UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	
-vs-	Case No. 1:10-cr-485
JEFFREY ALEXANDER STERLING, Defendant.	

HEARING ON MOTIONS

July 7, 2011

Before: Leonie M. Brinkema, USDC Judge

APPEARANCES:

William M. Welch, II, James L. Trump and Timothy J. Kelly, Counsel for the United States

Edward B. MacMahon, Jr., Barry J. Pollack and James Holt, Counsel for the Defendant

The Defendant, Jeffrey A. Sterling, in person

Joel Kurtzberg, David N. Kelley and Peter K. Stackhouse, Counsel for James Risen

THE CLERK: Criminal case 10-485, the United States of America versus Jeffrey Alexander Sterling.

Will counsel please note their appearances for the record.

MR. WELCH: Good morning, Your Honor. William Welch on behalf of the Government.

THE COURT: Good morning.

MR. KELLY: Tim Kelly on behalf of the Government. Good morning, Your Honor.

MR. WELCH: Good morning, Your Honor. Jim Trump.

THE COURT: Good morning, Mr. Trump.

MR. MacMAHON: Good morning, Your Honor. Edward MacMahon with Barry Pollack and James Holt for Mr. Sterling, who is present.

MR. POLLACK: Good morning, Your Honor.

THE COURT: Good morning.

MR. STACKHOUSE: Good morning, Your Honor. I am Peter Stackhouse, I am local counsel for James Risen. And David Kelley and Joel Kurtzberg are also representing Mr. Risen.

MR. KURTZBERG: Good morning, Your Honor.

MR. KELLEY: Good morning, Your Honor.

THE COURT: Good morning. All right. We have before us today the Government's motion in limine to admit the testimony of James Risen, as well as Mr. Risen's motion to

quash.

The issues have been well briefed. They repeat to a significant degree issues that we had previously addressed in the grand jury proceedings.

As a preliminary matter, counsel, you are all aware that I had queried the Government as to whether it was interested in, for the purposes of having a complete record of these proceedings, removing the seal on the original motion to quash, the Government's response thereto, and my original memorandum opinion during the grand jury process.

Now, the memorandum opinion has been unsealed, and I believe it is almost entirely now unredacted and has been available publicly, correct? Yes, Mr. Welch?

MR. WELCH: Correct, that's right.

THE COURT: All right. The only reason I had asked the Government whether or not it made sense given the significance of the issues raised, and just to give context to that opinion, whether it made sense to have the pleadings that surrounded it also made public, was why I issued the order that I did.

I did receive, we have received the Government's opposition to that request, rightfully referring to the fact that grand jury proceedings are secret. I really, I don't believe have heard any position from the defendant or from Mr. Risen.

But it's also true, with the Court's memorandum opinion being publicly available, I think there is probably enough public access to that issue at that level, and now the issue has been reraised, the same basic legal issues are involved in the current motion to quash and the Government's motion in limine. So, I think there is enough public access.

But if anyone wants to address that preliminary issue first, I will be glad to hear from them? No.

MR. KURTZBERG: Your Honor, Joel Kurtzberg for Mr. Risen. I would just say that--

THE COURT: Mr. Kurtzberg, please be at the lectern.

MR. KURTZBERG: Joel Kurtzberg for Mr. Risen, Your Honor.

Mr. Risen would be in favor of unsealing the papers for the very reasons that Your Honor has already pointed out. We do think this is a matter of public interest.

We also think that given the fact that the opinion has been now made public, that there is already public access to the grand jury materials that are in question, so we can't see any legitimate need to keep those matters sealed at this point.

THE COURT: All right. Mr. MacMahon, do you have any position?

MR. MacMAHON: Your Honor, we have always maintained that we would want a public trial in this case. And I think

there has been substantial, I don't want to say cherry-picking of disclosure of the information that has now been kept under seal, some of which I touched upon in my opposition to the motion in limine. But the idea of keeping this matter sealed, but only to the extent that the Government wants to release it, I don't think is appropriate.

And so, just in furtherance of Mr. Sterling's public trial rights, I think that it has to yield at this time and get some of this information out. Specifically the letter that was referenced in here, is referenced, it was something that was at the grand jury, it's in your opinion, and all we do is get their spin on what it is.

So, I don't think there is a compelling need at this time, Mr. Sterling hasn't worked at the CIA for over ten years, and so I don't see any compelling need under Rule 6(e) to keep this under seal.

THE COURT: Again, this has nothing to do with CIPA matters, that's a separate issue. And to the extent that there are any classified materials involved in that round of litigation within the grand jury proceedings, that would not be unsealed.

MR. MacMAHON: No, I understand that, Your Honor. I am not asking any classified information be disclosed. That's for another day.

THE COURT: All right. I think in this case, and I

did look with care at the Government's argument, and I completely agree with the Government that the grand jury proceedings, the standard rule is they are secret, but there are all sorts of exceptions that are made to secrecy. Jencks material, for instance, often involves grand jury testimony of witnesses that does become available publicly during a trial.

The other thing is this does not involve grand jury testimony per se. I mean, we're not exposing a witness' testimony.

