

House Committee on the Judiciary
John Conyers, Jr., Ranking Member



*U.S. Attorney General Eric Holder's Testimony before the
Committee and the Justice Department's Investigation of
National Security Leaks*

Minority Staff Report

July 31, 2013

INTRODUCTION

On May 15, 2013, the Committee held a general oversight hearing on the Department of Justice. U.S. Attorney General Eric H. Holder, Jr., the sole witness, testified for more than four hours, during which he answered questions on a broad range of topics.

This hearing was held shortly after press reports revealed that the Justice Department had subpoenaed phone records of several Associated Press reporters in the course of investigating a national security leak. During an exchange with Representative Hank Johnson (D-GA), who expressed concern that current law allows the government to prosecute reporters, Attorney General Holder responded that “[w]ith regard to potential prosecution of the press for the disclosure of material, that is not something that I have been involved, heard of, or would think would be a wise policy.”¹

Attorney General Holder was not asked during the hearing about the Department’s decision to seek a warrant for the email of Fox News reporter James Rosen as part of its investigation of a leak at the U.S. Department of State. When news of that warrant became public, however, the Majority opened an investigation into the possibility that the Attorney General intentionally misled the Committee.²

That investigation failed to establish that the Attorney General intended to mislead or deceive the Committee when responding to Representative Johnson’s concerns.

Allegations of misconduct should be reserved for extraordinary circumstances when the charge involves the nation’s chief law enforcement officer. Nothing in the Attorney General’s testimony before the Committee justified the allegations against him.

Instead of pursuing baseless allegations against the Attorney General, the Committee should allocate its limited time and resources to review and revise the law to ensure that reporters are protected from undue threat or interference by the government. A free press is essential to the transparent and effective functioning of our democracy, but federal law currently leaves reporters vulnerable in several ways: it fails to adequately protect reporters from compulsory disclosure of their sources; it allows for their prosecution through the sweeping text of the Espionage Act; and it permits the government to seek warrants for their material when they are not themselves the target of criminal investigation.

¹ *Oversight of the United States Dep’t of Justice: Hearing Before the H. Comm. on the Judiciary* (Draft Transcript), 113th Cong 31-32 (2013) (statement of Eric Holder, Att’y Gen. of the United States).

² *See, e.g.,* Fox News Sunday: Eric Holder being investigated for Hill testimony; impact of political scandal on 2014 (Fox News television broadcast June 2, 2013).

These laws—all of which fall squarely within the Judiciary Committee’s jurisdiction—should be amended to ensure that they protect reporters from undue threat or interference from the government. The Committee should devote its time and resources to working in a bipartisan fashion to accomplish this critical task.

FINDINGS

A. Attorney General Holder Did Not Provide Deceptive or Misleading Testimony to the Committee.

During Attorney General Holder’s appearance before the Committee’s hearing on “Oversight of the United States Department of Justice” on May 15, 2013, Representative Hank Johnson expressed concern that reporters are at risk for prosecution under the Espionage Act of 1917, which, among other things, criminalizes the communication and transmission of “defense information” with “intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation.”³ The Attorney General responded that potential prosecution of the press for disclosure of classified material was “not something I have been involved, heard of, or would think would be a wise policy.”⁴

The Attorney General was not answering a question about Fox News reporter James Rosen, or about the Department’s use of the warrant authority under the Privacy Protection Act to obtain materials from journalists. Instead, Attorney General Holder was providing a general response to Representative Johnson’s concern that the law allows for prosecution of journalists. Attorney General Holder stated that he was unaware of such a prosecution and, as he subsequently clarified: “Consistent with [my] testimony, it remains my understanding that the Department has never prosecuted a journalist for publishing classified information.”⁵

The Attorney General has acknowledged that his statement about “potential” prosecution might have been subject to misinterpretation by Committee members.⁶ As he has explained, he was talking about whether, as a matter of prosecutorial discretion, he believed a reporter should be charged. He has told the Committee that his comment did not reflect “certain investigative

³ Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified at 18 U.S.C. § 794(a)).

⁴ *Oversight of the United States Dep’t of Justice: Hearing Before the H. Comm. on the Judiciary* (unofficial transcript), 113th Cong 31-32 (2013).

⁵ Letter from Eric Holder, Att’y Gen. of the United States, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary (June 19, 2013), available at <https://www.fas.org/sgp/news/2013/06/holder-goodlatte.pdf>.

⁶ *Id.*

steps—such as seeking a search warrant for reporter’s emails from an internet service provider—during an investigation into the unauthorized disclosure of classified information.”⁷

With regard to Mr. Rosen, the Attorney General explained that, in the course of a leak investigation, prosecutors sought and obtained a search warrant for his email account. This was an investigative step, not to be equated with targeting or prosecuting Mr. Rosen:

[W]hile 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

The Attorney General has made clear that the government’s intent was to gather evidence it deemed critical to its investigation, not to prosecute Mr. Rosen. Although many members have raised legitimate questions and concerns about the Justice Department’s pursuit of Mr. Rosen’s email, there is no evidence that the Attorney General misled the Committee.

B. Attorney General Holder and the Justice Department Have Cooperated Fully in this Investigation.

The Majority contends that Attorney General Holder “refused to answer questions from the Committee” and only cooperated “after weeks of delay.” To the contrary, the Attorney General has cooperated promptly and fully.

