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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?

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?

The Honorable Eric H. Holder, Jr.

May 29, 2013

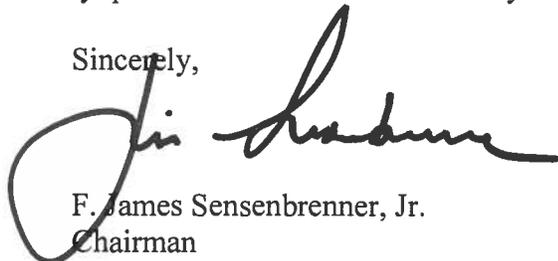
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Thank you for your cooperation in responding to our questions. Please contact Samuel Ramer, Senior Counsel for the Subcommittee on Crime, Terrorism, Homeland Security and Investigations at sam.ramer@mail.house.gov with any questions. We look forward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