UNITED STATES HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

CHAIRMAN BOB GOODLATTE

JOURNALISTS OR CRIMINALS?

Attorney General Eric Holder's Testimony before the Committee and the Justice Department's National Security Leak Investigative Techniques

House Committee on the Judiciary
Majority Staff Report to
Chairman Bob Goodlatte

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APPENDIX

EXECUTIVE SUMMARY

The recent controversy surrounding Attorney General Eric Holder, Jr. and his testimony before the House Judiciary Committee is the result of deliberate efforts by Mr. Holder to avoid answering for questionable decisions and actions in the performance of his official duties. In particular, Mr. Holder's testimony was an attempt, through verbal gymnastics, to circumvent proper congressional oversight and accountability by distorting the truth about the Justice Department's investigative techniques targeting journalists.

Mr. Holder assured the Committee, in sworn testimony, that "*[w]ith regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved, heard of, or would think would be a wise policy.*" Yet, as the Committee learned after its May 15, 2013, hearing, in 2010, the Justice Department obtained a search warrant for Fox News Chief Washington Correspondent James Rosen's emails by swearing to a federal court that Mr. Rosen was a co-conspirator in a national security leak investigation. When questioned by the Committee about the obvious clash between his testimony and the truth, Mr. Holder refused to answer questions from the Committee. Finally, after weeks of delay, Mr. Holder responded to the Committee's inquiry. However, Mr. Holder's responses do not ameliorate our concern that his testimony to the Committee was deceptive and misleading. We take little comfort in Mr. Holder's assurances to us now that the Department never intended to prosecute Mr. Rosen when it labeled him a criminal suspect in 2010.

Tarnishing a journalist as a suspect in a national security investigation is not something that should be taken lightly. Espionage is a serious federal crime, punishable by up to a decade in prison. In essence, the Justice Department dangled Mr. Rosen over a cliff. But the American people were then assured by Mr. Holder that this was appropriate because there was never a potential of him falling to his doom.

In response to the nationwide disapproval of his tactics, Mr. Holder has proposed new rules and regulations to control the Justice Department's dealings with the media. While some of these proposals are welcome, the Committee is dismayed that Mr. Holder suggests that Congress change the law to stop him from continuing to do what he has done in the past – distort federal law to fit his investigative prerogatives. Mr. Holder proposes that Congress amend the Privacy Protection Act of 1980, a law intended to prohibit the government from searching a journalist's records unless the journalist is a criminal suspect. Mr. Holder maintains that the law contains a loophole that permits the government to do what it did in the Rosen case. But there is no such loophole. If Mr. Holder believes that the law should not permit the Justice Department to do what it did, he never should have authorized the search warrant in the first place. The Committee believes that Mr. Holder is trying to deflect responsibility for his actions by presenting a distorted reading of the law. Changing the law is not the solution for misuse of the law.

The Committee finds that Mr. Holder's sworn testimony in the Rosen matter was deceptive and misleading. No amount of law-making can restore credibility and professionalism to the Justice Department in the wake of these revelations. The only way to achieve this goal is through an improvement in the quality of leadership at the Justice Department.

1. THE JUSTICE DEPARTMENT'S INVESTIGATIONS OF NATIONAL SECURITY LEAKS

Since the WikiLeaks case in July 2010, a series of significant and highly-damaging national security leaks have occurred – including, most notably, the June 2013 disclosure of certain National Security Agency (NSA) programs by government contractor Edward Snowden.

The Obama Administration is credited with initiating more national security leak investigations than any previous administration. While this may be true, it is certainly also true that the increase in national security leak investigations is directly proportional to an increase in national security leaks in the last four and a half years. Beginning with the raid that killed Osama bin Laden, observers have noticed a marked increase in the amount and severity of leaked information.[1] Although laudable, the fact that the Obama Administration has initiated more national security leak investigations than any previous administration is in fact a necessary response to the high rate of leaks.

To be sure, Attorney General Eric Holder, Jr., in describing the 2012 leak of a Yemeni bomb plot, stated: "I have been a prosecutor since 1976 and I have to say that this is among, if not the most serious, it is within the top two or three most serious leaks that I have ever seen. It put the American people at risk, and that is not hyperbole. It put the American people at risk. And trying to determine who was responsible for that I think required very aggressive action."[2]

FBI Director Robert Mueller, in testimony before the Senate Judiciary Committee on May 16, 2012, said "[l]eaks such as this have . . . a huge impact on our ability to do our business, not just on a particular source and the threat to the particular source, but your ability to recruit sources is severely hampered . . . . In cases such as this, the relationship with your counterparts overseas are damaged and which means that an inhibition in the willingness of others to share information with us where they don't think that information will remain secure. So it also has some long-term effects, which is why it is so important to make certain that the persons who are responsible for the leak are brought to justice."[3]

A. *WikiLeaks*

Founded in 2006, WikiLeaks.org describes itself as a "public service designed to protect whistle-blowers, journalists and activists who have sensitive materials to communicate to the public."[4] Arguing that "[p]rincipled leaking has changed the course of history for the better," WikiLeaks states that its purpose is to promote transparency in government and fight corporate fraud by publishing information that governments or corporations would prefer to keep secret,

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[1] Tom Cohen, *Congressional leaders call for halt to 'cascade of leaks'*, CNN (June 7, 2012, 9:18 PM), http://www.cnn.com/2012/06/07/politics/white-house-leaks.
[2] *Eric Holder says leak to AP was 'very serious'*, BBC NEWS (May 14, 2013, 8:55 PM), http://www.bbc.co.uk/news/world-us-canada-22532057.
[3] Jason Ryan, *Attorney General Eric Holder Appoints Federal Prosecutors for Leak Investigations*, ABC NEWS (June 8, 2012), http://abcnews.go.com/blogs/politics/2012/06/attorney-general-eric-holder-appoints-federal-prosecutors-for-leak-investigations/.
[4] WIKILEAKS, http://www.wikileaks.org/wiki/WikiLeaks:About (last visited July 11, 2013).

obtained from sources in person, by means of postal drops, and by using "cutting-edge cryptographic technologies" to receive material electronically.[5]

WikiLeaks obtained more than 91,000 secret U.S. military reports related to the war in Afghanistan and posted the majority of them, unredacted, on its website in late July 2010, after first alerting the *New York Times* and two foreign newspapers, the *Guardian* and *Der Spiegel*, about the pending disclosure. U.S. military officials charged Army Private Bradley Manning for offenses related to his disclosure of documents to WikiLeaks. The most serious charge, aiding the enemy in violation of UCMJ Article 104, is a capital offense, but prosecutors reportedly said they did not intend to seek the death penalty. On February 28, 2013, Private Manning pleaded guilty in a military courts-martial to ten counts related to his unauthorized disclosure to WikiLeaks.[6]

Julian Assange, the founder of WikiLeaks, is an Australian citizen who has resided in several countries in recent years. On November 20, 2010, Sweden issued an arrest warrant for Mr. Assange on allegations of sexual abuse by two women.[7] INTERPOL later issued a red notice seeking Mr. Assange's arrest on the Swedish warrant.[8] On December 7, 2010, Mr. Assange, who was believed to be in England, surrendered himself to British authorities at Scotland Yard.[9] He was held in a British jail pending extradition to Sweden until December 14, 2010, when a British judge released Mr. Assange on bail.[10] The judge placed conditions on Mr. Assange's release, including that he surrender his passport, abide by a curfew, and wear an electronic monitoring device.[11]

Mr. Assange challenged his extradition to Sweden, believing that Swedish authorities would extradite him to the United States.[12] After a two-year legal battle, the Supreme Court of the United Kingdom dismissed his appeal against enforcement of the Swedish warrant.[13] Mr. Assange failed to surrender to his bail, and was designated as an absconder by British

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[5] *Id.*
[6] Charlie Savage, *Soldier Admits Providing Files to WikiLeaks*, N.Y. TIMES (Feb. 28, 2013), http://www.nytimes.com/2013/03/01/us/bradley-manning-admits-giving-trove-of-military-data-to-wikileaks.html?pagewanted=all&_r=0.
[7] *Timeline: sexual allegations against Assange in Sweden*, BBC (Aug. 16, 2012, 10:31 AM), http://www.bbc.co.uk/news/world-europe-11949341.
[8] Robert Booth, *Julian Assange: Sweden issues fresh arrest warrant for WikiLeaks founder*, GUARDIAN (Dec. 2, 2010), http://www.guardian.co.uk/media/2010/dec/02/julian-assange-faces-arrest-wikileaks.
[9] *Julian Assange Surrenders to Scotland Yard*, ARLINGTON CARDINAL (Dec. 7, 2010, 11:54 AM), http://www.arlingtoncardinal.com/2010/12/julian-assange-surrenders-to-scotland-yard/.
[10] *Wikileaks founder Julian Assange freed on bail*, BBC (Dec. 16, 2010, 3:41 PM), http://www.bbc.co.uk/news/uk-12005930.
[11] Radell Smith, *Julian Assange Conditions of Release*, EXAMINER.COM (Dec. 16, 2010), http://www.examiner.com/article/julian-assange-conditions-of-release.
[12] Owen Bowcott & Esther Addley, *Julian Assange given 14 days to challenge extradition ruling*, GUARDIAN (May 30, 2012), http://www.guardian.co.uk/media/2012/may/30/julian-assange-challenge-extradition.
[13] *Supreme court dismisses Assange appeal bid*, BBC (June 14, 2012, 12:38 PM), http://www.bbc.co.uk/news/world-18446295.

authorities.[14] Several individuals who had posted significant funds for Mr. Assange's release had those funds seized by the courts.[15]

Mr. Assange took refuge in the Ecuadorian embassy on June 19, 2012.[16] In August, 2012, the Ecuadorian foreign ministry said the country had decided to grant asylum because Sweden could not guarantee Mr. Assange would not be extradited from there to the United States.[17] British authorities have stated that they will not grant Mr. Assange safe passage out of the embassy. Britain's Foreign Secretary has said that if Mr. Assange steps foot outside the embassy, he will be arrested.[18] Police officers are stationed outside and in the lobby around the clock, in case he attempts to leave.[19] London police said the cost of the embassy operation had reached nearly $6 million at the end of May 2013.[20]

Mr. Assange remains at the Ecuadorian embassy. He has indicated that he will not leave the embassy even if Sweden drops its extradition request, because he fears being extradited to the United States.[21] According to numerous media reports, there exists a sealed U.S. indictment of Mr. Assange.[22]

B. *Stuxnet*

The Stuxnet worm, which was first reported in June 2010 by a security firm in Belarus, appears to be the first malicious software (malware) designed specifically to attack a particular type of computer-assisted industrial control system (ICS): one that controls nuclear plants, whether for power or uranium enrichment.[23] The malware attacks and disrupts a Microsoft Windows-based application that is employed by a particular ICS produced by the German company Siemens. The worm can be spread through an air-gapped network by a removable device, such as a thumb drive, and possibly through computers connected to the Internet, and it is

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[14] Conal Urquhart, *Julian Assange rejects police request to surrender for breaking bail terms*, BBC (June 28, 2012), http://www.guardian.co.uk/media/2012/jun/29/julian-assange-police-surrender-bail.
[15] Telegraph Reporters, *Julian Assange backers lose £200,000 bail money*, TELEGRAPH (Sep. 4, 2012), http://www.telegraph.co.uk/news/worldnews/wikileaks/9519767/Julian-Assanges-backers-lose-200000-bail-money.html.
[16] *Julian Assange rape accusations: timeline*, TELEGRAPH (June 20, 2012), http://www.telegraph.co.uk/news/worldnews/wikileaks/9343503/Julian-Assange-rape-accusations-timeline.html.
[17] William Neuman & Maggy Ayala, *Ecuador Grants Asylum to Assange, Defying Britain*¸ N.Y. TIMES (Aug. 16, 2012), http://www.nytimes.com/2012/08/17/world/americas/ecuador-to-let-assange-stay-in-its-embassy.html?pagewanted=all&_r=0.
[18] Vanessa Allen, *Ecuador president says Julian Assange can stay in London embassy 'indefinitely', leaving UK taxpayer with massive bill*, DAILY MAIL (Aug. 22, 2012), http://www.dailymail.co.uk/news/article-2192107/Ecuador-president-says-Julian-Assange-stay-London-embassy-indefinitely-leaving-UK-taxpayer-massive-bill.html.
[19] Haroon Siddique, *Julian Assange stakeout at Ecuadorean embassy costs Met police £3.8m*, GUARDIAN (July 10, 2013), http://www.guardian.co.uk/media/2013/jul/10/julian-assange-ecuadorian-embassy-police-cost.
[20] Cole Morton, *Julian Assange vigil costs taxpayers £4 million*, TELEGRAPH (May 19, 2013), http://www.telegraph.co.uk/news/worldnews/wikileaks/10066084/Julian-Assange-vigil-costs-taxpayers-4million.html.
[21] Esther Addley, *Assange will not leave Ecuador embassy even if Sweden drops extradition bid*, GUARDIAN (June 18, 2013), http://www.guardian.co.uk/media/2013/jun/18/julian-assange-will-not-leave-embassy.
[22] Ryan Grim, *Julian Assange Attorney Says Sealed Indictment 'More Likely Than Not'*, HUFFINGTON POST (June 5, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/06/05/julian-assange-attorney-indictment_n_3386793.html.
[23] PAUL K. KERR, JOHN ROLLINS & CATHERINE A. THEOHARY, CONG. RESEARCH SERV., R41524, THE STUXNET COMPUTER WORM: HARBINGER OF AN EMERGING WARFARE CAPABILITY (2010).

often capable of remaining hidden from detection. It is difficult to determine the geographic origin of the malware, as cyber attackers often employ sophisticated methods such as peer-to-peer networking or spoofing IP addresses to obviate attribution. Likewise, malware placed on a removable device may contain no signatures that would identify its author.[24]

Iran has apparently suffered the most attacks by the Stuxnet worm and, as noted, may well have been its main target. A September 2010 study by Symantec argued that the "concentration of infections in Iran likely indicates that this was the initial target for infections and was where infections were initially seeded."[25] As of September 25, 2010, Iran had identified "the IP addresses of 30,000 industrial computer systems" that had been infected by Stuxnet, according to Mahmoud Liaii, director of the Information Technology Council of Iran's Industries and Mines Ministry, who argued that the virus "is designed to transfer data about production lines from our industrial plants" to locations outside of Iran.[26]

On June 1, 2012, the *New York Times* reported that "President Obama secretly ordered increasingly sophisticated attacks on the computer systems that run Iran's main nuclear enrichment facilities, significantly expanding America's first sustained use of cyberweapons [sic] [.]"[27] The report included graphics that detailed how the United States inserted computer malware into Iran, as well as other highly-sensitive facts, including the code name for the operation and a detailed description of a White House Situation Room meeting.[28] The article claimed its "account of the American and Israeli effort to undermine the Iranian nuclear program is based on interviews over the past 18 months with current and former American, European and Israeli officials involved in the program, as well as a range of outside experts. None would allow their names to be used because the effort remains highly classified, and parts of it continue to this day."[29]

That same month, the *Washington Post* reported that the United States had collaborated with Israel to develop another "computer virus nicknamed Flame that collected intelligence in preparation for cyber-sabotage aimed at slowing Iran's ability to develop a nuclear weapon."[30]

On June 8, 2012, Mr. Holder tasked Mr. Rod J. Rosenstein, the U.S. Attorney for the District of Maryland, to lead the investigation into the Stuxnet leak. The investigation has recently focused on retired Marine General James Cartwright, the former vice chairman of the

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[24] *Id.*
[25] *Id.* at 3 (quoting Nicolas Falliere, Liam O Murchu & Eric Chien, *W32.Stuxnet Dossier*, SYMANTEC SECURITY RESPONSE, 7 (September 2010) *available at* http://www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/w32_stuxnet_dossier.pdf).
[26] *Id.* (citing *Iran Confirms Cyber Attack, Says Engineers 'Rooting Out' Problem*, MEHR NEWS AGENCY (September 25, 2010).
[27] David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?_r=2&pagewanted=all.
[28] *Id.*
[29] *Id.*
[30] Ellen Nakashima, Greg Miller & Julie Tate, *U.S., Israel developed Flame computer virus to slow Iranian nuclear efforts, officials say*, WASH. POST (June 19, 2012), http://articles.washingtonpost.com/2012-06-19/world/35460741_1_stuxnet-computer-virus-malware.

Joint Chiefs of Staff, as a possible source of the leaked information regarding Stuxnet.[31] To date, no charges have been filed.

