



# BULLETIN

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## Criminal Prosecutions of the Press:

The Espionage Act, Newsgathering Post-Bartnicki,  
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**ALLEGEDLY CRIMINAL NEWSGATHERING AND  
FIRST AMENDMENT DUE PROCESS**

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## **ALLEGEDLY CRIMINAL NEWSGATHERING AND FIRST AMENDMENT DUE PROCESS**

### **A True Story of First Amendment Due Process**

This is a true story. A newspaper decided to investigate the so called underground railroad which transported illegal immigrants, mostly from El Salvador, through Central America to Mexico over the border to south Texas and onward to points north. The railroad was thought to be operated by people affiliated with the Catholic church. The reporter assigned to the investigation suggested to his editors that it would be useful to accompany some of the illegal immigrants on their journey. The editors agreed but stipulated that the reporter could only travel in the United States; he would not be permitted to cross with the immigrants from Mexico into this country and he should do nothing to violate any criminal statute. The reporter easily found the group operating the “railroad” and traveled to the small south Texas town of San Benito to attend a planning session where the organizers were mapping out a journey for three illegal Salvadorians (a young man, a young woman and the woman’s baby) who were to be driven from San Benito to San Antonio. At this meeting there was discussion of where United State Border Patrols checkpoints were located and the driver of the vehicle ( a young Catholic nun) was told how to avoid these locations. A Catholic lay worker was chosen to accompany the Salvadorians and the nun. It was agreed that the sixth passenger would be the newspaper reporter.

A road map was prepared which highlighted the suggested route and noted border patrol checkpoints. The highlighted route avoided these sites. The group got into the car and set out for San Antonio but, as luck would have it, the border patrol stopped the car, despite the evasive route, and detained everyone. The reporter got out of the front seat, passenger side. He left behind the map which turned out to contain his fingerprints. The prosecutor later referred to the reporter as the navigator.

When the border patrol agent discovered that he had netted three illegal Salvadorians, a Catholic nun, a Catholic lay worker and a newspaper reporter, his first instinct was to send the Salvadorians back home and let everyone else go. Instead, he called the Assistant United States Attorney for the Southern District of Texas who demanded that everyone be arrested. The reporter called his editor from jail and shortly thereafter the newspaper’s lawyer was contacted at approximately 4 a.m.

When the prosecutor got to work that day, he should have referred to 28 C.F.R. Pt. 50.10 (2001), a Justice Department regulation which deals with accusations of criminal misconduct against the media and generally requires personal approval from the United States Attorney General before a member of the media can be subpoenaed, charged, arrested, indicted or prosecuted.

Part 50.10 reads, in part, as follows:

**Policy with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media.** Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department in all cases: . . . (Subsections a-g deal with subpoenas)

(h) No member of the Department shall subject a member of the news media to questioning as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General: Provided, however, That where exigent circumstances preclude prior approval, the requirements of paragraph (l) of this section shall be observed.

(i) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media.

(j) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General.

(k) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the

Attorney General. A copy of the request shall be sent to the Director of Public Affairs.

(l) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Affairs.

(m) In light of the intent of this section to protect freedom of the press, news gathering functions, and news media sources, this policy statement does not apply to demands for purely commercial or financial information unrelated to the news gathering function.

(n) Failure to obtain the prior approval of the Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action. The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person.

After hearing from the jailed reporter, the newspaper's editor and I flew to south Texas and asked the United States Magistrate Judge to release the reporter on his own recognizance and, over the government's objection, the request was granted. With the reporter out of jail but by no means out of trouble, how did we construct a defense and did the First Amendment have any role to play? The first issue for us, of course, related to representation. The newspaper had instructed the reporter not to violate any criminal law but did give sanction to the overall scope of the newsgathering activity. The paper retained a criminal defense lawyer to protect the reporter's interests while its regular counsel represented the corporation. There was initial consideration of a "substantive First Amendment defense" to the reporter's conduct. The thought was rejected recognizing that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

We knew of the United States Supreme Court's dicta in *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972) which stated:

It would be frivolous to assert...that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.... The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.