One of the arguments the Government made, which is correct, is that witnesses need to feel secure if they go into the grand jury, which is a secret proceeding, that to the extent possible that testimony will be kept secret. There is no invasion of that particular concern here.

I think given the fact that the Court's memorandum opinion, which summarizes some of that information that was in the pleadings, is already public, there has already been a partial disclosure.

And the rule of completeness-- And this is a case, and particularly this aspect of the case has significant public interest and is of public concern, this whole issue about the role of the media in modern society, the rights of the First Amendment, the concerns about privacy, and government security, are all significant issues that I think the public has a right to have access to.

So, I am going to overrule the Government's objection and direct that, obviously, with any CIPA matters that might be a problem being kept redacted, that to the extent the memoranda of the parties concerning that issue, the issue of the grand jury subpoena, be unsealed.

And I will request that the Government make sure that before we unseal anything, actually have the Government go ahead and file it so we are sure that there is no problem in that respect.

All right. Now, the next issue then is, unless there are any other preliminary issues, the other issue to address is the actual subpoena that is at issue today.

MR. KURTZBERG: I do have a preliminary issue, Your Honor, that I just would add.

THE COURT: Yes.

MR. KURTZBERG: It is very similar to the issue that was just addressed by this Court. Mr. Risen filed his papers in this matter under seal because the filing was made before Your Honor actually made the opinion public.

We would propose, and we can get Your Honor a copy of what we would propose specifically, that the briefs that we filed now be unsealed to the extent that the information that is in our briefs simply is recounting things that have now since become public.

THE COURT: I would assume the Government has no

objection to that. Again, Mr. Kurtzberg was not, has not been privy to any classified information. So, the only materials within their pleadings that did require sealing at one point were the things that revealed the Court's opinion.

MR. WELCH: In light of the Court's opinion, we would not object. I would add the following caveat. I do know, having reviewed the grand jury filings, at least in Mr. Risen's 2010 response, there is grand jury witness testimony mentioned.

So, to the extent that we will provide or unseal grand jury filings, we will do so consistent with the approach we took on the memorandum opinion, which is to redact names of witnesses from those filings.

As it relates to I believe Exhibits 1 through 10 of Mr. Kurtzberg's affidavit in his opposition to the trial subpoena, my memory is that there are no witness names except for the August 2008 transcript, which I believe does mention at least one witness by name. So, we are going to have to go through that and do a scrub of that.

THE COURT: And, Mr. Kurtzberg, you are not objecting to that?

MR. KURTZBERG: No, Your Honor.

THE COURT: All right, that's fine. All right, very good.

All right. Any other preliminary matters? No?

All right. Then I will go ahead and ask each side if

there is anything in addition to what's been presented in your pleadings that you want to raise with the Court this morning? Any additional legal argument, any additional factual issue that you think the Court ought to consider?

Mr. Welch.

MR. WELCH: Thank you, Your Honor. I am going to do a couple of brief points that I think are worth mentioning.

First, as it relates to the Branzburg precedent, I think it's important to note that the Supreme Court on two subsequent occasions has passed on Branzburg. We cited those opinions in our briefing papers, they are Cohen v. Cowles and University of Pennsylvania versus EEOC. But in each one of those cases they reaffirm the holding of Branzburg.

The second point that I want to make is on the issue of Fourth Circuit precedent and the issue of balancing. And I think it's important to talk about this particular subject in light of the fact that we are now postindictment and dealing with a trial subpoena. Because I think there is a tendency to conflate the idea of a compelling interest with this notion of compelling need. And I think they are two different and distinct concepts.

In the civil line of cases, as the Fourth Circuit addresses the issue of compelling interest, for example, in Ashcraft, and in some of the other civil cases, the discussion is uniquely factual. Meaning it has the flavor of compelling

need.

And the reason that's the case is because in civil cases, as the Court knows, it's a battle between two private litigants. And the government's interests, particularly in the criminal arena, don't present themselves. And so, there is no real discussion of compelling interest in the sense of the governmental interest, the state interest--

THE COURT: Well, the government can have an interest in civil litigation.

MR. WELCH: They can, but in those particular cases you don't really see it in the way that you do in the criminal cases.

And that's why I want to focus on that issue because in the criminal arena, in any balancing text that the Court may employ, the compelling interests at stake are not merely factual, it is not about need, but it is also about the interests behind the criminal justice system. It is the interest in the search for the truth. It's the interest in the jury having a right to every man's evidence. It's the interest in privileges being narrowly construed. It's the interest in certainty in jury verdicts.

So, there are a number of compelling interests that exist that may not be discussed as robustly and as fulsomely in the civil cases as exist certainly in this criminal matter.

And so, going back to Branzburg, clearly that's a

case where a compelling interest, meaning the government's interest in the enforcement of its criminal laws, and in this particular case the additional paramount interest of the enforcement of our national security concerns, these are compelling interests that necessarily will be, must be part of any balancing test that the Court may employ.

So, I wanted to stress that portion of any analysis that this Court may adopt or employ if that's the approach that the Court takes.

