

<p>UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS</p> <p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>BARRETT LANCASTER BROWN</p> <hr/> <p>Attorney for Intervenor: Jason Flores-Williams, Esq. 624 Galisteo #10 Santa Fe, NM 87505 Telephone: 505-467-8288 Email: JFW@JFWLAW.NET Bar No. 132611</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 3:12-CR-317-L</p> <p>Hon. Judge Lindsay</p>
---	---

MOTION FOR LEAVE TO REPLY

COMES NOW Sebastiaan Provost, by and through counsel, pursuant to LCrR 47.1(f), respectfully moves this Honorable Court for leave to reply on the following grounds:

1. The government impliedly asks *what is a journalist today?* Mr. Provost prays this Honorable Court allow him to address this critical First Amendment issue central to the just determination of his motion.
2. The government attempts to dismiss *pro bono* civil rights litigation as an attempt to obtain publicity. This is a time-tested way of demeaning the constitutional concerns of the less powerful.¹ Mr. Provost requests that he be able to reply to this mischaracterization of his legal position.
3. The government uses content from experienced civil rights attorney Jay Leiderman's personal business website in its exhibits. Along with sending a message that attorneys risk *ad hominem* attack for the duty-bound advocacy of our constitution, these exhibits contravene the rules of hearsay and authentication should this Honorable Court choose to apply the Federal Rules of Evidence to the adjudication of this motion. See. *F.R.E 801, 901*.

¹ Also contrary to the aspirations of our legal ethics which speak to the duty of taking on challenging cases *pro bono*. See ABA Model Rule 6.1
WBDL: Motion For Leave To Reply

For the above-referenced grounds, Mr. Provost respectfully moves this Honorable Court for leave to reply pursuant to LCrR 47.1(f).

Respectfully submitted,

s/Jason Flores-Williams

Jason Flores-Williams
Attorney for Mr. Provost
Bar No. 132611
624 Galisteo #10
JFW@JFWLAW.NET
Santa Fe, NM 87505
T: 505-467-8288
F: 505-467-8288

<p>UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS</p> <p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>BARRETT LANCASTER BROWN</p> <hr/> <p>Attorney for Intervenor: Jason Flores-Williams, Esq. 624 Galisteo #10 Santa Fe, NM 87505 Telephone: 505-467-8288 Email: JFW@JFWLAW.NET Bar No. 132611</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 3:12-CR-317-L</p> <p>Hon. Judge Lindsay</p>
---	---

(P)ROPOSED ORDER FOR MOTION FOR LEAVE TO REPLY

Mr. Provost's Motion For Leave To Reply is GRANTED _____

Respectfully submitted,

s/ Jason Flores-Williams

Jason Flores-Williams
Attorney for Mr. Provost
Bar No. 132611
624 Galisteo #10
Santa Fe, NM 87505
JFW@JFWLAW.NET
T: 505-467-8288
F: 505-467-8288

Hon. Sam A Lindsay
Federal Court Judge

WBDL: Motion For Leave To Reply

CERTIFICATE OF SERVICE

I certify that on 4/14/13, I caused a copy of the foregoing pleading to be delivered via electronic filing to the Honorable Sam. A. Lindsay, United States District Judge; and Ms. Candina S. Heath, Assistant United States Attorney; and Mr. Doug Morris , Assistant Federal Public Defender; and via fax to interested party CloudFlare, Inc.

s/ Jason Flores-Williams

Jason Flores-Williams
Attorney for Mr, Provost
Bar No. 132611
624 Galisteo #10
SF, NM 87505
JFW@JFWLAW.NET
T: 505-467-8288
F: 505-467-8288

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 3:12-CR-317-L
	§	
BARRETT LANCASTER BROWN (1)	§	

GOVERNMENT'S MOTION TO DISMISS
MOTION TO INTERVENE AND QUASH SUBPOENA

The United States, by and through the undersigned Assistant United States Attorney, respectfully files this Motion to Dismiss the Motion to Intervene and Quash Subpoena (Document 42).

POSITIONS OF THE PARTIES

1. Sebastiaan Provost, by and through his attorney, filed a Motion to Intervene and Quash Subpoena, that being a post indictment trial subpoena issued by the government to Cloudflare, Inc. (Cloudflare). As to his Motion to Intervene, Provost relied on Fed. R. Crim. P. 17(c)(2), Fed. R. Civ. P. 24, and cited a few cases. As to his Motion to Quash, Provost claimed that Cloudflare's compliance with the subpoena would somehow violate Provost's First and Fifth Amendment rights.

2. Provost fails to present a cognizable right to intervene in this criminal case, or to quash the subpoena. Provost did not include an affidavit or offer any specific facts in support of his claims, which were otherwise conclusory. Provost was not a named

defendant or mentioned in the Indictment as an unindicted coconspirator. Provost is not a party to this criminal case, or any criminal case in the Northern District of Texas at this time. Provost is not a citizen of the United States and does not reside within the United States; therefore his claims to rights under the First and Fifth Amendments are without merit. Provost does not purport to be an officer or employee of Cloudflare, and therefore cannot represent the interests of Cloudflare

3. Provost's Motion is indicative of an agenda other than what is presented. Provost is represented by Jason Flores-Williams, who is one of the three founders of a newly formed entity called the Whistleblower Defense League (WBDL). This Motion is the first action undertaken by the WBDL, and therefore the source of some self-promotion.

