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# The Other Side of Leak Investigations: Defending the Press and Reporters

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In the last few decades, the Department of Justice has investigated and pursued an increasing number of criminal cases involving "leaks" of government information. The Obama years witnessed high-profile prosecutions of Edward Snowden, David Petraeus, and others, while the first Trump Administration made identifying and punishing leakers a top priority. And a recent report by the Office of the Inspector General for the Department of Justice confirmed that, during leak investigations, the Department of Justice surveilled journalists from the *New York Times*, the *Washington Post*, and more.

The early days of the new Trump Administration point to more of the same. The new FBI Director, Kash Patel, previously vowed to "come after" journalists and suspected leakers. And though existing Department of Justice policy largely prohibits the FBI and Department of Justice from using compulsory legal processes, like subpoenas and search warrants, against journalists "acting within the scope of newsgathering," the new Attorney General Pam Bondi has proved willing to rescind and modify past Department of Justice policy. 28 C.F.R. §50.10(c). The change in leadership at the Department of Justice and the FBI may therefore yield more aggressive investigations of journalists who receive or publish leaked government information.

For targets of leak investigations, the stakes are immense. As we explain, the Department of Justice has a variety of statutes at its disposal to investigate and potentially prosecute government employees who leak and the journalists who receive leaked information. Yet with skilled counsel, targets of leak investigations can successfully navigate these investigations by following certain best practices and staying ahead of the likely trends in leak investigations that are coming over the next four years.

***Potential Criminal Risks for Targets of Leak Investigations***

A web of criminal laws punishes leaks and, potentially, the journalists who publish them. The most famous example is the Espionage Act of 1917, which (among other things) makes it a crime to improperly access or transmit "information respecting the national defense" with the intent to injure the United States or aid a foreign nation. 18 U.S.C. §793. It also prohibits disclosing or publishing certain classified information "in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States." 18 U.S.C. §798(a).

The Computer Fraud and Abuse Act contains similar prohibitions. It makes it a crime to willfully retain or communicate classified information obtained from a computer without (or exceeding)

authorization if that information "could be used to the injury of the United States, or to the advantage of any foreign nation." 18 U.S.C. §1030(a)(1). More broadly, it criminalizes intentionally accessing a computer without (or exceeding) authorization to obtain "information from any department or agency of the United States." 18 U.S.C. §1030(a)(2)(B).

The government sometimes prosecutes leaks under the federal theft statute, which criminalizes efforts to steal, sell, or convey "any record, voucher, money, or thing of value of the United States or of any department or agency thereof." 18 U.S.C. §641. That prohibition also applies to anyone who "receives" or "retains" the record or thing of value with "intent to convert it to his use or gain" and with knowledge that it had be stolen or converted. 18 U.S.C. §641.

Taken literally, these statutes apply both to the leaker and the journalist who publishes the information. Yet the Department of Justice has traditionally prosecuted only the leaker, not the publisher. The reason has been dubbed the "New York Times problem." The "problem" is that any legal theory used to prosecute a rogue individual who self-publishes stolen government secrets could also be used to prosecute the New York Times for publishing the leak – a consequence the Department of Justice has historically been unwilling to accept.

The prosecution of WikiLeaks founder Julian Assange was a notable exception. The government charged Assange both with conspiring to obtain and leak classified information ***and*** with violating the Espionage Act merely by publishing that information. Ultimately, however, the government dismissed those charges and Assange pleaded guilty to a single count of conspiring to obtain classified documents, leaving the viability of charges for publishing leaked information unresolved.

Yet even though the Department of Justice has traditionally refused to prosecute journalists for publishing leaked information, it has increasingly investigated journalists for doing so, which itself carries risks. For example, between 2017 and 2020, the Department violated its own policies to obtain phone records from journalists at the *New York Times*, the *Washington Post*, and other outlets to identify leakers. Journalists targeted in leak investigations risk being held in contempt for refusing to reveal sources or, as in any criminal investigation, charged as co-conspirators of leakers or with obstructing investigations or misleading investigators.

***Initial Steps Upon Learning of Leak Allegations***

Learning that someone (or their company) has been implicated in a federal criminal investigation can be unsettling. Almost universally, the first step in navigating the investigation is to gather facts and assess potential exposure – criminal, civil, or regulatory.

Upon learning of the allegations, counsel at the news organization should preserve all potentially relevant documents, suspend any auto-delete or document destruction policy, and instruct all employees who may have relevant information to do the same. Counsel should also identify the individuals with the most relevant information and collect documents and corporate records from those individuals. Communications with employees about the allegations should include an "*Upjohn* warning" – a statement that counsel represents the company and that, while communications are privileged, the privilege belongs to the company and not the employee.

Outside counsel might also be engaged to conduct a more thorough internal investigation. That investigation would include review of corporate documents and interviews with company employees and, in some cases, third parties.

With the facts in hand and an assessment of potential risks, the next step involves engaging the government – or deciding not to. Sometimes, opening a dialogue with prosecutors and investigators can lead to closure of the investigation or otherwise mitigate risk, especially when investigators appear to lack all the relevant facts, or the allegations are based on a misunderstanding.

