WHY "MEMBERS OF THE NEWS MEDIA" SHOULD WELCOME A SHIELD FOR THE ACT OF JOURNALISM

As I noted in this piece, the new policies DOJ rolled out in the wake of the AP and James Rosen revelations applies explicitly to "members of the news media," not journalists per se. The definition might permit the exclusion of bloggers and book writers, not to mention publishers like WikiLeaks.

I've been asked what I think a better solution is. My answer is to define — and then protect — the act of journalism, not the news media per se.

That approach would have several advantages over protecting "the news media." First, by protecting the act of journalism, you include those independent reporters who are unquestioningly engaging in journalism (overcoming the blogger question I laid out, but also those working independently on book projects, and potentially — though this would be a contentious though much needed debate — publishers like WikiLeaks), but also exclude those news personalities who are engaging in entertainment, corporate propaganda, or government disinformation.

But protecting the act of journalism rather than "news media" would also serve to exclude another group that should have limited protection. Included within DOJ's definition of those it is protecting here are not just the reporters who work for the news media, but also the managers.

> "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.

While I absolutely agree that, say, AP's editors should have had their phone records protected as they contemplated withholding the UndieBomb 2.0 story after the White House request (those records were included in the subpoena) — that is, as they engaged in a journalistic role. That would protect any discussions they had with sources or other experts to challenge the government's claim about damage, for example. But the communications of a Tim Russert being pressured after the fact about a critical story by the Vice President's Chief of Staff should not be protected. Nor should WaPo CEO Katharine Weymouth's discussions with huge donors like Pete Peterson or potential salon sponsors. While I suspect DOJ sees real benefit in protecting these cocktail weenie means of pressure on news media (as do, undoubtedly, some of the executives involved), I see no journalistic reason to do so.

Moreover, in an era where WaPo is really a testing firm with a journalistic rump and NBC is really the TV content wing of a cable supplier, should we really be protecting the "news media" with no limits? (Bloomberg, I think, presents the most fascinating question here, particularly given their recent spying on users of Bloomberg terminals; where does the journalistic protection for companies that primarily provide privatized information begin and end?)

But even within the scope of Friday's guidelines, there's a reason the members of the news media should favor protecting the act of journalism rather than membership in news media.

That's because two of the most important passages in the new News Media Policies refer to newsgathering activities as a further modification to its otherwise consistent discussion of members of the news media. The phrase appears in what amounts to a mission

statement describing why this issue is important.

> As an initial matter, it bears emphasis that it has been and remains the Department's policy that members of the news media will not be subject to prosecution based solely on newsgathering activities. Furthermore, in light of the importance of the constitutionally protected newsgathering process, the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure. The Department's policy is to utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.

This is a weird passage, in that it both admits the "newsgathering process" is constitutionally protected, presumably for all, but then suggests the protections within this policy will only apply to members of the news media (one limitation) who cannot be prosecuted exclusively for their newsgathering activities (a second limitation).

Note the parallel limitation in a number of DOJ's surveillance and investigative guidelines — which say people cannot be investigated solely for their First Amendment protected activities — has not provided adequate protection to Muslims engaging in speech and religion.

The policies again invoke "newsgathering activities" in the passage describing the news media protections in DOJ's treatment of the Privacy Protection Act.

> 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.

By limiting protections offered to members of the news media to "ordinary newsgathering activities," DOJ has just punted one of the crucial issues underlying the James Rosen affidavit (and, along with it, DOJ's efforts to prosecute WikiLeaks). Because it still permits DOJ to decide, potentially in secret (though, as a laudable part of the new policy, with the input of the Public Affairs Director and the Privacy and Civil Liberties Officer), what constitutes "ordinary newsgathering activities." And some of the things the FBI officer apparently decided in that case did not constitute ordinary newsgathering activities, but instead provided evidence that Rosen was part of a conspiracy to commit espionage, include:

- Soliciting disclosure of intelligence information, including documents, on North Korea
- Using (in the FBI officer's description) "covert email communications as a means of compartmentalizing the information" — this includes use of a pseudonym and a code for facilitating non-email communication

- Exploiting a source "like a rag doll" and the source's vanity (according to defendant Stephen Jin-Woo Kim's descriptions); employing flattery (according to the FBI officer's description)
- Providing other news articles in advance of their publication to a source not used on that story

While there are other protections for news media in these new policies (including protections from non-NSL Administrative orders, review before using such investigative methods, reporting on how much investigation of news media occurs, and what amount to increased minimization procedures for news media contact information), this is one of the critical new protections in this policy.

If DOJ decides that protecting sources and methods, soliciting information, and sucking up to sources do not constitute "ordinary newsgathering activities," then how useful are the protections?

DOJ has announced its intention to respect ordinary newsgathering activities and even recognized constitutional protections for them, sort of (I look forward to the legal cases that cite that language, anyway). But until there's a common understanding about when such activities constitute journalism and when they constitute spying, the protection has limited value.

If the ultimate idea is to protect newsgathering activities, then why not establish what those activities are and then actually protect them, regardless of whether they are tied to a certain kind of institution?