

Spying on Journalists: Department of Justice (DOJ) Sets “Guidelines” Concerning Government Surveillance of Members of the Press

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On Friday, the US Department of Justice (DOJ) released a memorandum setting forth new “guidelines” concerning government surveillance of members of the press. “These revised guidelines will help ensure the proper balance is struck when pursuing investigations into unauthorized disclosures,” announced Attorney General Eric Holder.

Billed on the front page of the *New York Times* as a major reform that “would significantly narrow the circumstances under which journalists’ records could be obtained,” the memorandum actually does nothing of the kind.

The memorandum (available [here](#)) resembles Holder’s previous work on the subject of military commissions, incommunicado detention, drones, and assassination. Couched behind weasel-words, vague loopholes, and conciliatory language, the Obama administration always goes out of its way not to concede any limits on its asserted powers.

As an initial matter, the idea that an internal Department of Justice memorandum could constitute a “reform” is a sham. If the Obama administration can “self-restrict” its activities, then it can just as easily “self-expand” them.

The memorandum itself, far from “tightening” restrictions on intelligence activities with respect to the press, actually further codifies a regime for spying on, bullying, and prosecuting members of the press who come into possession of information the executive branch has deemed “classified.”

The memorandum follows revelations that the Obama administration systematically targeted and spied on members of the press. In May, the Associated Press revealed that the Obama administration had secretly wiretapped more than 20 phone lines of its journalists, including home phones and cell phones. (See: [“The AP spying scandal and the crisis of American democracy”](#))

Associated Press president Gary Pruitt, in an open letter, denounced the Obama administration’s wiretaps as a “massive and unprecedented intrusion,” seeking information that “the government has no conceivable right to know.”

The DOJ memorandum has a strong component of damage control in the aftermath of the spying scandal. Under the circumstances, it is remarkable for what it does not say. The memorandum does not indicate that the Obama administration will cease its spying on journalists or its ruthless persecution of government whistle-blowers. In fact, the

memorandum expressly reserves the power to continue spying on the press “when the information sought is essential to a successful investigation or prosecution.”

Contrary to the presentation of the memorandum in the corporate media, the memorandum does not even include any actual “guidelines.” The memorandum merely proposes that, at some point in the future, new guidelines and policies will be drafted and implemented (e.g., the “Department’s policies *will be revised ...*,” “the Department *would revise* current policy ...;” “the Department *will require* ;” etc.).

Among the changes proposed by the memorandum is an expanded mechanism for intimidating and threatening (“negotiating with”) journalists who come into possession of classified information. Pursuant to this regime, the journalist will receive an invitation to “negotiate” with the military-intelligence agencies. It is not that hard to guess at the content of any such negotiations (“hand over the files or else,” “tell us your source or else”). Notwithstanding this mechanism, the memorandum expressly reserves the power to spy on journalists without notice or negotiations.

The memorandum announces that the administration will expand its efforts to prevent leaks internally by withdrawing security clearances and imposing unspecified “other sanctions” against would-be whistle-blowers.

Also included are proposals to set up toothless, token committees and groups to advise the Attorney General with respect to press spying. The advice of these committees and groups will be non-binding, and the Attorney General will be free to disregard it. The memorandum would further require direct authorization from the Attorney General for many kinds of press surveillance.

In one significant passage, the memorandum expressly reserves the power to search and seize journalists’ records where 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 national defense, classified information, or restricted data.” This language is from the so-called Privacy Protection Act of 1980.

In the context of this memorandum, the citation of the phrase “committed or is committing a criminal offense,” is a threat not just to spy on journalists who publish classified information, but a threat to prosecute them as well.

The “balancing” of democratic rights against national security—the Obama administration’s standard refrain—features prominently in the memorandum. The memorandum announces that it “strikes the appropriate balance between two vital interests: protecting the American people by pursuing those who violate their oaths through unlawful disclosures of information and safeguarding the essential role of a free press in fostering government accountability and an open society.”

This framework, accepted uncritically by the press and academic commentators, is false and fundamentally undemocratic. Here, the reactionary campaign to kill or capture NSA whistle-blower Edward Snowden is placed on the scales and declared a “vital interest” of equal importance as the Bill of Rights.

In fact, these two supposedly “vital interests” cannot be reconciled. There is not an ounce of

legitimacy to the Obama administration's relentless pursuit and persecution of whistle-blowers such as Snowden, whose conduct has been perfectly legal. Meanwhile, the Bill of Rights expressly guarantees "the freedom ... of the press" as well as the "right of the people to be secure in their persons, houses, papers, and effects." These are absolute rights, not suggestions conditioned on other government interests.

The "balancing" formula, pursuant to which the president asserts the unilateral power to ignore the Bill of Rights in the name of national security, is a recipe for dictatorship.

In the final analysis, there is no reason even to accept the memorandum released Friday at face value. The Obama administration has repeatedly lied through its teeth as to the extent of its spying activities.

Absolutely no confidence can be placed in the promises of Obama, Holder, and the rest of the political establishment to "self-reform," "self-regulate," or otherwise impose "guidelines" on themselves. The Obama administration's persecution of journalists and whistle-blowers does not need "guidelines." It is illegal, it must be stopped, and the perpetrators must be held accountable.

The Obama administration has deliberately and repeatedly violated the Constitution, along with the basic rights of hundreds of millions of people in the United States and internationally. All of the top military, intelligence, and civilian officials in the American government, including Obama and Holder, deserve to be impeached, arrested, and prosecuted.

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