stating: "We are asked to create [a testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."[42]

The Court in *Branzburg* recognized that law enforcement attempts made in bad faith to obtain information from the news media would be problematic: "News gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."[43]

Many courts and commentators have cited Justice Powell's concurring opinion in *Branzburg* to support the proposition that *Branzburg* recognized a limited reporter's privilege

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38 408 U.S. at 667.

39 *Id.* at 681.

40 *Id.* at 681-83.

41 *Id.* at 685. The Court in *Branzburg* noted that although legislation had been introduced in Congress, there existed no federal statutory privilege for reporters. That was true in 1972, and remains so today; although there is currently a federal reporter's shield law pending in Congress, no such federal legislation has ever been enacted into law.

42 *Id.* at 690.

43 *Id.* at 707-08.

that shields from discovery certain information such as a reporter's confidential sources. In his concurrence, Justice Powell stated:

> [The] Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources . . . If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy . . . he will have access to the court on a motion to quash . . . The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct . . . In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.[44]

Although *Branzburg* appeared to have definitively answered in the negative the question whether journalists could use the First Amendment or a reporter's privilege derived from the common law as a shield against providing information in criminal proceedings, that issue has been continually litigated in the federal courts.[45] While there have been some fractured decisions (in part due to disagreement as to the meaning and significance of Justice Powell's concurrence), no court has held that journalists have an absolute right to withhold relevant information from criminal proceedings brought in good faith. Rather, consistent with *Branzburg*, courts have found that journalists, and third parties in possession of evidence relating to journalists (such as telephone service providers), must comply with lawful, good faith requests for relevant information, even if that information were obtained pursuant to promises of confidentiality. A brief description of several of the most relevant of the cases follows.

Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co., 593 F.2d 1030 (D.C. Cir. 1978), resolved a claim similar to the claim of The Associated Press in this matter that the Department's subpoenas interfered with its First Amendment rights. In *Reporters Committee*, individual journalists and press organizations sued telephone companies, asserting that the companies were required to notify them prior to providing law enforcement officials with the long-distance telephone toll records of the journalists and news media. The United States intervened in the matter. In declining to provide the journalists with the relief they sought the court found that, "The so-called right of journalists to gather information from secret sources does not include a right to maintain the secrecy of sources in the face of good faith

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[44] *Id.* at 709-10. A few years after *Branzburg*, the Supreme Court found that police lawfully searched the offices of a newspaper for evidence of crimes about which the paper had reported. *See Zurcher v. The Stanford Daily*, 436 U.S. 547 (1978). The Court reiterated its statement in *Branzburg* that it found without merit the concern that "confidential sources will disappear and that the press will suppress news because of fears" about law enforcement access to news material. *Id.* at 566. In a concurrence, Justice Powell noted that his concurrence in *Branzburg* "does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment." Justice Powell explained that his concurrence in *Branzburg* should be read to mean that "under the warrant requirement of the Fourth Amendment, the magistrate should consider the values of a free press as well as the societal interest in enforcing criminal laws." *Id.* at 570.

[45] As some courts have noted, the "judicial history of the First Amendment journalist privilege is not notable for its clarity." *See, e.g., Frederico v. Lincoln Military Housing*, 2014 WL 3962823 (E.D. Va. August 13, 2014) (citations and quotations omitted).

felony investigations . . . *Branzburg v. Hayes* is dispositive on [this] point."[46] The court found that the journalists and news media had no First Amendment right to shield their sources from law enforcement investigations conducted in good faith:

> Thus, the Government's good faith inspection of the defendant telephone companies' toll call records does not infringe on plaintiffs' First Amendment rights, because that Amendment guarantees no freedom from such investigation . . . The First Amendment does not guarantee journalists the right to preserve the secrecy of their sources in the face of Good faith criminal investigations. Moreover, government inspection of third-party records, while it may inhibit plaintiffs' news-gathering activity, does not impermissibly abridge such activity. Hence, journalists in this context have no 'First Amendment' interest in third-party records which disclose the identity of a secret source. . . ."[47]

In *New York Times v. Gonzalez*, 459 F.3d 160 (2d Cir. 2006), *The New York Times* sought a declaratory judgment that the government could not obtain telephone records of its reporters from third-party service providers because such records were protected by the First Amendment and a common law privilege. The case arose as a result of the government's attempt to determine the source of an authorized disclosure of information to the news media about the government's plan to investigate several corporate entities for allegedly funding terrorist organizations. The court held that, "no First Amendment protection is available to the *Times* on these facts in light of the Supreme Court's decision in *Branzburg*," and found that "we need not decide whether a common law privilege exists because any such privilege would be overcome as a matter of law on the present facts."[48] The court found that as the government had made "a clear showing of a compelling government interest in the investigation, a clear showing of relevant and unique information in the reporters' knowledge, and a clear showing of need," it had overcome any qualified reporter's privilege that may have applied.[49]

In *In re Grand Jury Subpoena*, 438 F.3d 1141 (D.C. Cir. 2006), a special prosecutor was attempting to determine who had disclosed without authorization to journalists the identity of a Central Intelligence Agency agent. The special prosecutor had obtained grand jury subpoenas seeking information from several journalists and news organizations to help identify the source of the unauthorized disclosure. The court rejected the reporters' contention that they had a First Amendment right to refuse to provide evidence regarding confidential sources to a grand jury, and found that even assuming the existence of a common law testimonial reporters' privilege, that privilege was overcome under the facts presented in that matter, in which the special prosecutor was conducting a criminal investigation into a serious leak of classified material.

In *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013), the government was prosecuting a former Central Intelligence Agency agent for unlawfully disclosing classified

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46 593 F.2d at 1050.

47 *Id.* at 1053.

48 459 F.3d at 163.