C. *North Korean nuclear testing*

On June 11, 2009, FOX News published an article written by its Chief Washington Correspondent James Rosen (the "Rosen Article") regarding nuclear testing in North Korea.[32] The Rosen Article allegedly contained "United States national defense information… that was classified TOP SECRET/SPECIAL COMPARTMENTED INFORMATION (TS/SCI)"[33] regarding four planned North Korean responses to a United Nations Security Council resolution condemning the North Koreans for recent nuclear and ballistic missile tests.[34] The FBI subsequently initiated an investigation "to determine the source(s) of the unauthorized disclosure."[35] That investigation revealed that the information in the Rosen Article "was first made available to a limited number of Intelligence Community members in an intelligence report (the 'Intelligence Report') that was electronically disseminated… on the morning of the date of publication of the [Rosen Article]."[36]

The classified information database containing the Intelligence Report warned all users seeking access to the database that "[n]one of the intelligence contained in this system may be discussed or shared with individuals who are not authorized to receive it."[37] In addition, "the Intelligence Report was clearly marked TS/SCI."[38]

The investigation further revealed that 96 individuals accessed the Intelligence Report on June 11, 2009, but only one of those 96 individuals, Stephen Jin-Woo Kim, also had contact with Mr. Rosen on that same day.[39] Mr. Kim "is a Lawrence Livermore National Laboratory employee who was on detail to the Department of State's Bureau of Verification, Compliance, and Implementation (VCI) at the time of the publication" of the Rosen Article.[40] As a government employee with a security clearance, Mr. Kim executed multiple SF 312 Classified Information Non-Disclosure Agreements (NDAs) with the Government.[41] NDAs are legally-binding agreements that notify the individual with a security clearance that "unauthorized disclosure of classified information can lead to criminal prosecution."[42]

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[31] Barbara Starr, *Source: Justice Department investigates ex-vice chairman of Joint Chiefs of Staff*, CNN (June 29, 2013), http://www.cnn.com/2013/06/27/us/stuxnet-cartwright.
[32] James Rosen, *NK's Post UN Sanctions Plans, Revealed*, FOXNEWS.COM (June 11, 2009), http://politics.blogs.foxnews.com/2009/06/11/nks-post-un-sanctions-plans-revealed.
[33] Reyes Aff. ¶¶ 9–10, May 28, 2010, ECF No. 1:10-mj-00291-AK *available at* http://s3.documentcloud.org/documents/702199/d-o-j-versus-james-rosen.pdf.
[34] Rosen, *supra* note 32.
[35] Reyes, *supra* note 33, ¶ 11.
[36] *Id.*
[37] *Id.*
[38] *Id.* ¶ 12.
[39] *Id.* ¶ 13, n.4.
[40] *Id.* ¶ 13.
[41] *Id.* ¶ 16.
[42] *Id.*

Government electronic records revealed that between the time the Intelligence Report was made available to the Intelligence Community on June 11, 2009, and the time the Rosen Article was published, "the unique electronic user profile and password associated with Mr. Kim *accessed at least three times* the Intelligence Report that contained the TS/SCI information" that the Rosen Article disclosed later that day.[43]

Telephone records demonstrate that before the Rosen Article was published, "multiple telephone communications occurred between phone numbers associated with Mr. Kim and [Mr. Rosen]."[44] Additionally, telephone and government electronic records for Mr. Kim's workstation reveal that "at or around the same time that Mr. Kim's user profile was viewing the TS/SCI Intelligence Report two telephone calls were placed from his desk phone to [Mr. Rosen]."[45] In addition to these phone calls, the FBI's investigation also revealed evidence "suggesting that Mr. Kim met face-to-face with [Mr. Rosen] outside of the [Department of State]" based on Department of State badge access records of Mr. Kim and Mr. Rosen.[46] The Rosen Article was published on the Internet "[w]ithin a few hours" of the face-to-face meeting.[47]

In September 2009, the FBI conducted a non-custodial interview with Mr. Kim, during which "Mr. Kim denied being a source of the classified information" in the Rosen Article.[48] However, in a second FBI-conducted interview in March 2010, Mr. Kim conceded that he may have "inadvertently confirmed something" and that it is possible that he "succumbed to flattery."[49] He further stated: "I was exploited like a rag doll. [Rosen] asked me a lot of questions and got me to talk to him and have phone conversations with him."[50]

Mr. Kim was indicted on August 19, 2010, on two charges: one count of unauthorized disclosure of national defense information under 18 U.S.C. § 793(d) ("Gathering, transmitting or losing defense information") and one count of knowingly and willfully making false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States" under 18 U.S.C. § 1001(a)(2) ("Statements or entries generally"). The prosecution of Mr. Kim is pending.

D. *Bin Laden raid*

On May 1, 2011, President Obama announced that the United States had successfully completed an operation to assassinate Osama bin Laden in Pakistan.[51] In the months following the raid, a number of details regarding the classified operation were leaked to the public. One detail in particular involved the assistance of a Pakistani doctor who took DNA samples to help locate bin Laden for U.S. forces, which was originally published by the U.K. newspaper the

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[43] *Id.* ¶ 18.
[44] *Id.* ¶ 19.
[45] *Id.* ¶ 20.
[46] *Id.* ¶ 21.
[47] *Id.* ¶ 22.
[48] *Id.* ¶ 24.
[49] *Id.* ¶ 36.
[50] *Id.*
[51] Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden is Dead, Obama Says*, N.Y. TIMES (May 1, 2011), http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=all.

Guardian.[52] After media reports of the doctor's assistance, the doctor was arrested by Pakistani authorities and sentenced to 33 years in prison.[53]

Additionally, administration officials provided access to classified information regarding the bin Laden raid to Hollywood filmmakers Kathryn Bigelow and Mark Boal. Bigelow and Boal wrote and directed the film *Zero Dark Thirty*, which was released in December 2012 and chronicles the killing of Osama bin Laden.

In a letter dated August 9, 2011, Congressman Peter King, then-Chairman of the House Committee on Homeland Security, requested that the Department of Defense (DOD) and the CIA investigate alleged leaks of classified information to the entertainment industry.[54] In December 2011, the Inspector General for the Department of Defense (DODIG) stated that it would conduct an investigation into whether classified or otherwise sensitive information regarding the bin Laden raid had been leaked to the filmmakers.[55] A draft of the DODIG's report that was published in June 2013 showed two instances where the classified names of military operatives involved in the bin Laden raid were released by administration officials: on June 15, 2011, Under Secretary of Defense for Intelligence Michael Vickers gave Bigelow and Boar the name of a special operations planner in an interview and, on June 24, 2011, then-CIA Director Leon Panetta identified the name of the Navy SEAL ground commander at an awards ceremony attended by Boar.[56] According to press accounts, Vickers also provided the filmmakers with a "roadmap" of the raid.[57]

The DODIG's final report, issued on June 14, 2013, omitted these details and stated that the IG "did not identify instances whereby any special operations, tactics, techniques, and procedures-related information was provided to filmmakers."[58] According to the chief of Public Affairs for DOD, the Department is still investigating whether Vickers released classified information to the filmmakers and all matters involving Panetta have been referred to the CIA

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[52] Mark Mazzetti, *Vaccination Ruse Used in Pursuit of Bin Laden*, N.Y. TIMES (July 11, 2011), http://www.nytimes.com/2011/07/12/world/asia/12dna.html?_r=0.

[53] Jon Boone, *Pakistani doctor jailed after bin Laden hunt found guilty of Islamist militancy*, GUARDIAN (May 30, 2012), http://www.guardian.co.uk/world/2012/may/30/pakistani-doctor-bin-laden-terrorism.

[54] Press Release, H. Comm. on Homeland Sec., DoD/CIA Take Action on Chairman King's Call for Investigation of Obama Administration-Sanctioned Film on Classified bin Laden Mission, (Jan. 5, 2012), *available at* http://homeland.house.gov/press-release/dodcia-take-action-chairman-king%E2%80%99s-call-investigation-obama-administration-sanctioned.

[55] *Id*.

[56] Adam Zagorin & David S. Hilzenrath, *Unreleased: Probe Finds CIA Honcho Disclosed Top Secret Info to Hollywood*, PROJECT ON GOV'T OVERSIGHT (June 4, 2013), http://www.pogo.org/our-work/articles/2013/unreleased-probe-finds-cia-disclosed-secret-info.html; Lee Ferran, *After Leak, Rep. King Demands 'Zero Dark Thirty' Disclosure Report*, ABC NEWS (June 6, 2013), http://abcnews.go.com/Blotter/leak-rep-king-demands-dark-thirty-disclosure-report/story?id=19338380#.UdsYm6wfIyZ.

[57] Alex Gore, *Zero Dark Thirty director given 'roadmap' behind U.S. stealth mission to kill Osama bin Laden*, DAILY MAIL (January 19, 2013), http://www.dailymail.co.uk/news/article-2265074/Zero-Dark-Thirty-director-given-roadmap-U-S-stealth-mission-kill-Osama-bin-Laden.html#ixzz2YYmV7Je4.

[58] OFFICE OF THE INSPECTOR GEN. OF THE U.S. DEPT. OF DEF., OFFICE OF THE DEPUTY INSPECTOR GEN. FOR INTELLIGENCE & SPECIAL PROGRAM ASSESSMENTS, REPORT NO. DODIG-2013-092, RELEASE OF DEPARTMENT OF DEFENSE INFORMATION TO THE MEDIA (June 14, 2013), *available at* http://www.dodig.mil/pubs/documents/DODIG-2013-092.pdf.

for review.[59] It has been reported that Under Secretary Vickers has been referred to the Justice Department for an investigation into his role in providing classified information to the makers of *Zero Dark Thirty*.[60]

The draft of the DODIG's report into leaks of the bin Laden raid also revealed that Admiral William McRaven, the top U.S. special operations commander, had directed that military records regarding the bin Laden raid be purged from DOD computers and sent to the CIA, where the documents would be shielded from Freedom of Information requests.[61] There is no record of this document transfer being approved by the National Archives and the discussion of Admiral McRaven's actions was removed from the DODIG's final report.[62]

E. *Targeted kill list*

In May 2012, the *New York Times* disclosed the existence of President Obama's secret "kill list" – a list of terrorist targets personally nominated by the President for kill or capture.[63] This disclosure revealed a dramatic increase in drone strikes during President Obama's tenure as compared to the number of strikes during President George W. Bush's two terms in office.

As of September 2012, President Obama had authorized 283 drone strikes in Pakistan – a six-fold increase over President Bush. "As a result, the number of estimated deaths from the Obama administration's drone strikes is more than four times what it was during the Bush administration -- somewhere between 1,494 and 2,618 . . . . To the extent that the targets of drone attacks can be ascertained, under Bush, al Qaeda members accounted for 25% of all drone targets compared to 40% for Taliban targets. Under Obama, only 8% of targets were al Qaeda compared to just over 50% for Taliban targets."[64]

President Obama has also relied more heavily on the use of so-called "signature strikes," which are strikes based upon patterns of activity by a group rather than a targeted strike against an individual suspected terrorist. Signature strikes are estimated to have killed between 1,332 and 2,326 militants.[65]

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[59] Carlo Muñoz, *DOD omits details of secret disclosures in 'Zero Dark Thirty' report*, THE HILL (June 14, 2013, 5:32 PM), http://thehill.com/blogs/defcon-hill/policy-and-strategy/305729-dod-omits-details-of-top-secret-disclosures-in-zero-dark-thirty-report.
[60] Marisa Taylor & Jonathan S. Landay, *Bin Laden film leak was referred to Justice; leaker top Obama official*, MCCLATCHY (Dec. 17, 2012), http://www.mcclatchydc.com/2012/12/17/177676/bin-laden-leak-is-referred-to.html#storylink=cpy.
[61] Richard Lardner, *SOCOM chief's secret move keeps bin Laden records in the shadows*, NAVY TIMES (July 8, 2013), http://www.navytimes.com/article/20130708/NEWS/307080024/SOCOM-chief-s-secret-move-keeps-bin-Laden-records-shadows; *Bin Laden raid records secreted away from Pentagon*, CBS NEWS (July 8, 2013), http://www.cbsnews.com/8301-202_162-57592603/bin-laden-raid-records-secreted-away-from-pentagon/.
[62] Richard Lardner, *Secret move keeps bin Laden records in the shadows*, SEATTLE TIMES (July 8, 2013), http://seattletimes.com/html/nationworld/2021351472_20130708_apusbinladenfilespurged.html.
[63] Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.
[64] Peter Bergen & Megan Braun, *Drone is Obama's weapon of choice,* CNN, Sept. 19, 2012, http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone.
[65] *Id.*

The drone strikes have not just targeted foreign nationals, but American citizens as well. President Obama ordered the killing of Anwar al-Awlaki, an American-born al-Qaeda cleric, who was killed in a targeted strike in September 2011. Also killed in that strike was Samir Khan, the American-born editor of the jihadist magazine *Inspire*.[66] Abdulrahman al-Awlaki, Anwar al-Awlaki's son, was killed two weeks later, along with nine other suspected members of al Qaeda in the Arabian Peninsula (AQAP).

The Committee is not aware of any Justice Department investigation into the leak of the targeted kill list.

F. *Yemeni bomb plot*

Also in May 2012, the Associated Press reported that the CIA had recently interrupted a plot by the al Qaeda affiliate in Yemen to bomb a U.S.-bound airplane.[67] The plot, which was intended to occur near the one-year anniversary of Osama bin Laden's death, involved a more sophisticated version of the explosive that had failed to detonate in a jetliner over Detroit on Christmas 2009.

The suicide bomber tasked with carrying out this terrorist plot was actually a Saudi Arabian intelligence agent who had infiltrated al Qaeda.[68] The double agent had operated in Yemen with the knowledge of the CIA, but his actions were not directly supervised by the agency. The agent provided information to the CIA that allowed the agency to direct a drone strike to kill Fahd Mohammed Ahmed al-Quso, a leader in the Yemeni al Qaeda affiliate and a suspect in the bombing of the U.S.S. Cole in 2000.[69] The agent also provided the bomb intended for the airliner to the FBI for analysis. According to press accounts, U.S. officials had hoped that the agent would be able to provide even more useful intelligence regarding al Qaeda's explosives capability. However, the reporting of the thwarted plot in the press also revealed the double agent's cover, thereby stopping the agent's ability to collect and share information.[70]

The AP learned of the thwarted terrorist plot a week prior to reporting on it, but agreed to requests from the White House and the CIA to refrain from revealing the information while the intelligence operation was underway.[71] The AP published its report on May 7, 2012, after U.S. officials said that their concerns had passed, but it refused to wait until the Obama administration

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[66] Robbie Brown & Kim Severson, *2nd American in Strike Waged Qaeda Media War*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/middleeast/samir-khan-killed-by-drone-spun-out-of-the-american-middle-class.html?_r=0.

[67] *U.S: CIA thwarts new al-Qaeda underwear bomb plot*, USA TODAY (May 8, 2012), http://usatoday30.usatoday.com/news/washington/story/2012-05-07/al-qaeda-bomb-plot-foiled/54811054/1.

[68] Scott Shane & Eric Schmitt, *Double Agent Disrupted Bombing Plot, U.S. Says*, N.Y. TIMES (May 8, 2012), http://www.nytimes.com/2012/05/09/world/middleeast/suicide-mission-volunteer-was-double-agent-officials-say.html?pagewanted=all.

[69] *Id.*

[70] Scott Neuman, *Leaks, Bombs And Double Agents: More On That AP Story*, NPR (May 15, 2013), http://www.npr.org/blogs/thetwo-way/2013/05/15/184274166/leaks-bombs-and-double-agents-more-on-that-ap-story.

[71] *U.S: CIA thwarts new al-Qaeda underwear bomb plot*, *supra* note 67.

made an official announcement on May 8th.[72] Officials also said that the risk to the double agent and his family from exposure had been "mitigated" by moving them to a safe location.[73]

Soon after the AP's report, the FBI Director and the Director of National Intelligence announced that they would investigate the leak of the Yemeni plot to the media.[74] On June 8, 2012, Mr. Holder appointed Mr. Ron Machen, the U.S. Attorney for the District of Columbia, to lead the investigation.[75] According to the Attorney General, the investigation into this leak is ongoing.[76] For additional information regarding the investigation into this leak, see Section 2.