The second point that I wanted to make is simply in talking about some of the Eastern District of Virginia precedent. In the Court's memorandum opinion the Court cited the King case, excuse me, the Court cited the Regan case for the proposition of using balancing in a criminal case.

I would simply point the Court to pages 6 and 7 of that opinion. And in that opinion the District Court specifically noted that this was not a case where a trial subpoena was being served on the reporter in order to prove criminal conduct of the defendant. And the Court quite explicitly said, this is not a case where the reporter is being called as an eyewitness, but rather was being called for a different purpose.

And the Court went on to specifically say that its holding, almost identical to the Court's terms in its memorandum opinion, might very well be different had there been

an instance of a trial subpoena served on a journalist for purposes of proving the criminal conduct of the defendant.

THE COURT: And it said might be different, again, because, recognizing the need to do the balancing.

MR. WELCH: Understood.

THE COURT: Right.

MR. WELCH: And the last point I want to make is we clearly have advanced our position in the papers. And as the Court knows, we are staking out the position legally that Branzburg controls. That if the Court doesn't find that and employs the balancing test, we have articulated how that should be employed.

I do want to stress that from the review of the Branzburg opinion and the Fourth Circuit precedent, that the idea of harassment and confidentiality is a conjunctive test. Meaning it's not an or, it's an and.

And we find our basis for that in Justice Powell's opinion in Branzburg where he himself links the two concepts. As cited in the Court's memorandum opinion, Justice Powell clearly says that in employing balancing, it might, there might very well be a balancing where the confidential information is implicated without the legitimate need of law enforcement.

In other words, he himself links confidentiality plus the lack of a legitimate compelling interest or lack of a legitimate need.

So, we would stress that it is not a disjunctive test, but is a conjunctive test. That's the test that appears in Judge Powell's opinion, if that is the opinion that the Court is going to be relying upon in the sense of providing guidance, and that is also the test employed by the Fourth Circuit in Steelhammar, another criminal case, and in In re Shain.

THE COURT: Of course, as you know, I mean, Mr. Risen's papers do indicate an argument that not only is there a confidential agreement, I don't think there is any dispute about that, but also that there have been significant government interests in stifling his reportage in particular, while on a general basis an actual campaign against certain types of news reporting that probes into areas that the government doesn't want revealed.

MR. WELCH: It does.

THE COURT: That is certainly in the papers.

MR. WELCH: That is certainly in the papers. And the one comment or the response to that I would add is the trial subpoena is different. Certainly issued by a different line prosecutor. It's approved by a different administration.

And finally, I would even question the basis for which anyone would make a factual finding of the predicate of harassment.

In other words, it is somewhat ironic that the basis

for harassment is really a First Amendment expression of criticism of Mr. Risen's work. That is the theme of what appears in the affidavit. And the harassment can only be a linkage of that criticism with the actual service of the grand jury subpoenas or the trial subpoenas. In this particular case we're only dealing with a trial subpoena. There has been no linkage of those First Amendment expressions with what occurred in this particular matter.

THE COURT: All right. Now, if the Court determines, I mean, I have already-- The legal analysis of this issue I think has already been expressed by this Court in its memorandum opinion on the grand jury issue. We are in a different setting now because the burden of proof is higher on the Government, it's not just probable cause, which is all you needed in the grand jury. And as you know, I made the finding that based on the evidence that you all had proffered to the Court, there was more than abundant evidence to get an indictment because all you need is probable cause.

The other major difference between the trial setting and the grand jury setting is that hearsay evidence is permissible in the grand jury. Whereas it is not in the trial. And at least one of the witnesses to whom you have made a reference, I believe, would be not able to testify at the trial because that witness' testimony would be hearsay.

MR. WELCH: Correct.

THE COURT: And so, there is a different tension. And I suggested that in the original opinion, and that is quite clear at this level.

However, what I am not convinced I yet have sufficiently developed in this record is, because your papers don't present it, is I really don't know what your trial evidence looks like.

How can the Court, taking the balancing approach that I believe is the correct approach here, make the decision as to whether or not the evidence is necessary for the Government when I don't know what the Government's evidence is?

I mean, I have a general idea from the grand jury issues. And I don't mind telling you, it appears to be pretty strong evidence, very strong circumstantial evidence. And as you know, the standard jury instruction that the Court gives to a jury is that direct and indirect, or direct and circumstantial evidence is worthy of the same degree of credibility and the jury is to use all of it in coming to its conclusion. And so, you have a lot of indirect evidence.

In your papers, and even today, you have described Mr. Risen as being an eyewitness or your only direct evidence. I don't know if I can actually accept that representation on the record that I have before me because I haven't seen, given a proffer of what your trial evidence looks like.

MR. WELCH: Let me respond in two ways. The first is

a legal, the second is a factual.

The legal response is you can decide the issue because it goes back to my initial point, which is this notion of a compelling interest in the sense of the interests of the criminal justice system.

In that sense, the compelling criminal interests, the truth-seeking function and those sort of things, cause the First Amendment privilege, assuming it serves as the basis for the privilege, and I am not quibbling about that in the sense of this discussion, must cause it to yield in this context, in this criminal context.

