

Government Can Spy on Journalists in the U.S. Using Invasive Foreign Intelligence Process

Newly released documents illuminate the little-known use of Foreign Intelligence Surveillance Court orders against journalists.

[Cora Currier](#)

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The U.S. government can monitor journalists under a foreign intelligence law that allows invasive spying and operates outside the traditional court system, according to newly released documents.

Targeting members of the press under the law, known as the Foreign Intelligence Surveillance Act, requires approval from the Justice Department's highest-ranking officials, the documents show.

In [two 2015 memos for the FBI](#), the attorney general spells out "procedures for processing Foreign Intelligence Surveillance Act applications targeting known media entities or known members of the media." The guidelines say the attorney general, the deputy attorney general, or their delegate must sign off before the bureau can bring an application to the secretive panel of judges that approves monitoring under the 1978 act, which governs intelligence-related wiretapping and other surveillance carried out domestically and against U.S. persons

abroad.

The high level of supervision points to the controversy around targeting members of the media at all. Prior to the release of these documents, little was known about the use of FISA court orders against journalists. Previous attention had been focused on the use of National Security Letters against members of the press; the letters are administrative orders with which the FBI can obtain certain phone and financial records without a judge's oversight. FISA court orders can authorize much more invasive searches and collection, including the content of communications, and do so through hearings conducted in secret and outside the sort of adversarial judicial process that allows journalists and other targets of regular criminal warrants to eventually challenge their validity.

"This is a huge surprise," said Victoria Baranetsky, general counsel with the Center for Investigative Reporting, previously of Reporters Committee for the Freedom of the Press. "It makes me wonder, what other rules are out there, and how have these rules been applied? The next step is figuring out how this has been used."

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The [documents were turned over](#) by the Justice Department's Office of Information Policy to the Freedom of the Press Foundation and the Knight First Amendment Institute as part of an [ongoing lawsuit](#) seeking the Trump administration's rules for when and how the government can spy on journalists, including during leak investigations. Freedom of the Press and Knight shared the documents with The Intercept. (First Look Media, The Intercept's parent company, provides funding for both

organizations, and multiple Intercept staffers serve on the board of Freedom of the Press Foundation.)

The memos discussing FISA are dated in early 2015, and both are directed at the FBI's National Security Division. The documents are on the same subject and outline some of the same steps for FISA approvals, but one is unclassified and mostly unredacted, while the other is marked secret and largely redacted. The rules apply to media entities or journalists who are thought to be agents of a foreign government, or, in some cases, are of interest under the broader standard that they possess foreign intelligence information.

Jim Dempsey, a professor at Berkeley Law and a former member of the Privacy and Civil Liberties Oversight Board, an independent federal watchdog, said that the rules were "a recognition that monitoring journalists poses special concerns and requires higher approval. I look on it as a positive, and something that the media should welcome."

"They apply to known media, not just U.S. media," he added. "Certainly back in the Cold War era, certain Soviet media entities were in essence arms of the Soviet government, and there may have been reasons to target them in traditional spy-versus-spy context. And it's possible today that there are circumstances in which a person who works for a media entity is also an agent of a foreign power. Not every country lives by the rules of journalistic integrity that you might want."

But Ramya Krishnan, a staff attorney with the Knight Institute, said that concerns remained. "There's a lack of clarity on the circumstances when the government might consider a journalist an agent of a foreign power," said Krishnan. "Think about WikiLeaks; the government has said they are an intelligence operation." Hannah Bloch-Wehba, a

professor at Drexel University, said that “a probable example would be surveillance of reporters who are working for somewhere like RT” — the state-funded Russian television network — “and as a consequence, anyone who is talking to reporters for RT. The reporters are probably conscious they are subject to surveillance, but their sources might not be.”