G. *NSA programs*

In June 2013, Edward Snowden, a former defense contractor and CIA employee, released classified material on top-secret NSA data collection programs, including the PRISM program, to the media. On June 5, 2013, it was reported that, on April 25, 2013, the Foreign Intelligence Surveillance Court (FISC) granted an order requested by the FBI pursuant to section 215 of the USA PATRIOT Act.[77] Media reports have indicated that the order compels Verizon Communications, Inc., on an "ongoing, daily basis," to produce to the NSA electronic copies of "all call detail records or 'telephony metadata' created by Verizon for communications between the United States and abroad" or "wholly within the United States, including local telephone calls."[78] "Telephony metadata" includes, but is not limited to, originating and terminating number, the duration of each call, telephone calling card numbers, trunk identifiers, International Mobile Subscriber Identity (IMSI) number, and "comprehensive communication routing information."[79] The order gives the government the authority to obtain the call detail records or "telephony metadata."[80]

On June 6, 2013, classified information regarding a second program, the PRISM program, was reported by the *Guardian* and the *Washington Post*.[81] PRISM was authorized by section 702 of the Foreign Intelligence Surveillance Act,[82] which was reauthorized by Congress in 2012 and expires in December 2017.[83] Section 702 allows NSA to obtain data from electronic service providers on their customers who reside outside the United States – including e-mail,

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[72] *CIA 'foiled al-Qaida bomb plot' around anniversary of Bin Laden death*, GUARDIAN (May 7, 2012), http://www.guardian.co.uk/world/2012/may/07/cia-al-qaida-bomb-plot.
[73] Shane & Schmitt, *supra* note 68.
[74] Jason Ryan, *FBI Investigates Media Leaks in Yemen Bomb Plot*, ABC NEWS (May 16, 2012), http://abcnews.go.com/blogs/politics/2012/05/fbi-investigates-media-leaks-in-yemen-bomb-plot/.
[75] Ryan, *supra* note 3.
[76] *Oversight of the United States Dep't of Justice: Hearing Before the H. Comm. on the Judiciary* (Draft Transcript), 113th Cong. 30 (____) (statement of Eric Holder, Att'y Gen. of the United States).
[77] 50 U.S.C. § 1861 (2012).
[78] Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, GUARDIAN (June 5, 2013), http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order.
[79] *Id.*
[80] *Id.*
[81] Glenn Greenwald & Ewen MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, GUARDIAN (June 6, 2013), http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data.
[82] 50 U.S.C. § 1881a (2012).
[83] *Id.*; *see also* FISA Amendments Act Reauthorization Act of 2012, Pub. L. No. 112-238, 126 Stat. 1631 (2012).

chat, photos, videos, stored data, and file transfers. To the extent the program captures information pertaining to U.S. citizens, such interception can only be "incidental."

On June 14, 2013, U.S. prosecutors filed a criminal complaint against Edward Snowden for leaking classified information regarding these surveillance programs, alleging that he committed offenses concerning the theft of government property (18 U.S.C. § 641), unauthorized communication of national defense information (18 U.S.C. § 793(d)), and willful communication of classified communications intelligence information to an unauthorized person (18 U.S.C. § 798(a)(3)).[84]

Edward Snowden fled the United States on May 30, 2013, traveling from Hawaii to Hong Kong, where he remained until he flew to Russia on June 23, 2013.[85] The United States revoked his passport on the same day Mr. Snowden arrived in Russia.[86] Mr. Snowden has sought asylum from as many as twenty countries, including Russia, Iceland, and Ecuador.[87] The leaders of Venezuela and Bolivia have expressed an interest in granting Mr. Snowden asylum.[88] He remains in the transit area of Moscow's Sheremetyevo International Airport.

2. SUBPOENAS FOR ASSOCIATED PRESS TELEPHONE TOLL RECORDS

On May 13, 2013, the Associated Press (AP) reported it had been involved in an investigation into the unauthorized disclosure of classified information that had been opened in May 2012 by the Justice Department. The AP learned of the investigation in a letter from the Justice Department to AP President and CEO Gary Pruitt on May 10, 2013.[89]

According to press accounts, the Justice Department was investigating an AP story from May 2012 regarding a CIA operation to thwart a Yemeni terrorist plot to bomb a U.S-bound airliner.[90] Prior to subpoenaing the phone records, the Justice Department allegedly conducted over 500 interviews regarding the matter.[91] The Justice Department then subpoenaed and obtained historical telephone records from April and May 2012 for at least 20 separate AP phone lines, including the main AP telephone number in the U.S. House of Representatives Press Gallery; AP office numbers in New York City, Washington, D.C., and Hartford, CT; and the

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[84] Complaint, United States v. Snowden, No. 1:13 CR 265 (CMH) (E.D. Va. June 14, 2013), *available at* http://www.scribd.com/doc/149271971/Edward-Snowden-Complaint.
[85] Devlin Barrett & Te-Ping Chen, *Snowden on the run: Leaker Flees Hong Kong for Moscow, Asks Ecuador for Asylum*, WALL ST. J. (June 24, 2013), http://online.wsj.com/article/SB10001424127887323683504578562852310273818.html.
[86] Matthew V. Lee, *NSA leaker Edward Snowden's passport revoked: source*, WASH. TIMES (June 23, 2013), http://www.washingtontimes.com/news/2013/jun/23/nsa-leaker-edward-snowdens-passport-revoked-source/.
[87] *Edward Snowden seeks asylum in 20 nations, but gets no immediate takers*, CBS NEWS (July 2, 2013), http://www.cbsnews.com/8301-202_162-57591909/edward-snowden-seeks-asylum-in-20-nations-but-gets-no-immediate-takers/.
[88] *Id.*
[89] Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS, May 13, 2013, *available at* http://bigstory.ap.org/article/govt-obtains-wide-ap-phone-records-probe.
[90] Max Fisher, *Here's the story the AP suspects led to sweeping Justice Dept. subpoena*, WASH. POST (May 13, 2013), http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/13/heres-the-story-the-ap-suspects-led-to-sweeping-justice-dept-subpoena.
[91] Scott Neuman, *Holder Defends Subpoena Of Journalists' Phone Logs*, NPR (May 14, 2013, 3:35 PM), http://www.npr.org/blogs/thetwo-way/2013/05/14/183968738/holder-defends-subpoena-of-journalists-phone-logs.

work and personal phone numbers of individual reporters.[92] According to the AP, more than 100 journalists work in the offices where the phones are located.[93]

On May 13, 2013, the AP sent a letter to the Justice Department protesting the subpoenas.[94] In the letter, Mr. Pruitt said:

> Last Friday afternoon, AP General Counsel Laura Malone received a letter from the office of United States Attorney Ronald C. Machen Jr. advising that, at some unidentified time earlier this year, the Department obtained telephone toll records for more than 20 separate telephone lines assigned to the AP and its journalists. The records that were secretly obtained cover a full two-month period in early 2012 and, at least as described in Mr. Machen's letter, include all such records for, among other phone lines, an AP general phone number in New York City as well as AP bureaus in New York City, Washington, D.C., Hartford, Connecticut, and at the House of Representatives. This action was taken without advance notice to AP or to any of the affected journalists, and even after the fact no notice has been sent to individual journalists whose home phones and cell phone records were seized by the Department.
>
> There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations, and disclose information about AP's activities and operations that the government has no conceivable right to know.
>
> That the Department undertook this unprecedented step without providing any notice to the AP, and without taking any steps to narrow the scope of its subpoenas to matters actually relevant to an ongoing investigation, is particularly troubling.
>
> The sheer volume of records obtained, most of which can have no plausible connection to any ongoing investigation, indicates, at a minimum, that this effort did not comply with 28 C.F.R. §50.10 and should therefore never have been undertaken in the first place. The regulations require that, in all cases and without exception, a subpoena for a reporter's telephone toll records must be "as narrowly drawn as possible.'' This plainly did not happen.
>
> We regard this action by the Department of Justice as a serious interference with AP's constitutional rights to gather and report the news. While we evaluate our options we urgently request that you immediately return to the AP the telephone toll records that the Department subpoenaed and destroy all copies. At a

[92] Sherman, *supra* note 89.
[93] *Id.*
[94] *Id.*

> minimum, we request that you take steps to segregate these records and prohibit any reference to them pending further discussion and, if it proves necessary, guidance from appropriate judicial authorities. We also ask for an immediate explanation as to why this extraordinary action was taken, and a description of the steps the Department will take to mitigate its impact on AP and its reporters.[95]

On May 14, 2013, Deputy Attorney General James Cole responded to the AP, saying:

> [F]or each of the phone numbers referenced in our May 10, 2013, letter there was a basis to believe the numbers were associated with AP personnel involved in the reporting of classified information. The subpoenas were limited to a reasonable period of time and did not seek the content of any calls. Indeed, although the records do span two months, . . . they cover only a portion of that two-month period. [T]hese records have been closely held and reviewed solely for the purposes of this ongoing criminal investigation.[96]

3. ATTORNEY GENERAL HOLDER'S TESTIMONY BEFORE THE COMMITTEE

On May 15, 2013, Attorney General Holder appeared before the House Judiciary Committee for its annual Justice Department oversight hearing.

A. *Recusal from the Yemeni terrorist plot leak investigation*

Mr. Holder, in response to questions about the AP subpoenas, explained that he had recused himself from the AP matter because he had been interviewed as a potential target of the investigation and, accordingly, Mr. Cole had approved the subpoenas:

> I was recused in that matter, as I described, I guess, in a press conference that I held yesterday. The decision to issue this subpoena was made by the people who are presently involved in the case. The matter is being supervised by the Deputy Attorney General. I am not familiar with the reasons why the case -- why the subpoena was constructed in the way that it was because I'm simply not a part of the -- of the case.[97]
>
> ***
>
> I was interviewed as one of the people who had access to the information that was -- that was a subject of the investigation. I, along with other members of the National Security Division, recused myself. The head of the National Security

[95] Letter from Gary Pruitt, President & C.E.O. of the Associated Press, to Eric Holder, Att'y Gen. of the United States, (May 13, 2013), *available at* http://www.usatoday.com/story/news/2013/05/13/doj-seizes-ap-phone-records/2156819/.

[96] Letter from James M. Cole, Deputy Att'y Gen. of the United States, to Gary Pruitt, President & C.E.O. of the Associated Press, (May 14, 2013), *available at* http://www.nytimes.com/interactive/2013/05/15/us/politics/15leaks-letter.html?_r=0.

[97] *Oversight of the United States Dep't of Justice: Hearing Before the H. Comm. on the Judiciary* (Draft Transcript), supra note 76, at 24–25 (statement of Eric Holder, Att'y Gen. of the United States).

Division was left. The present head of the National Security Division, we all recused ourselves.

I recused myself because I thought it would be inappropriate and have a bad appearance to be a person who was a fact witness in the case to actually lead the investigation, given the fact, unlike Mr. Cole, that I have a greater interaction with members of the press than he does.[98]

B. *Statements in response to questions from Mr. Johnson*

During his appearance before the Committee, the following exchange occurred between Mr. Holder and Congressman Hank Johnson (D-GA):

Mr. Johnson. Thank you, Mr. Chairman. General, the issue of the AP investigation, or actually the investigation into the illegal disclosure of classified information. To conduct that investigation, the Justice Department has various tools, among which is the subpoena. And a subpoena can be issued without judicial oversight, and it was through a subpoena that the Justice Department obtained phone records from the carrier that related to certain personnel at the Associated Press. Is that correct?

Attorney General Holder. Again, I assume that that is correct. I am not –

Mr. Johnson. Well, subpoena is what we know that the information was compiled from. Now, we can or the Justice Department has the lawful authority by way of subpoena power to obtain those records. Is that correct?

Attorney General Holder. The Justice Department does have that subpoena power?

Mr. Johnson. Yes.

Attorney General Holder. Yes.

Mr. Johnson. And so it is legal for the Justice Department to obtain that information, but it certainly could cast a cool breeze over the 1st Amendment rights of freedom of the speech and freedom of the press. And that is why we have some special rules with respect to the issuance of subpoenas by law enforcement to obtain information from media sources. That is correct, is it not?

Attorney General Holder. Yeah. I mean, again, without getting into the AP case, for lack of a better term, because the case is really not about the AP, it is about the people who leaked.

Mr. Johnson. Correct.

[98] *Id*. at 31–32 (statement of Eric Holder, Att'y Gen. of the United States).

Attorney General Holder. Be that as it may, there is a recognition within the Justice Department that in dealing with interacting with the press, that you are dealing with a special entity, and that there have to be special rules about how that interaction occurs.

Mr. Johnson. And those rules are by way of regulations, but they are not by way of legislation, correct?

Attorney General Holder. That is correct.

Mr. Johnson. And that being the case, it might be a good thing for Congress to visit that issue and to determine whether or not we want to turn those guidelines and regulations into law.

And now, you made an important distinction. You said that the crime that is being investigated -- well, you did not say this, but I will say this. It is not the publishing of the information, of the classified information, but it was actually the leaking of the classified information which is the basis of your investigation, correct?

Attorney General Holder. That is correct.

Mr. Johnson. But now, we also have an old law that would allow for prosecution of anyone who published the classified information. Is that not correct?

Attorney General Holder. *You got a long way to go to try to prosecute people, the press, for the publication of that material. Those prosecutions have not fared well in American history.*

Mr. Johnson. Well, I would argue that the Espionage Act of 1917 would authorize the prosecution of anyone who disclosed classified information. And perhaps that is another area that we may need to take action on here in this Congress.

Now, I will note that in this Congress, we have had a lot of bills, the most famous of which in my mind was the Helium legislation. And we wanted to ensure that we had enough helium to keep everything moving forward here in America, but we certainly need to protect the privacy of individuals, and we need to protect the ability of the press to engage in its 1st Amendment responsibilities to be free and to give us information about our government so as to keep the people informed. And I think it is a shame that we get caught up in so-called scandals and oversight of unimportant matters when we should be here addressing these real problems that things like the AP scandal illustrate us for us. I will yield the balance of my time to you.

> Attorney General Holder. Well, I would say this. *With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved, heard of, or would think would be a wise policy.* In fact, my view is quite the opposite, that what I proposed during my confirmation, what the Obama Administration supported during 2009, and I understand I think Senator Schumer is now introducing a bill that we are going to support as well, that there should be a shield law with regard to the press' ability to gather information and to disseminate it.
>
> *The focus should be on those people who break their oaths and put the American people at risk, not reporters who gather this information. That should not be the focus of these investigations.*[99]

4. SEARCH WARRANT FOR JAMES ROSEN'S EMAILS

A. *Allegations in the affidavit*

As discussed above, on May 28, 2010, the Justice Department sought and obtained a search warrant for emails belonging to James Rosen, the chief Washington correspondent for FOX News. The search warrant was issued following the publication of an article by Mr. Rosen in June 2009, which allegedly contained classified material.[100] The affidavit in support of the search warrant alleged that the source of the material was Stephen Jin-Woo Kim, a Lawrence Livermore National Laboratory employee detailed to the State Department.[101] The affidavit alleges the following:

> Nevertheless, Mr. Kim denied that he was a source for the Reporter or had knowingly provided the Reporter with classified documents or information. Mr. Kim claimed to have specifically informed the Reporter that the Reporter "won't get stuff out of me," to which the Reporter allegedly replied, "I don't want anything." Mr. Kim did admit, however, that he may have "inadvertently" confirmed information that he believed the Reporter had already received from other individuals. Mr. Kim made further statements which could fairly be characterized as either a confession or a near confession:
>
> - "I did not purposely discuss the [Intelligence Report], but might have discussed [some of the topics discussed in the Report]."
>
> - "Maybe I inadvertently confirmed something … too stubborn to not …. [I] just don't know …someone values my views, listens up,…maybe I felt flattered. [The Reporter] is a very affable, very convincing, persistent person. [The Reporter] would tell me I was brilliant and it is possible I

[99] *Id.*at 103–107 (statements of Rep. Hank Johnson, Member, H. Comm. on the Judiciary, and Eric Holder, Att'y Gen. of the United States) (emphasis added).
[100] Rosen, *supra* note 32.
[101] Reyes, *supra* note 33, ¶¶ 13, 18–22.

succumbed to flattery without knowing it. Maybe it was my vanity. [The Reporter] considers me an expert and would tell me …could use my insight. . . .The IC is a big macho game but I would never say I'm read in to this and you are not. I would never pass [the Reporter] classified."

- "[The Reporter] exploited my vanity."

- "[M]y personal and professional training told me not to meet people like [the Reporter]. I felt like while on the phone I was only confirming what he already knew. I was exploited like a rag doll. [The Reporter] asked me a lot of questions and got me to talk to him and have phone conversations with him. [The Reporter] asked me a lot, not just specific countries. [The Reporter] asked me how nuclear weapons worked."

- "It's apparent I did it. I didn't say 'did you see this?' I think I did it. I can't deny it. I didn't give [the Reporter] the [specific intelligence information in the article]. I didn't provide him with the stuff."

- "I don't think I confirmed … maybe I inadvertently confirmed in the context of other conversations [with the Reporter]. It wasn't far-fetched that the information was out there. I would not talk over an open line about intelligence. I did not leak classified."

