

August 6, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Garland:

The American Civil Liberties Union (ACLU), the ACLU of Oregon, the National Association of Black Journalists, and NewsGuild-CWA write to urge you to uphold your commitment to protect journalists and other observers of the activities of our government. To safeguard their pivotal role in upholding our democracy, we urge you to permanently adopt protections for journalists and legal observers at protests by enshrining restrictions on law enforcement's ability to interfere with their activities at protests into the DOJ's Law Enforcement Guidelines for First Amendment Protected Events.

The Department of Justice (DOJ), under your leadership, recently publicly announced a pivot away from the Trump administration's aggressive searches of reporters' phone and email data¹ and in your confirmation hearing you praised DOJ policies that "ensure respectful treatment of the press."² It has also announced its pursuit of prosecutions against January 6th rioters for attacking journalists and destroying their equipment that day.³ These are positive developments. However, the DOJ is simultaneously and paradoxically taking up the Trump mantle to fight free press, free speech, and government transparency in court, and defending the ability of law enforcement to engage in the same conduct as the January 6th rioters, by continuing to defend the federal government's purported authority to violently disperse journalists and legal observers at protests⁴—a practice that a court has already ordered the government to stop.

As is now well-known, on May 25, 2020, Derek Chauvin, a Minneapolis police officer murdered George Floyd. Darnella Frazier captured this atrocity on camera and shared it with the world. The video sparked outrage and nationwide protests demanding an end to law enforcement violence against Black people and people of color. Portland, Oregon became the site of particularly vocal and long-lasting protests. Federal law enforcement agencies, including those from the Department of Justice, Department of Homeland Security, and others, descended on the

¹ Charlie Savage, *Garland Confronts Long-Building Crisis Over Leak Inquiries and Journalism*, NYTimes (Jun. 12, 2021), <https://www.nytimes.com/2021/06/12/us/politics/government-leaks-garland-biden-administration.html?referringSource=articleShare>.

² *The Nomination of the Honorable Merrick Brian Garland to be Attorney General of the United States: Day 1 Before the S. Judiciary Comm.*, 117th Cong. (2021) (statement of Merrick Brian Garland, Nominee for Attorney General), <https://www.judiciary.senate.gov/imo/media/doc/SJC%20Testimony.final1.pdf>.

³ Devlin Barrett, *FBI launches flurry of arrests over attacks on journalists during Capitol riot*, WASH. POST (Jul. 3, 2021), https://www.washingtonpost.com/national-security/capitol-riot-media-attacks/2021/07/02/8af871d2-daa7-11eb-bb9e-70fda8c37057_story.html.

⁴ Federal Defendants' Motion for an Indicative Ruling on Dissolving the Preliminary Injunction, 3:20-cv-01035-SI, ECF 209 (DATE); *see also* Appellants United States Marshals Service and USDHS Motion to stay appellate proceedings, Case No. 20-35739 (June 11, 2021).

protests and each night, for over a month, repeatedly and indiscriminately deployed tear gas, impact munitions, truncheons, and other weapons of war against protesters in Portland.

The media's footage of these events exposed the government's response to the general public, generating outrage and motivating calls for change around the country, much like footage and images of police brutality did during the Civil Rights Movement. Freedom of the press is both a check against government power and part of the fabric of our democracy because it enables the public to make informed decisions. Despite the clear public interest in broadcasting the events in Portland for the world to see, federal agents used the same brutal tactics on journalists and ACLU and National Lawyers Guild legal observers to prevent them from documenting law enforcement's use of force on protesters.

The ACLU of Oregon sued to prevent law enforcement from blocking journalists and legal observers from documenting police activity as law enforcement cleared protesters from the streets. The mission of journalists and legal observers at a protest is distinct from that of the protesters. Journalists and legal observers are there to document events, communicate to and inform the public, and hold the government accountable for its actions when it uses force against its own people. As shown in the Derek Chauvin trial, where an observer's video of Mr. Floyd's murder played prominently in refuting the officer's characterization of events, if law enforcement is able to disperse journalists and legal observers without qualification, while continuing to deploy its own photographers and videographers, as it has done, it can use violence to constrain the marketplace of ideas, thereby unalterably jeopardizing constitutional protections. In recognition of this fact, the district court,⁵ in an opinion upheld by the Ninth Circuit Court of Appeals,⁶ issued a preliminary injunction barring federal officers from interfering with the mission of journalists and legal observers at the Portland protests.