So, in some sense the idea of need or a heightened need slips away in light of the reduced First Amendment protections vis-a-vis the compelling criminal justice interests, but also secondarily the grand jury allegations that the information disseminated was false and misleading.

So, from a strictly legal standpoint, as well as what the Court already knows, the Court can issue its ruling.

But from a factual standpoint, the presumption or the basis for the Court's observation is in some sense an observation that we lawyers often engage in. There is no difference between direct and circumstantial evidence. That's what the jury instruction says. That's what the Courts of Appeal say repeatedly. But that's different for 12 people who don't study law books and come in invariably for the very first

time to hear a criminal trial.

And it reminds me of what Justice Souter said in U.S. versus Old Chief where he talks about the reasonable expectations of jurors and he talks about the burden of proof on the Government in how trials are not syllogisms, but are stories that need to be laid out.

And there is a difference between direct evidence and circumstantial evidence. I hate to use this example, but I think we all know the difference given what happened in Florida three days ago.

So, as lawyers we can stand up and talk about the fact that there is no difference. From a practical standpoint as a former prosecutor, I know the Court knows there is a fundamental difference when you're trying to put a case on.

So, I think the Government is entitled to put on its direct evidence where available, where privileges must yield in light of the compelling criminal interests at stake, because a jury is entitled to know the information. And there is this truth-seeking function in which there should be a certainty about the verdicts.

THE COURT: All right, thank you.

All right, let me find out, Mr. MacMahon, do you have anything you want to argue first?

MR. MacMAHON: Thank you, Your Honor. We will rest on the pleadings that we've filed. It's obvious from your

questions that you read what we filed as to the speculative nature of at least a motion in limine. And as to the subpoena, we don't take any position on that.

THE COURT: Well, let me ask you a question. In Mr. Risen's pleadings, I am looking at pages 45 and 46, he has agreed to testify to a limited degree in this trial. And the four areas that he has agreed to testify to are: Number 1, that he wrote a particular newspaper article or chapter of a book. 2, that a particular newspaper article or a book chapter that he wrote is accurate. 3, that the statements referred to in his newspaper article or book chapter as being made by an unnamed source were in fact made to him by an unnamed source. And 4, that statements referred to in his newspaper article or book chapter as being made by an identified source were in fact made to him by that identified source.

All right. If Mr. Sterling had not been the source of those materials, and Mr. Risen is in the courtroom and had testified on direct to these four categories, don't you think you could stand up and ask him, Mr. Risen, is Jeffrey Sterling the unidentified source you've described in your testimony?

MR. MacMAHON: Well, Your Honor, I don't want to speculate as to how the trial would go and as to whether I would accept the stipulation from Mr. Risen if he went forward.

THE COURT: But if you did not ask that question, then my second question to you is, if you did not ask that

question, so Mr. Risen did in fact testify to those four areas, you chose not to cross-examine him, can the Government at the end of the case argue about that?

MR. MacMAHON: If I didn't cross-examine any witness, they could argue about it. Mr. Sterling has the right to make the Government prove their case and produce no evidence whatsoever.

So, if they wanted to argue that that was, that I had made this glaring error or there is an inference that could be drawn --

THE COURT: That's the question.

MR. MacMAHON: -- because I didn't ask him, that would be up to the Government to do that.

THE COURT: And don't you think that that question and asking a Northern Virginia, smart jury, because we don't have stupid juries in this jurisdiction, they are real smart, would understand clearly the inference of that question?

MR. MacMAHON: I wouldn't-- My luck with juries in this court, Your Honor, I am not exactly sure I am in a good position to answer that. But if that's the way it goes, that's the way it goes.

But I don't think at this stage in time that it's fair or appropriate to ask what we are going to do as a defense strategy, what we intend to do, evidence to put on or anything in the realm, in this motion.

THE COURT: All right. Mr. Welch or Mr. Trump or any of the three of you as prosecutors, do you see any reason why you could not make that argument to the jury? That that would in any respect tread on the presumption of innocence or on the shifting of burden concerns?

MR. WELCH: Meaning if there is a failure to cross-examine on essentially the authentication issues?

THE COURT: Well, no, I mean, on really the core issue. Because I think within the scope of what Mr. Risen has agreed to testify to, that question could be asked. It's not asking for anyone to be identified. It's for someone to be nonidentified, so to speak.

MR. WELCH: Correct. And--

THE COURT: And, therefore, if the question were not asked, don't you think you as the prosecutor could argue the inference of the failure to probe the witness on that issue?

MR. WELCH: Yes, I think we could.

THE COURT: And going one step further, it's my understanding, and I will let Mr. Risen's counsel address this issue, that the newsman's privilege can be waived by the source.

In other words, if I gave a confidential statement to Mr. Risen under the agreement that he would not reveal that confidence, and then I say to him, go ahead, you can reveal it, that's the end of it. Mr. Risen cannot independently stand up

and say, no, Brinkema, I don't want to reveal you as the source.

MR. WELCH: With all due respect, I don't think that's the law. I think if the source agrees to release the reporter, the journalist from the privilege, it lessens considerably the First Amendment issues, the First Amendment protections. I don't believe, and I would defer to Mr. Kurtzberg on this because I don't think I am an expert on it, but I feel like I know it pretty well, I don't think that would cause an express or absolute waiver of it.