We anticipated the holding of the court in *United States v. Sanders*, 17 F. Supp.2d 141, 144 (E.D.N.Y. 1998), *aff'd*, 211 F.3d 711 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 574 (2000), which stated that “the press may not use First Amendment protection to justify otherwise illegal actions.”

We did think, however, that we could require the prosecutor and the judges to employ stricter procedures in measuring the reporter’s conduct as compared to the actions of the other (non-First Amendment) defendants. We argued that Part 50.10 was a constitutionally compelled recognition that:

courts have . . . come to realize that procedural guarantees play an equally large role in protecting freedom of speech; indeed, they ‘assume an importance fully as great as the validity of the substantive rule of law to be applied.’ Responding to this realization, courts have begun to construct a body of procedural law which defines the manner in which they and other bodies must evaluate and resolve first amendment claims - a first amendment “due process,” if you will.

Henry P. Monaghan, *First Amendment “Due Process”* 83 Harv. L. Rev. 518 (1970).

Our first strategy decision was whether or not to allow the reporter to write about his experiences. We were worried that he might publish something to incriminate himself and possibly the newspaper. On the other hand, if his defense was that he was only working as a reporter what would be more natural and expected than to write about the events he was assigned to cover. He was just there, after all, to report on an important story and not participate in a crime. We decided to let him write an accurate but exculpatory article which contained the sentence: “I was on the scene *solely* as a reporter.”

The next step was to demand an examining trial and ask the United States Magistrate Judge to find “no probable cause” to proceed against the reporter. It was argued that Part 50.10 had not been followed and further that First Amendment due process required the judge to apply “strict scrutiny” to the evidence and, under that standard, no probable cause existed. The reporter did not testify but his editor did and emphasized the instructions from the paper were not to violate any criminal law. The Assistant U.S. Attorney told us later that this testimony kept him from seeking an indictment against the newspaper corporation, as he had been intending.

The border patrol agent testified that the reporter had been sitting in the front seat of the car, apparently directing the driver and that various documents, including the map which highlighted ways around the border control checkpoints, contained the reporter’s fingerprints. The reporter’s article about the incident was introduced and the government agent conceded that the sentence: “I was on the scene *solely* as a reporter” undercut its position. The Magistrate Judge found probable cause to proceed even though she accepted our argument that “strict scrutiny” should be applied to the evidence.

Our next move was to travel to Washington and speak with the Justice Department and with various officials at INS, the prosecuting agency. We emphasized both the legal and practical aspects of this proposed prosecution. First, we pointed out, again, that Part 50.10 had not been followed and we suggested that this was fatal to the government’s case. A senior Justice Department official

promised us he would look into it. INS was not interested in the adverse publicity generated from prosecuting a reporter and was more concerned with the underground railroad; their people agreed to consider the matter. Despite pressure from Washington, the Assistant United States Attorney in Texas was determined to prosecute the journalist. As he complained to us, “You guys have had everyone but the president calling me, but who do you think I would rather go to trial against; a young innocent looking nun or a bearded, scruffy newspaper reporter?”

The Assistant U.S. Attorney told us that he could not wait for Attorney General approval under Part 50.10 because of Speedy Trial Act problems. The reporter then immediately waived his Speedy Act protections before a court reporter in the U.S. Attorney’s office. The prosecutor was not, however, deterred and informed us that he was planning to present the reporter’s case before a federal grand jury that morning. We then filed a civil injunction proceeding against the Justice Department and the U.S. Attorney relying upon First Amendment due process as, we said, articulated in 28 C.F.R. pt. 50.10. Our argument under 50.10 was simply that this regulation articulated what First Amendment due process required, citing the Monaghan article. The federal judge telephoned the prosecutor and told him not to proceed with the grand jury until arguments could be heard.