Within a few hours of filing the Motion, the Motion and statements by the WBDL were posted publically. See Attachments A,¹ B,² and C.³ Mr. Flores-Williams advised the government that he represented Provost pro bono. Mr. Flores-Williams further advised that Provost resides outside the United States. The government understands that Provost is not a citizen of the United States. Provost had declined to informally resolve his issues, and instead now seeks to make public his issues, as well as his association with defendant Brown, the website Echelon2.org, and with the defendant Brown's Project PM.

1 Attachment A is a screenshot from <http://dissenter.firedoglake.com/2013/04/02/legal-group-launches-to-aggressively-challenge-us-government-prosecutions-of-whistleblowers/>.

2 Attachment B is a printout of <http://jayloriderman.blogspot.com/2013/04/wbdl-challenges-government-subpoena.html?spref=tw> (without comments).

3 Attachment C is a screenshot of the tweets @freebarrett_ on https://twitter.com/FreeBarrett_ as of 3:30p.m., Wednesday, April 3, 2013.

4. The government contends that Provost's attempted intervention and motion to quash were pursued in order to transform Brown's criminal case into some sort of "impact litigation," and for that reason alone his Motion should be denied. *United States v. Lepp*, 2013 WL 173960, *1 (N.D.Cal. January 16, 2013).⁴ Provost fails to articulate any legal authority permitting this Court to allow him to intervene in this criminal case, and further lacks standing to move to quash the subpoena.

5. The government requests that this Honorable Court deny Provost's Motion simply because it is conclusory, unsupported, and facially overbroad. The government responses below are provided in an attempt to anticipate what Provost might have meant.

BACKGROUND

6. The evidence to be presented at trial will establish that in September 2012, defendant Barrett Lancaster Brown posted communications online, threatening the safety of a Federal Bureau of Investigation (FBI) Special Agent and the Special Agent's family, as well as threatening law enforcement in general. In these communications, defendant Brown referenced and used the entity he founded, called Project PM. Project PM served as a forum through which defendant Brown and other individuals sought to discuss their joint and separate activities and engage in, encourage, or facilitate the commission of

⁴ *Lepp* cites and relies on *Harrelson v. United States*, 967 F.Supp. 909, 912 (W.D.Tex. 1997), stating "[t]his Court is aware of no authority that would support intervention by a third party in a criminal proceedings under Federal Rule of Civil Procedure 24(a)." *Lepp*, at *1

criminal conduct online. The ProjectPM site was maintained at Echelon2.org.⁵

Echelon2.org was served by Cloudflare. Cloudflare, among other things, was a web hosting service and was incorporated in California in or about February 2010. Cloudflare provided many services including hosting websites and “provid[ing] performance and security for any website.”⁶

7. For his threatening communications, Brown was arrested on a criminal complaint on September 12, 2012. In October 2012, a federal grand jury returned an Indictment (Document 19) in this case, charging defendant Brown with violations of 18 U.S.C. § 875(c) (Internet Threats); 18 U.S.C. § 371 (18 U.S.C. § 119)(Conspiracy to Make Publically Available Restricted Personal Information of an Employee of the United States); and 18 U.S.C. §§ 115(a)(1)(B) and (b)(4) (Retaliation Against a Federal Law Enforcement Officer). The Introduction to the Indictment identified occasions when defendant Brown used or referenced Project PM or Echelon2.org in furtherance of or to facilitate the violations alleged. Paragraph one of the Indictment’s Introduction provided the following information:

Barrett Lancaster Brown created Project PM in approximately 2010. Project PM was a IRC/wiki based blogger network created to allow Brown and those he associated with to share information and achieve or pursue certain goals. Barrett Lancaster Brown used the website **wiki.echelon2.org** to operate **Project PM**.

Project PM or Echelon2.org also are referenced in the Indictment paragraphs 2a, 2c, 2e, 3c, 4, 5c, 5d, 5e, 8a, 8b, 8e, 10b.

5 Echelon2.org resolves to http://wiki.echelon2.org/wiki/Main_Page.

6 The information is found at <http://blog.cloudflare.com/what-is-cloudflare>.

8. In January 2013,⁷ the government caused the issuance of a trial subpoena⁸ to Cloudflare, to produce non-content data related to Echelon2.org. The trial subpoena requested Cloudflare to produce documents associated with Echelon2.org for defendant Brown's trial that are relevant to defendant Brown and to the Indicted charges.

Specifically the government requested that Cloudflare produce subscriber information, type and length of service provided, payments made to Cloudflare, other domains associated with the same customer, DNS configuration, and transactional information.

9. On March 19, 2013, the government advised Cloudflare that it did not oppose Cloudflare advising its customer of the existence of the subpoena. On or about March 28, 2013, Cloudflare advised the government that based on its customer's request, Cloudflare would not comply with the trial subpoena until its customer's issue had been resolved. Cloudflare never identified its customer by name.

10. On April 2, 2013, Jason Flores-Williams filed a filed a Motion to Intervene and Quash Subpoena (Document 42), claiming to represent a customer of Cloudflare, that being a Sebastiaan Provost. Flores-Williams did not present any credible information to authenticate his claim that Provost was in fact the Echelon2.org account customer of Cloudflare.

7 The subpoena was corrected and reissued on March 5, 2013.

8 18 U.S.C. § 2703(c)(2) provides that pursuant to a Federal trial subpoena, "[a] provider of electronic communication service or remote computing service shall disclose to a governmental entity the (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and durations; (D) length of service (including start date) and types of service utilized; (E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service."