Chairman Bob Goodlatte (R-VA) and Crime Subcommittee Chairman F. James Sensenbrenner (R-WI) first wrote to the Department of Justice regarding the Attorney General’s testimony and the Rosen investigation on May 29, 2013 and requested a response by June 5.⁹ The Department replied on June 3, two days *before* the Majority’s deadline.¹⁰

⁷ *Id.* at 1.

⁸ *Id.* at 5.

⁹ 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>.

¹⁰ 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.,

Chairman Goodlatte and Representative Sensenbrenner wrote again to the Department on June 4, seeking additional information by June 5.¹¹ The Attorney General responded well within the 24-hour deadline.¹² Again, there is no evidence of delay or refusal to respond.

On June 6, the Majority wrote to the Attorney General to demand that he appear before the Committee to discuss his May 15 testimony.¹³ There is little precedent in Committee history for this demand. We are not aware of any other instance where the Committee has ordered the Attorney General of the United States to appear before it to explain a narrow segment of testimony given just days earlier.

Attorney General Holder instead offered to meet privately with Chairman Goodlatte, Crime Subcommittee Chairman Sensenbrenner, Ranking Member John Conyers, Jr. (D-MI), and Crime Subcommittee Ranking Member Robert C. “Bobby” Scott (D-VA).¹⁴ That meeting took place on June 28, 2013. Chairman Goodlatte characterized this meeting as a “frank discussion” that afforded him “the opportunity to ask Attorney General Holder substantive questions . . . that he would not have been able to answer in a public setting.”¹⁵

Over the course of this inquiry the Attorney General has demonstrated a commendable willingness to work directly with the Committee to satisfy its concerns.

and Investigations, (June 3, 2013), available at http://judiciary.house.gov/news/2013/Sensenbrenner_Goodlatte%202013-06-03.pdf.

¹¹ 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>.

¹² 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>.

¹³ 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.

¹⁴ 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.

¹⁵ 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>.

C. The Committee Should Consider Substantive Measures to Better Balance National Security and Freedom of the Press.

Over the past few months, the ongoing tension between safeguarding national security and ensuring a free press has been vastly apparent. In response to leaks of highly classified information, the Administration has aggressively sought to investigate and prosecute those responsible. In fact, the Obama Administration has initiated more national security leak investigations than any prior Administration.

These investigations—and, in particular, the Justice Department’s use of its subpoena and warrant power to obtain information from the press—reveal legitimate and troubling questions about whether the law adequately protects the press. Many members disagree with the Administration’s broad use of its subpoena power to obtain telephone records of Associated Press reporters. They are also concerned about its aggressive pursuit of the private emails of Mr. Rosen. This reflects the belief that reporters should not be characterized as criminal co-conspirators for doing their jobs, which is to seek and report on newsworthy topics—including, at times, topics that the government intends to keep secret.

A free press is essential to the transparent and effective functioning of our democracy. Current law, however, leaves reporters vulnerable in several ways. For example, the law fails to adequately protect reporters from compulsory disclosure of their sources, it allows for their prosecution through the sweeping text of the Espionage Act, and it permits the government to seek warrants for their material when they are not themselves the target of criminal investigation.

At President Obama’s direction, Attorney General Holder has undertaken “a comprehensive evaluation of the Department of Justice’s policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations.”¹⁶ As a result of that review, the Attorney General has proposed new guidelines that would rein in Department practice when seeking evidence from journalists and media organizations.¹⁷ He has also endorsed national press shield legislation¹⁸ and suggested amending the Privacy Protection Act to expand protections for journalists.¹⁹ This is an important first step toward improving press protections, and we applaud Attorney General Holder’s and President Obama’s pledge to work with Congress to improve the law.

¹⁶ U.S. DEP’T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES (2013), at 2, available at <http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf>.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 3.

We also believe there is merit in the legislative solution proposed by the Attorney General. Nothing in the Privacy Protection Act limits the government's ability to obtain a warrant related to the subjects of a criminal investigation. Before concluding that the suggested amendment is unnecessary or unwise, as the Majority has, the Committee should at the very least consider it more carefully.

The Committee should also consider the bipartisan Free Flow of Information Act.²⁰ The bill would enact a federal press shield—protecting the public's right to know by protecting the identities of confidential sources. The legislation sets forth reasonable and well-balanced ground rules for when a journalist can be compelled to testify about confidential sources, including when that testimony might prevent an act of terrorism or other significant harm to national security. The Free Flow of Information Act is sponsored by Representative Ted Poe (R-TX) and Ranking Member Conyers, and enjoys the support of 46 cosponsors—Republicans and Democrats—including 19 members of the House Judiciary Committee. The Committee and House passed similar legislation in the 110th and 111th Congresses, and should do so again without delay.

CONCLUSION

The past few weeks have been dominated by media reports about government surveillance programs—including revelations about the mass surveillance of United States citizens—that fall squarely within this Committee's jurisdiction.

Although these leaks have brought legitimate policy questions to light, they also may threaten our national security. The federal statutes necessary to address the unauthorized leaks of highly classified information are within our jurisdiction as well, as are the federal agencies tasked with investigating and prosecuting such leaks.

The laws, regulations, and procedures that govern these cases, along with oversight of the Department of Justice as it decides how to treat the reporters and media organizations involved, and the overarching constitutional mandate for unbridged freedom of the press—all of these matters, too, are the business of the House Judiciary Committee.

Instead of addressing these issues, the Majority has focused its energies on levying unfounded charges of misconduct against the Attorney General. The Committee should set aside partisan politics and work to address the substantive business at hand.

²⁰ H.R. 1962, 113th Cong. (2013).