49 *Id.* at 171.

material to a *New York Times* reporter. The government issued a trial subpoena to the reporter to obtain his testimony about his sources. The reporter moved to quash the subpoena asserting both First Amendment protection and a common law reporter's privilege. The court denied the motion to quash, stating that, "There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify . . . in criminal proceedings about criminal conduct the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source."[50] Similarly, the court "decline[d]" to "recognize a qualified, federal common-law reporter's privilege protecting confidential sources."[51] The court stated that even if it were to recognize a qualified reporter's privilege, it would, under the facts of that case, reject the assertion of the privilege because the information sought by the government was relevant, could not be obtained by alternative means, and the government had a compelling need for the information.

Federal courts have recognized that in criminal investigations into or prosecutions of the unauthorized disclosure of classified material to members of the news media, the best, and perhaps only, sources for obtaining evidence are the leaker or member of the news media to whom the information was given. *See, e.g., Gonzalez*, 459 F.3d at 171 (there may not be a "reasonably available substitute" for evidence in possession of the news media in a criminal leak investigation); *In re Grand Jury Subpoena*, 438 F.3d at 1174-75 ("the great majority of leaks will likely be unprovable without evidence from either the leaker or leakee.") (Tatel, J., concurring).

III. ANALYSIS

OPR analyzed whether Department attorneys complied with each requirement of 28 C.F.R. Section 50.10 (as that Section existed in February 2013) when it authorized the issuance of 30 subpoenas for telephone toll records thought to be associated with (b)(5), (b)(6), (b)(7)(C) [redacted] OPR concludes that the Department attorneys complied with the provisions of Section 50.10 effective in February 2013 and did not engage in professional misconduct or exercise poor judgment.

A. Criminal Investigators Exhausted All Reasonable Alternative Investigative Steps Prior to Subpoenaing The Associated Press Telephone Toll Records

Pursuant to Section 50.10(b) and (g)(1), the Department must take "all reasonable alternative investigative steps" prior to subpoenaing telephone toll records of a member of the news media.

(b) (5) [redacted]

[50] 724 F.3d at 492.

[51] *Id.* at 499.

(b) (5)

[redacted]

(b)(5) (b)(6) (b)(7)(C)

[redacted]

(b) (5)

[redacted]

Section 50.10, however, did not require that all alternative investigative measures be exhausted prior to issuing subpoenas for news media telephone toll records. Rather, Section 50.10 required the Department to exhaust all "reasonable" alternative measures. Before

(b)(5) (b)(6) (b)(7)(C)

[redacted]

In reaching this conclusion, OPR is particularly mindful of both the seriousness of the leak in this matter and the daunting task of investigating a leak under the circumstances presented here. As noted above, federal courts have recognized that in criminal leak

investigations, there may not exist any reasonable alternative sources of evidence other than the leaker and the person who received the leaked material. *See, e.g., Gonzalez*, 459 F.3d at 171 (there may not be a "reasonably available substitute" for evidence in possession of the news media in a criminal leak investigation); *In Re Grand Jury Subpoena*, 438 F.3d at 1174-75 ("the great majority of leaks will likely be unprovable without evidence from either the leaker or leakee.") (Tatel, J., concurring). Having pursued all reasonable investigative alternatives, Department attorneys reasonably determined that it was appropriate to subpoena The Associated Press telephone toll records in their attempt to further investigate a serious and damaging leak with significant national security implications.

B. Criminal Investigators Reasonably Believed that a Crime Had Been Committed

Pursuant to Section 50.10, when requesting telephone toll records from the news media, "[t]here should be reasonable ground to believe that a crime has been committed. . . ." 28 C.F.R. § 50.10(g)(1). Those interviewed by OPR uniformly characterized the leak of classified material to the news media about the Yemen bomb plot as among the most serious threats to national security that they had ever encountered. A full description of the damage caused by the leak would necessarily include classified material, and is therefore not set forth in this unclassified report. Although The Associated Press articles contained less sensitive classified material than the articles later published by other news media organizations, it is clear that The Associated Press articles about the Yemen bomb plot contained classified material the unauthorized dissemination of which was a criminal act. Sachtleben's guilty plea, in which he admitted violating 18 U.S.C. § 793(d), and the factual basis for that plea, strongly support the conclusion that investigators had reasonable grounds to believe a crime had been committed when they sought The Associated Press telephone toll records.

C. Department Officials Reasonably Concluded That the Subpoenas For The Associated Press Telephone Toll Records Were Directed at Relevant Information Regarding a Limited Subject Matter That was Essential to a Successful Investigation of a Crime

Pursuant to Section 50.10, in order for the Department to issue subpoenas for news media telephone toll records, "[t]here should be reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime." In addition, the subpoenas must be directed at "relevant information regarding a limited subject matter. . . ." 28 C.F.R. § 50.10(g)(1).

1. The Subpoenas Sought Information Regarding a Limited Subject Matter That Was Essential to a Successful Investigation of a Crime

As discussed above, there was a basis for the Department to reasonably conclude that criminal investigators had pursued all reasonable alternative investigative measures prior to seeking The Associated Press telephone toll records. One investigative step that had not yet been

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5), (b)(6), (b)(7)(C)

was consistent with the requirements of Section 50(g)(1).