11. However, in a blog posted on April 9, 2013, a Sebastiaan Provost admitted to receiving notice from Cloudflare of the trial subpoena.⁹ In the posting, Provost described Echelon2.org as “a very specific wiki, aimed to collect information and research about the global intelligence community.” See Attachment D.¹⁰ However, Echelon2.org described itself, in part, as a “pursuance,” and further defined a “pursuance” “as some number of people who have come together via the internet to pursue some action or agenda on which participants will work closely via a set of online communication mediums in order to achieve their goal.”¹¹

ARGUMENTS AND AUTHORITIES

12. Although the government contends that Provost cannot intervene in this criminal case, it will first address Provost’s inability to move to quash this particular subpoena under the Stored Communications Act (SCA).

A. Provost Lacks Standing to Move to Quash the Subpoena, i.e. There is No Statutory Standing Under the Stored Communications Act (18 U.S.C. §§ 2703 and 2704)

13. Through 18 U.S.C. § 2703(c)(2), Congress authorized and enabled the government to obtain certain records pursuant to a Federal trial subpoena. 18 U.S.C. § 2703(c)(2) stated that “[a] provider of electronic communication service or remote computing service

9 The government would need to subpoena the subscriber and transactional records from wordpress.com to authenticate the identity of this blogger.

10 Attachment D is a printout of <http://sebaprovost.wordpress.com/2013/04/>, purporting to be a statement posted by Provost on April 9, 2013.

11 Echelon2.org site, found at http://web.archive.org/web/20120122182642/http://wiki.echelon2.org/wiki/Guide_to_Pursuants.

shall disclose to a governmental entity the (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and durations; (D) length of service (including start date) and types of service utilized; (E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service.” (Emphasis added). Congress therefore intended that the service provider’s production of the subpoenaed material would be mandatory.

14. Congress specifically permitted the “customer” to challenge a 18 U.S.C. § 2703 subpoena in one fact-specific situation; that being, when the subpoena directed the service provider to “create a **backup copy** of the contents of the electronic communications sought in order to preserve those communications.” 18 U.S.C. §§ 2704(a)(1) and 2704(b).

Congress intentionally did not make allowances for the “customer” to challenge any other type of 18 U.S.C. § 2703 subpoena. The “customer challenge” provision of 18 U.S.C. § 2704 is not applicable in this case.¹² The subpoena to Cloudflare did not direct Cloudflare to create a backup pursuant to 18 U.S.C. § 2704. The subpoena was simply requested Cloudflare to produce non-content data as identified in 18 U.S.C. § 2703(c)(2).

Thus, Provost has no statutory standing to bring a motion to quash the subpoena on

¹² In the drafting of the Stored Communication Act (SCA), “Congress clearly provided pre-disclosure protections for one type of § 2703 order but not for others [It] must [be] infer[red] that Congress deliberately declined to permit challenges for the omitted orders.” A trial subpoena under 18 U.S.C. § 2703(c)(2) was omitted from any provision in 18 U.S.C. § 2704 allowing the customer of the service provider to challenge the service provider’s compliance with the trial subpoena.

non-constitutional grounds. *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F. Supp. 2d 114, (E.D.Vir. Nov. 10, 2011).

B. No Right to Intervene in a Criminal Case

15. Provost seeks to intervene in a criminal case. Provost relies on Fed. R. Civ. P. 24, Fed. R. Crim. P. 57(b),¹³ and cites a few cases (*In re Associated Press*, 162 F.3d 503 (7th Cir. 1998) and *United States v. Rollins*, No. 09-2293 (7th Cir. June 9, 2010)¹⁴). **However, the criminal rules do not provide for a third party to intervene in a criminal case.** See *United States v. Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007) (“There is no provision in the *Federal Rules of Criminal Procedure* for intervention by a third party in a criminal proceeding; intervention in civil proceedings is governed by Rule 24 of the *Federal Rules of Civil Procedure*, which does not apply in a *criminal* case.”) (emphasis in original); *Schultz v. United States, et al.*, 594 F.3d 1120 (9th Cir. 2010) (even the victim may not intervene in a related civil suit in pursuit of his interest in restitution under the Mandatory Victim Restitution Act); *DSI Associates, LLC v. United States* 496 F.3d 175, 183-86 (2nd Cir. 2007) (third parties may not intervene in criminal forfeiture proceedings to assert their interests in property being forfeited); *Harrelson v. United States*, 967 F.Supp. 909, 912 (W.D.Tex. 1997) (intervention pursuant to Fed. R. Civ. P. 24 is generally not permitted in federal criminal proceedings), citing *United States v. Briggs*, 514 F.2d 794, 804 (5th Cir.

13 Fed. R. Crim. P. 57(b) is titled “Procedure When There Is No Controlling Law” and provides, in pertinent part, that “[a] judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.” The government contends that to be consistent with the prevailing “federal law, these rules, and the local rules” this Court should deny Provost’s Motion to Intervene and Motion to Quash.

14 Correct cite is *United States v. Rollins*, 607 F.3d 500 (7th Cir. 2010).

1975) (holding that an unindicted coconspirator had no right to intervene under the Fed. R. Crim. P.); *In re Application of the New York Times Co.*, 878 F.2d 67, 67-68 (2nd Cir. 1989) (noting that “no rule of criminal procedure allows intervention by third parties in a criminal proceeding.”); and *United States v. Davis*, 902 F.Supp. 98, 101 (E.D.La.1995) (noting the lack of an intervention provision in Fed. R. Crim. P.).