The injunction put in place common sense protections⁷ for journalists and legal observers present at the protests. Under the injunction:

- Federal officials cannot arrest, threaten to arrest, or use physical force against any person whom they know or reasonably should know is a journalist⁸ or legal observer,⁹ unless there is probable cause to believe that person committed a crime.

⁵ Press Release, ACLU, Order in ACLU Lawsuit Blocks Trump's Militarized Agents from Attacking Journalists, Legal Observers at Portland Protests While Underlying Lawsuit Proceeds (Jul. 23, 2020), <https://www.aclu.org/press-releases/federal-court-issues-restraining-order-federal-agents-portland>.

⁶ See Order Denying Federal Defendants' Motion to Stay the Preliminary Injunction, Case No. 20-35739 (Oct. 9, 2020).

⁷ Order Granting Preliminary Injunction, Case 3:20-cv-01035-SI, at 58-61 (D.OR. Aug. 8, 2020) https://aclu-or.org/sites/default/files/field_documents/2020-08-20_order_granting_pi.pdf.

⁸ The definition of journalist is a much-discussed topic in the legal world. In this context, Judge Michael Simon, who issued the preliminary injunction, took a practical approach to identifying journalists, which takes into account the context of the interaction between the government and the journalist and errs on the side of protecting press freedom. We urge the DOJ to take a similar approach when defining journalist for the purposes of this policy. https://aclu-or.org/sites/default/files/field_documents/2020-08-20_order_granting_pi.pdf.

⁹ Judge Simon took a similarly practical approach to defining who should be considered a legal observer, and we also encourage its adoption in DOJ policy. https://aclu-or.org/sites/default/files/field_documents/2020-08-20_order_granting_pi.pdf.

- Journalists and legal observers are not required to disperse following a dispersal order, though they are bound by all other laws and may not interfere with law enforcement’s lawful activities.
- Federal officials may not order any journalist or legal observer to stop recording, photographing, recording, or observing a protest, unless that person is arrested based on probable cause.
- Federal officers must wear unique identifying markers on their uniforms and helmets so that they can be identified at a reasonable distance.¹⁰

In addition, federal officials cannot seize photographic equipment, audio- or video-recording equipment, or press passes from anyone they know or reasonably should know is a journalist or legal observer, unless in connection with an arrest of that person. If officials do seize equipment pursuant to an arrest, they must make a list of things seized and provide a written copy as soon as reasonably possible. If the equipment is necessary for evidentiary purposes, officials must seek a search warrant, subpoena or other court order. If the request is denied, the equipment must be immediately returned. If the equipment is not needed for evidentiary purposes, it must also be immediately returned.

These protections for journalists and legal observers at protests ensure that they can observe and report what they see without interference or intimidation from law enforcement officers who may otherwise be incentivized to silence them. Yet, the DOJ is in court right now asking the court to lift the preliminary injunction enforcing them—without making any meaningful changes to its guidance or to its procedures for addressing protests.

How quickly the government asks us to forget the full-scale assault on racial justice and the freedom of speech launched by police departments and federal law enforcement officers in cities across the country – from Portland to Kenosha to Washington, D.C. – last year. We have not forgotten and we cannot sweep those violations of our constitutional rights aside. We do not trust that they will not happen again without permanent and enforceable policy changes.

The protesters that raised their voices demand a complete re-examining of how we approach community safety in this country. We stand with them. There will be many steps along that road. The incorporation of the protections for journalists and legal observers at protests outlined above into the DOJ’s Law Enforcement Guidelines for First Amendment Protected Events is a necessary initial step. We urge you to ensure it is done and that federal law enforcement officers understand their obligations towards journalists and legal observers at protests.

Thank you for your attention to this urgent matter. If you have any further questions, please reach out to Kate Ruane, kruane@aclu.org.

Sincerely,

American Civil Liberties Union

¹⁰ Kate Oh, New Law Requires Federal Agents to Identify Themselves to Protesters, ACLU Blog (Jan. 4, 2021), <https://www.aclu.org/news/free-speech/new-law-requires-federal-agents-to-identify-themselves-to-protesters/>.

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cc: The Honorable Vanita Gupta, Associate Attorney General, U.S. Department of Justice
The Honorable Kristen Clarke, Assistant Attorney General, U.S. Department of Justice
The Honorable Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security