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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
(Portland Division)

UNITED STATES OF AMERICA,

Civil No. 3:16-CR-00051-BR

Plaintiff,

v.

**JASON PATRICK, DUANE LEO
EHMER, BARRYL WILLIAM THORN,
and JAKE RYAN,**

Defendants.

**BRIEF OF *AMICUS CURIAE* THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN
SUPPORT OF NON-PARTY WITNESS
JOHN SEPULVADO**

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a subpoena that compels journalist John Sepulvado to testify about his interviews with one or more of the defendants in this case. The Reporters Committee for Freedom of the Press seeks leave to file as *amicus curiae* to explain the policy reasons supporting a reporter's privilege and to stress the need to protect the flow of information to the public through an independent press.

Courts in this circuit have long understood the importance of allowing reporters to keep their work product confidential. A single legal demand affects not just the work of the targeted journalist, but all other journalists whose sources will hesitate and hold back information on significant matters of public concern if courts take up the invitation to scrutinize a reporter's newsgathering process. Accordingly, the Ninth Circuit has recognized a reporter's privilege against compelled disclosure in both criminal and civil proceedings alike. *See Shoen v. Shoen*, 5 F.3d 1289, 1292, 1295 (9th Cir. 1993) ("*Shoen I*"); *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975). This substantial body of law is firmly grounded in the role a free and independent press plays in maintaining an informed public.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("Reporters Committee") respectfully submits this brief as *amicus curiae* in support of non-party witness John Sepulvado. As a nonprofit organization dedicated to safeguarding the rights of journalists to gather and report the news, the Reporters Committee can speak to the dangers of compelling journalists to testify about both confidential and nonconfidential sources and information, including a reporter's mental impressions and personal notes about his or her interviews. The Reporters Committee has decades of experience advocating for a reporter's privilege, including involvement in the

drafting of several shield laws and the submission of *amicus* briefs in dozens of reporter subpoena cases over more than 40 years. Thus, the Reporters Committee has a strong interest in this Court’s resolution of this case and respectfully urges this Court to quash the government’s subpoena of John Sepulvado.

ARGUMENT

I. Requiring journalists to reveal any information – nonconfidential or confidential – undermines society’s interest in protecting the newsgathering process.

Based on the negative effect of compelled disclosure of confidential and nonconfidential information and unpublished material, the Ninth Circuit applies a qualified privilege, arising under the First Amendment, in both civil and criminal judicial proceedings to protect information acquired by a journalist in the course of gathering the news. The balancing test under the qualified privilege protects the autonomy of the press and its ability to cultivate sources.

A free press is fundamental to our system of government and to holding public officials accountable to the people. “The First Amendment guarantees a free press primarily because of the important role it can play as ‘a vital source of public information.’” *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)). *See also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”). The Supreme Court has held that “an informed public is the essence of working democracy.” *Minneapolis Star & Tribune Co. v. Minnesota Com’r of Revenue*, 460 U.S. 575, 585 (1983). As a country, “[w]e have placed our faith in knowledge, not in ignorance, and for most this means reliance on the press.” *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring).

Protecting journalists from subpoenas supports the independence of the news media, which furthers the public's interest in the free flow of newsworthy information. *See Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (finding that the absence of a reporter's privilege invites authorities "to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government"). In this circuit, the *Shoen* court similarly recognized that requiring a journalist to provide the government with his or her work product or unpublished material degrades the independent status of the press. Compelled disclosure of unpublished material "convert[s] the press in the public's mind into an investigative arm of prosecutors and the courts" and causes journalists to "be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally." *Shoen I*, 5 F.3d at 1295) (quoting DUANE D. MORSE & JOHN W. ZUCKER, *THE JOURNALIST'S PRIVILEGE IN TESTIMONIAL PRIVILEGES* 474–75 (Scott N. Stone & Ronald S. Liebman eds., 1983)).

States have also long provided their own legal protections for the work of journalists. *See The Reporter's Privilege Compendium: An Introduction*, RCFP, <http://bit.ly/1bg7g4l> (last visited Feb. 21, 2017). The first shield law was enacted in Maryland in 1896. *See id.* By the time the U.S. Supreme Court decided *Branzburg*, 17 states had enacted shield laws. *Branzburg*, 408 U.S. at 689 n.27. Today, 39 states and the District of Columbia have shield laws that protect journalists to some degree from compelled testimony. *Number of states with shield law climbs to 40*, *THE NEWS MEDIA & THE LAW* (Summer 2011), <http://bit.ly/2m5iRNF> (last visited Feb. 21, 2017) (The temporary shield law in Hawaii has since expired.). Oregon has a shield law that provides an absolute privilege for "(a) The source of any published or unpublished information

obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or (b) Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.” O.R.S. § 44.520 (2015). That an overwhelming majority of the states, including Oregon, recognizes the importance of protecting journalistic communications demonstrates the broad consensus around the reporter’s privilege.