Leading up to these events, the newspaper and its parent corporation were contacting various members of the administration and the Justice Department asking them to exercise their prosecutorial discretion against indictment and/or trial of the reporter. The cumulative effects of all these efforts lead the Assistant United States Attorney to remove the reporter’s name from the proposed indictment without waiting for the judge to rule on the request for injunctive relief. The government proceeded only against the nun and lay worker who were subsequently found guilty and sentenced. The nun entered into a plea agreement while the lay worker demanded a jury trial where she was convicted, and later, sentenced to jail. The reporter moved to San Diego, a free man.

## **Substantive First Amendment Defenses to Criminal Newsgathering Allegations Generally Do Not Work**

There are certain lessons to be learned from this case. First, I doubt that a substantive First Amendment defense would have worked with any of our constituents: the prosecutor, the Justice Department officials, the INS, or the judge. To have even made the argument would have irritated the government and made matters worse. There has developed ample precedent for this view starting with the above quoted passage from *Branzburg*. Consider for example, the comments of United States District Judge Walter Smith who, when confronted with a substantive First Amendment defense in a suit by ATF Agents against the news media arising from the Branch Dividian incident in Waco, Texas wrote “it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story.” *Risenhoover v. England*, 936 F. Supp. 392, 404 (W.D. Tex. 1996).

A substantive First Amendment defense did not work in the *United States v. Sanders*, 17 F. Supp.2d 141, 148 (S.D.N.Y. 1998), *aff’d*, 211 F.3d 711 (2d Cir. 2000) either. In *Sanders* a journalist employed his wife, a senior TWA flight attendant, to investigate the possible causes for the 1996 crash of TWA Flight 800. The crash killed all 230 persons on board, and provoked speculation about

possible causes. The journalist, with his wife's help, began talking confidentially with a TWA pilot who was participating in the official investigation by the National Transportation Safety Board and the Federal Bureau of Investigation.<sup>1</sup> The journalist persuaded the pilot to remove sample portions of seat cushions from the crash wreckage, received those samples from the pilot and subsequently published an article theorizing that a Navy missile had downed Flight 800.<sup>2</sup> Federal prosecutors and the FBI attempted to learn the journalist's confidential source (the TWA pilot) by threatening the journalist with criminal prosecution. After those negotiations broke down, federal prosecutors indicted and prosecuted the journalist and his wife under a federal statute prohibiting "the unauthorized removal, concealment, or withholding of 'a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident.'"<sup>3</sup> A jury convicted the journalist and his wife and the convictions were affirmed by the United States Court of Appeals for the Second Circuit.

The District Judge disposed of the substantive First Amendment defense as follows:

As a preliminary matter, the court must address the defendants' contention that their conduct in obtaining the fabric from the wreckage was protected by a First Amendment "newsgathering" privilege. Under this privilege, defendants contend that the acts the defendants are charged with all relate to the constitutionally protected process of newsgathering because James Sanders was a freelance journalist and was investigating the crash of Flight 800 for newsgathering purposes. Elizabeth Sanders, in assisting her husband, was also engaged in the newsgathering process. While the court recognizes that there is a "reporter's privilege" with respect to certain information subpoenaed in civil and criminal proceedings, this privilege clearly does not apply as a shield against prosecution for violation of laws of general applicability...the press may not use First Amendment protection to justify otherwise illegal actions.

17 F. Supp. 2d at 143-144.

The court then quoted from *United States v. Sanusi*, 813 F. Supp. 149, 155 (E.D.N.Y. 1992) to the effect that "because the press in certain circumstances may be able to resist the demands of a subpoena, does not mean the press may, simply by raising the cry of 'newsgathering,' exempt itself from all ordinary legal constraints."

The substantive First Amendment defense fared no better in *United States v. Matthews*, 209 F.3d 338 (4<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 910 (2000). In *Matthews*, a veteran, award-winning journalist, who had previously produced a radio series on the availability of child pornography via the internet, began actively investigating pornography for purposes of creating another report. The journalist maintained an on-line "chat room" with which he had sexually explicit discussions with allegedly minor females. He sent or received over the internet roughly 160 pictures depicting child

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<sup>1</sup> *Sanders*, 211 F.3d at 715-16.

<sup>2</sup> *Id.* at 715.