THE COURT: All right. Mr. Kurtzberg, now you are on. Answer that question first for me, please.

MR. KURTZBERG: I am happy to, Your Honor.

I don't believe that it is correct that a source or an alleged source can waive the privilege. The courts that have decided that issue or that have addressed that issue have I believe universally held that it is the journalist's privilege, and it is only the journalist who can decide whether or not to waive it.

So, there are certain instances publicly where a journalist has said, I am going to waive because my source released me from my promise, but it is always the journalist who has the decision to make as to whether or not that the privilege would be waived.

THE COURT: In the context of a criminal case, which

this is, if someone who was not a source were to want to ask a reporter, not to indicate who the source was, but to confirm that he or she was not the source, do you think the newsman's privilege would shield that reporter from the obligation to at least answer that question?

MR. KURTZBERG: I believe that it might, Your Honor. It depends very much on the context. All of this analysis is very context dependent.

But the reason why it might is because if those types of questions were allowed, then by a process of elimination they could be asked repeatedly to a journalist. So, can you rule out Person X. And the next person comes along, can you rule out Person Y. Can you rule out Person Z.

And some point if those questions were permitted, effectively the journalist is being asked to make very clear who the source is or isn't. So, I do believe that it could trigger the journalist's privilege.

THE COURT: But it depends on the context.

MR. KURTZBERG: I do believe all of this depends on context since we are talking about a balancing test, Your Honor.

THE COURT: And if there were in fact no other major contenders as the source, and so the one question that is being asked is, am I the source, that answer could be done?

MR. KURTZBERG: Again, I think it depends. It

depends upon the context. But I do think that as a general matter Mr. Risen's position is that once you go down that road of identifying this person is or is not a source and confirming the truth of whether a person is or is not a source, you've opened the door to any questions about whether someone else is or is not the source.

And so, I do think that even in that context, that it may trigger the journalist's privilege, and the balancing would need to be done.

THE COURT: All right. I will let you make your presentation.

MR. KURTZBERG: Sure. Your Honor, I would like to just highlight a few points for you that aren't necessarily expressly addressed in the papers.

The first is that I don't think that the Government ever really comes to grips with the burden of proof that is placed on them in performing the relevant balance. And I would like to highlight just a few examples of that for you, one of which you touched upon in your questions to Mr. Welch.

You talked about the fact that this is a different setting than the grand jury setting. And most notably that there are hearsay exceptions or that hearsay is permitted in that context, is not permitted at trial unless there is an applicable exception. But what the Government's papers fail to do-- And you highlighted that there may be one witness, for

example, that was referenced in your opinion, not by name, but that may not have admissible testimony. What the Government hasn't done is made an affirmative showing, as they are required to do, that that testimony is unavailable.

And in fact, as to two witnesses, if you look at their reply brief at page 26, they suggest that there are two witnesses that may have inadmissible testimony absent some exception. They refer to testimony of an ex-girlfriend of Mr. Sterling and then to another witness that was referred to in Mr. Risen's papers.

But what the Government hasn't done, as we believe they are required to do, is set forth what their case is going to look like. And the requirement that they show that there aren't reasonable alternatives to Mr. Risen's testimony, I agree, Your Honor, how can you weigh and do the balancing if they have not made a motion in limine first to say that, okay, there is hearsay testimony from these two witnesses, here is why it should come in.

I mean, I think there are arguments that can be made as to why hearsay in the two examples they give in their reply brief on page 26, that that testimony might be admissible. And it is not my job as the attorney to Mr. Risen to come here and say look, here are the reasons why that potential hearsay testimony is admissible, because the burden of proof is on them.

They needed to come to you and say, the reporter should be the last resort, not the first resort. Why this is the first motion in limine that I am aware of as to a witness' testimony coming in, and it's of a reporter, before you are getting a motion in limine that hearsay evidence from other people should come in, I don't understand.

And in fact--

THE COURT: Well, you have got Crawford now. You have got very strong Supreme Court law as to the ability to bring hearsay evidence into a criminal trial. Pre-Crawford you could use 804, the residual hearsay exceptions, and probably most of that would have come in in this case, but you can't do that anymore.

So, I think that argument probably wouldn't fly.

MR. KURTZBERG: But, Your Honor, I believe, first of all, let's just take the two examples. They actually cite in their papers as to the testimony of Mr. Sterling's ex-girlfriend, suggest that it wouldn't be admissible because they cite to a Fourth Circuit case about the marital privilege.

And in fact, if you look at the case they cite, the case holds the exact opposite. It holds that if you are not married, even if you have been living together I believe for 26 years in that case, the marital privilege doesn't apply.

So, the Government finds itself in this odd position I think of actually making arguments to you which I think on

their face are wholly unpersuasive that potential evidence they have doesn't come in.

And my point to you is not that you can decide right here and now that that evidence does or does not come in, it should be fully briefed and that the burden is on the Government. If they want to say, we don't have access to enough evidence to prove our case and we need Mr. Risen's testimony because we believe it will prove our case, they have a burden. Their burden is to come in here and show you that there are no reasonable alternatives.