2. All of the Subpoenas Sought Relevant Information, Although Some Did Not Yield Relevant Information

If investigators looking into the Yemen bomb plot leak had a good faith evidentiary basis to conclude that telephone toll records might produce investigative leads, a subpoena for such records would not violate Section 50.10 even if the subpoena returns failed to produce relevant evidence essential to a successful investigation of the crime. (b)(5) (b)(6) (b)(7)(C)

[52]

(b)(5) (b)(6) (b)(7)(C)

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[54] (b)(5) (b)(6) (b)(7)(C)

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(b)(5) (b)(6) (b)(7)(C)

[54] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[55] (b)(5) (b)(6) (b)(7)(C)

[56] (b)(5) (b)(6) (b)(7)(C)

D. OPR Found Insufficient Evidence to Conclude by Preponderant Evidence That the Subpoenas were Not Drawn as Narrowly as Possible

Pursuant to Section 50.10, subpoenas seeking news media telephone toll records must be "as narrowly drawn as possible." 28 C.F.R. § 50.10(g)(1). OPR analyzed whether the subpoenas for telephone toll records believed to be associated with (b)(5) (b)(6) (b)(7)(C) "as narrowly drawn as possible" in relation to: (1) the number of news media organizations whose telephone toll records were subpoenaed; (2) the number of reporters and editors whose telephone toll records were subpoenaed; (3) the total number of telephone numbers for which telephone toll records were obtained; and (4) the type of telephone numbers subpoenaed (*i.e.*, the general telephone numbers for The Associated Press offices in New York City, Washington, D.C., and Hartford, Connecticut).

(b) (5)

(b) (5)

[57] (b) (5)

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[55] (b)(5) (b)(6) (b)(7)(C)

[56] (b)(5) (b)(6) (b)(7)(C)

[57] (b)(5)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[58] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[59] (b)(5) (b)(6) (b)(7)(C)

[58] (b)(5) (b)(6) (b)(7)(C)

[59] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[60] (b)(5) (b)(6) (b)(7)(C)

OPR found insufficient evidence to conclude by preponderant evidence that the USAO's request to subpoena the telephone toll records of 30 telephone numbers (b)(5) (b)(6) (b)(7)(C) was not drawn as narrowly as possible. The decision not to subpoena the telephone toll records of employees of *The New York Times*, *The Washington Post*, and ABC News supports a finding that those who sought the subpoenas for telephone toll records for The Associated Press reporters and editors significantly and deliberately narrowed their request for subpoenas for telephone toll records of the news media. (b)(5) (b)(6) (b)(7)(C)

OPR could not establish that investigators had a way to determine to which reporter or editor the leaker had provided classified information; it could have been to any (b)(5) (b)(6) (b)(7)(C) (b)(5), (b)(6), (b)(7)(C).

OPR finds it was not unreasonable for investigators to subpoena the telephone toll records of 30 distinct telephone lines (b)(5) (b)(6) (b)(7)(C). OPR could not find by preponderant evidence that it was unreasonable for investigators to subpoena the telephone toll records for the trunk lines of major Associated Press offices, (b)(5) (b)(6) (b)(7)(C)

[61].

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[60] (b)(5) (b)(6) (b)(7)(C)

[61] (b)(5) (b)(6) (b)(7)(C)

Finally, and perhaps most importantly, the subpoenas requested toll records for – and not the contents of – telephonic communications.[62] Investigators never received through the subpoenas any content for the calls made to or from the telephone numbers; they received only non-content information about telephone calls made to and from the subpoenaed telephone numbers.

The evidence adduced by OPR does not support a finding that the investigators' intent was to embark on a fishing expedition by conducting an overly broad or unfocused search of The Associated Press telephone records; nor did OPR uncover any evidence that they attempted to do so. Given the circumstances surrounding this matter, the information known to investigators concerning the leak, and the severe damage to the nation's security as a result of the unauthorized dissemination of classified material about the Yemen bomb plot, OPR finds that there is insufficient evidence to conclude that the request to subpoena the telephone toll records for 30 telephone numbers believed to be associated with (b)(5), (b)(6), (b)(7)(C) [redacted] was not reasonably narrow.

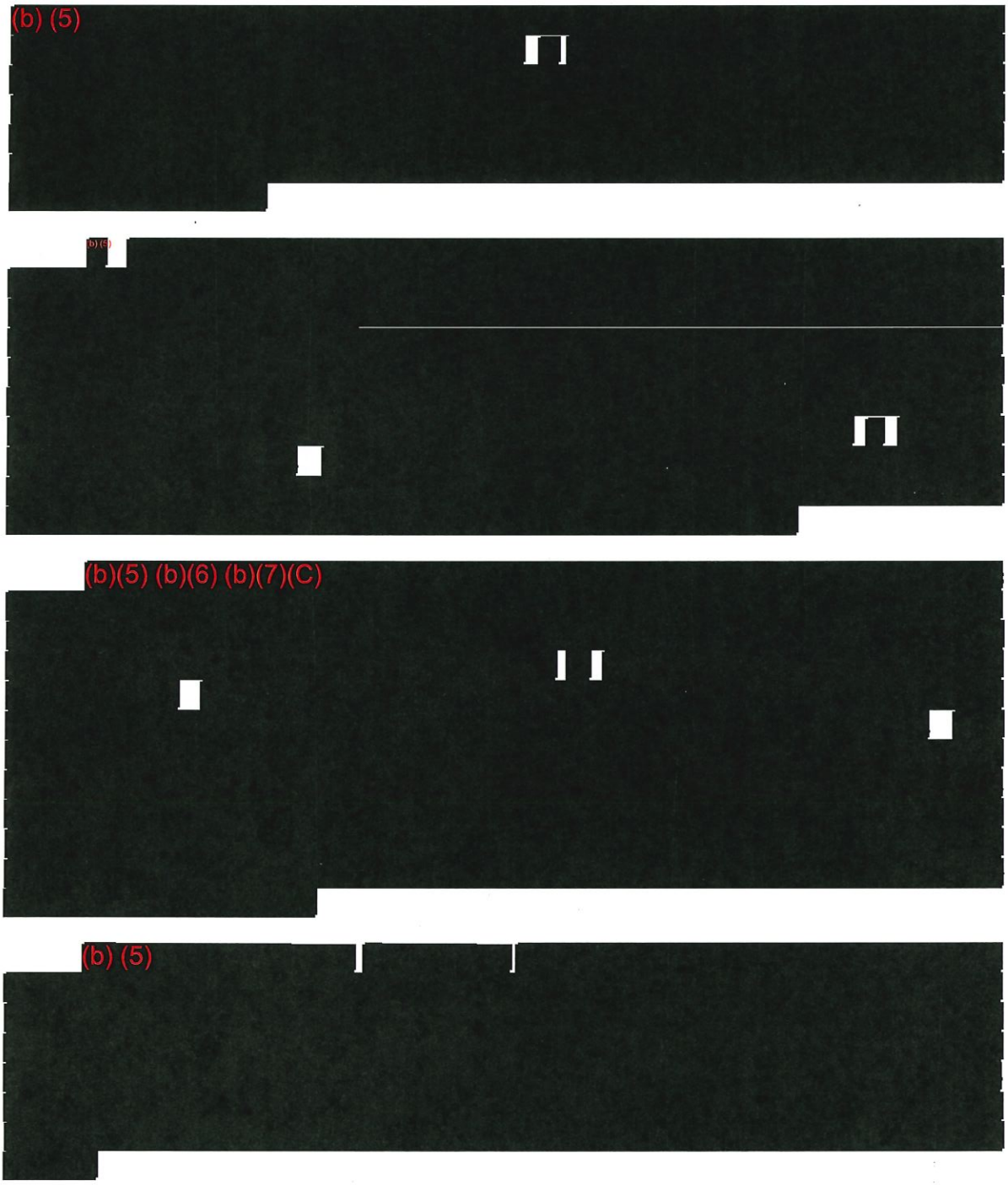
E. The Subpoenas Covered a Reasonably Limited Time Period