II. Journalists rely on confidential newsgathering information to deliver informative narratives of significant interest to the public.

The threats to newsgatherers are amplified when a broad subpoena is approved by a court. A subpoena of a reporter that is not limited on its face to specific information places the reporter’s entire newsgathering process in question, particularly when the reporter faces vigorous opposition under cross-examination. Compelling a journalist to appear and testify in court therefore not only affects the information sought, but almost certainly any confidential newsgathering information used to research a story or obtain interviews. *See* Mot. to Quash Subpoena at 3 (“[C]ompelled testimony [in this case] will invariably lead to questions that will invade both confidential and nonconfidential newsgathering, and will have an exceptional impact on [Sepulvado’s] and OPB’s future newsgathering.”). Unlimited questioning and cross-examination of Sepulvado will likely touch on sources and methods of newsgathering that he wishes to keep confidential, and the work that secured him the interviews with those who occupied the Malheur National Refuge would thus be compromised.

Reporters strategically choose which information to publish. They ask particular questions and engage in certain conversations to gain the trust of their sources and, in some cases, enter into agreements with sources that are based on trust. If unpublished information were to routinely become public, especially the means by which a reporter sought an interview,

journalists would lose the trust of their sources, and their ability to write deeply-researched stories based on the input of well-placed and knowledgeable people would be jeopardized.

Former *Washington Post* investigative reporter Carl Bernstein, who, along with then-fellow Post reporter Bob Woodward, relied on information from a confidential source to bring down a presidency, has testified that Mark Felt “would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality.” Decl. of Carl Bernstein, *in Ex. 15 to Mem. of Points and Authorities in Opp’n to the Government’s Mot. in Limine and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, United States v. Sterling*, Case No. 1:10cr485, at ¶¶ 3–5.¹

Confidential sources were the basis for the information developed and contained in nearly all of the more than 150 articles Woodward and Bernstein authored in the ten months following the break-in at the Democratic National Committee’s offices in Washington, D.C., Bernstein said, adding that no major sources of information were identified by name in any of those articles. *Id.* “Almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat.” *Id.*; *see also id.* at Ex. 17, ¶ 6 (aff. of the late Jack Nelson) (stating that without confidential sources, the *Los Angeles Times* would have been unable to report “numerous . . . stories involving corruption or governmental abuses in at least six [presidential] administrations”).²

Furthermore, some of the most distinguished and honored news reporting in our history has necessarily depended on information from confidential sources. For example, relying on

¹ A copy of the Bernstein Declaration is included in an appendix to this brief. *Amicus* can provide copies of any other cited authorities at the Court's request.

² A copy of the Nelson Declaration is included in an appendix to this brief.

confidential sources, the *New York Times* revealed that the National Security Agency — under a then-illegal secret wiretapping program — had been monitoring phone calls and email messages into and out of the United States involving suspected al-Qaida operatives without seeking approval from federal courts. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. The *New York Times* and other news organizations also reported on the use of harsh interrogation tactics against terrorism suspects in U.S. custody. *See, e.g.*, Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1. Such news coverage precipitated a wide-ranging public debate that prompted Congress to prohibit certain interrogation tactics entirely and led to the promulgation of an executive order repudiating many of them. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2680 (2005); Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

More recently, after the government disclosed in 2013 that it had subpoenaed Associated Press phone records and searched Fox News reporter James Rosen’s email, reporters noticed a substantial change in the willingness of sources to talk. *See* Dylan Byers, *Reporters Say There’s a Chill in the Air*, POLITICO (June 8, 2013), <http://politi.co/1c7Xkrv>. The *New York Times* and Associated Press said their reporters found that some sources suddenly feared to return phone calls. *Id.* The loss suffered in these circumstances is real, and it is suffered by the public at large, which is denied knowledge on a range of issues affecting its ability to govern itself in a complex world.

Judicial precedent in this circuit and state shield laws have long recognized the importance of protecting the integrity of the newsgathering process and the corrosive effect of compelled disclosure of newsgathering sources and materials. The nation relies on the press for information about the performance of the government, the military, and other institutions of

significant public concern. Applying a robust reporter's privilege in this case is essential to preserving the free flow of essential information to the public.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court quash the subpoena of John Sepulvado.

DATED this 22nd day of February, 2017.

TONKON TORP LLP

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF NON-PARTY WITNESS JOHN SEPULVADO on all ECF participants by electronic means through the Court's Case Management/Electronic Case File system on the date set forth below.

DATED this 22nd day of February, 2017.

