



Journalist Challenges DOJ Subpoena, Claims Reporter's Privilege

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James Risen, an investigative journalist for *The New York Times*, is currently challenging a subpoena issued by the U.S. Department of Justice seeking testimony from him against a CIA agent accused of leaking classified information. The subpoena highlights a trend in which the government attempts to use journalists' testimony against government employees who reveal information in exchange for anonymity. Risen, citing reporter's privilege, is seeking to have the subpoena quashed, although federal prosecutors claim that his testimony "is directly relevant to, and powerful evidence of, facts that are squarely at issue in this trial—including the identity of the perpetrator."

The subpoena in question was originally issued to Risen, but then abandoned, by the Bush administration. The Obama administration revitalized the subpoena, which would force Risen to testify in the whistleblower prosecution of Jeffrey Sterling, a former CIA agent. In December 2010, a federal grand jury in Alexandria, Va., indicted Sterling on 10 counts, including unauthorized disclosure of national defense information and obstruction of justice. Sterling is accused of leaking to Risen the story of a severely botched agency plot, from 11 years ago, to infiltrate Iran's nuclear program. The story was published under the condition of anonymity in newspaper articles and in Risen's 2006 book "State of War: The Secret History of the CIA and the Bush Administration."

The DOJ now wants to force Risen to testify under oath about whether Sterling was his source. In a somewhat unusual move, the government filed a motion in limine — a tool typically used to focus the evidence to be used at trial — along with the subpoena. In its motion, the government argues that Risen is an eyewitness to the alleged crime and that no federal law exists that exempts a reporter from his or her obligation to testify. On July 7, 2011, the court entered a minute entry on the government's motion in limine, noting that it was taking the motion under advisement.

Risen has categorically refused to reveal his source. Like other reporters in his situation, Risen is relying on the reporter's privilege to avoid giving up his sources. Interestingly, Risen and four other reporters were held in contempt of court in 2004 for refusing to disclose confidential sources in a lawsuit against the government brought by former Los Alamos scientist Wen Ho Lee. There, the judge ordered a fine of \$500 per day until the reporters complied with the order. In exchange for getting the contempt charges dropped, five news organizations—*The New York Times*, ABC News, The Associated Press, the *Los Angeles Times* and *The Washington Post*—eventually agreed to pay an unprecedented \$750,000 as their share of a settlement.



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Although 40 states and the District of Columbia have shield laws that exempt reporters from disclosing confidential sources, there is no such statute at the federal level. Some federal courts, however, have interpreted the Supreme Court's 1972 decision in *Branzburg v. Hayes* — a landmark decision invalidating the use of the First Amendment as a defense for reporters summoned to testify before a grand jury — as providing a qualified privilege shielding journalists from forced disclosure of confidential sources, especially in civil cases.

Sterling is the fifth known leaker prosecuted by the Obama administration. According to Risen, the Sterling prosecution and the accompanying subpoena to him represent an attempt by the government to chill the exercise of basic rights of whistleblowers and reporters who challenge government secrecy. Whether Risen can successfully challenge the government's subpoena remains to be seen.

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The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!