Section 50.10 required that subpoenas for telephone toll records "should cover a reasonably limited time period." 28 C.F.R. § 50.10(g)(1). The 30 subpoenas for telephone toll records (b)(5), (b)(6), (b)(7)(C) [redacted] covered a 40-day time period from April 1, 2012 to May 10, 2012.[63] (b)(5) (b)(6) (b)(7)(C) [redacted] (b) (5) [redacted]

(b)(5) (b)(6) (b)(7)(C) [redacted]

62 (b)(5) (b)(6) (b)(7)(C) [redacted]

63 In its May 10, 2013 letter to The Associated Press, notifying it that the Department had subpoenaed telephone toll records for 21 telephone numbers ([redacted] reporters and editors and The Associated Press's Hartford, Connecticut office trunk line that had no information returned), the USAO stated that it had obtained telephone toll records "from April and May" 2012. This description naturally led The Associated Press and other news media to believe that the Department had obtained telephone toll records for 60 days, when it actually obtained such records for only 40 days. (b) (5) [redacted]



OPR finds that the USAO had a reasonable basis for determining the start and end dates for its subpoena requests, a range of time covering 40 days. OPR therefore concludes that the request was for a "reasonably limited time period," consistent with the requirement of Section 50.10(g)(1).

F. Department Officials Had a Reasonable Basis For Not Concluding that Providing Advance Notice to The Associated Press Would Not Pose a Substantial Threat to the Integrity of the Criminal Investigation

Section 50.10 provided that "[n]egotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. Such determination shall be reviewed by the Attorney General. . . ." 28 C.F.R. § 50.10(d).

The question of whether to provide advance notice to The Associated Press was perhaps the most difficult issue officials faced when assessing the USAO's Section 50.10 request to obtain The Associated Press telephone toll records, as discussed more fully below. Numerous media sources had already reported that the Department had initiated a criminal investigation to determine who leaked classified material about the Yemen bomb plot to the news media, including to The Associated Press. (b) (5) [redacted]

1. Public Information About the Criminal Investigation and The Associated Press's Role in Obtaining the Leaked Information

The earliest stories about the Yemen bomb plot were published on May 7 and 8, 2012. The Associated Press was the first news organization to publish such information; those stories were followed close in time by stories published by other news media organizations. Many of the stories published by The Associated Press, and stories published by other news media, stated that The Associated Press first reported the story and/or that The Associated Press withheld publication of the story for several days at the government's request.[64] The criminal investigative team was aware of the published articles and attached or referenced them in the June 2012 document requests they sent to various U.S. government agencies seeking information about employee contacts with the reporters and editors associated with those articles.

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[64] *See, e.g.*, The Associated Press: *US: CIA thwarts new al-Qaida underwear bomb plot*, May 7, 2012 ("The AP learned about the thwarted plot last week but agreed to White House and CIA requests not to publish it immediately . . . Once officials said those concerns were allayed, the AP decided to disclose the plot . . . ."); The Associated Press: *CIA Thwarts 'Undetectable' al-Qaeda Bomb Plot*, May 7, 2012 (contains same language quoted from prior article); Washingtonpost.com: *Al-Qaeda Airline Bomb Plot Disrupted, U.S. Says*, May 7, 2012 ("the disclosure of the plot, first reported by the Associated Press"); NYT.com: *Double Agent Disrupted Bombing Plot, U.S. Says*, May 8, 2012 ("the disclosure of the Qaeda plot, first reported Monday by the Associated Press, which had held the story for several days at the request of the C.I.A.").

The criminal investigation into the Yemen bomb plot leak had been publicly disclosed just after the leak occurred. On May 16, 2012, then-FBI Director Mueller announced that the FBI had initiated a criminal investigation of the leak of classified material related to the Yemen bomb plot. Director Mueller's announcement was widely reported in the media, and some of those stories noted that The Associated Press withheld publication of the story for several days.[65] Director Mueller's announcement was made before the USAO was assigned to lead the investigation.