16. In support of his motion to intervene, Provost cites *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998). *In re Associated Press* did not involve a subpoena, it involved a news agency’s petition to intervene in order to cause the release of records in a criminal case. The Courts have allowed news agencies to challenge gag orders or orders limiting their ability to interview jurors. See *In re Application of the New York Times Co.*, 878 at 67–68 (2d Cir.1989) (finding that the Court of Appeals has jurisdiction over a newspaper's appeal of a gag order); *Davis*, 902 F.Supp. at 101 (newspaper can intervene in criminal case to challenge gag order); *United States v. Harrelson*, 713 F.2d 1114 (5th Cir.1983) (press challenge to order limiting scope of post-trial juror interviews); *In re The Express–News Corporation*, 695 F.2d 807 (5th Cir.1982) (acknowledging press standing to challenge order limiting right to interview jurors); *United States v. Antar*, 38 F.3d 1348 (3d Cir.1994) (same). As far as the government knows, Provost is not a news agency, nor does his work in building websites rise to the level of being considered a member of the press.

17. The other cases cited by Provost, i.e. *Gravel v. United States*, 408 U.S. 606 (1972), *Warth v. Seldin*, 422 U.S. 490 (1975), and *Matthews v. Eldridge* 424 U.S. 319 (1976), either did not stand for what he claimed or were distinguishable. The Supreme Court in

Gravel vacated the prior court's order granting full relief to the intervener. Also, *Gravel* did not deal with a trial subpoena or an indicted case. *Gravel* also dealt with a legislative immunity privilege which is not available to Provost. *Warth* and *Matthews* did not deal with a third party intervening in a criminal case.

18. Provost contends that Fed. R. Civ. P. 24 should apply, and in support, cites *United States v. Rollins*, No. 09-2293 (7th Cir. June 9, 2010)⁵. Fed. R. Civ. P. 24 does not apply in a criminal case. Provost's reliance on *Rollins* is in error. *Rollins* does not say that the civil rules apply in criminal cases. *Rollins* says motions to reconsider (the subject of *Rollins*) exist in criminal prosecutions notwithstanding the absence of a criminal rule, and cites Supreme Court holdings. *Rollins* simply invokes a procedural vehicle by which a party to the criminal case can request the court to exercise its discretion in reconsidering a prior ruling. Again, *Rollins* does not say that the civil rules apply in criminal cases.

19. Assuming, *arguendo*, that Fed. R. Civ. P. 24 does apply in a criminal case, Provost fails to articulate how he is entitled to intervene. Fed. R. Civ. P. 24 provides that a third party may intervene in a *civil* action as a matter of right or on a permissive basis, and that the Court *must* permit intervention if the third party has "an unconditional right to intervene by a federal statute," or "claims an interest relating to the property . . . that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(1). Provost does not have "an unconditional right to intervene by a federal statute."

20. Rule 24(b) provides that “[o]n timely motion, the court *may* permit anyone to intervene who ... has a claim or defense that *shares* with the “main action” a common question of law or fact.” Fed. R. Civ. P. 24(b)(1), (b)(1)(B)(emphasis added). The “main action” in 3:12-CR-317-L is the Indictment. Provost fails to articulate (more likely does not *want* to articulate) what claim or defense he shares with defendant Brown regarding the criminal conduct alleged in the Indictment.

21. Continuing down Provost’s faulty reasoned path, if Fed. R. Civ. P. 24(b) applies, then Fed. R. Civ. P. 45(c) also applies. Rule 45(c) is entitled “Protection of Persons Subject to Subpoena” and is the primary civil guidance on Subpoenas. Even the title of the rule indicates that *only* the recipient of the subpoena has the authority to seek an order quashing it. The Fifth Circuit has held a non-party does not have standing to raise “the issue of [a non-party's] amenability to the compulsory process of the district court since they are not in possession of the materials subpoenaed and have not alleged any personal right or privilege with respect to the materials subpoenaed.” *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir.1979); see also *Garrett v. Blanton*, No. 89-4367, 1993 WL 262697, at *5, (E.D.La. July 6, 1993). Provost only seeks to intervene because he seeks to quash the subpoena. **Even if the civil rules were applicable, Provost has no right to quash, and therefore no reason to intervene.**

22. Bottom line, the civil rules do not apply to this criminal prosecution. As a third party, Provost cannot intervene in Brown’s criminal case.

C. Provost Lacks Standing to Move to Quash the Subpoena, i.e. Provost Lacks any Personal Right or Privilege¹⁵

23. Cloudflare was the entity subpoenaed, and a representative of Cloudflare was commanded to appear before this Honorable Court with the items identified pursuant to the subpoena. The subpoena was not directed at Provost, and did not command Provost to do or produce anything. Provost is not a named defendant or a party to the criminal action. Provost does not claim any proprietary interest in defendant Brown's ProjectPM or in Echelon2.org. Provost admitted that he "did not actively participate in Project PM." Provost admitted to hosting Brown domain Echelon2.org (Project PM Wiki), on his Cloudflare account, and maintaining the server. See Attachment D.

24. *9A Wright and Miller, Federal Practice and Procedure* § 2463.1 at 501–06 (2008) ("Wright and Miller") provides that "[a] motion to quash, or for a protective order, should be made *by the person from whom the documents, things, or electronically stored information are requested*. Numerous cases have held that a party lacks standing to challenge a subpoena absent a showing that the objecting party has a personal right or privilege regarding the subject matter of the subpoena." (Emphasis added). Provost does not claim any legally-cognizable interests in the items sought by the trial subpoena issued to Cloudflare, and therefore Provost does not have standing to challenge the validity

¹⁵ Provost cites *The People v. Harris*, 36 Misc.3d 613, 945 N.Y.S.2d 505 (April 20, 2012) and *The People v. Harris*, 36 Misc.3d 868, 949 N.Y.S.2d 590). The first *Harris* case discussed the defendant's lack of standing to move to quash a subpoena issued by the prosecution to Twitter, Inc. in the defendant's case. The second *Harris* case involved Twitter, Inc.'s failed attempt to quash the same subpoena. Both *Harris* cases go against Provost. The court denied both the defendant's and the subpoena-recipient's motions to quash. The only third party in the *Harris* cases was the subpoena-recipient.

of that subpoena. See, e.g., *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) (asserting constitutional privilege, U.S. Senator may move to intervene and quash subpoena directed at his assistant).