<sup>3</sup> 17 F. Supp. 2d at 144.

pornography.<sup>4</sup> Two pictures showed a prepubescent minor female engaged in explicit sex acts with adults.<sup>5</sup> The FBI began monitoring the journalist's on-line activities and, eventually, commenced a prosecution against him for knowingly transmitting and receiving a "visual depiction . . . of a minor engaging in sexually explicit conduct."<sup>6</sup> Because the trial court would not allow him to explain his activities to the jury, the journalist entered a conditional plea of guilty that preserved all rights to appeal. The trial court sentenced him to 18-months in jail.

The Fourth Circuit affirmed, holding:

The reporter admits that he traded in the pornography but maintains that he did so only to research a news story. He contends that when such acts are committed solely for a valid journalistic purpose, the First Amendment provides a defense to criminal conviction, and he appeals the district court's refusal to permit him to present this defense to a jury. Because we conclude that the First Amendment provides no defense in these circumstances, and because we reject the reporter's other arguments, we affirm.

209 F.3d at 339.

The substantive First Amendment defense has also been repeatedly rejected in a recurring fact pattern where newsgathering arguably leads to trespassing. In *Stahl v. State*, 665 P.2d 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984) several journalists covering a protest by 339 demonstrators against nuclear power facilities followed the demonstrators onto state-controlled property. The journalists and protestors were warned not to enter the property by way of signs and a loudspeaker announcement. The reporters were convicted of criminal trespass and each fined \$25. The Oklahoma Court of Criminal Appeals upheld their convictions,<sup>7</sup> ruling that "the pivotal issue in this appeal is whether the First Amendment shields newsmen from state criminal prosecution in their news gathering function. We hold that it does not."

A recent decision from the United States Court of Appeals for the Fifth Circuit, however, serves as some precedent for a substantive First Amendment defense to trespassing although the case did not implicate newsgathering. In *Vasquez v. Housing Auth. of the City of El Paso* 271 F.3d 198, 206 (5<sup>th</sup> Cir. 2001), the Court held that a city regulation which prohibited door-to-door campaigning in a city owned, low income housing project violated the First Amendment. The regulation was a no trespassing rule which called for the arrest of violators. The Fifth Circuit held that "an outright ban on door-to-door political campaigning by nonresidents (places) an unreasonable restriction on the freedoms guaranteed by the first amendment." The 11<sup>th</sup> Circuit reached exactly the opposite conclusion in *Daniel v. City of Tampa*, 38 F.3d, 546 (11<sup>th</sup> Cir. 1994).

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<sup>4</sup> *Id.* at 340.

<sup>5</sup> *Id.* at 346.

<sup>6</sup> *Id.* at 340 & 342.

<sup>7</sup> 665 P.2d at 840.

## Exception: A Substantive First Amendment Defense Works When the “Crime” Is Publishing and Only Publishing

A substantive First Amendment defense does work, however, when the statute makes the act of publishing a crime and where the reporter has not been involved in any other way with the underlying criminality. The leading case is the recent U.S. Supreme Court decision in *Bartnicki v. Vopper*.<sup>8</sup> *Bartnicki* followed a line of Supreme Court cases: *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979) and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Bartnicki*, a reporter received a tape recording which was the product of an illegal wiretap.<sup>9</sup> The statute makes it a crime to disclose or use, i.e., publish, the contents whether or not the publisher has been involved in the original wire tapping.<sup>10</sup> The Court invalidated the statute, as applied, on First Amendment grounds holding: “First (the reporters) played no part in the illegal interception . . . . Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Third, the subject matter of the conversation was a matter of public concern.”<sup>11</sup>

But this line of authority represents an exception to the general rule that there is no substantive First Amendment defense. Consider for example the two *Peavy* cases (*Peavy I* and *Peavy II*). In *Peavy I*,<sup>12</sup> an illegally obtained wire tap was transcribed and read at a school board meeting. A reporter asked for a transcript of the recording from the board pursuant to the state’s open records act. *Id.* In a subsequent civil lawsuit against the reporter by Peavy, who relied on the civil remedies section of the wiretap act, relief was denied based upon a substantive First Amendment defense.<sup>13</sup> But in *Peavy II* – same illegal taping but different reporter – the journalist was accused of participating in the underlying wiretap and the substantive First Amendment defense was rejected. The Fifth Circuit in reversing the trial court wrote that:

Primarily at issue is whether the First Amendment shields WFAA-TV, Inc., and its reporter, Robert Riggs, from liability for their “use” and “disclosure,” in violation of the Federal and Texas Wiretap Acts, of the contents of the Peavys’ cordless telephone conversations, illegally intercepted and recorded by the Harmans, with them providing the recordings to Riggs *and with Riggs and WFAA having some participation concerning the interceptions, at least as to their extent....* The district court granted summary judgment for WFAA and Riggs, holding ... even though defendants engaged in proscribed “use” and “disclosure,” the First Amendment

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<sup>8</sup> 121 S.Ct. 1753 (2001), 532 U.S. 514.

<sup>9</sup> *Id.* at 1757.

<sup>10</sup> *Id.* at n. 3 (citing 18 U.S.C. § 2511(1)(c)).

<sup>11</sup> *Id.* at 1760.

<sup>12</sup> *Peavy v. New Times*, 976 F. Supp 532 (N.D. Tex. 1997).

<sup>13</sup> *Id.* at 540.

trumps the two Acts. We ... reverse.”

*Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 163 (5<sup>th</sup> Cir. 2000), *cert. denied*, 121 S.Ct. 2191 (2001).

Riggs’ “participation”—telling Harmon to tape all of the conversation and not just a part—is easily explained on journalistic grounds. Reporters don’t want their sources secretly editing things which could make the tape inaccurate. The Court found a more sinister potential in the instruction—participation in illegal activities.

### **Exception: Bad Faith Prosecutions**

Substantive First Amendment concerns are at their apex when a prosecutor proceeds criminally against a press defendant in bad faith. This is especially true when there is evidence that the prosecution is in reaction to or anticipation of unfavorable coverage of the government or a government official.

In a case where there was some evidence of prosecutorial bad faith, the District of Columbia Circuit instructed a district court to consider substantive and procedural First Amendment remedies if the bad faith was proven. *See Reporters Comm. for Freedom of the Press v. American Tel. and Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). The Court wrote: “no harassment of newsmen will be tolerated. If the newsman believes that the grand jury investigation is not being conducted in good faith, he is not without remedy.” The court remanded the case to the trial court to determine the scope of the remedy for a bad faith subpoena. The reporters sought prior notice of any third party subpoenas designed to expose the identity of a confidential news source. The court cautioned however that:

[E]ven if ... the District Court finds, that there have been past instances of abuse, (that) does not necessarily mean that each plaintiff will be entitled to prior notice of future subpoenas. As already stated, in order to obtain the kind of anticipatory relief sought in this case, each individual plaintiff must show not only that he personally faces an imminent threat of harm but also that the threatened harm is irreparable. In addition, each plaintiff must show that his remedy at law is inadequate.

593 F.2d at 1067.

### **First Amendment Due Process**

The substantive First Amendment defense is rarely effective and often counterproductive. But as the “True Story” indicates, First Amendment due process can help successfully defend a reporter accused of crime. “The history of American freedom is in no small measure the history of procedure,”<sup>14</sup> and there is little doubt about “the close relationship between procedure and substance in free-speech cases.” *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1192 (7<sup>th</sup> Cir. 1984), *aff’d*, 475 U.S. 292 (1986). There are few cases which discuss First Amendment due

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<sup>14</sup> *Malinski v. New York*, 324 U.S. 401, 414 (1945). (Frankfurter, J., concurring).

process in the context of allegedly “criminal” newsgathering so the argument for First Amendment due process must rely primarily on authority from other areas of First Amendment jurisprudence and, of course, part 50.10. We outline below how the argument could be articulated.