TONKON TORP LLP

By /s/ Steven M. Wilker

Steven M. Wilker, OSB No. 911882
*Attorneys for Amicus Curiae the Reporters
Committee for Freedom of the Press*

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

IN RE: GRAND JURY SUBPOENA, JAMES RIJSEN

Case No.: 1:08dm61 - LMB

UNDER SEAL

DECLARATION OF CARL BERNSTEIN

Carl Bernstein hereby deposes and says:

1. I have been a journalist for 47 years. I have worked as an investigative reporter for *The Washington Post*, a senior correspondent and Washington Bureau Chief for ABC News, and have taught journalism at New York University. I have contributed to *Time*, *Rolling Stone*, *The New Republic*, *The New York Times*, and *The Los Angeles Times*, among other publications. With Bob Woodward I co-authored the books *All the President's Men* and *The Final Days* and I contributed to Mr. Woodward's book *The Secret Man*. I am also the co-author of *His Holiness*, a biography of Pope John Paul II, and *A Woman in Charge: The Life of Hillary Rodham Clinton*.

2. I am fully familiar with the facts set forth herein and make this declaration based on my personal knowledge unless otherwise stated.

3. More than thirty years ago, while an investigative reporter for *The Washington Post*, my colleague Bob Woodward and I reported the facts and circumstances arising out of the break-in of the Democratic National Committee's offices in the Watergate. Those facts and circumstances were among those that ultimately led to the resignation of President Richard M.

Nixon. Our work was cited in the Pulitzer Prize award to *The Washington Post* for Public Service in 1973.

4. Throughout our investigation, we relied on confidential sources, among them an individual who became known to the public as "Deep Throat," and whose identity remained secret until 2005, more than thirty years after our investigation. In 2005, W. Mark Felt and his family announced, and Mr. Woodward and I confirmed, that Mr. Felt was our confidential source, Deep Throat. At the time of our reporting, Mr. Felt was the number-two official at the Federal Bureau of Investigation.

5. Mr. Felt, like all our confidential sources, would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality. Stated differently, almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat. In fact, we identified no major sources of information by name in any of more than 150 articles we wrote in the first ten months after the Watergate break-in. In virtually all of them, anonymous sources were the basis for the significant information we developed.

6. Throughout my career — in my own reporting and the reporting of staff that I have directed — I have been involved in numerous situations where sources with information on matters of great public interest and concern insist on confidentiality for fear of retaliation or retribution if their identities became known. Without the ability to grant confidentiality to the sources involved, those stories would not have been published or broadcast.

7. I am greatly concerned about the federal government's drive in recent years to subpoena reporters to testify about their confidential sources. Not only do I believe it is an assault on the First Amendment and the press freedoms we are guaranteed, but on an individual level, compelling the disclosure of confidential information by any reporter is certain to obstruct his future newsgathering and make it nearly impossible to do his job effectively. In my experience, confidential sources will speak only to a journalist they trust and one whom they believe is sufficiently independent of government influence and authority. If an investigative reporter is compelled by the government to testify as to confidential information, his trustworthiness, integrity and independence will likely be forever tainted and any potential sources who might have previously approached him with important information may very well be deterred.


8. I also believe, based on my professional experience, that compelled disclosure of confidential information will cause irrevocable damage to the quality of information the public receives. Many times, in my experience, people who have valuable information about corporate or governmental wrongdoing will only come forward if granted confidentiality. Without such individuals (in some circumstances called "whistleblowers") and the ability to protect them, the press will not be able to sufficiently develop important stories — as in the case of Watergate — or even learn of the existence of potential important stories, and the uninformed public will suffer as a result.

9. I understand that *New York Times* investigative reporter and author James Risen has been served with a subpoena seeking, among other things, the identity of the source, or sources, for information contained in Chapter Nine of his book, *State of War: The Secret History of the CIA and the Bush Administration* ("State of War").

10. In my professional opinion, for all of the reasons set forth in this Affidavit, were an order to compel Mr. Risen to disclose information about his confidential sources issued and were it to be obeyed, it would do irreparable harm to investigative reporting across the nation.

11. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 16, 2008


Carl Bernstein

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

IN RE: GRAND JURY SUBPOENA, JAMES RISEN

Case No.: 1:08dm61 -- LMB

UNDER SEAL

AFFIDAVIT OF JACK NELSON

Jack Nelson, being duly sworn, deposes and says:

1. Prior to my retirement at the end of 2001, I spent 36 years as a journalist with the *Los Angeles Times*, including 22 years as the *Times*' Washington Bureau Chief. Before I began working for the *Los Angeles Times*, I worked as a reporter for *The Atlanta Journal-Constitution* and *The Biloxi Daily Herald*.