But providing information to the government also carries risks. Where the facts support criminal charges, engaging with the government might do little more than tip a defendant's hand about potential defenses and theories at trial, giving the government an opportunity to shore up its case and plug gaps that defense counsel could otherwise exploit. Companies and individuals, moreover, might weigh these risks differently when balancing them against the potential benefits of engagement.

***Issues Unique to Media Organizations: Privilege and the First Amendment***

Members of news media may be able to assert unique privileges when approached by investigators. Nearly every state plus the District of Columbia has enacted a "shield law" or otherwise recognized a qualified "reporter's privilege." Although the specific contours of these laws vary by jurisdiction, they generally allow a reporter to resist producing documents related to, or answering questions about, their reporting and confidential sources. These laws, however, apply only to proceedings in state court or to investigative demands issued by state enforcement agencies.

Congress, by contrast, has not enacted any shield law, and the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972),rejected the argument that the First Amendment includes a reporter's privilege. Reporters, the Supreme Court ruled, could be compelled to appear before a grand jury and answer questions about the identity of their confidential sources. *Branzburg*'s reasoning turned heavily on the criminal nature of the inquiry and the role of the grand jury in the American justice system. As a result, some lower federal courts have recognized a qualified reporter's privilege in other circumstances – usually civil or regulatory litigation. But *Branzburg* makes it difficult – if not impossible – to assert the privilege in criminal contexts, even where lower federal courts have recognized the privilege in other circumstances.

Indeed, several reporters in recent years have been held in contempt for refusing to identify the names of confidential sources, including *New York Times* reporter Judith Miller in connection with her reporting on Valerie Plame and, more recently, Catherine Herridge in connection with her reporting on a federal investigation into Chinese American scientist Yanping Chen.

The journalists in *Branzburg* faced no allegation of wrongdoing; they were not targets of the grand jury's investigation. When a reporter ***is*** a target of the investigation – or even when the reporter fears that disclosing the identity of a source could implicate them in a crime – the Fifth Amendment's protections against compelled self-incrimination would be implicated. That Fifth Amendment right extends even to the production of documents in response to a subpoena when producing the

documents could be incriminating. Corporations, however, are not protected by the Fifth Amendment, so media companies themselves cannot invoke the Fifth Amendment to resist responding to a grand jury subpoena directed to the corporation, as opposed to an individual reporter.

Although most federal courts do not recognize a reporter's privilege in criminal cases following *Branzburg*, and although Congress has not enacted a federal shield law, the Department of Justice has itself promulgated policy governing investigative activity that touches on members of the news media acting within the scope of news gathering.

As a general matter, the Department's policy prohibits use of compulsory legal process – grand jury subpoenas, search warrants – against members of the news media engaged in news gathering, except in certain circumstances: (1) when necessary to authenticate previously public documents; (2) when the news organization consents to provide the information but only if served with compulsory legal process; and (3) when necessary to prevent "an imminent or concrete risk of death or serious bodily harm." 28 C.F.R. §50.10(c)(3). Even then, the decision to use compulsory process must be approved by high-level Department of Justice officials and can only be sought after investigators have sought to obtain the information from other sources. 28 C.F.R. §50.10(c), (g). The Department's policy also sets forth the standards for granting such authorization, requiring the authorizing official to consider, among other things:

- The importance of a free and independent press to the functioning of American democracy;
- The important national interest in protecting journalists from compelled disclosure of information related to the identity of their sources and their reporting; and
- Whether there exist reasonable grounds to believe that the information sought is essential to a successful investigation or prosecution.

These standards are somewhat – but not entirely – relaxed when the journalist is the subject or target of the investigation and is suspected of having committed a crime. Arrest warrants for members of the news media similarly require high-level approval. In most circumstances, moreover, prosecutors must provide notice to the affected news media before executing compulsory process.

The Department of Justice policy is not binding on the Department, so litigants challenging a subpoena or other government action taken in violation of the policy are unlikely to succeed in quashing the subpoena based solely on such a violation. But a violation of the policy could nonetheless support an argument that the subpoena is unreasonable, harassing, or burdensome and should be quashed for that reason. Violations of the policy might also convince supervisory prosecutors to withdraw the subpoena or investigative demand. And, finally, prosecutors who do not comply with the policy may be administratively reprimanded or subject to other disciplinary action.

***Future Trends***

With recent leaks of government emails and other actions, the future promises more scrutiny for both those who leak government information ***and*** those who publish that information.

The Department of Justice, for example, seems likely to revisit and, potentially, revise its policy governing investigation of and information requests directed toward media organizations and journalists. Potential changes might include the elimination of notice requirements, the easing or elimination of pre-approval requirements, or even rescission of the policy entirely.

Even if prosecutors' focus remains elsewhere, congressional committees could probe the source of leaks. Indeed, such investigations could involve seeking documents from reporters and members of the news media, even serving journalists with subpoenas to testify at public hearings. Refusing to comply could trigger criminal contempt charges. In recent years, the Department of Justice has shown an increasing willingness to prosecute contempt of Congress charges, including several high-profile prosecutions. That trend gives no indication of slowing down.

Media organizations may find themselves becoming increasingly embroiled in civil litigation as well. News reports revealing leaked government information could provide the basis for civil lawsuits challenging governmental action or, at the very least, reveal evidence that one party believes to be highly relevant to such an action. That could result in news organizations receiving civil subpoenas for documents or testimony.

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