

Court of Appeals rules Obama administration can force journalist to testify against alleged leaker

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The US Court of Appeals for the Fourth Circuit ruled Friday that *New York Times* reporter James Risen can be forced to testify against former CIA officer and alleged leaker Jeffrey Sterling in a case brought against Sterling by the Obama administration.

In a blow to the First Amendment's protection of freedom of the press, two of the three presiding appellate judges—both Democratic appointees—reversed a lower court ruling and agreed that the government can jail journalists who refuse to reveal their sources.

The ruling reinforces the US government's assault on democratic rights. It is part of a wider campaign to intimidate or imprison anyone—journalists included—who attempts to make public information about the secret and illegal actions of the US government.

The Obama administration appealed a federal court ruling in favor of Risen to the Fourth Circuit appeals court, which is based in Virginia, underscoring the ruthlessness of its drive to silence all would-be leakers and whistle-blowers. Friday's ruling comes in the midst of Washington's international campaign to capture former National Security Agency contractor Edward Snowden, who has exposed details of the US government's illegal spying operations against the entire US population and much of the rest of the world, and try him for espionage.

It also coincides with the final stages of the frame-up court martial of Private Bradley Manning, who is charged with espionage and "aiding and abetting the enemy" because he leaked, via WikiLeaks, material exposing US war crimes in Iraq and Afghanistan. Julian Assange, the founder of WikiLeaks, has been holed up in the Ecuadorian embassy in London for more than a

year in an attempt to avoid extradition to face prosecution under espionage laws in the US.

Chief Judge William Traxler Jr. wrote in the majority opinion: "There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source."

The opinion further stated: "The reporter must appear and give testimony just as every other citizen must. We are not at liberty to conclude otherwise."

The federal district court ruling quashing the subpoena of Risen, which the Obama administration appealed, stated: "A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook."

Now that the appeals court has granted such a free pass, the administration has declared its approval. "We agree with the decision," said Justice Department spokesman Peter Carr. "We are examining the next steps in the prosecution of this case."

The Obama White House has carried out an unprecedented campaign against alleged leakers and whistle-blowers, prosecuting seven people for violating the Espionage Act of 1917—more than double the number of individuals prosecuted by all previous administrations combined.

Sterling—one of the seven—is under criminal investigation for allegedly providing Risen with information about CIA spying operations against Iran,

which Risen subsequently published in his book, *State of War: The Secret History of the CIA and the Bush Administration*.

The Fourth Circuit ruling was met with heavy condemnation by First Amendment groups. Trevor Trimm, the founder of the Freedom of the Press Foundation, said, “[T]his is the worst reporter’s privilege decision in recent memory, and if it stands, will have significant consequences for press freedom in the United States.”

Trimm’s comments were echoed by Lucy Dalglish, the co-chair of the First Amendment Committee of the American Society of News Editors. “It has really gotten bad, and not just in national security reporting,” Dalglish said. “Every official now knows that if they talk to a reporter they are potentially in a world of hurt.”

The subpoena of Risen comes as part of a wider attack waged by the Obama administration against press freedom. The administration has obtained the telephone records of dozens of reporters in a program the Associated Press called a “massive and unprecedented intrusion.” It has also seized the email of Fox News reporter James Rosen.

The *New York Times* on Saturday noted the degree to which the Obama administration has escalated the attack on leakers and whistle-blowers. Its article cited former Director of National Intelligence (DNI) Dennis Blair as working closely with Attorney General Eric Holder and other high-ranking Obama officials to “fashion a more aggressive strategy to punish anyone who leaked national security information that endangered intelligence-gathering methods and sources.”

The *Times* cited officials who emphasized that the changes that took place after the inauguration of Obama.

“A tipping point was reached in 2009,” an anonymous Senate aide told the *Times*. “There was an official change of policy” after Obama took office.

The article noted that added pressure was placed on the Department of Justice by Democratic Senator Dianne Feinstein, who chairs the Senate Intelligence Committee. She complained that the national security apparatus “had not adequately protected national security secrets.”

It is notable that the 2009 “tipping point” occurred

before WikiLeaks began to publish material leaked by Bradley Manning in 2010.

The Obama administration’s continuing legal assault on journalists such as Risen underscores the reactionary nature of the Department of Justice’s recent announcement of new guidelines for the subpoenaing of reporters’ phone records and issuance of warrants for reporters’ email records.

A memorandum detailing the new proposals was published by Attorney General Eric Holder earlier this month. Far from limiting government surveillance of journalists, the memorandum affirms the supposed right of the state to spy on the press, in blatant contravention of the First Amendment, without any serious safeguards or limits.

Risen has declared he will not testify against Sterling, even if it means going to jail. “I am going to fight this subpoena,” he said in 2011. “I will always protect my sources, and I think this is a fight about the First Amendment and the freedom of the press.”

Risen reiterated this position on Saturday. It is likely the Fourth Circuit ruling will be appealed to the US Supreme Court.



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