2. In 1960, I was awarded a Pulitzer Prize for reporting that exposed widespread financial corruption and medical malpractice at the Milledgeville (Ga.) State Hospital, then the world's largest mental institution. Much of my career has been spent either doing investigative reporting or overseeing investigative reporting. During my career as a reporter, I used confidential sources at all levels of government to report on financial corruption, vote fraud, medical malpractice, and other wrongdoing. I am, through these experiences, personally familiar with news reporting in general, and with the importance of confidential sources in newsgathering, in particular.

3. I make this affidavit in support of a fellow investigative reporter, James Risen, who, I understand, has been served with a grand jury subpoena seeking to obtain, among other things, the identity of the source, or sources, of information provided to him and published in Chapter 9 of his book, *State of War: The Secret History of the CIA and the Bush Administration* ("State of War"). I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated.

4. I have utilized and protected confidential sources throughout a career of more than 50 years as a journalist. During that time, I have found it essential to use confidential sources to adequately report and keep the public informed of government at the local, state and national level. In order to fully report stories on many subjects, especially in order to learn of government activities that otherwise would have been shielded from the public, I often found it necessary to rely on confidential sources.

5. I have covered the activities of six different presidential administrations -- four Republican and two Democratic -- and have directed the Washington bureau's coverage of five of them. And in all of the administrations we had to rely on confidential sources in reporting on government developments that were of great public interest but that government officials tried to keep concealed.

6. In Washington, my own reporting and the reporting of staffers I've directed routinely disclosed governmental abuses of one kind or another based on solid sources who insisted on confidentiality for fear of reprisal if their identities became known. Without those sources the *Los Angeles Times* would have been unable to report numerous such stories involving corruption or governmental abuses in at least six administrations. Examples include: aspects of the Watergate scandal and abuses of power of the FBI and other federal agencies in the Nixon Administration; questions surrounding President Ford's pardon of President Nixon; scandals in the Carter Administration involving OMB Director Bert Lance and President Carter's brother Billy Carter's

representation of Libya; illegal and inappropriate payments and cover-up attempts in the Iran/Contras scandal in the Ronald Reagan Administration; President George H. W. Bush's role in the Iran/Contras scandal and other wrongdoing in his Administration; and lies told by President Clinton in the Monica Lewinsky scandal. All of these stories contributed in a positive way to important national debates in this country and none of them would have been possible without information obtained from confidential sources.

7. Similarly, the information reported in Chapter 9 of *State of War* provided considerable benefit to the public. The chapter relates to a critically important subject: flaws and mismanagement of U.S. intelligence efforts concerning Iran's nuclear capabilities. Mr. Risen's reporting in Chapter 9 is all the more important given our apparent failures to gather accurate intelligence regarding Iraq's WMD capabilities (and the catastrophic consequences of that failure), and in light of recent changes to the National Intelligence Estimate concerning our intelligence agencies' views regarding the existence of an active nuclear program in that country.

8. Based on my experience, a reporter who obeys a court order to disclose a source to whom he has promised confidentiality would seriously damage his ability to cover government in the future. In my opinion, other government sources who insist on confidentiality and hear news about a reporter disclosing the identity of a confidential source obviously would consider that reporter, and perhaps other reporters, to be untrustworthy and refuse to deal with them in the future. And it undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing.

9. In fact, high government officials from presidents on down routinely have leaked classified information when it has promoted their agenda or otherwise suited their purposes. Any reporter who has covered Washington for any length of time knows that officials routinely leak classified information. Some government public information officials have publicly acknowledged that they routinely use classified information in briefing reporters. Congress passed a bill cracking down on leaks in 2000, but President Clinton vetoed it after Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, and Strobe Talbot, the Deputy Secretary of State, reportedly told the President they routinely used classified information in briefing reporters and could not adequately do their jobs if the bill became law. Bacon told the *Washington Post* the measure was "disastrous for journalists . . . disastrous for any official who deals with the press in national security, whether at State, the NSC or the Pentagon." And Talbot told me, for a paper on government secrecy that I wrote while at Harvard University as a Shorenstein Fellow in 2001, that the bill was "unbelievably pernicious for all kinds of reasons." The paper was a chapter in a 2003 book, "Terrorism, War, and the Press," published by the Joan Shorenstein Center on the Press, Politics and Public Policy and the John F. Kennedy School of Government.

10. I believe a federal court order that holds reporters or their news organizations in contempt for refusing to divulge confidential sources would be closely watched by all government sources and potential sources who might be inclined to help the public know how its government is operating. And if a contempt order were to compel a reporter to reveal his source, it would have a chilling effect on sources and not only damage the reporter's ability to do his job, but the ability of all reporters covering government to do their jobs.

Jack Nelson
Jack Nelson
Date: 2/15/08

Witnessed by me this 15th day of Feb., 2008,

[Signature]
(Notary Public)

My commission expires on 05/01/2010

