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Affiliations appear only for purposes of identification.

By email

December 22, 2021

The Honorable Bennie G. Thompson
Chair, Select Committee to Investigate the
January 6th Attack on the United States Capitol
Longworth House Office Building
Washington, D.C. 20515

The Honorable Liz Cheney
Vice Chair, Select Committee to Investigate the
January 6th Attack on the United States Capitol
Longworth House Office Building
Washington, D.C. 20515

Re: Toll records subpoena to photojournalist Amy Harris.

Dear Chairman Thompson and Vice Chair Cheney:

The undersigned members of the news media and advocates for press freedom write to express our profound concern with reports that the Select Committee has issued a subpoena for the telephone toll records of a photojournalist, Amy Harris.¹ The events of January 6th were an attack on democracy, and it would be incongruous were a Congressional investigation into 1/6 to itself endanger the independence of the press. We respectfully urge the Select Committee to withdraw the subpoena.

While the “broad” power of Congress to conduct investigations is “inherent in the legislative process,” the “Bill of Rights is applicable to investigations as to all forms of government action,” and Congressional investigations are necessarily incident to lawmaking. *Watkins v. United States*, 354 U.S. 178, 187-88, 197 (1957). As such, the “First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.” *Id.* at 197. Further, it is indisputable that the act of newsgathering is protected under the First Amendment. *See Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) (“The First Amendment guarantees a free press primarily because of the important role it can play as a vital source of public information.”) (cleaned up).

The Select Committee is seeking the type of information—granular data about who called whom and when—that could disclose the identity of

¹ Harris has filed suit in federal court seeking, among other relief, a declaration that the phone records sought in the subpoena are protected under the First Amendment and federal and district reporters’ privileges. *See Compl., Harris v. U.S. H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, No. 21-cv-03290 (D.D.C. Dec. 15, 2015).

confidential sources or impair Harris’s reporting on stories that have nothing to do with the 1/6 attack. That information is particularly sensitive, as the inability of a journalist to maintain the confidentiality of sources means sources will be less likely to come forward, which itself limits the free flow of information to the public. *See id.* at 711 (“Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.”).

For that reason, confrontations between Congress and newsgathering rights have been rare. To our knowledge, the last time Congress contemplated using the press as an investigative arm of the legislature was during Justice Clarence Thomas’s confirmation hearings, when a special counsel appointed by the Senate sought authorization to depose *Newsday*’s Timothy Phelps and National Public Radio’s Nina Totenberg, as well as a subpoena for their phone records.

Following national outcry, lawmakers declined to do so, with the chair of the Senate Rules Committee, Sen. Wendell Ford of Kentucky, saying that granting “the requested orders could have a chilling effect on the media and could close a door where more doors need opening.” *See* Clifford Krauss, *Senate Panel Rebuffs Prosecutor in Leak Inquiry*, N.Y. Times, Mar. 26, 1992, at B12, <https://perma.cc/6L9E-2TV8>.

The Justice Department has likewise adopted internal policies that limit when members of the department may seek information from or regarding members of the news media. *See* 28 C.F.R. § 50.10. For half a century, these “News Media Guidelines” have contained safeguards to balance press rights against investigative interests, including that the attorney general personally approve certain investigative steps, a presumption that affected members of the news media will be notified before their records are sought from third parties, and that government attorneys make all reasonable efforts to obtain the desired information from non-media sources.

Indeed, following revelations that the Justice Department had secretly sought in 2020 to obtain phone and email records of reporters at CNN, the New York Times, and the Washington Post, Attorney General Merrick Garland issued a memorandum that would *prohibit* the Justice Department from pursuing the same information the Select Committee is demanding here. That is, the Garland memorandum set down a bright-line rule barring compulsory process against journalists, with only limited exceptions, none of which apply in this case. *See* Memorandum from the Attorney General Re: Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media (July 19, 2021), <https://perma.cc/22F7-J6ZH>.

Constitutional protections for newsgathering reflect the reality, well known to the framers, that the press itself preserves democratic governance by promoting an informed electorate. It cannot do so if sources are concerned that speaking to the press will expose them to the burdens of a government investigation. The Select Committee’s subpoena threatens to compromise that independence, and we strongly urge you to withdraw it.

Please do not hesitate to contact Bruce Brown, Executive Director of the Reporters Committee for Freedom of the Press, with any questions. He can be reached at bbrown@rcfp.org.

Sincerely,

The Reporters Committee
for Freedom of the Press

National Press Photographers
Association

ABC News
The Associated Press
The Atlantic Monthly Group LLC
Bloomberg News
Boston Globe Media Partners, LLC
BuzzFeed
Californians Aware
CBS News
The Center for Investigative Reporting
(d/b/a Reveal)
Committee to Protect Journalists
CNN, Inc.
Courthouse News Service
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