- Finally, Mr. Kim opined that "someone either gave [the Reporter] the [sic] [the Intelligence Report] or it was read to [the Reporter] over the telephone."[102]

The affidavit concludes that "there is probable cause to believe that the Reporter [Rosen] has committed a violation" of 18 U.S.C. § 793(d) (the Espionage Act) "at the very least, either as an aider, abettor and/or co-conspirator of Mr. Kim."[103]

B. *Non-disclosure orders*

The search warrant application for Mr. Rosen's emails also requested that the district court issue a non-disclosure order on the email provider, alleging that disclosure of the existence of the search warrant would endanger the life and safety of an individual, flight from prosecution, destruction and tampering of evidence, intimidation of potential witnesses, or otherwise seriously jeopardize the investigation.[104]

Two judges specifically denied the request. Documents show that both judges separately declared that the Justice Department was required to notify Mr. Rosen of the search warrant, even if the notification came after a delay. Otherwise, "[t]he subscriber therefore will never know, by being provided a copy of the warrant, for example, that the government secured a

[102] *Id.* ¶ 36.
[103] *Id.* ¶ 54.
[104] *Id.* ¶ 53.

warrant and searched the contents of her e-mail account," Judge John M. Facciola wrote in an opinion rejecting the Obama Administration's argument. The Justice Department appealed that decision, and on September 20, 2010, Royce C. Lamberth, the Chief Judge of the U.S. District Court for the District of Columbia, granted the Department's request to overturn the order of the two judges.[105] Beginning with Chief Judge Lamberth's September 20, 2010, order, the government was presumably permitted to delay notice to Mr. Rosen until it moved the court to unseal the search warrant on November 7, 2011.

The court also ordered that the government file a proposed redacted version of the court's September 20, 2010, order. The government complied and on November 1, 2010, the court ordered that the redacted opinion by the court be unsealed and placed on the public record.

C. *U.S. District Court's failure to unseal court records*

What happened next was a series of what Chief Judge Lamberth later called "administrative errors" that kept Mr. Rosen, and the public, from learning about the search warrant for Mr. Rosen's private emails:

1. The November 1, 2010 unsealing order and the redacted version of the original September order authorizing the warrant were filed under seal, in direct violation of the court's instruction.

2. Mr. Kim's indictment was unsealed in August 2010. More than a year later, on November 7, 2011, the government moved to unseal the search warrant for at least three email accounts dealing with the Kim investigation, and place redacted versions on the public record. Magistrate Judge Kay signed the orders, but the clerk's office failed to comply and did not place any of the search warrants on the public record as ordered.

3. On May 16, 2013, due to press inquiries, the clerk's office discovered its failure to comply with Magistrate Judge Kay's unsealing order. The clerk's office mistakenly attributed the unsealing order to another magistrate, rather than Magistrate Judge Kay.[106] The clerk's office listed the order under the other magistrate's name.

Chief Judge Lamberth apologized to the public, and to the media, for these multiple administrative errors, and stated that reviews of personnel performance and administrative processes are underway. The Chief Judge has directed that a new category be added to the court's website, where all search and arrest warrants will be publicly available after execution, unless a separate sealing order is entered by the court.[107]

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[105] Ryan Lizza, *How Prosecutors Fought to Keep Rosen's Warrant Secret*, NEW YORKER (May 24, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/05/how-justice-fought-to-keep-rosens-warrant-secret.html.
[106] Mem. & Order of Royce, C.J., at 3 (D.D.C. May 22, 2013), *available at* http://www.mainjustice.com/wp-admin/documents-databases/122-1-Judge-Lamberth-order-on-administrative-errors.pdf.
[107] *Id.* at 3–4.

5. COMMITTEE ON THE JUDICIARY CORRESPONDENCE WITH THE JUSTICE DEPARTMENT

On May 22, 2013, fourteen Republican members of the House Judiciary Committee sent a letter to Deputy Attorney James Cole regarding the AP subpoena matter.[108] In the letter, the members posed eleven questions to Mr. Cole regarding Mr. Holder's recusal from the matter, how the subpoenas were approved by the Department, and whether all relevant regulations regarding media investigations were followed. The letter set a response deadline of May 31, 2013. On June 4, 2013, Principal Deputy Assistant Attorney General Peter Kadzik, and not Mr. Cole, responded by letter, answering only four of the eleven questions posed in the May 22, 2013, letter.[109]

On May 29, 2013, Judiciary Committee Chairman Goodlatte and Crime, Terrorism, Homeland Security, and Investigations Subcommittee Chairman Sensenbrenner wrote to Mr. Holder, asking him to explain the discrepancies in his testimony to the Committee based on the revelations of the search warrant for Mr. Rosen's emails by June 5, 2013.[110]

However, the Committee did not receive an on-the-record response from Mr. Holder answering the questions by the deadline. On June 3, 2013, the Committee received a nonresponsive letter, again from Mr. Kadzik.[111] The Chairmen's May 29, 2013, letter posed eight questions to the Attorney General. Mr. Kadzik's June 3, 2013, response failed to answer outright five questions and provided vague or nonresponsive answers to the remaining questions. Chairmen Goodlatte and Sensenbrenner replied to Mr. Kadzik the following day, citing his responses as insufficient.[112]

Mr. Holder responded on June 5, 2013, but again failed to answer any of the Committee's questions, simply stating that Mr. Kadzik's June 4, 2013, response "accurately sets forth the Department's and my position with respect to your May 29, 2013, letter[.]"[113] Mr. Holder's failure to fully and specifically answer the Committee's questions prompted all Judiciary

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[108] Letter from H. Comm. on the Judiciary Republicans, to James M. Cole, Deputy Att'y Gen. of the United States, (May 22, 2013), *available at* http://judiciary.house.gov/news/2013/5%2022%2013%20Jud%20to%20DAG%20Cole%20re%20AP.pdf.

[109] Letter from Peter J. Kadzik, Principal Deputy Att'y Gen. of the United States, to H. Comm. on the Judiciary Republicans, (June 4, 2013), *available at* http://judiciary.house.gov/news/2013/AP%20Emails.pdf.

[110] Letter from Bob Goodlatte, Chairman, H. Comm. on the Judiciary, and Jim Sensenbrenner, Chairman, H. Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations, to Eric Holder, Att'y Gen. of the United States, (May 29, 2013), *available at* http://judiciary.house.gov/news/2013/5%2029%2013%20Letter%20to%20AG%20re%20Rosen%20search%20warrant.pdf.

[111] Letter from Peter J. Kadzik, Principal Deputy Att'y Gen. of the United States, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary, and Jim Sensenbrenner, Chairman, H. Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations, (June 3, 2013), *available at* http://judiciary.house.gov/news/2013/Sensenbrenner_Goodlatte%202013-06-03.pdf.

[112] Letter from Bob Goodlatte, Chairman, H. Comm. on the Judiciary, and Jim Sensenbrenner, Chairman, H. Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations, to Peter J. Kadzik, Principal Deputy Att'y Gen. of the United States, (June 4, 2013), *available at* http://judiciary.house.gov/news/2013/Letter%20to%20PDAG.pdf.

[113] Letter from Eric Holder, Att'y Gen. of the United States, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary, and Jim Sensenbrenner, Chairman, H. Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations, (June 5, 2013), *available at* http://judiciary.house.gov/news/2013/Goodlatte%20and%20Sensenbrenner%20jr.pdf.

Committee Republicans to send a letter to Mr. Holder requesting that he appear before the Committee to personally clarify his previous testimony.[114] On June 14, 2013, Chairman Goodlatte and Subcommittee Chairman Sensenbrenner announced that Mr. Holder had agreed to fully answer the Committee's questions in writing by June 19, 2013, and that Mr. Holder planned to meet with senior Committee leaders on Capitol Hill before the July 4th recess.[115]

6. MEETING WITH ATTORNEY GENERAL HOLDER

On June 28, 2013, Judiciary Committee Chairman Bob Goodlatte, Ranking Member John Conyers, Crime, Terrorism, Homeland Security, and Investigations Chairman Jim Sensenbrenner and Ranking Member Bobby Scott met privately with Mr. Holder to discuss his May 15, 2013, testimony before the Committee and issues surrounding the Justice Department's use of a search warrant to obtain Mr. Rosen's emails. The group also discussed issues relating to the collection of evidence from or targeting of journalists, particularly in national security leak investigations. Following the meeting, the Committee members issued the following statement:

> Today we had a frank discussion with Attorney General Holder about his testimony before the House Judiciary Committee and the search warrant for James Rosen's emails. The House Judiciary Committee intends to issue a report outlining its findings of its investigation into this matter. We felt it was prudent to hold a private meeting with Attorney General Holder due to the pending prosecution of Mr. Kim. The private meeting afforded us the opportunity to ask Attorney General Holder substantive questions about the ongoing prosecution and the relationship between Mr. Kim and Mr. Rosen that he would not have been able to answer in a public setting.[116]

7. STATUTES AND REGULATIONS GOVERNING THE COLLECTION OF EVIDENCE FROM OR INVESTIGATION OF JOURNALISTS

A. *The Privacy Protection Act of 1980*

The use of search warrants against journalists to obtain evidence against third parties arose in the Supreme Court case of *Zurcher v. Stanford Daily*.[117] In *Zurcher*, a university student newspaper challenged the constitutionality of a search warrant for negatives, films, and pictures on the newspaper's premises revealing the identities of demonstrators who assaulted police officers during a confrontation.[118] The newspaper claimed that federal officials should have

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[114] Letter from H. Comm. on the Judiciary Republicans, to Eric Holder, Att'y Gen. of the United States, (June 6, 2013), *available at* http://judiciary.house.gov/news/2013/0251_001.pdf.
[115] Press Release, Bob Goodlatte, Chairman, H. Comm. on the Judiciary, House Judiciary to get Answers From Holder on Recent Testimony, (June 14, 2013), *available at* http://goodlatte.house.gov/press_releases/420.
[116] Press Release, H. Comm. on the Judiciary Democrats, Conyers, Goodlatte, Sensenbrenner, and Scott Statement on Meeting with U.S. Attorney General Eric Holder, (June 28, 2013), *available at* http://democrats.judiciary.house.gov/press-release/conyers-goodlatte-sensenbrenner-and-scott-statement-meeting-us-attorney-general-eric.
[117] Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
[118] *Id.* at 551–52.

proceeded with a subpoena *duces tecum*, which was less intrusive than a search warrant.[119] As the U.S. Supreme Court stated:

> The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring.[120]

The U.S. Supreme Court held that using a warrant rather than a subpoena in the *Zurcher* case was constitutional, reasoning that:

> If the third party knows that contraband or other illegal materials are on his property, he is sufficiently culpable to justify the issuance of a search warrant. Similarly, if his ethical stance is the determining factor, it seems to us that whether or not he knows that the sought-after articles are secreted on his property and whether or not he knows that the articles are in fact the fruits, instrumentalities, or evidence of crime, he will be so informed when the search warrant is served, and it is doubtful that he should then be permitted to object to the search, to withhold, if it is there, the evidence of crime reasonably believed to be possessed by him or secreted on his property, and to forbid the search and insist that the officers serve him with a subpoena duces tecum.[121]

The Court also stated that no special constitutional protections from search warrants should be granted to members of the media in addition to those provided to all citizens under the Fourth Amendment.[122] The Court stated:

> If "properly administered, the preconditions for a warrant -- probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness -- should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."[123]

Justice Powell elaborated on this principle in his concurring opinion, stating that:

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[119] *Id*. at 552.
[120] *Id*. at 553.
[121] *Id*. at 560.
[122] *Id*. at 565.
[123] *Id*.

> If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. . . . The struggle from which the Fourth Amendment emerged was that between Crown and press. . . . The Framers were painfully aware of that history, and their response to it was the Fourth Amendment. . . . Hence, there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other person.[124]

In October 1980, as a direct result of the *Zurcher* ruling, Congress passed the Privacy Protection Act (PPA).[125] The PPA contains broad protections for First Amendment-protected activities. The PPA prohibits, except in very limited circumstances, federal, state, and local law enforcement officials from searching for or seizing "work product" or "documentary materials" in possession of anyone reasonably believed to have the intention of disseminating information by means of public communication, such as a newspaper, book, or broadcast. The language defining who would be considered to be acting as a journalist (and, therefore, subject to statutory protection) has even been applied to protect the operator of an Internet bulletin board.[126]

The PPA protects journalists from being compelled to turn over to law enforcement officials any work product and documentary materials, including sources, before the information contained in those materials is disseminated to the public.[127] It also prevents investigators from searching newsrooms to uncover information or sources that a news organization has assembled.[128] However, the PPA does not prohibit searches of a journalist's work product if there is probable cause to believe that the person possessing the materials has committed or is committing a crime to which the materials relate (including receipt, possession, or communication of classified material).[129] It is important to note that the government can still request work product materials from non-suspect journalists via subpoena. Upon signing the law, President Jimmy Carter stated:

> This bill requires Federal, State and local authorities either to request voluntary compliance or to use subpoenas – with advance notice and the opportunity for a court hearing – instead of search warrants when they seek reporters' materials as evidence. The bill also covers others engaged in first amendment activities such as authors and scholars. Searches are allowed only in very limited situations.[130]

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[124] *Id.* at 569 (Powell, J., concurring).
[125] Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. §2000aa et seq).
[126] Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457 (5th Cir. 1994).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Presidential Statement on Signing the Privacy Protection Act 1980, (Oct. 14, 1980), *available at* http://www.presidency.ucsb.edu/ws/?pid=45281.

In passing the PPA, Congress concluded that the new law would cover only those parties involved in First Amendment-related activities, rather than covering all non-suspect third parties.[131] The premise of the Act was that journalists' First Amendment activity would be better protected if law enforcement officials were required, in most circumstances, to seek work product through a subpoena, a less intrusive means of obtaining evidence than a search warrant.[132] Thus, under the Act, law enforcement officials must subpoena information directly from a journalist, except in those narrow circumstances in which they seek evidence in a national security or crimes against children criminal investigation and probable cause exists that the journalist is involved in the crime.[133]

B. *Justice Department regulations*

The government can get access to a document (either physical or electronic) through means other than a warrant. When the government suspects that documentary evidence exists within the possession of a third party, the government remains free to subpoena the seizable documents.[134] This allows the individual in possession of the documents, or his counsel, to separate the documents from papers protected by the First Amendment. It also provides notice to the individual and a process by which the subpoena may be challenged. As noted above, Congress has expressed a preference for the use of subpoenas rather than warrants in cases in which information is sought from persons who are involved in the communication of ideas to the public.[135]

The use of subpoenas involving the media has been further restricted by the Justice Department. Regulations governing the use of subpoenas to obtain information in the possession of journalists are codified in the Code of Federal Regulations. Under 28 CFR § 50.10, the Justice Department set forth internal guidelines for whenever subpoenas are issued for the telephone toll records of journalists during the investigation of a crime. The intent behind these regulations are contained in the opening policy statement:

> 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

[131] S. REP. NO. 96-874, at 8 (1980).
[132] *See id.* at 4.
[133] *See* 42 U.S.C. § 2000aa (2001); *see also* S. REP. NO. 96-874 at 4-5.
[134] A subpoena *duces tecum* is "[a] court process, initiated by a party in litigation, compelling production of *certain specific* documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of a person or body served with process." BLACK'S LAW DICTIONARY 1426 (6th ed. 1990) (emphasis added) (citing FED. R. CIV. P. 45 & FED. R. CRIM. P. 17).
[135] S. REP. NO. 96-874, at 4–5.

> following guidelines shall be adhered to by all members of the Department in all cases.[136]

The importance of a free press is reflected in these regulations, which apply in all cases where information is sought from a member of the media:

a) The approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

b) All reasonable attempts should be made to obtain information from alternative sources before issuing a subpoena to a member of the news media, including for toll records.

c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media.

d) Negotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated, unless the responsible Assistant Attorney General determines that such negotiations would pose a substantial threat to the integrity of the investigation in connection with which the records are sought.

e) No subpoena may be issued to any member of the news media or for the telephone toll records of any member of the news media without the express authorization of the Attorney General.

f) In requesting the Attorney General's authorization for a subpoena to a member of the news media, the following principles will apply:

    1) In criminal cases, there should be reasonable grounds to believe, based on information obtained from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

    2) In civil cases, there should be reasonable grounds, based on non-media sources, to believe that the information sought is essential to the successful completion of a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

    3) The government should have unsuccessfully attempted to obtain the information from alternative non-media sources.

[136] 28 C.F.R. § 50.10 (2012).

4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

5) Even subpoena authorization requests for publicly-disclosed information should be treated with care to avoid claims of harassment.

6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, cover a reasonably-limited period of time, and avoid requiring production of a large volume of unpublished material. The government should give reasonable and timely notice of the demand for documents.[137]

The regulations also apply when telephone toll records of members of the news media are sought by the government, with the additional requirement that the member of the media must be notified when the Attorney General has approved such subpoenas. In cases where the telephone toll records of a member of the news media have been subpoenaed without the requisite notice, the member of the media must be notified of the subpoena "as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation."[138] In any event, that notification must be made within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days.[139]

These regulations highlight the high standards of accountability and prudence required whenever a criminal investigation intersects with an individual engaged in legitimate First Amendment activities. As further proof of this, the regulations require the approval of the Attorney General whenever information is presented to a grand jury seeking to investigate a member of the media for the commission of a crime during the performance of activities arising out of a journalist's official duties.[140] In addition, a member of the Justice Department must state all facts necessary for determination of the issues by the Attorney General, and a copy of the request must be sent to the Director of Public Affairs.[141] This requirement applies whenever a member of the media is arrested or questioned in an investigation as well.[142] These regulations are further enshrined in the United States Attorneys' Manual.[143]

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[137] *Id.* § 50.10(a)-(f).
[138] *Id.* § 50.10(g)(3).
[139] *Id.*
[140] *Id.* § 50.10(j).
[141] *Id.* § 50.10(k).
[142] *Id.* § 50.10(l).
[143] UNITED STATES ATTORNEYS' MANUAL, § 9-13.400 *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.400.