### **A. Newsgathering Is Protected Under The First Amendment**

Newsgathering is a First Amendment protected activity.<sup>15</sup> As long ago as *Branzburg*, the Court said that “without some protection for seeking out the news, freedom of the press could be eviscerated.”<sup>16</sup> In *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), the Court ruled that the “First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Court found a First Amendment right for the public and the press to attend criminal trials thus giving constitutional stature to the right. The lower federal courts have recognized that newsgathering enjoys First Amendment protection.<sup>17</sup> The task for a court confronted with a claim that newsgathering has involved criminal conduct is to do so in a setting designed to discriminate between protected and unprotected activity.<sup>18</sup>

### **B. First Amendment Due Process Applies In Newsgathering Cases**

First Amendment due process developed first in obscenity cases<sup>19</sup> but has since been extended to other areas of First Amendment jurisprudence such as mass demonstrations,<sup>20</sup> narrow application of The Foreign Agents Registration Act to exclude publications of a foreign agent<sup>21</sup> and even on burden of proof issues in tax cases.<sup>22</sup> New methods of communication continue to provide

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<sup>15</sup> Commentators note, however, that some courts question this. See Erwin Chenerinsky, *Protecting the Press, A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000).

<sup>16</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

<sup>17</sup> See, e.g., *Sherrill v. Knight*, 569 F.2d 124, 3 Media L. Rep. 1514 (D.C. Cir. 1977); *In re Express-News Corp.*, 695 F.2d 807, 9 Media L. Rep. 1001 (5<sup>th</sup> Cir. 1982); *Boddie v. American Broad. Cos.*, 881 F.2d 267, 271, 16 Media L. Rep. 2038 (6<sup>th</sup> Cir. 1989); *Daily Herald Co. v. Munro*, 838 F.2d 380, 14 Media L. Rep. 2332 (9<sup>th</sup> Cir. 1988); *United States v. Sherman*, 581 F.2d 1358 (9<sup>th</sup> Cir. 1978); *Journal Publ’g Co. v. Mechem*, 801 F.2d 1233, 13 Media L. Rep. 1391 (10<sup>th</sup> Cir. 1986).

<sup>18</sup> Stephen J. Friedman, *Mr. Justice Brennan: The First Decade*, 80 HARV. L. REV. 7 (1966).

<sup>19</sup> See *Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 470 (6<sup>th</sup> Cir.), cert. denied, 479 U.S. 915 (1986).

<sup>20</sup> *Carroll v. President and Cummr’s of Princess Anne*, 393 U.S. 175 (1968).

<sup>21</sup> *Viereck v. United States*, 318 U.S. 236 (1943).

<sup>22</sup> *Speiser v. Randall*, 389 U.S. 241 (1967).

opportunity for application of First Amendment due process.<sup>23</sup> As Judge Posner explained in *Hudson v. Chicago Teachers Union*:

Just the danger (as distinct from actuality) of depriving people of the freedom of expression guaranteed by the First Amendment has led courts to invalidate procedures that created the danger. This body of First Amendment law has a long historical pedigree. At common law, free speech meant freedom from prior restraints – a procedural right. The press could not be licensed although it could be punished, after the fact in a criminal proceeding, for “disseminating...bad sentiments.” The present case, remote as it is from the classic prior restraint, illustrates in a new setting the close relationship between procedure and substance in free-speech cases.

743 F.2d at 1192 (citations omitted).

*Hudson* dealt with the First Amendment right of union employees to have fair procedure with respect to how their dues monies were being spent on political matters. In affirming the 7<sup>th</sup> Circuit’s decision, the U.S. Supreme Court wrote that:

[P]rocedural safeguards often have a special bite in the First Amendment context...(and) commentators have discussed the importance of procedural safeguards in our analysis of obscenity, overbreadth, vagueness and public forum permits. The purpose of these safeguards is to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns.