On June 12, 2012, Attorney General Holder issued a public statement that he had asked U.S. Attorney Machen and the U.S. Attorney for the Maryland USAO to "lead criminal investigations into recent instances of possible unauthorized disclosures of classified information." The Attorney General's statement was reported in the media, and did not identify any particular news organization such as The Associated Press.[66]

On January 26, 2013, while the Breuer and Machen memoranda were pending in the ODAG, but before Deputy Attorney General Cole approved the request for subpoenas for The Associated Press telephone toll records, *The Washington Post* published an article specifically stating that The Associated Press was the focus of the criminal investigation into the leak of information about the Yemen bomb plot.[67] The criminal investigative team was aware of the January 26, 2013 story in *The Washington Post.* (b) (5)

[redacted][68]

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65 *See, e.g.*, Abcnews.com: *FBI Investigates Media Leaks in Yemen Bomb Plot*, May 16, 2012; CBSnews.com: *FBI Director Mueller Confirms Bureau Probing Lead of Foiled Qaeda Underwear Bomb Plot*, May 16, 2012 ("the Associated Press and other news organizations revealed details of the bomb plot."); NYT.com: *FBI Chief Says Leak on Queda Plot is Being Investigated*, May 16, 2012 ("[T]he A.P. said it learned of the bomb plot two weeks ago but agreed not to publish an article about it in response to pleas from the White House and the Central Intelligence Agency . . . After the operation was completed, the A.P. published an article . . . .").

66 *See, e.g.*, AP.org: *Holder appoints 2 US attorneys to lead leak probes*, June 9, 2012.

67 *See* The Washington Post: *FBI is Increasing Pressure on Suspects in Stuxnet Inquiry*, January 26, 2013 ("Holder named [Machen] . . . to head a criminal investigation into leaks concerning the disruption of a bomb plot by al-Qaeda in the Arabian Peninsula . . . Machen is examining a leak to the Associated Press [of information about the bomb plot]."). The article also contained information about the USAO for the District of Maryland's criminal investigation into an unauthorized disclosure of classified material unrelated to the Yemen bomb plot leak.

68 (b)(5) (b)(6) (b)(7)(C)

(b) (5)

[69] (b) (5)

[70] (b) (5)

(b) (5)

(b) (5)

[71]

(b) (5)

(b) (5)

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[69] (b)(5) (b)(6) (b)(7)(C)

[70] (b)(5) (b)(6) (b)(7)(C)

[71] (b)(5) (b)(6) (b)(7)(C)

2. The Basis For the Determination that Advance Notice to The Associated Press Threatened the Integrity of the Investigation

(b) (5)

(b) (5)

(b)(5) (b)(6) (b)(7)(C)

[73] (b)(5) (b)(6) (b)(7)(C)

[74]

Witnesses told OPR that there were several reasons why providing The Associated Press with advance notice of the subpoenas would have substantially threatened the integrity of the investigation.

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[72] (b)(5) (b)(6) (b)(7)(C) These witnesses also noted that the newly revised Section 50.10 reversed that presumption. *See* 28 C.F.R. § 50.10(c)(5)(iii)(A) ("The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations 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.").

[73] (b)(5) (b)(6) (b)(7)(C)

[74] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[75] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[76] (b)(5) (b)(6) (b)(7)(C)

[75] (b)(5) (b)(6) (b)(7)(C)

[76] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[77] (b)(5) (b)(6) (b)(7)(C)

[78]

(b)(5) (b)(6) (b)(7)(C)

[79] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[80] (b)(5) (b)(

[77] (b)(5) (b)(6) (b)(7)(C)

[78] (b)(5) (b)(6) (b)(7)(C)

[79] (b)(5) (b)(6) (b)(7)(C), (b) (7)(E)

[80] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

Based upon its investigation, OPR finds that the Department could reasonably conclude that it was unable to find that negotiations would not pose a substantial threat to the integrity of the leak investigation.[81] Accordingly, the Department acted consistent with the requirements of Section 50.10 and was free to forego negotiation and decline to provide The Associated Press with advance notice of the telephone toll record subpoenas.

G. The Department Was Not Required to Immediately Notify The Associated Press About the Subpoenas (b)(5) (b)(6) (b)(7)(C)

1. The Criminal Division Had a Reasonable Basis For Delaying Notice to The Associated Press for an Additional 45 Days

Section 50.10 provided that "[w]hen the telephone toll records of a member of the news media have been subpoenaed without . . . notice . . . notification shall occur within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days." 28 C.F.R. § 50.10(g)(3). Notably, Section 50.10(g)(3) contained no standard by which the responsible Assistant Attorney General was to assess whether to delay notice an additional 45 days. Former Acting Assistant Attorney General Raman told OPR (b) (5)

[82]

Deputy Attorney General Cole authorized issuance of the subpoenas on February 6, 2013, and the subpoenas were issued almost immediately thereafter. (b) (5)

[81] (b)(5) (b)(6) (b)(7)(C)

[82] (b)(5) (b)(6) (b)(7)(C)

On March 22, 2013, the PSEU Deputy Chief sent a two-page memorandum to the Deputy Assistant Attorney General in which (b) (5)

(b) (5)

Raman approved the request that same day, March 22, 2013.[83]

(b)(5) (b)(6) (b)(7)(C)

Therefore, for the same reasons that OPR finds that the decision not to provide The Associated Press with advance notice of the subpoenas was consistent with Section 50.10, OPR finds that Raman's decision to delay notification an additional 45 days was also consistent with Section 50.10: because Raman reasonably believed that providing advance notification continued to pose a substantial threat to the investigation.