C. *Delayed notice procedures*

Under the Federal Rules of Criminal Procedure, law enforcement agencies can obtain warrants to search and seize any property that constitutes evidence of a criminal offense.[144] Ordinarily, the officer executing the warrant must give the subject a copy of the warrant and a receipt for what was taken at the time of execution.[145] However, the law permits a magistrate or a judge to delay notification of a warrant.[146] The Supreme Court held in *United States v. Dalia* that covert entry pursuant to a judicial warrant does not violate the Fourth Amendment.[147] Since *Dalia*, other Federal courts of appeals have upheld the constitutionality of delayed-notice search warrants.[148] For example, in *United States v. Freitas*, the Ninth Circuit considered the constitutionality of a search warrant allowing surreptitious entry to ascertain the status of an illegal drug laboratory without revealing the existence of the investigation. While the court ruled that the covert search was permissible, it further held that the warrant's failure to specify when notice must be given was impermissible. The court found that notice must be given within "a reasonable, but short, time" and set a maximum period of delay of seven days absent "a strong showing of necessity."[149]

The Second Circuit reached a similar conclusion but used a different standard. In *United States v. Villegas*, the court considered the permissibility of a search warrant authorizing delayed notice of the search of a cocaine factory because the primary suspect's co-conspirators had not yet been identified. The court held that delay is permissible if investigators show there is "good reason" for the delay.[150] The Second Circuit agreed with the Ninth Circuit that the initial delay should not exceed seven days, but allowed for further delays if each is justified by "a fresh showing of the need for further delay."[151] In 2000, in *United States v. Simons*, a case involving a warrant to seize evidence of child pornography, the Fourth Circuit ruled that delayed notification of even 45 days was constitutional.[152] Under 18 U.S.C. § 3103a(c), any period of delay may be extended by the court for good cause shown, subject to the condition that extensions should only be granted upon an updated showing of the need for further delay and that each additional delay should be limited to periods of 90 days or less, unless the facts of the case justify a longer period of delay.

Under 18 U.S.C. § 2705, a governmental entity can delay notification of a court order or a subpoena for up to 90 days, if the court determines that disclosure will have an adverse result. An adverse result is defined as:

A) Endangering the life or physical safety of an individual;
B) Flight from prosecution;

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[144] FED. R. CRIM. P. 41(c); *see also* 18 U.S.C. § 3102 (2012).
[145] FED. R. CRIM. P. 41(f)(1)(c).
[146] 18 U.S.C. § 3103a(b) (2012).
[147] Dalia v. United States, 441 U.S. 238 (1979); *see also* Katz v. United States, 389 U.S. 347 (1967).
[148] See, *e.g.*, United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Simons, 206 F.3d 392 (4th Cir. 2000).
[149] *Freitas*, 800 F.2d at 1456.
[150] *Villegas*, 899 F.2d at 1337.
[151] *Id.*
[152] *Simons*, 206 F.3d at 403.

C) Destruction or tampering with evidence;
D) Intimidation of potential witnesses; or
E) Otherwise seriously jeopardizing an investigation or unduly delaying a trial.[153]

8. FINDINGS

A. *Attorney General Holder gave deceptive and misleading testimony before the Committee*

On May 15, 2013, Attorney General Holder appeared before the House Judiciary Committee for its annual Justice Department oversight hearing. In response to a question from Mr. Johnson regarding the use of the Espionage Act to prosecute members of the media, Mr. Holder testified, under oath, as follows: "You got a long way to go to try to prosecute people, the press, for the publication of that material. Those prosecutions have not fared well in American history."[154] In addition, during the colloquy with Mr. Johnson, Mr. Holder stated: "Well, I would say this. With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved, heard of, or would think would be a wise policy."[155]

The following week it was revealed that, in 2010, the Justice Department obtained a search warrant for the emails of FOX News Chief Washington Correspondent James Rosen, alleging that he was a possible co-conspirator to State Department employee Stephen Kim in violation of the Espionage Act.

It is important to note that at the time Mr. Holder testified, the mainstream media was focused on the issue of the Justice Department's investigations into reporters' private information.[156] The AP telephone toll record subpoenas were the subject of many articles and newscasts, most of them critical of the Department's acquisition of these records. The Obama Administration found itself uncharacteristically the direct target of media suspicion. The president of the Associated Press wrote to Mr. Holder: "I am writing to object in the strongest possible terms to a massive and unprecedented intrusion by the Department of Justice into the newsgathering activities of The Associated Press."[157]

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[153] 18 U.S.C. § 2705(a)(2) (2012).
[154] *Oversight of the United States Dep't of Justice: Hearing Before the H. Comm. on the Judiciary* (Draft Transcript), *supra* note 76, at 105 (statement of Eric Holder, Att'y Gen. of the United States).
[155] *Id.* at 106. Charlie Savage, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html?pagewanted=all\.
[156] Charlie Savage, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html?pagewanted=all\; Erik Wemple, *AP subpoena: Government wants your sources*, WASH. POST (May 14, 2013, 5:06 pm), http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/05/14/ap-subpoena-government-wants-your-sources/; Michael Isikoff, *DOJ's secret subpoena of AP phone records broader than initially revealed*, NBC NEWS (May 20, 2013), http://investigations.nbcnews.com/_news/2013/05/20/18377209-dojs-secret-subpoena-of-ap-phone-records-broader-than-initially-revealed?lite.
[157] Letter from Gary Pruitt, President & C.E.O. of the Associated Press (May 13, 2013), *supra* note 95.

It is also important to note that Mr. Holder's statements on the potential prosecution of journalists were not made in response to a direct question. Mr. Johnson yielded the balance of his time to the Attorney General after Mr. Johnson made a statement about how the Espionage Act applies to those who publish classified information, as well as those who leak it.[158] At no time in the colloquy was Mr. Holder challenged on his office's record of prosecuting journalists or his plans to seek charges against journalists. Instead of demurring or merely agreeing with the Member's description of the law, Mr. Holder took the opportunity to inform the Committee, and the American public, that at no time had he ever "been involved" in or "heard of" the potential prosecution of a member of the press under the Espionage Act.[159]

We believe that Mr. Holder's simple and direct statement had the intended effect – to leave the members of the Committee with the impression that not only had the potential prosecution of a reporter never been contemplated during Mr. Holder's tenure, but that nothing comparable to the Rosen search warrant had ever been executed by this administration. Mr. Holder was not conversing with fellow prosecutors at the Justice Department; he was speaking to members of Congress and the American people in a venue that requires the utmost candor and clarity. Assuming, arguendo, that Mr. Holder intended to reference only instances in which a reporter has actually been charged with a crime, his statements nevertheless left a clear impression that belied the reality of the Department's actions vis-à-vis Mr. Rosen.

The Justice Department's internal regulations require Attorney General approval to present evidence to a grand jury in order to investigate a journalist. On the basis of Mr. Holder's testimony, there was little doubt in the Members' minds that the legal machinery for such an undertaking had never been started.

However, the search warrant affidavit in the Kim case, published days after Mr. Holder's statement, gives a very different impression. In a lengthy affidavit, the Justice Department asserted that "there is probable cause to believe that [Rosen] committed a violation of 18 U.S.C. § 793 (Unauthorized Disclosure of National Defense Information), at the very least, either as an aider, abettor and/or co-conspirator of Mr. Kim."[160] In addition, the affidavit took great pains to portray the interactions between Mr. Kim and Mr. Rosen in a nefarious light:

> (a), From the beginning of their relationship, the Reporter [Rosen] asked, solicited and encouraged Mr. Kim to disclose sensitive United States internal documents and intelligence information about the Foreign Country. Indeed, in the May 20, 2009 e-mail, the Reporter solicits from Mr. Kim some of the national defense intelligence information that was later the subject matter of the June 2009 article;
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> (b), *The Reporter did so by employing flattery and playing to Mr. Kim's vanity and ego*;

[158] *Oversight of the United States Dep't of Justice: Hearing Before the H. Comm. on the Judiciary* (Draft Transcript), *supra* note 76, at 105–06.
[159] *Id.* at 106 (statement of Eric Holder, Att'y Gen. of the United States).
[160] Reyes, *supra* note 33, ¶ 40.

> (c), *Much like an intelligence officer would run a clandestine intelligence source, the Reporter instructed Mr. Kim on a covert communications plan* that involved the e-mail of either one or two asterisks to what appears to be [an] e-mail account set up by the Reporter [Rosen], _____ @gmail.com, to facilitate communication with Mr. Kim and perhaps other sources of information;[161]

In addition, the Justice Department requested that the court delay notification to Mr. Rosen of the existence of the search warrant on the basis that Mr. Rosen could flee from prosecution, evidence could be tampered with or destroyed, witnesses could be intimidated, or the life or safety of individuals could be at risk. Taken together, this search warrant affidavit served as ample evidence to any reasonable observer that, at least in May 2010, not only was there a *potential prosecution* of Mr. Rosen, but that there was *intent* to prosecute him at some point in the Kim investigation.

It is difficult to square Mr. Holder's testimony that there was never a *potential prosecution* of Mr. Rosen with the affidavit seeking evidence against him. Most Americans understand that law enforcement seeks authority to search the premises or papers of a suspect when probable cause exists that the suspect has committed a crime. Once that probable cause exists, most Americans expect the authorities to prosecute the suspect. It is improper to maintain that there is no potential prosecution of a suspect from whom evidence is sought just because that suspect was not ultimately charged. Why then, does the Justice Department seek evidence, if not to prepare for a potential prosecution?

Mr. Holder's subsequent statements only deepen the contradiction. On June 6, 2013, several days after the Rosen affidavit was published, Mr. Holder told the Senate Appropriations Committee: "The Department has not prosecuted, and as long as I'm Attorney General, will not prosecute any reporter for doing his or her job."[162]

These statements lead us to another question, beyond the borders of this report, but worth asking: If what the Justice Department alleged about Mr. Rosen was true in the minds of the Justice Department, why wouldn't the Department prosecute a journalist for violating national security laws?

B. *The Justice Department inappropriately interpreted the Privacy Protection Act of 1980 to obtain a search warrant for Mr. Rosen's emails*

In his June 19, 2013, response to a letter from Chairmen Goodlatte and Sensenbrenner, Mr. Holder wrote:

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[161] *Id.* ¶ 39.

[162] Rachel Rose Hartman, *Holder: Justice 'has not… and will not prosecute any reporter for doing his or her job'*, YAHOO! NEWS (June 6, 2013), http://news.yahoo.com/blogs/ticket/eric-holder-no-reporters-prosecuted-under-watch-none-143720092.html.

> As you know, in the course of the ongoing investigation into the unauthorized disclosure of classified information that appeared in a news article in June 2009, the Department, with my approval, sought a search warrant for a reporter's emails from an internet service provider. *In order to proceed under the Privacy Protection Act, the government was required to establish that there was probable cause to believe that the reporter has committed or was committing a criminal offense to which the needed materials related….* As explained in our prior letters, the government's decision to seek this search warrant was an *investigative step*, and at no time during the matter have prosecutors sought approval from me to bring criminal charges against the reporter. We also note that ultimately, a grand jury charged an individual for making the unauthorized disclosure, and the reporter was neither charged nor named as an unindicted co-conspirator in the indictment.[163]

This response strongly indicates that Mr. Holder believes that the Privacy Protection Act permits the government to search the files of journalists for evidence against third parties, as long as the government makes a pre-textual showing that the journalist is involved in criminal activities related to the documents. This interpretation runs exactly counter to the purpose of the PPA.

The legislative history of the PPA makes clear that the goal of the legislation was to protect journalists from government searches for and seizures of evidence to be used against third parties. As both the House and Senate reports following the passage of the legislation highlight, the impetus for the law was the Supreme Court's decision in *Zurcher v. Stanford Daily*.[164] In that case, the Court ruled that the First Amendment did not foreclose the government from searching through the files of reporters for evidence to use against third parties under suspicion of criminal activity.

The Senate Report notes that only two exceptional circumstances will allow a search warrant procedure instead of a subpoena in obtaining work product from journalists.[165] The first exception, and the only one at issue here, is called the "suspect exception," which applies in cases of certain national security and crimes against children statutes where the "person possessing the materials has committed or is committing the criminal offense for which the material is sought."[166] The Report also points out that the exception may not be invoked if the "only offense of which the possessor is suspected is the receipt, possession, communication or withholding of the material of the information contained therein."[167] The suspect exception does apply, however, in the case where the suspect possesses classified documents.[168]

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[163] Letter from Eric Holder, Att'y Gen. of the United States, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary (June 19, 2013), (emphasis added) *available at* https://www.fas.org/sgp/news/2013/06/holder-goodlatte.pdf.
[164] *Zurcher*, 436 U.S. 547.
[165] S. REP. NO. 96-874, at 11.
[166] *Id.*
[167] *Id.*
[168] Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. §2000aa et seq).

The legislative history in the House of Representatives is equally clear. It noted:

> In the case of reports and other preparing material for publication, searches for actual 'work product', that is the personal notes and papers of the writer, are limited to situations in which there is probable cause to believe that the person searched has actually committed an offense for which the material involve would constitute evidence.[169]

In addition, the House Report explains:

> Searches for materials which fall within the definition of work product are prohibited by this legislation with only two limited exceptions. The first of these two exceptions found at section 2(a)(1) allows a search work product if there is probable cause to believe that the person possessing the materials has committed or is committing the crime for which the materials are sought. While this provision is cast in the form of an exception, it really codifies a core principle of this section, which is to protect from search only those persons involved in First Amendment activities who are themselves not implicated in the crime under investigation, *and not to shield those who participate in crime*.[170]

We need look no further, in determining whether Congress intended that search warrants under the PPA be executed only when there is a potential prosecution, than the use of the term "suspect exception." Clearly, Congress intended the PPA to insulate journalists from being subjected to intrusive searches in the pursuit of evidence against third parties.

Any remaining doubt as to the nature of the suspect exception is dispelled in the Senate Report, which warns us that "[t]he Department of Justice, in drafting the legislation, agreed with the Committee and has further justified the work product distinction in hearings on the very practical grounds that without the protection of a no-search rule, a journalist's work product would realistically be fair game for law enforcement investigators who could use a search warrant to piggyback their own investigation on the back of a journalist's efforts."[171]

That is precisely what has happened in the Rosen matter. Mr. Holder's language is specific and transparent. He explained that, "*[i]n order to proceed under the Privacy Protection Act, the government was required to establish that there was probable cause to believe that the reporter has committed or was committing a criminal offense to which the needed materials related…., the government's decision to seek this search warrant was an investigative step, and*

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[169] H.R. REP. NO. 96-1064, at 5 (1980).
[170] *Id.* at 7.
[171] S. REP. NO. 96-874, at 12–13.

at no time during the matter have prosecutors sought approval from me to bring criminal charges against the reporter."[172]

The PPA is not a criminal statute under which the government "proceeds" to bring charges against a suspect. Instead, it is a barrier designed to protect journalists' First Amendment activities from a government entity that is "proceeding" under another statute to investigate and prosecute. The PPA exists to protect reporters from certain "investigative steps," such as those the Justice Department took here, that are intended to bring charges against a third party. At no time during the matter did prosecutors seek approval to bring charges against Mr. Rosen, which strongly indicates that Mr. Rosen was neither a target, nor a suspect.

It is true that the PPA does not require the government to eventually charge the journalist whose records are searched. However, no statute could do so. The separation of powers doctrine could not allow Congress to dictate specifically who is prosecuted – the executive branch is empowered by the Constitution to carry out the laws Congress enacts. Nor can the law anticipate whether a search warrant will produce the evidence necessary to proceed against the individual who is searched.

In this case, Mr. Holder made clear in his June 19, 2013, response to the Committee's May 29, 2013, letter that charges against Mr. Rosen were never contemplated. In addition, in the Attorney General's testimony before the House Judiciary Committee, he made clear that even a "potential prosecution" of a reporter under the Espionage Act is something in which he had never "been involved" or "heard of."[173] He also testified before the Senate Appropriations Committee on June 6, 2013, that "[t]he Department has not prosecuted, and as long as I'm Attorney General, will not prosecute any reporter for doing his or her job."[174] This blanket rule the Attorney General has adopted does little favor to journalists if it will not apply when government wishes to investigate a third party and needs to "proceed under the Privacy Protection Act."