I don't see how they can meet that burden if they haven't come in, fully made the arguments, briefed them, allowed the defendants to fully brief a response, and then have Your Honor make an informed decision about whether a particular piece of testimony is admissible or not.

So, in that sense, this motion should be denied on that ground alone because the burden is on them to show you that they don't have these other sources of testimony. And they haven't done that at all.

In fact, they don't really show you anything about what their case or their evidence at trial is going to look like, as you pointed out in your questioning. They don't have anything. They have no affidavit. They have no declaration. Nothing that they have submitted to the Court to demonstrate this is what our evidence is going to look like, this is why we

need the testimony of Mr. Risen.

And in fact, we can be perfectly clear, in the grand jury context there was a declaration submitted to the Court that did make such a showing or purported to make such a showing. They haven't even elected to do that in this context.

Second point. The Government fails to show that Mr. Risen's testimony is critical or necessary to the case as we believe that it must under Fourth Circuit law.

Now, the Government looks at this prong of the LaRouche balancing on a general level. Mr. Welch just got up here and said, you have to look at things about a compelling interest along the lines of the government's interest in law enforcement, for example. Their interest in making sure that national security, the national security interests that are implicated by enforcement of the laws.

All of those things we agree are part of the balance, but where the Government is perfectly silent is about how that prong applies to the specifics of this case.

So, all they do in analyzing that third prong, the compelling interest prong, is say, well, this is a criminal trial context and, therefore, those interests are very weighty.

But that's not what the case law says. That's not what this Court found, the kind of balancing that needs to be done. I mean, look at the balancing that you did when we were at the grand jury level. You looked at the specifics of the

evidence of the case to see if there was in fact a compelling need. They have made no showing of that here. They have set forth nothing. And again, the burden is on them to do that.

And then secondly, there is a legal dispute about what that third prong requires. And we say that the Fourth Circuit case law makes clear that the compelling interest in the information prong requires them to show that the testimony they seek is critical or necessary to its case. And we believe this is clear from the cases that analyze the LaRouche balancing test, as well as from LaRouche itself.

The most notable case is the Church of Scientology case, a case that this Court cited in its opinion about the grand jury subpoena. That case interpreted the LaRouche balancing test. The Government tries to distinguish that case in its papers and says, well, it is not relevant because it is a civil case.

Well, LaRouche itself was a civil case. And that's besides the point. LaRouche set forth the balancing. And in Church of Scientology the Fourth Circuit interpreted how should that balancing be done.

Church of Scientology makes clear that the information that is sought must be, quote, critical to the case in order to compel disclosure under the compelling interest in information prong. It is right there in the case, that that is what the law requires.

But then if you look at LaRouche itself, LaRouche itself set forth the three-prong balancing test, and it cited to one case in support of the three-prong test that it said would be an aid in the balancing. That case was a Fifth Circuit case called Miller versus Transamerican Press. If you look at Miller, what Miller says is that in order to compel testimony from a reporter, a party must show, among other things, that, quote, knowledge of the identity of the informant is necessary to the proper preparation and presentation of the case.

So, the Government argues that Miller does not impose a requirement that Risen's testimony about his confidential source or sources be necessary, but that's in fact exactly what the decision says. It basically said, if you look, it was a defamation case, it was a civil case in that context as well, but it found that, quote, the only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity.

So, if you look at Church of Scientology, you look at LaRouche itself and the cases that it relied on, it's clear that this notion that the testimony must be critical or necessary to the case is a requirement.

And if you look to other circuits, it is also

supported by the case law of other circuits even in the criminal trial context. We cited to United States versus Burke, a Second Circuit case that held that the law in this circuit is clear, this is a quote, to protect the important interests of reporters and the public in preserving the confidentiality of journalist's sources, disclosure may be ordered only upon a clear and specific showing in the criminal trial context that the information is highly material and relevant, necessary or critical to the maintenance of the claim and not obtainable by other available sources.

The Government in this case does not even claim to make such a showing. Nor can it. All the Government says, and all that they admit that they can say, if you look at their opening brief and their reply, their opening brief at page 5, their reply at page 21, they say that Mr. Risen's testimony will simplify the trial and allow for an efficient presentation of the Government's case.

But that is not even close to what is required for them to satisfy their burden of compelling Mr. Risen's testimony.

So, they have come forward with no evidence that there aren't these alternative sources and setting forth the evidence what they expect to show at trial even though the burden is on them. And they have come forward with no evidence of how Mr. Risen's testimony is absolutely critical or

necessary to their case in light of all of the what you have described as very strong circumstantial evidence that they say that they have at this point.

To make this motion in limine and seek a ruling that the reporter has to testify before it is even clear what else is out there, is backwards. The case law is clear that the reporter should be the last resort if they need them at all, not the first resort as is the case here.