D. Provost Lacks Standing to Move to Quash the Subpoena, i.e. The subpoena is not Unreasonable or Oppressive

25. Provost also relies on Fed. R. Crim. P. 17(c)(2) to quash the subpoena. Rule 17(c)(1) of the Federal Rules of Criminal Procedure provides that “[a] subpoena may order the witness to produce any ... documents ... or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence.” “A subpoena for documents may be quashed if their production would be **‘unreasonable or oppressive,’ but not otherwise.**” *United States v. Nixon*, 418 U.S. 683, 698 (1974) (Emphasis added). Congress specifically authorized and enabled the government to obtain certain records pursuant to a Federal trial subpoena pursuant to 18 U.S.C. § 2703(c)(2), therefore the government’s use of a trial subpoena to request those records cannot be unreasonable or oppressive. Also, Cloudflare as the subpoena’s recipient would be the proper party to move to quash, not a third party. Cloudflare cannot claim and has not claimed that the subpoena is unreasonable or oppressive. Ultimately, Provost lacks standing.

E. Provost Lacks Standing to Move to Quash the Subpoena, i.e. Lack of Constitutional Grounds

26. In his motion to quash, Provost claims that “when a third party’s rights are threatened by the government, then they have a right to avail themselves of due process.” Provost infers that his First and Fifth Amendment “rights” have been or will be violated by Cloudflare’s compliance with this trial Subpoena. However, Provost fails to articulate how he acquired the protection of the First or Fifth Amendment, or how they would be violated by Cloudflare’s compliance with this trial Subpoena. As a non-citizen and a non-resident, and without any voluntary physical connections to the United States, Provost cannot claim entitlement to those protections.¹⁶ The trial subpoena is not issued to him. Provost has no obligation to produce anything. The trial subpoena does not mention Provost, or specifically request the production of items belonging to or authored by

¹⁶ The government reserves the right to respond further concerning Provost’s constitutional rights, if and when Provost can establish that he has been afforded the protection of those rights. In any event, the government cites a few worthwhile cases: In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. While aliens enjoy certain constitutional rights, they are not entitled to the protection of the Fourth Amendment abroad if they have “no previous significant voluntary connection with the United States * * *.” *Id.* at 271. See *id.* at 274-275 (“At the time of the search, [defendant] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.”). See *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) (the Fourth Amendment did not apply to non-resident alien’s conversations intercepted in the Bahamas); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 168 (2d Cir. 2008) (“the Fourth Amendment affords no protection to aliens searched by U.S. officials outside of our borders”) (citing *Verdugo-Urquidez*). *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (“Mere lawful presence in the country creates an implied assurance of safe conduct and gives [the noncitizen] certain rights; they become more extensive and secure when he makes [a] preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization”); *Fong Yue Ting v. United States*, 149 U.S. 698, 724, (1893) (“having taken no steps towards becoming citizens [they] remain subject to the power of Congress to expel them”); *Veiga v. World Meteorological Organization*, 568 F.Supp.2d 367, 374 (S.D.N.Y. 2008). (non U.S. citizen without sufficient connection to the U.S. was not entitled to constitutional protections.)

Provost. Provost fails to specify what materials would be produced by Cloudflare, and how the production of those materials would impact any rights, assuming he had rights. His claims of constitutional violations are wholly conclusory.

27. Provost also accused the government of “using the prosecution of Mr. Brown as a ‘fishing expedition’ against Mr. Provost.” Since the undersigned first became aware of the name “Sebastiaan Provost” by his own filing of the Motion to Intervene and Quash Subpoena, Provost’s statement is in error. Provost’s argument is long on rhetoric and short on reliable facts.

F. Provost’s Motion is Facially Overbroad

28. Finally, Provost’s motion is facially overbroad. Provost moved to quash the subpoena in its entirety. Provost fails to identify the “objectionable” data or information that he contends will be produced by Cloudflare. The trial subpoena’s request is circumscribed and reasonable. Cloudflare’s compliance therewith would not be oppressive or unreasonable. Provost’s motion to intervene and quash is without merit.

CONCLUSION

29. Provost failed to present a cognizable right to intervene in this criminal case or to quash the subpoena. Provost claims are conclusory at best, and do not meet the threshold

for even an evidentiary hearing. In conclusion, Provost's Motion to Intervene and Quash Subpoena should be denied, with prejudice.

Respectfully submitted,

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

S/ Candina S. Heath
CANDINA S. HEATH
Assistant United States Attorney
State of Texas Bar No. 09347450
1100 Commerce Street, 3rd Floor
Dallas, Texas 75242
Tel: 214.659.8600
Fax: 214.659.8812
candina.heath@usdoj.gov

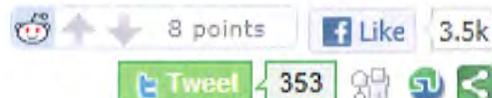
CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2013, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to Brown's attorney of record, Doug Morris, who consented in writing to accept this Notice as service of this document by electronic means. I also faxed this Motion to Jason Flores-Williams, Esq. at 505.467.8288.