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[83] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[84] (b)(5) (b)(6) (b)(7)(C)

[85] (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

[86] (b)(5) (b)(6) (b)(7)(C)

[87]

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[84] (b)(5) (b)(6) (b)(7)(C)

[85] (b)(5) (b)(6) (b)(7)(C)

[86] The importance of the process by which information is obtained from news media organizations is reflected in the preamble to Section 50.10, which stated that one purpose of the regulation is "to provide protection for the news media from forms of compulsory process . . . which might impair the news gathering function."

[87] (b)(5) (b)(6) (b)(7)(C)

2. Providing Notice About the Subpoenas to The Associated Press Continued to Pose a Clear and Substantial Threat to the Investigation (b)(5) (b)(6) (b)(7)(C)

Section 50.10 provided that "[w]hen the telephone toll records of a member of the news media have been subpoenaed without . . . notice . . . notification of the subpoena shall be given the member of the news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation." 28 C.F.R. § 50.10(g)(3). As set forth in detail below, OPR concludes that notification to The Associated Press continued to pose a clear and substantial threat to the integrity of the investigation even (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

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(b)(5) (b)(6) (b)(7)(C)

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(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

H. Following Attorney General Holder's Recusal, Deputy Attorney General Cole Became the Acting Attorney General With Authority to Approve the USAO's Section 50.10 Request

Section 50.10 provided that "[n]o subpoena may be issued . . . for the telephone toll records of any member of the news media without the express authorization of the Attorney General." 28 C.F.R. § 50.10(e). In this matter, the Machen and Breuer memoranda were addressed to Deputy Attorney General Cole, which raises the issue of whether the subpoenas to The Associated Press violated Section 50.10(e).

According to multiple witnesses, Attorney General Holder had access to the classified material related to the Yemen bomb plot prior to the unauthorized publication of some of that classified material. Moreover, Attorney General Holder told criminal investigators that he communicated with a reporter shortly before the first publication of information about the Yemen bomb plot. Because he was within the universe of persons possibly responsible for the leak, Attorney General Holder recused himself from the criminal investigation into the leak of classified material relating to the Yemen bomb plot.

Deputy Attorney General Cole also had access to the classified material related to the Yemen bomb plot prior to the unauthorized publication of some of that classified material. According to Deputy Attorney General Cole, however, he did not communicate with any member of the news media immediately prior to the unauthorized publication of classified material related to the Yemen bomb plot, and therefore his recusal was not necessary.[88] Deputy Attorney General Cole informed OPR that upon the Attorney General's recusal, he (Deputy Attorney General Cole) had authority to consider and approve Section 50.10 requests pursuant to 28 U.S.C. § 508, 5 U.S.C. § 3345(a)(1), and 28 C.F.R. § 0.15.[89]

28 U.S.C. § 508(a) states that if the Office of the Attorney General is vacant, or the Attorney General is absent or has a disability, the Deputy Attorney General may exercise all of the duties of the Attorney General. While it is not entirely clear whether the Attorney General's recusal causes a "vacancy," an "absence," or a "disability," the intent of the law is clear: the Deputy Attorney General stands in the shoes of the Attorney General when the Attorney General cannot perform the duties of his or her office. In a June 24, 1977 memorandum, the Department's Office of Legal Counsel (OLC) opined that "[u]nder § 50.10 as presently written . . . either the Attorney General or another officer exercising the Attorney General's power as Acting Attorney General must, under § 50.10, exercise the power." In an August 17, 2010 e-mail to the ODAG, OLC reiterated the conclusion set forth in its

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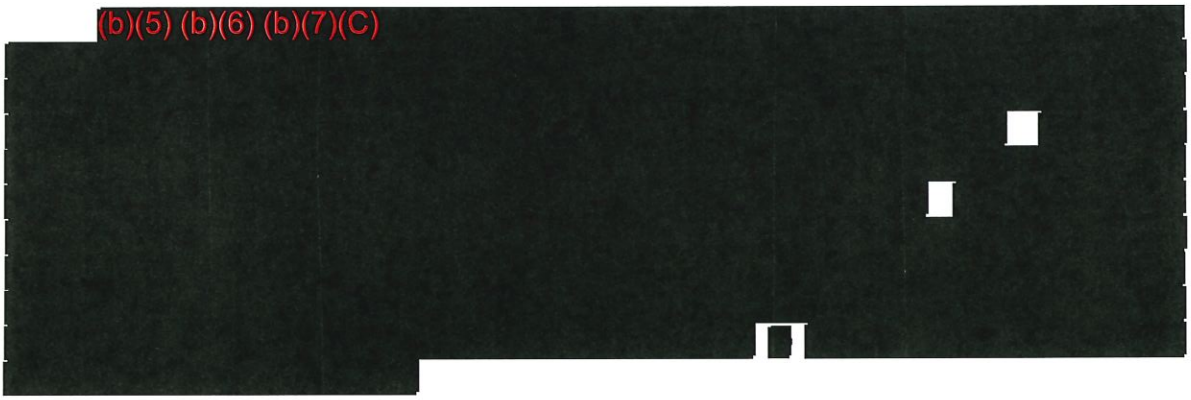
[88] (b)(5) (b)(6) (b)(7)(C) [redacted]

[89] 5 U.S.C. § 3345(a)(1) provides: "If an officer of an Executive agency [subject to Presidential appointment and Senate approval] . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office – the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity. . . ." 28 C.F.R. § 0.15 enumerates the powers and authority of the Deputy Attorney General. Section 0.15(a) provides: "The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally."

June 24, 1977 opinion, and added that "the plain text of [Section 50.10] should not preclude someone from acting as [Attorney General] . . . even if only for purposes of a particular case (for example, because of a recusal)."

Based upon 28 U.S.C. § 508, and OLC's interpretation of it, OPR concludes that upon Attorney General Holder's recusal, Deputy Attorney General Cole became the Acting Attorney General with respect to the Yemen bomb plot leak investigation. Deputy Attorney General Cole therefore had the authority under Section 50.10 to act upon the USAO's request to subpoena The Associated Press telephone toll records.