The last thing I would note is, and I don't think I am going to take Your Honor through all of the evidence that, the circumstantial evidence that you have described, but I will say this. The evidence that the Government has claimed to have-- And we have not seen all of it. I would note in particular that this Court concluded in its opinion at page 26 that in assessing the circumstantial evidence, that that evidence showed that, quote, very few people had access to the information in Chapter 9, and Sterling was the only one of those people who could have been Risen's source.

That's what this Court concluded after assessing the circumstantial evidence. And in particular, the Court cited to paragraphs 110 through 130 of the Bruce declaration in support of that proposition.

Well, we went to our copy of the Bruce declaration, which I understand has still not been released or is not public, but our version of the document at this point is still

largely redacted as to those paragraphs. That I believe there are, some of those paragraphs have been unredacted for us, the very beginning of paragraph 110. But almost the entirety of that presentation of whatever evidence it is that the Government claims to have that led this Court to believe that Sterling was the only one of the people who had access to the information that could have been Risen's source, at least that it appeared that way based on the strong circumstantial evidence, well, if that statement is true, then there is no question that the balancing should come out the same in this context, even in the context of a criminal trial, because the testimony is not and cannot be critical or necessary to the case.

So, you look at that third prong, the compelling interest prong, not only on the general level-- Yes, they have an interest in law enforcement. We have an interest in freedom of the press and ensuring that information flows to reporters. And we have presented a lot of evidence that a rule that allowed or forced Mr. Risen to testify would, would impede the flow of that information.

Those interests need to be balanced, but not just in the abstract, not just because they have an interest in enforcing laws and we have an interest in freedom of the press, but they have failed to show you specifics in this case. And under the relevant case law, the burden is on them to make that

showing before they are entitled to any order that would compel them as to anything.

I just would add one other last point, and it's on the authentication testimony that Your Honor has discussed.

Mr. Risen has expressed a willingness to testify as to the topics, and you read them into the record just a few moments ago. But I also would suggest that, you know, if they-- They have to show that they need that testimony.

And, for example, what they haven't shown is that there couldn't be a stipulation that Mr. Risen wrote those chapters or the articles or whatever, and that he stands by the truth of them. I don't know if they have explored that with the defendant.

But again, the case law requires them to make an affirmative showing that the testimony is needed.

So, yes, Mr. Risen does stand ready to confirm what he outlined in his affidavit and in our briefs, but I would still suggest that if it's possible for there to be some stipulation between the parties that would just say, look, no one is going to dispute the authenticity of your story, that even that testimony might not be necessary.

So, those are my only points, Your Honor.

THE COURT: All right, thank you.

Mr. Welch, did you want to respond?

MR. WELCH: A couple of brief points.

First, on the issue of balancing. The one point that I would make is in our reply we carved out five subject areas that we say are not subject to any privilege because either they are not confidential or they have been waived.

So, to the extent there is an argument about balancing, there are five are discrete areas of his testimony, including authentication, that any balancing simply wouldn't apply to. You just don't get to claim privilege for that which is not privileged to begin with.

THE COURT: Well, beyond the four areas that he has agreed to testify to, what do you have left?

MR. WELCH: We have authentication.

THE COURT: Right.

MR. WELCH: The second area is when. Meaning when did he receive the information. He submitted an affidavit two, three weeks ago saying that he received the information appearing in Chapter 9 in 2003.

So, why he doesn't want to tell a jury of 12 when he has made that representation to billions, I don't know. But he continues to affirm that he can't tell the jury when he received it.

THE COURT: Go ahead, your next one.

MR. WELCH: The third issue is the 2004 letter found off Mr. Sterling's computer. We simply want to ask him whether or not he received it or not.

The fourth area is where, where did he receive the information.

The Court may recall back in the grand jury setting you had asked me whether or not venue is proven not only by disclosure but by receipt. And we can easily ask questions about where he received the information by asking him where he was or where his sources were. That discloses nothing.

And lastly, discrete questions about who is not a source.

So, there are at least five different areas that aren't subject to balancing at all, at least in the Government's position.

THE COURT: Well, the who is not a source, the need for that particular question, as I understand it, arises from suggestions by defense counsel that a theory of defense may be that the source was somebody else, identified actually as somebody on the Hill, correct?

MR. WELCH: Correct.

THE COURT: All right. Now, in fact although that has been proffered as a possible line of defense, if that is not in fact an issue that defense counsel raises in opening statement or during their case if they put one on, that information would be unnecessary.

MR. WELCH: I would disagree with that for the following reason. Bottom line, we have to prove identity. We

have to prove it beyond a reasonable doubt. And that means as much proving Mr. Sterling as the source as eliminating other suspects.

THE COURT: But you know who the other proposed suspects are. And they are going to be testifying, aren't they?

MR. WELCH: Perhaps not all of them.

THE COURT: But you have the power to compel their testimony.

MR. WELCH: We do. And we have the power to compel their testimony. Whether or not they are going to be physically able to do so is another question.

So, this--

THE COURT: All right, that's one witness, but you have got some other ones as well.

MR. WELCH: I would say it is one witness we would ask the question about.

THE COURT: Well, you have the Hill people.

MR. WELCH: The Hill people are available.

THE COURT: And there is no privilege issue there.

MR. WELCH: No.