The guidelines, at least in the unredacted portions, do not say how to handle the information that is gathered or how to mitigate the risk of exposing journalists’ sources and sensitive information unrelated to an investigation (although they would be subject to minimization procedures if they pertained to a U.S. person, Dempsey noted). There is no requirement that the journalist be notified that their records were sought. The unredacted guidelines also do not discuss the scenario in which a journalist themselves might not be the target, but where surveillance is likely to reveal journalists’ communications with a target.

“Journalists merely by being contacted by a FISA target might be subject to monitoring — these guidelines, as far as we can tell, don’t contemplate that situation or add any additional protections,” said Krishnan.

Targeting journalists for surveillance, especially when trying to determine their sources, has historically been limited by First Amendment concerns. In 2015, after it emerged that the Obama administration had secretly seized phone records from the Associated Press and named a Fox News reporter as a co-conspirator in a leak case, former Attorney General Eric Holder instituted new guidelines that made the targeting of journalists in criminal cases a “last resort,” and said that the Justice Department ordinarily needed to notify journalists when their records were seized. The guidelines still worried

advocates, however, because they left room for the use of National Security Letters. In 2016, The Intercept [obtained](#) 2013 guidelines that showed that National Security Letters involving the media required only two extra layers of sign-off. The Justice Department has [since said](#) that the FBI does not currently use the letters against journalists for leak investigations, but it's not clear how often they've been used in the past, or in other contexts.

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Through an earlier Freedom of Information Act request, the Freedom of the Press Foundation [obtained emails referencing a "FISA portion"](#) of FBI guidelines for handling the press, but that glancing mention was the only clue that FISA could be used against journalists.

Many journalists [already worried](#) that their calls and emails were likely to be swept up in dragnet acquisition of overseas communications authorized under a controversial provision of FISA, added in 2008, that allows intelligence agencies to acquire large quantities of electronic communications without obtaining individualized warrants for each target. Journalists could become entangled in such collection since many of them likely communicate with people who meet the broad definition of possessing "foreign intelligence" information — [which could include information on "foreign affairs."](#) That concern applied to journalists based in the United States, or U.S. citizens, who might have their end of a conversation picked up "incidentally" under the FISA provision; such incidental collection [can then be tapped](#) by domestic law enforcement for use against Americans in so-called backdoor

searches. But the issue resonated even more with foreign journalists based overseas who could be spied on without triggering constitutional restraints.

The 2015 memos, however, contemplate a scenario in which a journalist or media entity is specifically targeted for surveillance under various provisions of the act, either in the U.S. or as a U.S. person abroad. There are no publicly reported instances of FISA being used in this way.

In their lawsuit for these documents, [filed last November](#), press freedom groups expressed concern that the Trump administration may have jettisoned or loosened rules for investigating journalists, given the president and Attorney General Jeff Sessions's regularly expressed vitriol for the media and avowed interest in tracking down leakers, albeit those who in many cases do not appear to be disclosing classified information or otherwise violating the law. Sessions has brought three prosecutions under the Espionage Act for leaks to the media (two against individuals accused of providing information to The Intercept) and in another leak case, seized [years of email and phone records](#) from New York Times reporter [Ali Watkins](#). That instance has elevated concerns that the administration is more aggressively going after reporters, even as the Justice Department [maintains](#) that the Holder guidelines are still in place.

It is probably easier and quicker for the government to use traditional law enforcement tools, rather than FISA, to go after leakers, said Bloch-Wehba, especially since officials would not want to disclose intelligence methods if a case went to court.

"One concern would be evidence laundering," she said. "They could

learn something about a journalists' source and then they go back and use ordinary methods to get the same information."

The Justice Department and the FBI both declined to comment on the guidelines, including about whether they had been revised since 2015, how often FISA applications concerning journalists were made, and whether FISA warrants could be used in leak investigations.

Correction: Sept. 17, 2018, 4:25 p.m.

A quote from Hannah Bloch-Wehba has been amended to reflect that she said "evidence laundering," not "evidence wandering."

Top photo: Journalists film during a South Africa training session at the Surrey Sports Park on Oct. 28, 2015, in Guildford, England.