475 U.S. at 303 n.12 (citations omitted).

The Supreme Court has thus recognized that “[l]ike the substantive rules [at issue in First Amendment cases], insensitive procedures can ‘chill’ the right of free expression. Accordingly, wherever First Amendment claims are involved, sensitive procedural devices are necessary.”<sup>24</sup> It would seem especially so in the newsgathering context where the press is investigating newsworthy matters. After all the “press” is the only institution singled out in the Bill of Rights for protection<sup>25</sup> and “if the constitution requires elaborate procedural safeguards in the obscenity area, a fortiori it

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<sup>23</sup> See Bernard W. Bell, *Filth, Filtering and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 237 (2001); Allan Tananbaum, “*New and Improved*”: *Procedural Safeguards For Distinguishing Commercial From Noncommercial Speech*, 88 COLUM. L. REV. 1821 (1988).

<sup>24</sup> Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 518 & 519 (1970).

<sup>25</sup> See Potter Stewart, *Or of The Press*, 26 HASTINGS L.J. 631 (1975), abstract published in 50 HASTINGS L.J. 705, 707 (1999) (“It seems to me that the Court’s approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.”).

should require equivalent procedural protection when the speech involved—for example, political speech—implicates more central first amendment concerns.”<sup>26</sup>

**i. Part 50.10 –Express approval from the Top Law Enforcement Official**

The Justice Department regulation (parts 50.10), which has been in place for 25 years, sets out procedures which are, on their face, motivated by First Amendment concerns that “because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues.” *Id.* The Justice Department regulation creates a procedure whereby the chief law enforcement officer of the country (the Presidentially appointed and Senate confirmed Attorney General) must grant “express authority” to subordinate members of the Justice Department before a reporter may be “interrogated, indicted or arrested.”

Although the regulation expressly states that it is “not intended to create or recognize any legally enforceable right in any person” and one court has so held,<sup>27</sup> the First Amendment due process cases<sup>28</sup> powerfully argue that the regulation is constitutionally compelled. In attempting to insure that First Amendment due process is satisfied, it should be required that the chief law enforcement officer such as the Attorney General or District Attorney personally approve the prosecution so that the prosecutor’s historically wide discretion be exercised with sensitivity to constitutional values.

**ii. Strict scrutiny of the evidence on probable cause**

The requirement that a top official of the executive branch must approve prosecution should be quickly followed by judicial review of the evidence. This is the holding of the obscenity cases like *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962) and *Freedman v. Maryland*, 380 U.S. 51 (1965) which requires judicial action, circumscribed by tight procedure before even suspected obscene material can be suppressed. It has likewise been applied by the Supreme Court in permit cases like *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) where a criminal prosecution was invalidated for, among other things, failing to provide prompt judicial review to the denial of a parade permit. In the newsgathering context the “express approval” by the Attorney General should be followed by a judicial review of that decision providing an elevated standard to the evidence or “strict scrutiny” if you will.

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<sup>26</sup> See Henry P. Monaghan, *First Amendment “Due Process”* 83 HARV. L. REV. 518, 519 (1970).

<sup>27</sup> *In re: Lewis*, 384 F. Supp. 133, 137 (C.D. Cal. 1974), *aff’d*, 517 F.2d 236 (9<sup>th</sup> Cir. 1975) (“[T]here exists no burden on the Government to show that they have adhered to their interdepartmental policy statements or guidelines such as the Policy Regarding Issuance of Subpoenas to, and Interrogation, Indictment or Arrest of News Media, 28 C.F.R. § 50.10”).

<sup>28</sup> Collected in Henry P. Monaghan, *First Amendment “Due Process”* 83 HARV. L. REV. 518 (1970).

## **Conclusion**

The application of First Amendment due process to allegedly criminal newsgathering has little direct precedent to guide it. However, several things are reasonably clear: (1) newsgathering is First Amendment protected activity; (2) a substantive First Amendment defense to allegedly criminal newsgathering activity works only in limited circumstances; (3) there is ample precedent for procedural due process protection derived expressly from the First Amendment; (4) the Justice Department recognizes that, because of these First Amendment concerns, the U.S. Attorney General should be involved and “expressly approve” the prosecution of a reporter based upon his/her newsgathering activities and (5) The First Amendment due process cases suggest that the Attorney General’s decision to proceed against the reporter should receive prompt judicial review and strict scrutiny of the evidence.