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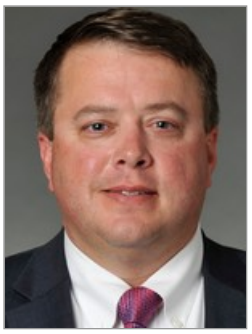
Extra Protection For Press In Law Enforcement Investigations

By **Thomas Barnard and Macy Climo** (August 17, 2018, 1:17 PM EDT)



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When the FBI seized New York Times journalist Ali Watkins' personal phone and email records in early 2018 as part of an investigation into leaks out of the Senate Intelligence Committee, the press was outraged.[1] The seizure was part of a run of U.S. Department of Justice cases investigating leaks that started under President Barack Obama and has tripled under President Donald Trump.[2] While not discussed in most reporting, the authority to seize documents from a reporter has a higher threshold of approval than for normal investigations, and the failure to follow those requirements has a unique statutory remedy for reporters. Seldom used, and relatively unknown to most courts, the Privacy Protection Act of 1980 provides a set of rules of which reporters, news agencies, and private counsel should all be keenly aware.

The protection of the free press is at the center of many modern political commentaries, and has been repeatedly touted as a fundamental part of the American experience since the early days of the republic. Reports of members of the press having their records seized and houses raided causes a guttural reaction in many who study history and the law, as censorship was one of the forms of tyranny most reviled by colonists, and has been the subject of litigation at numerous times. As a specifically enumerated right, it was written into the Constitution as the very first protection in the Bill of Rights, and it was one of the first to be applied to the states.

In 1978, however, the U.S. Supreme Court appeared to roll back the heightened protection the press had enjoyed. It considered a case in which the police, pursuant to a search warrant, raided the offices of a Stanford student newspaper searching for photographs of a demonstration at which several officers had been injured.[3] The newspaper staff members sued, arguing that their First and Fourth Amendment rights had been violated.[4] The Supreme Court ultimately held that the usual prerequisites for a search warrant were sufficient protection for third party searches, even in cases where First Amendment protections could be implicated.[5]

The outcome of the case raised such public indignation that Congress was moved to respond, and did so in 1980 by passing the Privacy Protection Act.[6] The PPA makes it unlawful for the government to search for or seize work product materials or documentary 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 connection with an investigation or criminal prosecution except under certain circumstances.[7] To get these materials, the government must cross a high bar: It must show that there is probable cause that the person possessing the materials has actually committed the criminal offense to which they relate, or that there is reason to believe that immediate seizure is necessary to prevent another person from death or serious injury.[8] What this means is that, if a reporter has documents provided to them by someone, and that someone committed a crime in getting the documents but the reporter did not, a search warrant cannot be used to seize the documents from the reporter. This is obviously an important protection for whistleblowers as well as reporters. In such an instance, the government must issue a subpoena for the materials, which is a critical procedural distinction, as getting the ability to seek judicial review of

the subpoena through a motion to quash is a protection not available in the context of a search warrant.

Furthermore, if the government fails to follow the procedures laid out in the law for gaining access to documents, the person whose documents and materials were illegally seized may bring a lawsuit for money damages against the state itself and against the individual officer or employee of the state who violated the law.[9] The PPA provides for damages of, at a minimum, $1,000, plus attorneys' fees and costs.[10] Notably, the law does not appear to include any kind of "good faith" exception for a flawed pre-warrant procedure, requiring only knowledge of the nature of the person who is being searched or the nature of the records seized to imposed liability.

Members of the press have successfully prosecuted suits under the PPA since it was passed, although there are not as many cases as one might expect.[11] It is especially surprising given that the act covers an expansive swath of individuals. Anyone who may reasonably be believed to have a purpose of "disseminat[ing] to the public" various forms of "public communication" may be covered by the PPA. In the computer age, this may very well encompass anyone who publishes anything online.[12] Indeed, in April of this year, a U.S. district court in Ohio denied the state's motion to dismiss a PPA claim filed against it by the creator of a Facebook page criticizing a city police department.[13] With the advent of social media and access to literally billions of people with the click of a button on the cell phones we carry in our pockets, the government must tread carefully when it seizes third-party records.

The case of Ali Watkins is certainly not clear, and details about the reason her records were seized have muddied the waters further, but it is a high-profile example of the current climate in journalism and the DOJ.[14] Should it become clear that the FBI failed to follow the proper procedures outlined in the PPA, Watkins, and other journalists or online posters who may be affected the DOJ's expanded prosecution of leaks should keep the PPA in mind as tool to check the government's power to interfere with journalists and to recoup their losses. Members of the media should be quick to ask, through counsel or otherwise, for documentation supporting the search and seizure, and, when necessary, act quickly to protect their rights through the civil remedy and waive of sovereign immunity included in the statute.

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[1] Michael Grynbaum, Press Groups Criticize the Seizing of a Times Reporter's Records, N.Y. Times (June 8, 2018), https://www.nytimes.com/2018/06/08/business/media/ali-watkins-records-seized.html.

[2] Id.

[3] Zurcher v. Stanford Daily , 436 U.S. 547 (1978).

[4] Id. at 552.

[5] Id. at 565-66.

[6] 42 U.S.C. §2000aa et seq.

[7] Id. § 2000aa(a) & (b).

[8] Id. § 2000aa(a)(1) & (b)(1).

[9] Id. § 2000aa-6(a).

[10] Id. § 2000aa-6(f).

[11] A Westlaw search reveals only 89 cases citing the PPA in the nearly 40 years since it was enacted.

[12] See Mark Eckenwiler, Applications of the Privacy Protection Act, 8 Seton Hall Const. L.J. 725 (1998), for a fulsome discussion of just how far the PPA may reach.

[13] Novak v. City of Parma, No. 1:17-cv-2148, 2018 WL 1791538 (N.D. Ohio Apr. 5, 2018).

[14] See Erik Wemple, New York Times: Ali Watkins 'Made Some Poor Judgments', Wash. Post (July 3, 2018), https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/07/03/new-york-times-ali-watkins-made-some-poor-judgments/?noredirect=on&utm_term=.1556f040e119.