The danger in the Attorney General's inappropriate reading of the PPA is self-evident. By categorizing Mr. Rosen's attempts to report on classified material as a national security violation, an end-run around the Privacy Protection Act can be effected, as long as one reads the Act's suspect exception as a requirement that one has to fulfill in order to get a search warrant approved. Such a twisted reading of the law, in clear contradiction of the legislative history, would create an open door to search the work product of any journalist in any case, even if there is no good faith intent that the government would ever prosecute that reporter.

The affidavit filed in support of the search warrant for Mr. Rosen's emails failed to inform the court that there was no risk of criminal charges being filed against Mr. Rosen. The Committee acknowledges that search warrant affidavits generally do not reveal the intentions of the prosecution to the court. To do so before evidence is collected, in a normal case, would be

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[172] Letter from Eric Holder, Att'y Gen. of the United States, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary (June 19, 2013), *supra* note 163.

[173] *Oversight of the United States Dep't of Justice: Hearing Before the H. Comm. on the Judiciary* (Draft Transcript), *supra* note 76, at 106 (statement of Eric Holder, Att'y Gen. of the United States).

[174] *Holder says Justice Dept. won't prosecute reporters for doing their jobs*, FOXNEWS.COM (June 6, 2013), http://www.foxnews.com/us/2013/06/06/holder-says-justice-dept-wont-prosecute-reporters-for-doing-their-jobs/.

premature. However, in this case, considering the requirements of the PPA and the difficulties that the Justice Department experienced during the investigation (i.e., three attempts to obtain delayed-notice approval from the court), the Committee believes that the court should have been informed that there was never any "potential prosecution" of Mr. Rosen planned.

Revealing to the court that the target of the investigation was Mr. Kim, and not Mr. Rosen, would have given the court a more fulsome understanding of the facts, and allowed the court to weigh the interests of the Justice Department against the risks of a chilling effect against a journalist. Failing to reveal that the "suspect" faced no chance of being charged would have enabled the court to ask more piercing questions about the Privacy Protection Act and the Justice Department's interpretation of the law. This type of candor would also have given the court more information to make an informed decision to seal the affidavit. The Committee is concerned that the Justice Department did not present to the court an honest, complete accounting of the need for Mr. Rosen's personal emails. We question whether the court would have approved the warrant knowing that Mr. Rosen was not, in fact, a suspect and would never be charged under any circumstances.

C. *The Justice Department's proposed regulations governing the collection of evidence from, or the investigation of, journalists are a good first step, but more is needed*

On July 12, 2013, the Justice Department released proposed new guidelines regulating Department practice when seeking evidence from journalists.[175] To be sure, the Committee commends the effort by the Department to analyze and improve these regulations. However, the Committee recommends enhancements to these suggested changes.

The first proposed change to the policy guidelines from the Justice Department concerns notice to and negotiations with the news media whenever Department attorneys seek access to their records.[176] Current policy under 28 CFR § 50.10 allows the news media to be notified of subpoenas where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation. The proposal would flip the presumption; advance notice of the Department's subpoenas could be delayed only where the Attorney General, after a review by a committee of attorneys, finds that the notice to the media would present a "clear and substantial threat" to the investigation, grave harm to national security, or imminent risk of death.[177]

In addition, the proposal will expand the Attorney General's approval and notification requirement to incorporate search warrants and 2703(d) orders.[178] Currently, the Attorney General is only required to approve subpoenas for material from journalists and their telephone toll records.[179] Expanding the regulations to cover search warrants and 2703(d) orders will bring the media regulations into the 21st century and provide needed supervision over Department attorneys who are attempting to gain access to journalists' records of any kind. We also support

[175] U.S. DEP'T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES (2013), *available at* http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf.
[176] *Id.* at 2.
[177] *Id.*
[178] *See* 18 U.S.C. § 2703(d) (2012).
[179] 28 CFR § 50.10.

the proposal to revise regulations to make clear that those policies apply to "communications records" or "business records" of journalists that are stored by third parties.

Under the proposed regulations, prior notice must now be given to a journalist or news organization for not only telephone toll record subpoenas, but also for 2703(d) orders and search warrants unless the "clear and substantial threat" test is met.[180] Notice after-the-fact will still be required within 45 days, unless the Attorney General himself authorizes a delay for an additional 45 days.[181]

Incorporating search warrants and other investigatory steps into 28 CFR § 50.10 will hopefully eliminate the possibility of a recurrence of what happened in the Rosen matter: An initial 14-month delay sought by the government followed by an additional 18-month delay before the federal district court ultimately released the search warrant. With the Justice Department's new regulations mandating the notification of the media about all forms of process, the affirmative duty to notify will prevent unnecessarily delayed notification to the journalist and serve as an additional check on the Judiciary's performance of its duties.

Other proposals to create new committees within the Department dealing with media-related investigations are welcome, as are requirements for communication with the intelligence community to determine which investigations truly are matters of grave national concern.

However, the Committee believes that these proposals do not go far enough to ensure that the Attorney General's actions are properly memorialized. The Committee recommends that where a journalist's records are sought in an investigation, the Attorney General should be required to do more than merely approve of the action. The Attorney General should personally review the subpoena or the application and affidavit to the court for a 2703(d) order or search warrant. He should also memorialize the decision approving the investigation tactic and the reasons for it in writing. This will provide Congress, the media, and the American people assurance that these evidence-collection techniques are fully vetted at the highest level of the Justice Department to deter any unnecessary chilling of First Amendment activity. It would also prevent the type of prolonged conflict between the Attorney General and Congress that has arisen in this case.

The Committee has expended much time and energy in performing its constitutional duty of oversight over the executive branch in the instant matter. This duty, one of the fundamental aspects of the constitutional structure of checks and balances, must be carried out with vigor and accuracy on behalf of the American people. In that spirit, we note that significant actions taken by Mr. Holder, such as his recusal from the investigation of national security leaks and his approval of search warrants for journalists, have occurred without a written record of his decisions and the reasons for them. The Committee recommends that when the Attorney General recuses himself from the responsibility for a criminal investigation or prosecution, he memorialize that decision and the reasons for it in writing.

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[180] U.S. DEP'T OF JUSTICE, *supra* note 175, at 3.
[181] *Id.* at 2.

The recusal of the nation's chief law enforcement cabinet officer from a national security investigation is a legitimate subject of concern for the American people. The search of journalists' communication and computer records in a prosecution is similarly of legitimate interest. Without a written record of these decisions and their rationale, oversight becomes merely an exercise in cross-examination of executive branch officials.

The Committee recognizes the importance of separation of powers. Each branch of the government serves as a check on the other, constraining any one branch from excessive exercises of power. In this area, the Committee is recommending common-sense measures that bring existing regulations back into relevance by updating them to modern sensibilities. In addition, rather than constraining the power of the executive, these measures merely act to increase transparency and accountability for important decisions.

D. *The Justice Department's proposed amendment to the Privacy Protection Act of 1980 does not expand protections for journalists but merely codifies original congressional intent*

The Department's July 12, 2013, proposal also recommends that the suspect exception to the Privacy Protection Act may be invoked only when the member of the news media "is the focus of the criminal investigation for conduct going beyond ordinary news-gathering activities."[182] Search warrants directed at reporters will not be allowed "if the sole purpose is the investigation of a person other than" the reporter.

This proposal changes nothing. As we made abundantly clear in the above analysis of the PPA and its legislative history, the law already prohibits the government from searching and seizing reporters' files when the reporter is not suspected of a crime. In its *raison d'etre* and its design, the Act prohibits searches if the purpose is the investigation of a person other than the reporter. Mr. Holder's interpretation that the Privacy Protection Act merely requires that the government label the journalist as a suspect in order to search his files flies in the face of the legislative history, and a plain, honest reading of the statute.

Mr. Holder attempted to disguise his clearly erroneous reading of the statute as a defect in the law. He claims the suspect exception should be re-written to make sure that it only applies if the journalist is a suspect. That is already the law. This proposal should be rejected as self-serving and unnecessary.

However, this suggested "fix" illustrates the Attorney General's dilemma, created by his deceptive and misleading testimony before this Committee. In his sworn testimony, Mr. Holder assured the American people that the "potential prosecution" of a member of the media was something he had never contemplated, or even "heard of." A few days later, the release of the Rosen warrant revealed that Mr. Holder approved the designation of Mr. Rosen as a suspect in order to seize his emails. So, the Attorney General had a choice. If his testimony was above-board, the Rosen warrant could not exist unless Mr. Rosen was labeled a suspect in name only, which would likely violate the Privacy Protection Act. However, if Mr. Rosen was truly a

[182] *Id.* at 3.

suspect, and therefore a legitimate target of prosecution, then Mr. Holder gave deceptive testimony to Congress and the American people.

Rather than admit that he gave deceptive testimony, and that Mr. Rosen was actually a target of prosecution (and further raise the ire of the media), Mr. Holder instead represented that Mr. Rosen was never a true suspect. To thread this legal needle, the Attorney General argues that the Privacy Protection Act is written incorrectly. He maintains that the current law permitted him to tarnish Mr. Rosen as a suspect, but only for the purpose of investigating a third party. The Committee rejects this facile reading of the law and rejects a needless, duplicative legislative "correction" that serves only to provide cover for Mr. Holder's misleading testimony.

APPENDIX

AP letter to Eric Holder on seizure of phone records

9:01 p.m. EDT May 13, 2013

The letter of protest sent today from Gary B. Pruitt, president and CEO of the Associated Press, to U.S. Attorney General Eric Holder protesting the government's seizure without notice of a large and broad amount of AP phone records for an unspecified investigation:

May 13, 2013

Attorney General Eric Holder

Department of Justice

Washington, D.C.

Dear General Holder:

I am writing to object in the strongest possible terms to a massive and unprecedented intrusion by the Department of Justice into the newsgathering activities of The Associated Press.

Last Friday afternoon, AP General Counsel Laura Malone received a letter from the office of United States Attorney Ronald C. Machen Jr. advising that, at some unidentified time earlier this year, the Department obtained telephone toll records for more than 20 separate telephone lines assigned to the AP and its journalists. The records that were secretly obtained cover a full two-month period in early 2012 and, at least as described in Mr. Machen's letter, include all such records for, among other phone lines, an AP general phone number in New York City as well as AP bureaus in New York City, Washington, D.C., Hartford, Connecticut, and at the House of Representatives. This action was taken without advance notice to AP or to any of the affected journalists, and even after the fact no notice has been sent to individual journalists whose home phones and cell phone records were seized by the Department.

There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations, and disclose information about AP's activities and operations that the government has no conceivable right to know.

That the Department undertook this unprecedented step without providing any notice to the AP, and without taking any steps to narrow the scope of its subpoenas to matters actually relevant to an ongoing investigation, is particularly troubling.

The sheer volume of records obtained, most of which can have no plausible connection to any ongoing investigation, indicates, at a minimum, that this effort did not comply with 28 C.F.R. §50.10 and should therefore never have been undertaken in the first place. The regulations require that, in all cases and without exception, a subpoena for a reporter's telephone toll records must be "as narrowly drawn as possible." This plainly did not happen.

We regard this action by the Department of Justice as a serious interference with AP's constitutional rights to gather and report the news. While we evaluate our options we urgently request that you immediately return to the AP the telephone toll records that the Department subpoenaed and destroy all copies. At a minimum, we request that you take steps to segregate these records and prohibit any reference to them pending further discussion and, if it proves necessary, guidance from appropriate judicial authorities. We also ask for an immediate explanation as to why this extraordinary action was taken, and a description of the steps the Department will take to mitigate its impact on AP and its reporters.

Given the gravity of this situation, I look forward to your prompt response.

Sincerely,

Gary Pruitt

Office of the Deputy Attorney General
Washington, D.C. 20530

May 14, 2013

Gary B. Pruitt
President and CEO
Associated Press
450 W. 33rd Street
New York, NY 10001

Dear Mr. Pruitt:

I am writing in response to your May 13, 2013, letter concerning the Department of Justice's notification on Friday, May 10, 2013, that it is in receipt of subpoenaed toll records for April and May 2012 for certain telephone numbers associated with the Associated Press.

As you know, Department policy provides that we should issue subpoenas for phone records associated with media organizations only in certain circumstances. There should be reasonable grounds to believe that a federal crime has been committed and that the information sought by the subpoena is essential to a successful investigation. The Department should take all reasonable alternative investigative steps before even considering the issuance of a subpoena for toll records related to a media organization. Any subpoena that is issued should be drawn as narrowly as possible, be directed at relevant information regarding a limited subject matter, and should cover a reasonably limited period of time. We are required to negotiate with the media organization in advance of issuing the subpoenas unless doing so would pose a substantial threat to the integrity of the investigation. We take this policy, and the interests that it is intended to protect, very seriously and followed it in this matter.

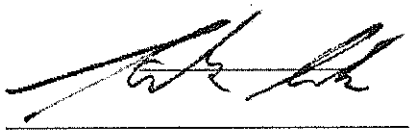
In May 2012, the Department of Justice opened criminal investigations into the unauthorized disclosure of classified information. Because such disclosures can risk lives and cause grave harm to the security of all Americans, the Department thoroughly investigates cases in which government employees and contractors trusted with our nation's secrets are suspected of willfully disclosing that information to individuals not entitled to them. Even given the significant public interest in enforcing criminal laws that protect our national security, seeking toll records associated with media organizations is undertaken only after all other reasonable alternative investigative steps have been taken. In this case, the Department undertook a comprehensive investigation, including, among other investigative steps, conducting over 550 interviews and reviewing tens of thousands of documents, before seeking the toll records at issue.

We understand your position that these subpoenas should have been more narrowly drawn, but in fact, consistent with Department policy, the subpoenas were limited in both time and scope. As you know, for each of the phone numbers referenced in our May 10, 2013, letter there was a basis to believe the numbers were associated with AP personnel involved in the

reporting of classified information. The subpoenas were limited to a reasonable period of time and did not seek the content of any calls. Indeed, although the records do span two months, as we indicated to you last week, they cover only a portion of that two-month period. In addition, these records have been closely held and reviewed solely for the purposes of this ongoing criminal investigation. The records have not been and will not be provided for use in any other investigations.

Given the ongoing nature of this criminal investigation involving highly classified material, I am limited in the information that I can provide to you. Please understand that I appreciate your concerns and that we do not take lightly the decision to issue subpoenas for toll records associated with members of the news media. We strive in every case to strike the proper balance between the public's interest in the free flow of information and the public's interest in the protection of national security and effective enforcement of our criminal laws. We believe we have done so in this matter.

Sincerely,



James M. Cole
Deputy Attorney General

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May 22, 2013

The Honorable James M. Cole
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Deputy Attorney General Cole:

We are writing to you in your capacity as Acting Attorney General for a national security leaks investigation in which the Justice Department subpoenaed two months of telephone call records of reporters and editors for the Associated Press (AP). According to media reports, the Justice Department obtained telephone records for the main AP telephone number in the U.S. House of Representatives Press Gallery, for AP office numbers in New York City, Washington, D.C., and Hartford, Connecticut, and for the work and personal phone numbers of individual reporters. In total, the Justice Department obtained call records for at least 20 separate phone lines during the months of April and May of last year. According to the AP, more than 100 journalists work in the offices where the phones are located.

At a press conference on May 14, 2013, and before a House Judiciary Committee hearing on May 15, 2013, Attorney General Eric Holder stated that the subpoenas were issued in an investigation into leaks of information relating to a matter of national security. Attorney General Holder also revealed that he recused himself from the investigation because he had been interviewed by the FBI in connection with the leaks, and "because I thought it would be inappropriate and have a bad appearance to be a person who was a fact witness in the case to actually lead the investigation, given the fact, unlike Mr. Cole, that I have a greater interaction with members of the press than he does."[1]

In a letter dated May 14, 2013, you informed Mr. Gary Pruitt, AP President and CEO, that the criminal investigation into the unauthorized disclosure of classified information was opened in May 2012. Your letter also restated some of the regulations found in 28 CFR §50.10

[1] Transcript of House Judiciary Committee Hearing on Oversight of the United States Department of Justice at page 31, line 644, May 15, 2013.

and incorporated into the U.S. Attorney's manual regarding the procedures that must be followed when the Justice Department seeks to subpoena information belonging to journalists. The regulations require the Justice Department to take all reasonable alternative investigative steps before considering subpoenas for telephone toll records of any member of the media.[2] In addition, the regulations require negotiations with the media to be pursued in all cases involving such subpoenas where the Assistant Attorney General determines that such negotiations would not pose "a substantial threat to the integrity of the investigation."[3] There is also a requirement that the subpoenas be drawn as narrowly as possible, namely that they be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period.[4]

The AP reports that five of the reporters and one of the editors targeted by the Justice Department were involved in a May 7, 2012, story about a failed airline bomb plot originating in Yemen. According to media reports, the AP held the story back for a week upon the request of the CIA, and only published the story once the CIA indicated that it no longer had such concerns about risks to national security.[5]

At the House Judiciary Committee oversight hearing, Attorney General Holder repeatedly stated that he could not answer questions about the subpoenas because he lacked any knowledge of the investigation due to his recusal. As Acting Attorney General for this investigation, you are in the best position to answer our questions in this matter. Therefore, please respond to the following questions as soon as possible, but by no later than May 31, 2013:

1. On what date did Attorney General Holder recuse himself from this investigation?

2. How did you learn of Attorney General Holder's recusal? Did Attorney General Holder personally inform you of his intent to recuse himself from the investigation? Was his recusal made in writing or memorialized in any manner?

