

PRESS FREEDOM: IT DEPENDS ON WHAT THE MEANING OF THE WORD “IS” IS

As we get further away from last week's what's-new-is-old counterterrorism speech, I'm increasingly convinced all that happened was the Administration yoked the word “continuing” onto the word “imminent” and declared an entirely new standard that just happens to replicate the existing one.

Which is why I think this detail, from Politico's leaks-about-a-meeting-about-leaks story, is the most telling I've seen on the Holder meeting.

“The guidelines require a balance between law enforcement and freedom of the press, and we all argued that the balance was out of kilter, with the national security and law enforcement interests basically overwhelming the public's right to get information,” one journalist at the meeting said. “The language concerning ‘aiding and abetting’ comes out of the Privacy [Protection] Act, and they discussed trying to revise that language so that reporters don't need to be defined as co-conspirators in order to execute search warrants.”

This is a reference to part of the Privacy Act that prohibits the government from seizing media work product unless it is connected to a crime (see pages 5 ff for how it affected the James Rosen warrant application). After claiming Rosen was aiding and abetting a violation of the Espionage Act and therefore his emails could be seized, the FBI then said that since he was potentially criminally liable, he should not get

notice. In other words, the aiding abetting was an investigative tactic DOJ used to get around protections put into place just for someone like Rosen.

And DOJ's solution for abusing a protection meant to protect someone like Rosen is apparently to simply redefine the law, so it can overcome those protections without having to accuse Rosen of being a criminal.

The outcome would remain the same; DOJ would just avoid saying mean things about people associated with powerful media outlets.

And note, from the reports I've seen thus far, none of these crack journalists seem to have suggested to DOJ that even the way it was using the Espionage Act to go after sources (many of whom are whistleblowers) is a dangerous misapplication of statute, just like calling James Rosen a co-conspirator is. That is, DOJ's use of the Espionage Act to give the clearance system more teeth than it was meant to have seems to have escaped these media representatives' notice.

Ah well. If they had raised DOJ's abuse of the Espionage Act, DOJ would just do what they appear to intend to do with its abuse of Privacy Act restrictions: redefine the terms and proceed as they had been.