S/ Candina S. Heath
CANDINA S. HEATH
Assistant United States Attorney

Legal Group Launches to Aggressively Challenge US Government Prosecutions of Whistleblowers

By: [Kevin Gosztola](#) Tuesday April 2, 2013 5:28 pm



A legal group of criminal defense attorneys has formed to combat what they describe as the FBI and Justice Department's use of harassment and over-prosecution to chill and silence those who engage in journalism, Internet activism or dissent.

The group, the Whistleblower Defense League, will, according to attorney Jason Flores-Williams, defend individuals engaged in investigating the United States government and those who are "in positions to reveal truths about this government and its relationships with other governments and corporations."

The [founding members](#) include Internet rights attorney Jay Leiderman, Dennis Roberts, an attorney who is a veteran of the civil rights movement and Flores-Williams, who is now involved in representing online activists targeted by the government's investigation into activist and former self-proclaimed spokesperson for Anonymous, Barrett Brown.

Attorneys in the group come from an "activist tradition," according to Flores-Williams. They have decided to form this group to defend truth-tellers and dissenters because they identify with these people. They think many of the people being subjected to over-prosecution or prosecutorial abuses of power are heroes. "We're going to pull out every stop and use every vector available us – media and constitutionally in the courts – to defend them." And they intend to take on not only whistleblower cases but also the cases of journalists and activists facing prosecution.

Michael Ratner of the [Center for Constitutional Rights](#), who is a part of the defense team for WikiLeaks, said in reaction to the formation of this group, "Every effort that focuses on the defense of whistleblowers, internet free speech activists, publishers and others persecuted by the US government is to be applauded. This group joins the many other members of the criminal defense bar as well as non-profits such as Electronic Frontier Foundation and Government Accountability Project, who are already defending those accused of shining light on the dark secrets of government and corporations."

Flores-Williams acknowledges there are other organizations doing necessary work on behalf of whistleblowers and activists, "Everyone who is out [there] trying to defend whistleblowers and activists and those who engage in dissent are heroes and are doing great work." Yet, he adds this legal group is forming because there is more attention the legal community needs to be giving to what the government is doing to go after these individuals. There needs to be "aggressive forms of litigation."

For example, he explains that this afternoon he submitted a motion to quash a government subpoena in the Brown investigation. The government subpoenaed content delivery network and domain name server service, CloudFlare, for information about a domain. The group was contacted because the government is using the case to "virally subpoena" information "about online activists around the world by using the Barrett Brown case as justification." They want details on domain names that he used so "people who used the domain names that Barrett Brown was associated with I now represent."

Attachment A

This is what needs to be done and the type of legal action will he be looking to do. Flores-Williams adds that they intend to get in the middle of this activity by prosecutors to abuse power and go after data and information in ways that violate the First Amendment, violate basic due process rights and fundamentally invade privacy.

With the zealous prosecutions of Internet activist Aaron Swartz, who committed suicide in January, and Pfc. Bradley Manning, who recently took responsibility in a military court for disclosing information to WikiLeaks, the government is "sending a message to everyone about stepping into the role of revealing truths about power structure," Flores declares.

"The Whistleblower Defense League and organizations like it are very important to let potential whistleblowers know they have a support network in case of retribution from the government," Trevor Timm, executive director of the [Freedom of the Press Foundation](#) states. "They can help mitigate the chilling effect from the recent increase of prosecutions of whistleblowers who have leaked information to the press. Hopefully, the Whistleblower Defense League can give whistleblowers any added encouragement they need to step forward if they witness wrongdoing or corruption in government."

Flores-Williams concludes, "The greatest threat to democracy is the unchecked power of prosecutors," on both the state and federal level. "These people have the mindset that there is always some threat to the United States that they have to be going after. Prosecutors are very simple people: they believe blindly in executing the law. They don't share that there is a human being on the other side." In 1850, they would prosecute a slave who escaped from Mississippi so "the law can be on the wrong side" and they do not always represent justice.

As someone who regularly covers cases of activists, whistleblowers and even journalists whom the Justice Department is targeting, it is refreshing to see a group form that is willing to inject some more spirit into the struggle to defend those who exercise their rights, challenge government policies, expose misconduct or wrongdoing and then wind up being subjected to the politics of personal destruction, which so many US prosecutors appear to be embracing these days.

The Justice Department seems to have plenty of zeal and commitment to go after activists like Swartz or Brown, to target whistleblowers like CIA whistleblower John Kiriakou or NSA whistleblower Thomas Drake or to even attempt to go after someone engaged in journalism, as in the case of Matthew Keys, who worked on social media for *Reuters* and was [recently indicted](#) under the Computer Fraud and Abuse Act over past work he did on Anonymous.

However, the Department does not have much zeal at all when it comes after going after criminals in government who authorize and engage in torture, a war crime, and attempt to cover up their involvement by destroying evidence. They aren't interested in making examples out of individuals contractors like Blackwater who violate weapons laws and smuggle arms, engage in obstruction of justice when under investigation or murder innocent civilians in Iraq. They certainly seem to have trouble cobbling together a case—trouble they wouldn't have if they pursue an activist or whistleblower—when bank executives commit financial fraud at "too big to fail" corporations and face no criminal penalty.

The work of defense attorneys to combat the trend in law enforcement to use the surveillance state to investigate activists and whistleblowers and then pass information on to the Justice Department for targeting is more important than ever. And the more groups there are out there vigorously defending victims of prosecutorial misconduct and abuses of government power, the better off citizens in this society will be.