3. Did every Justice Department official or employee who possessed the improperly disclosed information at issue in this investigation recuse themselves? Did every Department official or employee interviewed by the FBI in connection with this investigation recuse themselves from this investigation? Please provide a list of all Justice Department officials or employees who recused themselves from this investigation.

4. Do you also possess the improperly disclosed information at issue in this investigation? If so, were you interviewed by the FBI in connection with this investigation?

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[2] 28 CFR §50.10(b)
[3] *See* 28 CFR §50.10(d)
[4] *See* 28 CFR §50.10(g)(1)
[5] *Some Question Whether AP Leak on Al-Qaeda Plot Put U.S. at Risk*, The Washington Post, May 15, 2013

5. If you do possess the information at issue in this investigation, why were you not required to also recuse yourself? Please provide us with any and all applicable statutes, regulations or internal Justice Department policies that govern the recusal of a Department official or employee from an investigation.

6. Attorney General Holder testified that he was "95% percent certain, that the Deputy Attorney General, acting in my stead, was the one who authorized the subpoena....." He then clarified that he believed you did personally approve the subpoena requests. Please confirm that you did, in fact, personally approve and sign the subpoena requests for AP telephone toll records.

7. The Justice Department issued subpoenas for several telephone lines that are reportedly accessible to and used by a large number of reporters. What steps did the Department take, if any, to narrow the scope of the telephone toll records request to ensure that only those telephone toll records made by the subject reporters and staff were obtained?

8. The Justice Department issued subpoenas for a telephone line located in the U.S. House of Representatives Press Gallery. Are there any statutes, regulations or internal Justice Department policies applicable to requests for telephone toll records for a telephone located inside the U.S. Capitol complex, even if such telephone line is paid for by a media outlet?

9. 28 CFR §50.10(b) requires the Department to take all reasonable alternative investigative steps prior to obtaining telephone toll records pertaining to a member of the media. Please describe all of the alternative investigative steps the Department took in this investigation prior to issuing the subpoenas for the AP telephone toll records.

10. It has been reported that the AP refrained from releasing the story of the Yemeni bomb plot for a week until Obama administration officials confirmed that doing so would not jeopardize national security interests. This indicates a willingness on the part of the AP to work with the Justice Department on issues affecting national security. Given this, why did the Department not seek the AP's assistance with its request or provide notice to the AP prior to issuing the subpoenas?

11. 28 CFR §50.10(d) requires prior notice to a media outlet where "the responsible Assistant Attorney General determines that such negotiations [with the media] would not pose a substantial threat to the integrity of the investigation..." Is it the Department's position that a substantial threat to the integrity of the investigation existed in this instance? Please provide a detailed explanation of the facts and circumstances in this case that justified foregoing prior notice to the AP under the "substantial threat" exception.

Thank you for your cooperation in responding to our questions. Please contact Samuel Ramer, Senior Counsel for the Subcommittee on Crime, Terrorism, Homeland Security and Investigations at sam.ramer@mail.house.gov with any questions. We look forward to your prompt reply.

Sincerely,

BOB GOODLATTE
Chairman
House Committee on the Judiciary

F. JAMES SENSENBRENNER, Jr.
Chairman
Subcommittee on Crime, Terrorism
Homeland Security and Investigations

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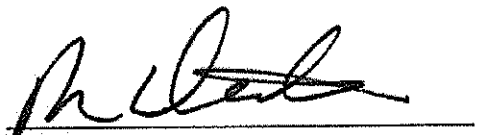

RON DeSANTIS
Member
House Committee on the Judiciary

DARRELL E. ISSA
Member
House Committee on the Judiciary

cc: The Honorable John Conyers, Ranking Member
cc: The Honorable Bobby Scott, Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security and Investigations

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May 29, 2013

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

We are writing to you with great concern regarding your recent testimony before the House Judiciary Committee. In response to a question from Congressman Hank Johnson regarding the use of the Espionage Act to prosecute members of the media for publishing classified material, you stated, under oath, the following: "*You got a long way to go to try to prosecute people, the press, for the publication of that material. Those prosecutions have not fared well in American history.*"[1] In addition, during the colloquy with Mr. Johnson, you stated: "*Well, I would say this. With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved in, heard of, or would think would be a wise policy.*"[2]

In the days following your sworn testimony, media reports circulated revealing that in May, 2010, the Justice Department had sought and obtained a search warrant for emails belonging to Mr. James Rosen, the chief Washington correspondent for FOX News. The search warrant was issued in the investigation of the publication of an article by Mr. Rosen in June, 2009, that allegedly contained classified material. The New Yorker magazine obtained a copy of the forty-four page search warrant affidavit, which alleged that the source of the material was Stephen Jin-Woo Kim, a Lawrence Liverpool National Laboratory employee detailed to the State Department.[3] In the affidavit in support of the search warrant, FBI Agent Reginald B. Reyes, stated, "...there is probable cause to believe that the Reporter [Rosen] has committed a

[1] Transcript of House Judiciary Committee Hearing on Oversight of the United States Department of Justice at 105, May 15, 2013.
[2] *Id.* at 106.
[3] "The DOJ versus James Rosen", Ryan Liza, *available at: http://www.newyorker.com/online/blogs/newsdesk/2013/05/the-doj-versus-journalist-gmail.html*

violation" of 18 USC §793(d) [the Espionage Act] "at the very least, either as an aider, abettor and/or co-conspirator of Mr. Kim."[4]

In addition, the search warrant application requested that the court issue a non-disclosure order on the email provider, alleging that disclosure of the existence of the search warrant would endanger the life and safety of an individual, flight from prosecution, destruction and tampering of evidence, intimidation of potential witnesses, or otherwise seriously jeopardize the investigation.[5] Subsequent media reports have stated that the Justice Department issued confirmation that the investigation of Mr. Rosen and the search warrant application for his private emails was approved "at the highest levels" of the Justice Department, including "discussions" with Attorney General Eric Holder.[6]

The media reports and statements issued by the Department regarding the search warrants for Mr. Rosen's emails appear to be at odds with your sworn testimony before the Committee. We believe – and we hope you will agree – it is imperative that the Committee, the Congress, and the American people be provided a full and accurate account of your involvement in and approval of these search warrants. Please respond to the following questions as soon as possible, but by no later than June 5, 2013:

1. Please provide all regulations and internal Justice Department policies that govern the issuance of search warrants for the email communications of members of the media.

2. 28 CFR§ 50.10 states: "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."[7] Is it the Department's position that, although not explicitly required by 28 CFR §50.10, the Attorney General must personally approve the use of a search warrant to obtain private emails belonging to a member of the media?

3. At the time the Justice Department requested the search warrant did the Department intend to prosecute Mr. Rosen under the Espionage Act? If the Department did not intend to prosecute Mr. Rosen, why did the Department refer to Mr. Rosen in its affidavit accompanying the search warrant affidavit as a "co-conspirator", and allege that "at the very least" Mr. Rosen was an aider and abettor?

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[4] See Search Warrant Affidavit, pg. 36, *available* at: *http://s3.documentcloud.org/documents/702199/d-o-j-versus-james-rosen.pdf*
[5] *Id.* at 35.
[6] " DOJ Confirms Holder OK'd Search Warrant for Fox Reporter's Emails", Michael Isikoff, *available at: http://openchannel.nbcnews.com/_news/2013/05/23/18451142-doj-confirms-holder-okd-search-warrant-for-fox-news-reporters-emails?lite*
[7] 28 CFR §50.10

4. The Department sought and obtained a non-disclosure order pursuant to 18 U.S.C. § 2705(b). Please identify which of the statutory criteria for non-disclosure existed in this instance and why the Department believed Mr. Rosen met one or more of these criteria?

5. The Justice Department issued a statement that the search warrant for Mr. Rosen's emails was approved at the highest levels of the Department. Did this include you? If so, on what date did you approve the search warrant request? As part of any such approval, did you personally read the search warrant application and accompanying affidavit? How was your approval memorialized?

6. The Department's statement seems to indicate that you may not have personally approved the use of a search warrant for Mr. Rosen's emails but were instead involved in "discussions" relating to the search warrant. Did these discussions include Mr. Rosen's status as an aider/abettor or co-conspirator? Did these discussions involve the need for a non-disclosure order? Did these discussions include an explanation of all reasonable alternative investigation steps taken prior to the search warrant request?

7. Whether you personally approved the search warrant request or were merely part of "discussions" relating to a search warrant for Mr. Rosen's emails, it is clear now that you were aware that the Department was engaged in a criminal investigation of a member of the media as far back as 2010. This fact contradicts your testimony before the Committee in which you stated clearly that: *"With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved in, heard of, or would think would be a wise policy."*

    a. How can you claim to have never "been involved" in the potential prosecution of a member of the media but you were admittedly involved in discussions regarding Mr. Rosen's emails?

    b. How can you claim to have never even "heard of" the potential prosecution of the press but were, at a minimum, involved in discussions regarding Mr. Rosen?

    c. Do you agree that characterizing a member of the media as an aider/abettor or co-conspirator in a sworn search warrant affidavit constitutes a "potential prosecution of the press for the disclosure of material"?

    d. Do you believe that the investigation of Mr. Rosen as a potential co-conspirator or aider/abettor to Mr. Kim was "wise policy"? Please explain.

8. If you believe, as you testified, that prosecutions of members of the media "*have not fared well in American history,*" why did you permit the Department to investigate Mr. Rosen as a co-conspirator or aider/abettor?

Thank you for your cooperation in responding to our questions. Please contact Samuel Ramer, Senior Counsel for the Subcommittee on Crime, Terrorism, Homeland Security and Investigations at sam.ramer@mail.house.gov with any questions. We look forward to your prompt reply.

Sincerely,

Bob Goodlatte
Chairman

F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism,
Homeland Security, and Investigations

cc: The Honorable John Conyers, Ranking Member
cc: The Honorable Robert C. "Bobby" Scott, Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 03 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism
Homeland Security, and Investigations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte and Chairman Sensenbrenner:

This responds to your letter to the Attorney General, dated May 29, 2013, requesting information about the Department's policies with respect to investigations involving members of the media and the Attorney General's knowledge of an investigation into the unauthorized disclosure of classified information that was then published in a news article in June 2009.

The Attorney General takes the unauthorized disclosure of classified information by those who have committed to protecting it very seriously, especially as such disclosures can cause grave damage to our national security. The Attorney General also has the utmost respect for the vital role the media plays in an open society. To ensure the proper balance of these important interests, the President has directed the Attorney General to conduct a review of Department policies regarding investigations involving the media, and as part of that process, the Attorney General has initiated a dialogue with news media representatives and other interested parties. Furthermore, as the Attorney General explained in the hearing before you on May 15, 2013, he supports the media shield legislation currently under consideration by the Senate, which provides robust judicial protection for journalists' confidential sources while also enabling the Department to continue to protect national security and enforce criminal laws. We look forward to working with Congress on this measure.

The Department's current policies provide separate processes for subpoenas and search warrants in the course of investigations involving members of the news media. As you know, 28 C.F.R § 50.10 governs the issuance of subpoenas to members of the news media, including subpoenas seeking their telephone toll records. This regulation requires the Department in every case to consider the balance between the public's interest in the flow of information and the public's interest in effective law enforcement and the fair administration of justice. Thus, the regulation requires the government to take all reasonable alternative investigative steps before considering issuing a subpoena to a member of the news media or for the telephone toll records of a member of the news media. The regulation also requires the authorization of the Attorney General before issuing a subpoena to a member of the news media or for telephone toll records of a member of the news media. This regulation has not been substantively amended in more than 30 years, and is a subject of the review process currently being undertaken by the Attorney General at the President's direction. Search warrants for materials in the possession of a journalist whose purpose is to disseminate information to the public are governed by the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, et seq. That law outlines the limited circumstances under which the Department may seek Court approval for a search warrant. Specifically, under the Privacy Protection Act, the government may seek work product materials or documents in the possession of a journalist only where there is probable cause to believe that the journalist has committed or is committing a criminal offense to which the materials relate, including the crime of unlawfully disclosing national defense or classified information.

Your letter also asks for additional information about the investigation of the unauthorized disclosure of classified information to a reporter in 2009. At the outset, it is important to note the difference between an investigation and a prosecution. When the Department has initiated a criminal investigation into the unauthorized disclosure of classified information, the Department must, as it does in all criminal investigations, conduct a thorough investigation and follow the facts where they lead. Seeking a search warrant is part of an investigation of potential criminal activity, which typically comes before any final decision about prosecution. Probable cause sufficient to justify a search warrant for evidence of a crime is far different from a decision to bring charges for that crime; probable cause is a significantly lower burden of proof than beyond a reasonable doubt, which is required to obtain a conviction on criminal charges. Prior to seeking charges in a matter, prosecutors evaluate the facts and the law and make decisions about who should be prosecuted. The regulation governing the issuance of subpoenas to the news media described above, which provides for consideration of the public's various interests, also requires that the Attorney General must approve any charges against a member of the news media. We are unaware of an instance when the Department has prosecuted a journalist for the mere publication of classified information.

The unauthorized disclosure of classified information that appeared in a June 2009 news article was a serious breach that compromised national security. The Federal Bureau of Investigation conducted a comprehensive inquiry into that unauthorized disclosure, and after exhausting all other reasonable options, the government applied for a search warrant for information in the reporter's email account believed to be related to the source of the unauthorized disclosure. The affidavit in support of the search warrant satisfied the requirements

of the Privacy Protection Act, based on the facts alleged, and a federal judge granted that warrant. The Attorney General was consulted and approved the application for the search warrant during the course of the investigation. Ultimately, as you know, although a Grand Jury has charged a government employee with the unauthorized disclosure of classified information, prosecutors have not pursued charges against the reporter. At no time during the pendency of this matter—before or after seeking the search warrant—have prosecutors sought approval to bring criminal charges against the reporter. The Attorney General's testimony before the Committee on May 15, 2013, with respect to the Department's prosecutions of the unauthorized disclosure of classified information was accurate and consistent with these facts. As the Attorney General explained, these prosecutions focus on those who "break their oath and put the American people at risk, not reporters who gather this information."

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

The Honorable Bobby Scott
Ranking Minority Member
Subcommittee on Crime, Terrorism
Homeland Security, and Investigations
Committee on the Judiciary

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June 4, 2013

Mr. Peter J. Kadzik
Principal Deputy Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Mr. Kadzik,

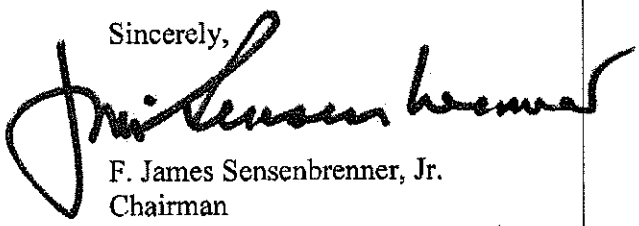
We received yesterday a letter from you that you claim responds to our May 29th letter to the Attorney General. It does not. The Attorney General made on-the-record statements before the Judiciary Committee and the American people under oath that prompted our letter. Congress and the American people deserve to have the Attorney General respond to the Committee on the record. A letter from a subordinate that fails to answer many of our questions does not suffice.

We, along with other members of Congress, have been invited to an off-the-record meeting at the Justice Department with Attorney General Holder. The email inviting us to this meeting says it "is one of a series of meetings with media and other organizations that the Attorney General is conducting as part of the policy review directed by the President." We support the policy review that the Department has initiated at the President's behest. But, as with your letter, an off-the-record policy review meeting with the Attorney General is not a substitute for an on-the-record response to our letter.

We expect the Attorney General to respond fully, in writing, to our letter by close of business on Wednesday, June 5, 2013. We look forward to his response.

Sincerely,

Bob Goodlatte
Chairman



F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism,
Homeland Security, and Investigations

cc: The Honorable Eric H. Holder, Jr.
cc: The Honorable John Conyers, Ranking Member
cc: The Honorable Robert C. "Bobby" Scott, Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 4, 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter to the Deputy Attorney General, dated May 22, 2013, concerning the Department's investigation of unauthorized disclosures of classified national security information which was published in May 2012. We are sending identical responses to the other Members who joined in your letter to us.

