

IN BID TO PLACATE LEGACY MEDIA, DOJ MOVES CLOSER TO INSTITUTING OFFICIAL PRESS

The First Amendment was written, in part, to eliminate the kind of official press that parrots only the King's sanctioned views. But with its revised "News Media Policies," DOJ gets us closer to having just that, an official press.

That's because all the changes laid out in the new policy (some of which are good, some of which are obviously flawed) apply only to "members of the news media." They repeat over and over and over and over, "news media." I'm not sure they once utter the word "journalist" or "reporter." And according to DOJ's Domestic Investigation and Operations Guide, a whole slew of journalists are not included in their definition of "news media."

DIIOG does include online news in its definition of media (PDF 157).

"News media" includes persons and organizations that gather, report or publish news, whether through traditional means (e.g., newspapers, radio, magazines, news service) or the on-line or wireless equivalent. A "member of the media" is a person who gathers, reports, or publishes news through the news media.

But then it goes on to exclude bloggers from those included in the term "news media."

The definition does not,

however, include a person or entity who posts information or opinion on the Internet in blogs, chat rooms or social networking sites, such as YouTube, Facebook, or MySpace, unless that person or entity falls within the definition of a member of the media or a news organization under the other provisions within this section (e.g., a national news reporter who posts on his/her personal blog).

Then it goes onto lay out what I will call the “WikiLeaks exception.”

As the term is used in the DIOG, “news media” is not intended to include persons and entities that simply make information available. Instead, it is intended to apply to a person or entity that gathers information of potential interest to a segment of the general public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience, as a journalism professional.

The definition does warn that if there is any doubt, the person should be treated as media. Nevertheless, the definition seems to exclude a whole bunch of people (including, probably, me), who are engaged in journalism.

The limitation of all these changes to the “news media” is most obvious when it treats the Privacy Protection Act – which should have prevented DOJ from treating James Rosen as a suspect. They say,

The Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa, generally prohibits the search or seizure of work product and documentary materials held by individuals who have a purpose to disseminate information to the public. The PPA, however, contains a number of exceptions to its general prohibition, including the "suspect exception" which applies when there is "probable cause to believe that the person possessing such materials has committed or is committing a criminal offense to which the materials relate," including the "receipt, possession, or communication of information relating to the national defense, classified information, or restricted data "under enumerated provisions. See 42 U.S.C. §§ 2000aa(a)(1) and (b)(1). Under current Department policy, a Deputy Assistant Attorney General may authorize an application for a search warrant that is covered by the PPA, and no higher level reviews or approvals are required.

First, the Department will modify its policy concerning search warrants covered by the PPA involving members of the news media to provide that work product materials and other documents may be sought under the "suspect exception" of the PPA only when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities. Under the reviews policy, the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media.

Second, the Department would revise current policy to elevate the current approval requirements and require the approval of the Attorney General for all

search warrants and court orders issued pursuant to 18 U.S.C. § 2703(d) directed at members of the news media. [my emphasis]

The PPA, however, applies to all persons “reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”

Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce;

I’m clearly covered by the PPA. But the FBI could easily decide to exclude me from this “news media” protection so as to be able to snoop into my work product.

Congratulations to the “members of the news media” who have been deemed the President’s official press. I hope you use your privileges wisely.

Update: I’ve learned that the issue of whom this applied to did come up in background meetings at DOJ; in fact, DOJ raised the issue. The problem is, there is no credentialing system that could define who gets this protection and DOJ didn’t want to lay it out (and most of the people invited have never been anything but a member of the news media, making it hard for them to understand how to differentiate a journalist).

Ultimately, I think DOJ is so anxious for Congress to pass a shield law (which they say elsewhere in their report) because it’ll mean

Congress will do the dirty work of defining who is and who is not a journalist.