Share 0 More Next Blog»

Create Blog Sign In

Jay Leiderman

Jay Leiderman is a criminal defense attorney in Ventura, California. He co-authored the first ever book on the legal defense of California medical marijuana crimes and has been called the "Hacktivist's Advocate" for his work defending those accused of computer crimes. He has been recognized and won awards for going above and beyond to represent clients accused of all sorts of crimes. Jay frequently lectures around the state and nation on various criminal defense topics.

Wednesday, April 3, 2013

WBDL CHALLENGES GOVERNMENT SUBPOENA

WHISTLEBLOWER DEFENSE LEAGUE

WWW.WHISTLEBLOWERDEFENSELEAGUE.COM

FOR IMMEDIATE RELEASE

WBDL CHALLENGES GOVERNMENT SUBPOENA

Washington DC—The U.S. Government is the New China. The WBDL has filed a motion challenging an oppressive, unconstitutional subpoena issued by the "Department of Justice" in the prosecution of journalist Barrett Brown and the investigation into the Project PM Wiki.

"The Department of Justice is abusing its subpoena power to invade lives, threaten freedoms and destroy people for simply exploring the truth about their government," says Jason Flores-Williams, WBDL lawyer. "Like China, they are trying to control the flow of information on the internet."

The government served the subpoena on CloudFlare Inc., in an attempt to gain protected, private information about a range of individuals, websites and data. CloudFlare agreed to give the WBDL time to challenge the subpoena in order to protect the rights of its clients.

"The internet is the new frontier for civil rights," says WBDL attorney Jay Leiderman. "This entire indictment of Barrett Brown, like Al Weiruch, is an affront to democracy. We have to stop this government from criminalizing dissent in our society."

Blog Archive

▼ 2013 (12)

▼ April (5)

#WBDL Founder Dennis Roberts Resume

Thanks to the Ventura County Star for this great p...

'Whistleblower Defense League' created to fight ba...

WBDL CHALLENGES GOVERNMENT SUBPOENA

Announcing the Whistleblower Defense League

► March (1)

► February (1)

► January (5)

► 2012 (10)

Contributors

Share It

• Jay Leiderman

• Jay

• Jay Leiderman

Attachment B

The government subpoena violates First Amendment rights of speech and association, Fourth amendment rights against illegal seizures and the Fifth Amendment right to remain silent.

"This government needs to be checked," says WBDL attorney Dennis Roberts. "These are critical constitutional issues that go to the very heart of our democracy."

The WBDL is a group of noted criminal defense attorneys and investigators from around the country who seek to lower defense costs via grassroots fundraising and support.

The Motion to Intervene and Quash was filed today in federal court in the Northern District of Texas.

Media contact:

Jason Flores-Williams, WBDL

505-467-8288

www.whistleblowerdefenseleague.com

+++

Share this on

 Facebook

 Tweet this

 Print

 Email

Follow by Email

Subscribe

WHISTLEBLOWER DEFENSE LEAGUE YOU ARE OUR CAUSE

IF YOU ARE A JOURNALIST, ACTIVIST, OR FREEDOM FIGHTER FEARING CRIMINAL INDICTMENT FROM THE U.S. DEPARTMENT OF JUSTICE: THEN WE DEFEND YOUR LIBERTY, YOUR ACTIONS, YOUR CAUSE.

† The WBDL stands with those brave souls willing to act against and expose the damaging corporate and political forces injuring our democracy.

† The WBDL provides fierce and total criminal defense. We lawyer aggressively, speak out on your behalf, and go to war for you in both the court of law and public opinion.

† We are a team of expert criminal defense attorneys who have developed protocols to safeguard your confidentiality. Your safety and security are paramount. From pre-indictment strategy to innovative litigation, we fight to protect you and defend your rights at every stage.

PHONE 505-467-8288

Begin by contacting The Law Office of Jason Flores-Williams at 505-467-8288. Do not email.

The WBDL is a group of private attorneys that strives to limit defense costs via grassroots support and donation.

Jay Leidenman is not involved in the legal work involving the CloudFlare subpoena. He has a legal conflict due to his prior representation of Barrett Brown.

Posted by Jay Leidenman at 9:57 AM

Recommend this on Google



Free Barrett Brown
@FreeBarrett_

#FreeBB wepay.com/donations/free...
admin@freebarrettbrown.org · <http://freebarrettbrown.org>

670 TWEETS
757 FOLLOWING
1,372 FOLLOWERS
Follow

Tweets



Claire @Shnarf 40m
Barrett illustration done ~ @freebarrett_ @BarrettBrownLOL
[@ProjectPM2013 pic.twitter.com/5HiRO0lr4](http://ProjectPM2013.pic.twitter.com/5HiRO0lr4)
pic.twitter.com/nc8lPpG0vZ
Retweeted by Free Barrett Brown
[View photo](#)



Kenneth Lipp @kennethlipp 9h
And if you had an account on wiki.echelon2.org, no matter how small your contribution, the stakes could not be higher for all of us
Retweeted by Free Barrett Brown
[Expand](#)



Kenneth Lipp @kennethlipp 7h
I agreed to append my name as an intervenor in the motion as it would constitute an undue invasion of my privacy.
Retweeted by Free Barrett Brown
[Expand](#)



Kenneth Lipp @kennethlipp 7h
I'm signing on as intervenor in the motion to quash the subpoena to Cloudflare for echelon2.org domain info in the Barrett Brown case.
Retweeted by Free Barrett Brown
[Expand](#)



