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By email August 21, 2013

Eric H. Holder, Jr., Esq.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Subpoena to James Risen in U.S. v. Sterling

Dear Attorney General Holder:

On July 25, 2013, lawyers for reporter James Risen wrote to you to urge you to withdraw the subpoena issued to him in the Jeffrey Sterling case. The undersigned news media organizations write in support of that request. We too believe that the subpoena to Mr. Risen should be subject to the new principles announced in your July report and that a careful examination of the facts shows that a demand for his testimony is not justified.

The recent interactions between you and your senior staff and our media coalition have been productive in formulating proposed changes to Justice Department subpoena policy that, upon implementation, should provide positive next steps in protecting the news media's ability to report on matters of public interest without sacrificing the legitimate needs of law enforcement. The Sterling trial presents a meaningful opportunity to see how the Department will apply these principles in an important case.

As Mr. Risen's attorneys have already pointed out, the new Department policy authorizes a subpoena to a member of the news media only "as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution." At this stage in the case, the question before the Department is more one of policy than law, and from that perspective the court proceedings below support withdrawal of the subpoena despite the outcome in the Fourth Circuit. The trial court decision underscores the weaknesses in the prosecutors' justifications for the subpoena – findings which go straight to the three factors of the new guidelines test. Conversely, the reversal by the appellate court, with its complete rejection of the interests of a free press and its narrow reading of the privilege factors that would render them irrelevant in any unauthorized disclosures case, actually sheds little light on the analysis which the Department must now undertake.

The trial court applied a three-part test somewhat similar to the new Department guidelines, weighing the relevance of the information sought, its availability by alternative means, and whether the government has a compelling interest in obtaining it. In her July 29, 2011 opinion, U.S. District

Judge Leonie M. Brinkema found the information clearly relevant to a prosecution for unauthorized disclosure. Nonetheless, the court quashed the subpoena based on the latter two factors.

In considering alternative sources for the information, Judge Brinkema rejected the government's argument that it is "self-evident" that Mr. Risen would be the only source of the information and noted the abundant circumstantial and documentary evidence that supported the proposition that the government sought to prove, "including numerous telephone records, email messages, computer files, and testimony [from two other witnesses] that strongly indicates that Sterling was Risen's source." *U.S. v. Sterling*, 818 F.Supp.2d 945, 956 (2011).

Regarding the third factor, the court found the government's arguments circular. Prosecutors had argued that the "burden of establishing Sterling's guilt beyond a reasonable doubt creates a compelling interest in obtaining Risen's testimony." *Id.* at 959. But such a proposition would render the compelling interest test meaningless because the government would always win in criminal cases. The court also noted that the government had not explained why Mr. Risen's evidence was decisive:

> [It] has not pleaded that Risen's testimony is necessary or critical to proving Sterling's guilt beyond a reasonable doubt; instead, it has argued that Risen's testimony will 'simplify the trial and clarify matters for the jury' and 'allow for an efficient presentation of the Government's case.' An efficient and simpler trial is neither necessary nor critical to demonstrating Sterling's guilt beyond a reasonable doubt. If making the trial more efficient or simpler were sufficient to satisfy the *LaRouche* compelling interest factor, there would hardly be a qualified reporter's privilege.

Id.

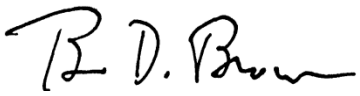
Over the strong dissent of Judge Gregory, the Fourth Circuit reversed the trial court and refused to recognize the existence of a reporter's privilege in criminal cases. The Department's task in this case thus already takes prosecutors down a different road because the Department recognizes the importance of evaluating these factors in every instance. The Fourth Circuit did examine the elements of the qualified privilege but made clear it would always find a "compelling interest" in criminal prosecutions and would recognize no alternative sources for a reporter's testimony in unauthorized disclosure cases. The majority on the panel, in other words, found no interests at stake other than the government's, even though Mr. Risen acted to inform the public about an intelligence operation that had been allegedly mishandled.

The Justice Department, however, has turned its back on this kind of absolutist approach that delegitimizes the interests of the news media in informing the public about national security – if not as a matter of law, at least as a matter of policy in wielding its prosecutorial powers. Reading the Department's commitments for new guideline factors in a way that makes them meaningless in the very cases where public accountability and free speech interests are at their highest would be inconsistent with all the thought and

effort dedicated to these issues in the last few months. We hope that a careful consideration of the record here will lead to the withdrawal of the subpoena.

If the Department pushes ahead with the demand for Mr. Risen's testimony, we believe that an explanation would be in order as to how it reached its conclusion. You agreed in your July report to annually release statistics on this approval process, including the outcome of any challenges by the news media, to "enhance oversight" of the process. An explanation of the Department's decision to go forward against Mr. Risen, should that occur, would similarly help with oversight and understanding of this process, not just in this case but in all media subpoena cases.

Sincerely,



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cc: Joel Kurtzberg, Esq.
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