I. The Department Did Not Violate the First Amendment Rights of The Associated Press or its Reporters and Editors

The Associated Press asserted that the Department's subpoenas for The Associated Press telephone toll records constituted "serious interference with AP's constitutional rights to gather and report the news."[90] As noted in Section II(C), above, federal courts have held that reporters have neither an absolute First Amendment right nor an absolute common law privilege to shield from a good faith criminal investigation or prosecution relevant information in their possession or in the possession of third parties, such as telephone service providers. Thus, The Associated Press and its reporters and editors whose telephone toll records were subpoenaed had no absolute right to shield that information from criminal investigators who sought to determine the source of the Yemen bomb plot leak.

Even assuming that The Associated Press had a qualified common law privilege allowing it to protect from disclosure its telephone toll record information, that qualified privilege would not be applicable under the facts at issue here. In this matter, the subpoenas for the telephone toll records sought information that was highly relevant to the criminal investigation: who with access to the leaked classified material was communicating with The Associated Press immediately prior to The Associated Press's publication of that material. As discussed above, the Department reasonably concluded that it had exhausted all other reasonable means of obtaining the evidence leading to the identification of the leaker prior to issuing the subpoenas. OPR found no evidence that the criminal investigation was conducted for illegitimate purposes or in bad faith. Finally, the government had a compelling interest in obtaining the information it

[90] The Associated Press May 13, 2013, letter to Attorney General Holder at 2.

sought, as the leak of classified information about the Yemen bomb plot was highly damaging to the country's national security. Accordingly, the subpoenas did not violate the First Amendment rights of The Associated Press or of its reporters and editors.

CONCLUSION

Beginning on May 7, 2012, The Associated Press reported in several articles that United States intelligence agencies had interrupted a terrorist plot by members of al-Qaeda in Yemen to use an improvised explosive device (IED) to destroy a United States-bound aircraft. Reports further recounted that the Federal Bureau of Investigation (FBI) had obtained and was examining the IED that was to have been used in the terrorist attack. The Associated Press publications contained classified material, the dissemination of which had not been authorized by persons with authority to grant such dissemination. In May 2012, the FBI and the United States Attorney's Office for the District of Columbia (USAO) commenced an extensive criminal investigation to determine the source of the leak of classified material relating to the Yemen bomb plot. (b) (5) [redacted]

In February 2013, Deputy Attorney General James Cole, in his capacity as Acting Attorney General for purposes of this matter, approved a request by the USAO and the Department's Criminal Division to subpoena telephone toll records pursuant to 28 C.F.R. Section 50.10 associated with (b)(5), (b)(6), (b)(7)(C) [redacted] most involved in the initial news gathering and reporting relating to the Yemen bomb plot. The USAO thereafter subpoenaed the telephone toll records for the period from April 1, 2012 through May 10, 2012 for 30 telephone numbers (b) (5) [redacted]

On May 10, 2013, the USAO notified The Associated Press that pursuant to Section 50.10, it had subpoenaed The Associated Press telephone toll records from April and May 2012. Shortly thereafter, The Associated Press and other news media organizations alleged that the Department had violated the requirements of Section 50.10, and interfered with The Associated Press's First Amendment rights, when it issued subpoenas for The Associated Press telephone toll records. In response to those allegations, and at the direction of President Obama, the Department carefully reviewed Section 50.10 and modified its procedures for obtaining subpoenas for news media telephone toll records. According to Department officials, these changes are intended to better balance the Department's compelling need to investigate serious federal crimes with the significant First Amendment rights of the news media and the public.

OPR thoroughly investigated the allegations raised by The Associated Press and other news media organizations and reached the following conclusions.

(1) The Associated Press published material that was classified, the dissemination of which was not authorized and thus unlawful. Therefore, prior to issuing the subpoenas, the Department had "reasonable ground to believe that a crime had been committed." Section 50.10(g)(1).

(2) Because extensive investigative measures had failed to produce sufficient leads to uncover the identity of the person or persons responsible for leaking the classified information, and it was possible that the leaker had communicated with The Associated Press by telephone, investigators had "reasonable ground to believe" that obtaining the telephone toll records would be "essential to the successful investigation of [the] crime." *Id.*

(3) Before they requested authority to subpoena The Associated Press telephone toll (b) (5) [redacted] The Associated Press telephone toll records. These investigative measures failed to produce sufficient investigative leads concerning the source of the leak of the classified information to several news media organizations. The Deputy Attorney General, in his capacity as Acting Attorney General, was provided sufficient information to allow him to reasonably conclude that the Department had taken "all reasonable alternative investigative steps" before it subpoenaed The Associated Press telephone toll records. Section 50.10(b) and (g)(1).

(4) Given the seriousness of the criminal leak of the classified material at issue and the likelihood that no other investigative measure was likely to identify the source of the leak, OPR found insufficient evidence to conclude that the request to obtain 30 subpoenas for telephone toll records (b) (5) [redacted], was not as "narrowly drawn as possible." Section 50.10(g)(1).

(5) Although the Department subpoenaed telephone toll records for several telephone numbers that subsequently were discovered not in fact to relate to an Associated Press reporter or editor, OPR found that at the time when the subpoenas were sought, investigators had a factual basis for believing that those telephone numbers did relate to Associated Press personnel.

(6) The 30 subpoenas sought telephone toll records for the period from April 1, 2012 through May 10, 2012. A full explanation for this date range would necessarily involve a discussion of classified material, and is therefore not provided in OPR's unclassified report. In sum, the date range began when communications concerning the general subject matter of the investigation could have begun between The Associated Press and the source of the leak, and ended shortly after the articles containing the classified material were first published. Obtaining telephone toll records for 40 days therefore covered "a reasonably limited time period." Section 50.10(g)(1).