Dustin M. Slaughter @DustinSlaughter 4h
Friend @kennethlipp joins fight against US Attorney Heath's invasive subpoena of @ProjectPM2013 domain:
kennethlipp.wordpress.com/2013/04/03/ema... #FreeBarrett
Retweeted by Free Barrett Brown
[Hide summary](#) [Reply](#) [Retweet](#) [Favorite](#) [More](#)

Email to Attorney Jason Flores-Williams Regarding the Motion to Quash...
By Kenneth Lipp @kennethlipp

Last night I was contacted by a friend who knew I had been involved in the ProjectPM wiki and other elements of the Project's public operations in the winter/spring of 2011. Apparently the prosecut

[WordPress.com](#) @wordpressdotcom Follow

5 RETWEETS 2 FAVORITES 

9:03 AM · 3 Apr 13 [Details](#) [Flag media](#)



Free Barrett Brown @FreeBarrett_ 2h
@GoldieSev Seems like you took my being busy working on this as lack of enthusiasm and unfollowed me... please have more patience.

Attachment C

 **Free Barrett Brown** @FreeBarrett_ 2h
@GoldieSev Seems like you took my being busy working on this as lack of enthusiasm and unfollowed me... please have more patience.
View conversation Reply Retweet Favorite More

 **Jay Leiderman** @JayLeidermanLaw 2h
#WBDL CHALLENGES GOVERNMENT SUBPOENA (CloudFlare/Barrett Brown Case)
jayleiderman.blogspot.com/2013/04/vbdl-c...
Retweeted by Free Barrett Brown
Expand

 **Free Barrett Brown** @FreeBarrett_ 3h
@blumo0n @anon_pinko @Ghostpickles @anonopshispano Real name is only needed for attorney, may be anonymous when represented in the motion.
View conversation

 **Goldie Sev** @GoldieSev 4h
I datamined #FBI & #DHS names/position/email out of #HBGary & put it on #ProjectPM wiki. @BarrettBrownLOL has since been charged & jailed...
Retweeted by Free Barrett Brown
Expand

 **Free Barrett Brown** @FreeBarrett_ 4h
Press release plus motion to quash and intervene CloudFlare subpoena for #ProjectPM: freebarrettbrown.org/ProjectPM_rele... freebarrettbrown.org/BB_motion.pdf
Expand

 **Free Barrett Brown** @FreeBarrett_ 4h
@GoldieSev Not at all, we've been trying to contact you. please DM me again.
View conversation

 **Kevin Gosztola** @kgosztola 6h
Barrett Brown case: CloudFlare subpoenaed by US govt to get data & info from activists associated w/ Brown bit.ly/Z1Ex6U
Retweeted by Free Barrett Brown
Expand

 **Free Barrett Brown** @FreeBarrett_ 13h
BB's defense fund has accepted #Bitcoin, now worth \$120, since day one, but only one donation so far.
1FreeBBjTK5XXXsnjYB8foyFhGGHoajpRF
Expand

 **Jay Leiderman** @JayLeidermanLaw 16h
Due to my prior representation of BB I have a conflict and I am not personally involved in opposing the CloudFlare sub in BB's case.
Retweeted by Free Barrett Brown
Expand

 **Free Barrett Brown** @FreeBarrett_ 16h
See paragraph 7 of the latest @kgosztola article for some preliminary information: dissenter.firedoglake.com/2013/04/02/leg...
Expand

 **Free Barrett Brown** @FreeBarrett_ 18h
Press release regarding the subpoena of CloudFlare for information on #ProjectPM, and legal efforts to fight it, is due for tomorrow.
Expand

 **Free Barrett Brown** @FreeBarrett_ 18h
@Asher_Wolf In need of intervenors for the motion, anyone else who had an account on the echelon2 wiki & is willing to be named. Contact me.
View conversation

Sebastiaan Provost *Smile and wave boys, smile and wave!*

April 9, 2013

- in Uncategorized
- Leave a Comment

The day I received a subpoena...

I was recently contacted by CloudFlare that the Dallas Court handling Barrett Brown's case has issued a subpoena ordering them to release all information regarding echelon2.org (Project PM Wiki) and also information about all other domains and services linked to the same CloudFlare account (Link to the subpoena: <http://cryptome.org/2013/04/fbi-cloudflare-subpoena.pdf> (<http://cryptome.org/2013/04/fbi-cloudflare-subpoena.pdf>)).

I was utterly surprised by this for several reasons. First of all I should make clear that I did not actively participate in Project PM, I merely decided to host the domain with my CloudFlare account and to maintain the server the wiki was being run on.

Examining the site one will quickly realize that its content is gathered from publicly available sources on the Internet, none of it looks illegal even by the most restrictive laws.

Basically echelon2.org is a very specific wiki, aimed to collect information and research about the global intelligence community.

I outright refuse to believe that the court has any reason to ask for the information listed in the subpoena in regards to Barrett's case.

Echelon2.org did never contain any information regarding this case, no links to material allegedly stolen from Stratfor, nor anything about Barrett allegedly threatening an FBI officer.

Moreover, as a technical admin I did act in every responsible manner, managing a domain and server that is legal by every set of democratic laws that I can imagine.

For this reason I decided to get legal defense and fight this publically. It cannot be right that the government can issue subpoenas at will for about any reason they can think of.

This endangers journalists, researchers and generally the right for free speech on an alarming level.

~ Sebastiaan Provost

Tags: Law, Internet

Sebastiaan Provost

Blog at WordPress.com. Theme: Skeptical by WooThemes.

Attachment 