The Department's June 3, 2013, letter to Chairmen Goodlatte and Sensenbrenner underscores the Attorney General's commitment to striking the right balance between safeguarding national security information and ensuring the substantial rights of a free press to gather and report the news. The Deputy Attorney General shares that commitment. He is fully engaged in both the ongoing review of Department policies regarding investigations involving the media that the Attorney General is conducting and the constructive dialogue we have begun with news media representatives and other interested parties about these important interests.

You have asked several questions about both the Attorney General's decision to recuse himself and our deliberative decisions and actions relating to other aspects of the investigation. Because this criminal investigation is ongoing, we are limited in what we can share about specific details and deliberations. Longstanding Department policy, across administrations, limits the disclosure of non-public information relating to open criminal investigations. And investigations dealing with highly classified information, such as this one, require particular caution. Nonetheless, we endeavor to respond as fully as we are able at this time.

In May 2012, the Department opened a criminal investigation into the unauthorized disclosures of classified information. Because such unauthorized disclosures can put lives at risk and pose a serious risk of harm to our national security, it is important that we pursue these matters using appropriate law enforcement tools. In this case, the Department conducted an extensive investigation, including more than 550 interviews and the review of tens of thousands of pages of documents, before seeking the telephone toll records at issue.

As the Attorney General recently explained—and as he testified in June 2012 and on May 15, 2013—he was interviewed by the FBI in connection with the criminal investigation into the unauthorized disclosures of classified information. Based upon the interview, and in light of his frequent contact with the media during the relevant time period, the Attorney General recused himself in order to avoid any potential appearance of a conflict of interest. As the Department has previously stated, other senior Department officials have also recused themselves in this matter. Since the Attorney General's recusal, the investigation has been conducted by the FBI, under the direction of the U.S. Attorney for the District of Columbia and under the general supervision of the Deputy Attorney General. While the Deputy Attorney General also possessed the information at issue and was interviewed, he did not have any contacts with the media during that time, thus avoiding the appearance of a conflict of interest. Consistent with federal statutes and Department practices, the Deputy Attorney General approved the decision to seek the toll records in his role as Acting Attorney General for purposes of the investigation.

Department policy provides that subpoenas for toll records associated with media organizations should be requested only in certain circumstances. First, there must be reasonable grounds to believe that a federal crime has been committed and that the information sought by the subpoena is essential to the success of the investigation. Second, we must take all reasonable alternative investigative steps before even considering the issuance of a subpoena for toll records related to a media organization. Third, any subpoena that is issued should be drawn as narrowly as possible, be directed at relevant information regarding a limited subject matter, and cover a reasonably limited time period. We take these requirements very seriously and followed them in this matter.

Consistent with Department policy, the subpoenas seeking toll records associated with AP personnel were limited in time and scope. They sought only toll records and did not seek the content of any calls. We note that toll records—not unlike a telephone bill—merely provide a list of incoming and outgoing calls, including the time, date, and duration of each call. The subpoenas here were narrowly drawn. They covered only a portion of a two-month period, and they only sought toll records for phone numbers which prosecutors had a basis to believe were associated with AP personnel involved in the reporting of the classified information. The toll records have been and will remain closely held. They have been used solely for purposes of this ongoing investigation, and access has been and will continue to be restricted accordingly.

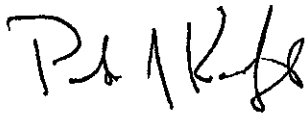
As you note, Department regulations provide that negotiations must be pursued with the affected member of the news media "where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation." 28 C.F.R. § 50.10(d). Although the ongoing nature of the investigation prevents us from sharing additional details about this case, there are a number of reasons—depending on the circumstances of a given case—that may lead the Department to refrain from negotiating with a media organization before seeking a subpoena for telephone toll records. For example, through the negotiation process, the potential target (the leaker) could become aware of the investigation, its focus, and its scope, and seek to destroy evidence, create a false narrative as a defense, or otherwise obstruct the investigation. It is also important to note that forgoing

negotiation does not permit the Department to obtain records in "secret." The media organization must be notified under the regulations in any event. Forgoing negotiation simply permits a delay of that notification for a maximum of 90 days in order to preserve the integrity of the investigation. That requirement was met in this matter.

The Department is committed to improving the laws and policies that are intended to safeguard the interests of the press in reporting the news and the public in receiving it. At the same time, the Department is committed to using appropriate law enforcement tools to investigate unauthorized disclosures of classified information that can cause grave harm to our national security.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Peter J. Kadzik
Principal Deputy Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Office of the Attorney General

Washington, D.C. 20530

June 5, 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism
Homeland Security and Investigations
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairmen Goodlatte and Sensenbrenner:

As has been reported, at President Obama's direction, I have initiated a review of the Department of Justice's policies and guidelines related to investigations that involve members of the media. As a part of this review, I have hosted a series of productive meetings with representatives of news organizations and other interested parties in order to solicit their valuable input. I welcome your contributions to this process and hope that both of you will join the Deputy Attorney General and me when we schedule meetings with interested members of Congress.

I also want to confirm that the June 3, 2013 letter from Principal Deputy Assistant Attorney General Peter J. Kadzik, the most senior official currently in the Department's Office of Legislative Affairs, accurately sets forth the Department's and my position with respect to your May 29, 2013 letter concerning the Department's investigative and enforcement policies applicable to disclosures of classified information, as well as my testimony before the Committee. Mr. Kadzik's response on behalf of the Department was consistent with the Department's long-standing practice in corresponding with Members of Congress and was not intended to demonstrate disrespect in any way.

I look forward to working with you on the Department's ongoing review and other matters.

Sincerely,

Eric H. Holder, Jr.
Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

The Honorable Robert C. "Bobby" Scott
Ranking Minority Member
Subcommittee on Crime, Terrorism
Homeland Security and Investigations
Committee on the Judiciary

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June 6, 2013

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

We are in receipt of your June 5th letter endorsing the Department's previous letter regarding the veracity of your testimony before the Committee. We are disappointed that your response still fails to fully and adequately answer our questions. Neither the letter from Principal Deputy Assistant Attorney General Peter Kadzik, nor your follow-up letter, constitutes a satisfactory on-the-record response by you to the Committee.

You testified on May 15th that "with regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved, heard of, or would think would be a wise policy." This statement left members of the Committee and the American people with the clear understanding that the Department had never taken the unprecedented step of characterizing a member of the media as a criminal co-conspirator in a sworn court document.

We do not believe our request – that you provide the Committee with an on-the-record explanation of your on-the-record testimony – is extraordinary. We believe the Committee and the American people deserve to hear from you directly. It is with this goal in mind that we invite you to appear before the Committee on June 18, 2013 at 10:00 a.m. to respond to our inquiry. If this date and time presents a conflict for you, please provide us with an alternative date between June 18 and June 28, 2013, for your appearance.

Please reply by COB, Friday, June 14, 2013, to schedule your appearance. We look forward to your reply.

Sincerely,

BOB GOODLATTE
Chairman

F. JAMES SENSENBRENNER, Jr.
Chairman
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

Member
House Committee on the Judiciary

Member
House Committee on the Judiciary

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cc: The Honorable John Conyers, Ranking Member
cc: The Honorable Robert C. "Bobby" Scott, Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

Office of the Attorney General
Washington, D. C. 20530

June 19, 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte:

This responds to your letter, dated June 6, 2013, requesting that I provide further explanation of my testimony before the Committee on May 15, 2013, regarding investigations of unauthorized disclosures of classified information involving members of the news media.

Consistent with that testimony, it remains my understanding that the Department has never prosecuted a journalist for publishing classified information. Your letter suggests, however, that Committee Members may have interpreted my statement to mean that the Department also has not taken certain investigative steps—such as seeking a search warrant for a reporter's emails from an internet service provider—during an investigation into the unauthorized disclosure of classified information. As the Department has explained—first in a letter from Principal Deputy Assistant Attorney General Peter J. Kadzik on June 3, 2013, and then again in my letter of June 5, 2013, confirming that Mr. Kadzik has set forth the Department's and my position—we have sought such a warrant for a reporter's emails, and in so doing, were required to meet the requirements of the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, et seq. (Privacy Protection Act).

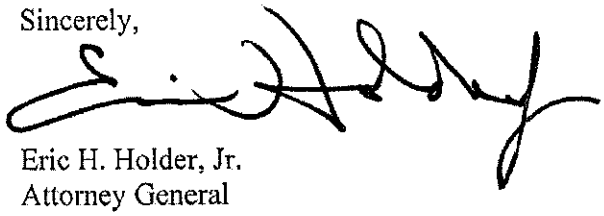
As you know, in the course of the ongoing investigation into the unauthorized disclosure of classified information that appeared in a news article in June 2009, the Department, with my approval, sought a search warrant for a reporter's emails from an internet service provider. In order to proceed under the Privacy Protection Act, the government was required to establish that there was probable cause to believe that the reporter had committed or was committing a criminal offense to which the needed materials related. Based on the facts establishing probable cause in the warrant application, a federal judge granted the warrant. As explained in our prior letters, the government's decision to seek this search warrant was an investigative step, and at no time during this matter have prosecutors sought approval from me to bring criminal charges against the reporter. We also note that ultimately, a grand jury charged an individual for making the unauthorized disclosure, and the reporter was neither charged nor named as an unindicted co-conspirator in the indictment.

I believe that this information, as well as the enclosed answers to the enumerated questions in your and Chairman Sensenbrenner's letter of May 29, 2013, further clarifies my statements of May 15, 2013. The Department has a longstanding policy against the disclosure of non-public information relating to open criminal investigations and prosecutions in order to

protect the integrity of our law enforcement efforts. In this and our previous letters regarding this matter, we have attempted to answer your questions to the fullest extent possible while remaining faithful to this policy. The disclosure of additional information about this ongoing case at this time could risk harm both to our continuing law enforcement efforts, as well as the privacy and due process interests of those involved. For these reasons, I am not in a position to provide additional details or testimony on this matter.

I look forward to meeting with you and Chairman Sensenbrenner and Ranking Members Conyers and Scott to discuss these issues, as well as the Department's ongoing efforts to revise its policies for investigations involving members of the news media.

Sincerely,



Eric H. Holder, Jr.
Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Member

1. **Please provide all regulations and internal Justice Department policies that govern the issuance of search warrants for the email communications of members of the media.**

   The Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, et seq., governs the issuance of search warrants for materials, such as email communications, in the possession of a member of the news media. Under the Privacy Protection Act, the government may seek such materials where it has probable cause to believe that the member of the media has committed or is committing a criminal offense to which the materials relate. The United States Attorney's Manual reiterates that the Privacy Protection Act governs in such a situation. *See* USAM 9-19.240.

2. **28 CFR 50.10 states: "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." Is it the Department's position that, although not explicitly required by 28 CFR 50.10, the Attorney General must personally approve the use of a search warrant to obtain private emails belonging to a member of the media?**

   Neither the current guidelines nor the Privacy Protection Act require that the Attorney General approve the decision to apply for a search warrant to obtain emails belonging to a member of the media. Of course, any such application made by the government is ultimately reviewed by, and granted or denied by, a court. In the course of the investigation of the unauthorized disclosure of information that appeared in a news article in June 2009, even though my approval was not required by our regulations or otherwise, Department officials sought my approval before the government took the investigative step of seeking a reporter's emails from a service provider and I approved of that step. The government also sought telephone toll records, which required my approval under 28 CFR § 50.10, and I approved the government's issuance of subpoenas for telephone toll records.

3. **At the time the Justice Department requested the search warrant did the Department intend to prosecute Mr. Rosen under the Espionage Act? If the Department did not intend to prosecute Mr. Rosen, why did the Department refer to Mr. Rosen in its affidavit accompanying the search warrant affidavit as a "co-conspirator", and allege that "at the very least" Mr. Rosen was an aider and abettor?**

   In the affidavit in support of a warrant for a reporter's emails in relation to the June 2009 news article, the government was articulating the probable cause required by the Privacy Protection Act. The government sought the search warrant as an investigative step, and there was a factual basis for the assertions in its application. At no time did prosecutors seek my approval to charge the reporter in this matter. Furthermore, the government

neither charged the reporter nor did it name him as an unindicted co-conspirator in the indictment of the individual accused of making the unauthorized disclosure of classified material.

4. **The Department sought and obtained a non-disclosure order pursuant to 18 U.S.C 2705(b). Please identify which of the statutory criteria for non-disclosure existed in this instance and why the Department believed Mr. Rosen met one or more of these criteria?**

   In accordance with 18 U.S.C. § 2705(b), the government's application for a search warrant states that the government had reason to believe that "subjects of criminal investigations will often destroy digital evidence if the subject learns of the investigation" and that if made aware of the warrant's existence, "targets of this investigation and other persons may further mask their identity and activity, flee, or otherwise obstruct this investigation." I note that these concerns would apply to the individuals who may have made the unauthorized disclosures, who were the targets of the investigation, in addition to the recipients of the disclosed materials.

5. **The Justice Department issued a statement that the search warrant for Mr. Rosen's emails was approved at the highest levels of the Department. Did this include you? If so, on what date did you approve the search warrant request? As part of any such approval, did you personally read the search warrant application and accompanying affidavit? How was your approval memorialized?**

   As stated above, although my approval was not required in order to seek a search warrant under the Privacy Protection Act, Department officials sought my approval before the government took the investigative step of seeking a reporter's emails from a service provider and I approved of that step. The approval occurred on May 28, 2010. Although Department attorneys described to me the factual basis for the search warrant affidavit, including how the requirements of the Privacy Protection Act were satisfied, I was not provided and did not review the actual affidavit in support of the search warrant. Of course, attorneys involved with the case reviewed the affidavit prior to its submission to the court, and ultimately, a federal judge reviewed and granted the warrant.

6. **The Department's statement seems to indicate that you may not have personally approved the use of a search warrant for Mr. Rosen's emails but were instead involved in "discussions" relating to the search warrant. Did these discussions involve Mr. Rosen's status as an aider/abettor or co-conspirator? Did these discussions involve the need for a non-disclosure order? Did these discussions include an explanation of all reasonable alternative investigation steps taken prior to the search warrant request?**

   As described above, I was involved in discussions about the investigative steps taken in this matter, which included both subpoenas for telephone toll records and an application for a search warrant. As required by 28 C.F.R. § 50.10, I approved of the issuance of subpoenas for telephone toll records. In addition, although my approval was not required

in order to seek a search warrant under the Privacy Protection Act, Department officials sought my approval before the government took the investigative step of seeking a reporter's emails from a service provider and I approved of that step. Ultimately, a federal judge granted a warrant. Consistent with longstanding Department policy, I am not in a position to provide more information about the Department's internal deliberations about prosecutorial decisions.

7. **Whether you personally approved the search warrant request or were merely part of "discussions" relating to a search warrant for Mr. Rosen's emails, it is clear now that you were aware that the Department was engaged in a criminal investigation of a member of the media as far back as 2010. This fact contradicts your testimony before the Committee in which you stated clearly that: "With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved in, heard of, or would think would be a wise policy."**

    a. **How can you claim to have never "been involved" in the potential prosecution of a member of the media but you were admittedly involved in discussions regarding Mr. Rosen's emails?**

    b. **How can you claim to have never even "heard of" the potential prosecution of the press but were, at a minimum, involved in discussions regarding Mr. Rosen?**

    c. **Do you agree that characterizing a member of the media as an aider/abettor or co-conspirator in a sworn search warrant affidavit constitutes a "potential prosecution of the press for the disclosure of material"?**

    d. **Do you believe that the investigation of Mr. Rosen as a potential co-conspirator or aider/abettor to Mr. Kim was "wise policy"? Please explain.**

As I have explained, the decision to seek a search warrant in this matter was an investigative step that is separate from charging decisions. When I testified before the Committee, I stated that I was unaware of the Department ever charging a reporter with a crime simply for publishing material, and that remains my understanding today. In the matter of the unauthorized disclosure of information that appeared in a June 2009 article, while I was aware of and approved the government's investigative step to seek a search warrant, prosecutors never sought my approval to charge a reporter. I do not agree that characterizations establishing probable cause for a search warrant for materials from a member of the news media during an ongoing investigation constitute an intent to prosecute that member of the news media. I do believe that a thorough investigation of the disclosure of classified information that threatened national security was necessary and appropriate.

8. **If you believe, as you testified, that prosecutions of members of the media "have not faired well in American history," why did you permit the Department to investigate Mr. Rosen as a co-conspirator or aider/abettor?**

The disclosure of classified information that appeared in a news article in June 2009 presented a serious threat to national security. I believe that under those circumstances, it was necessary to do as thorough and comprehensive an investigation as possible. As I noted previously, conducting a thorough investigation, including obtaining relevant evidence from a member of the news media, is not equivalent to the prosecution of a member of the news media.