(7) The Department had a reasonable basis for: (a) not concluding that providing advance notification to The Associated Press concerning the issuance of the subpoenas would not pose "a substantial threat to the integrity of the investigation"; and (b) extending by 45 days the period during which The Associated Press would not be notified about the subpoenas. Section 50.10(d) and (g)(3).

(8) Upon Attorney General Holder's recusal, Deputy Attorney General Cole, in his capacity as the Acting Attorney General, had the authority to approve requests for subpoenas to obtain The Associated Press telephone toll records.

(9) Federal courts have never recognized an absolute right for news media organizations to shield from disclosure information relevant to a criminal investigation, when investigators have a legitimate need for such information. In this matter, the investigation concerned an extremely serious breach of national security, and investigators had exhausted all reasonable alternative means to identify the leaker prior to obtaining The Associated Press telephone toll records. OPR therefore concludes that when they obtained The Associated Press telephone toll records, Department attorneys did not violate the First Amendment rights of The Associated Press or the seven reporters and editors whose records were subpoenaed.

Based on an exhaustive review of all information adduced during its investigation, OPR concludes that the attorneys involved in the decision to subpoena the telephone toll records of The Associated Press did not engage in professional misconduct or exercise poor judgment.

RECOMMENDATIONS

OPR sets forth below several recommendations for the Department's consideration that are intended to improve the process by which the Department obtains records from news media organizations and to ensure that the Attorney General and the Criminal Division are provided with all relevant information before they make decisions regarding requests under Section 50.10 to issue subpoenas.

(b) (5)

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(b) (5)

(b) (5)

(b) (5)

EXHIBIT A

(1) The closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) *In camera* inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege; or

(3) Grand jury proceedings or proceedings ancillary thereto; or

(4) Conferences traditionally held at the bench or in chambers during the course of an open proceeding; or

(5) The closure of judicial proceedings pursuant to 18 U.S.C. 3509 (d) and (e) for the protection of child victims or child witnesses.

(f) Because of the vital public interest in open judicial proceedings, the records of any proceeding closed pursuant to this section, and still sealed 60 days after termination of the proceeding, shall be reviewed to determine if the reasons for closure are still applicable. If they are not, an appropriate motion will be made to have the records unsealed. If the reasons for closure are still applicable after 60 days, this review is to be repeated every 60 days until such time as the records are unsealed. Compliance with this section will be monitored by the Criminal Division.

(g) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 914–80, 45 FR 69214, Oct. 20, 1980, as amended by Order No. 1031–83, 48 FR 49509, Oct. 26, 1983; Order No. 1115–85, 50 FR 51677, Dec. 19, 1985; Order No. 1507–91, 56 FR 32327, July 16, 1991]

§ 50.10 Policy with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media.

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department in all cases:

(a) In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, and similarly all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media.

(c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

(d) Negotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. Such determination shall be reviewed by the

Attorney General when considering a subpoena authorized under paragraph (e) of this section.

(e) No subpoena may be issued to any member of the news media or for the telephone toll records of any member of the news media without the express authorization of the Attorney General: *Provided,* That, if a member of the news media with whom negotiations are conducted under paragraph (c) of this section expressly agrees to provide the material sought, and if that material has already been published or broadcast, the United States Attorney or the responsible Assistant Attorney General, after having been personally satisfied that the requirements of this section have been met, may authorize issuance of the subpoena and shall thereafter submit to the Office of Public Affairs a report detailing the circumstances surrounding the issuance of the subpoena.

(f) In requesting the Attorney General's authorization for a subpoena to a member of the news media, the following principles will apply:

(1) In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(2) In civil cases there should be reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

(g) In requesting the Attorney General's authorization for a subpoena for the telephone toll records of members of the news media, the following principles will apply:

(1) There should be reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime. The subpoena should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period. In addition, prior to seeking the Attorney General's authorization, the government should have pursued all reasonable alternative investigation steps as required by paragraph (b) of this section.

(2) When there have been negotiations with a member of the news media whose telephone toll records are to be subpoenaed, the member shall be given reasonable and timely notice of the determination of the Attorney General to authorize the subpoena and that the government intends to issue it.

(3) When the telephone toll records of a member of the news media have been subpoenaed without the notice provided for in paragraph (e)(2) of this section, notification of the subpoena shall be given the member of the news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation. In any event, such notification shall occur within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days.

(4) Any information obtained as a result of a subpoena issued for telephone toll records shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes.

(h) No member of the Department shall subject a member of the news media to questioning as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General: *Provided, however,* That where exigent circumstances preclude prior approval, the requirements of paragraph (l) of this section shall be observed.

(i) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media.

(j) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General.

(k) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the Attorney General. A copy of the request shall be sent to the Director of Public Affairs.

(l) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Affairs.

(m) In light of the intent of this section to protect freedom of the press, news gathering functions, and news media sources, this policy statement does not apply to demands for purely commercial or financial information unrelated to the news gathering function.

(n) Failure to obtain the prior approval of the Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action. The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person.

[Order No. 916–80, 45 FR 76436, Nov. 19, 1980]

§ 50.12 Exchange of FBI identification records.

(a) The Federal Bureau of Investigation, hereinafter referred to as the FBI, is authorized to expend funds for the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by state statute and approved by the Director of the FBI, acting on behalf of the Attorney General, with officials of state and local governments for purposes of employment and licensing, pursuant to section 201 of Public Law 92–544, 86 Stat. 1115. Also, pursuant to 15 U.S.C. 78q, 7 U.S.C. 21 (b)(4)(E), and 42 U.S.C. 2169, respectively, such records can be exchanged with certain segments of the securities industry, with registered futures associations, and with nuclear power plants. The records also may be