THE COURT: Because that particular question, that line of questioning as to who is not a source is a rebuttal question. It may never come up.

In other words, we don't know at this time what Mr.

MacMahon's defense is going to be. That may not be the defense. And we will not know that until the case is actually in progress, which the normal approach to a motion in limine that over the years I have learned is usually, with a few exceptions, the most intelligent approach is a hedged opinion.

Preliminarily granting or denying relief with the caveat that that decision could change depending upon what happens during the trial. And at least that particular line of questioning would be completely irrelevant if not raised as a defense.

There may be another defense in this case. The defense could be it's not national security information.

MR. WELCH: Correct.

THE COURT: The defense could be he was entitled to have this information. The defense could possibly be that he didn't cause the publication, it was Mr. Risen who made the decision three years after he had gotten the information to go public with the book.

I don't know what the defenses are, but those defenses would involve that particular need for that particular question.

MR. WELCH: And the answer to that is not entirely correct. And this is the reason why. Again, I will go back to the burden of proof argument, but I am not going to reiterate that. The other reason is the chapter, the book, is the

central piece of evidence in the case. I mean, it is the disclosure item. It is the item through which Mr. Sterling's statements get fed to the public.

And so, that's why this notion of simply entering into a stipulation is certainly a convenient notion, but it also is incredibly damaging, at least from the Government's perspective of putting on its case. And the reason why is it is true, excuse me, Chapter 9 is written from the perspective of the case officer, but Chapter 9 also includes comments, thoughts from Human Asset No. 1.

So, for example, you simply go to the second page of Chapter 9, and this is the italicized portions of page 194, excuse me: I'm not a spy, he thought to himself. Good Lord--

THE COURT: You need some glasses?

MR. WELCH: I am losing my eyesight. I'm not a spy, he thought to himself. I'm a scientist. What am I doing here?

So, that is simply one example of where at various times woven in through Chapter 9 there are these thoughts, that would be the thoughts of Human Asset No. 1.

So, if we don't put on affirmative evidence that Human Asset No. 1 or several other individuals were not the sources for those pieces of information, the jury is left to question, even if the defense has not presented, was Human Asset No. 1 a source or not. The Government has never proven it one way or the other. We have never heard anything

definitive that he was not.

And so, in some sense the best defense would be to say nothing and then in closing argument obliquely refer to it or just hope to assume that a very smart Northern Virginia jury would begin to do their due diligence and begin to say, my goodness, the Government didn't prove that Human Asset No. 1 was not the source.

And that's why some aspects of what are listed, I shouldn't say some aspects, but all aspects of items A through E that we have in our reply can't be left for rebuttal. It is part of the affirmative case that we need to put on. It's why a stipulation will not suffice in lieu of testimony.

THE COURT: All right.

MR. WELCH: Quickly, just two other points on the critical and necessary argument. Mr. Kurtzberg cited Miller. I would encourage the Court to look at Miller. I would encourage the Court to look at page 726. The Fifth Circuit in Miller on that page specifically notes that the First Amendment protections in a civil defamation case are greater than they would be in the criminal case.

So, Miller is not supportive of Mr. Risen's motion to quash.

The other case that he cited was Burke, a Second Circuit case, a criminal case. Burke is no longer good law. In U.S. versus Cutler, again cited in both Mr. Risen's motion

to quash as well as I believe in our opinion, Cutler confined Burke to its facts, essentially said that it wasn't good law. And you can find that at 6 F.3d at 73.

The last-- Well, just one moment.

The last point I do want to make is this notion of the Government putting forward a declaration or a proffer or those sorts of things. We have a detailed indictment. We have factual allegations made by a grand jury, established by probable cause. And the Court must accept those as true.

And that factual indictment, in light of the arguments that we have presented, I believe are sufficient for the Court to make the rulings that it needs to make.

THE COURT: All right.

MR. WELCH: Thank you.

THE COURT: Thank you. All right, first of all, Mr. MacMahon.

MR. KURTZBERG: Two small points, Your Honor.

THE COURT: Wait, wait, Mr. MacMahon first. Do you have anything you want to respond?

MR. MacMAHON: No, Your Honor.

THE COURT: All right. That's fine.

Now, Mr. Kurtzberg.

MR. KURTZBERG: Two very quick points. The subject areas that Mr. Welch identified where he says that there really is no balancing, I believe these are not, this is not new

ground, and I believe this Court already held in the grand jury context that Mr. Risen's confidentiality agreement with his sources or source extended beyond merely revealing the source's name, but also to protect any information that might lead to the source's identity.

And it also made various holdings as to the information available to prove venue and things of that nature. I don't believe there is a single category of information that they have identified that has not already been something that they were seeking earlier in the grand jury context.

The second point I would just make is about Burke. It is an overstatement to say that Burke is not good law. It is true that Burke's holding has been limited, but not for the proposition that I cited to Your Honor. And that is an important distinction.

So, yes, Cutler did basically say that it put limits on the holding of Burke, but as to whether or not the notion of the test applying, being critical or necessary to the case, that's the proposition that I cited to Your Honor, that is still good law, it is still good law in the Second Circuit.

And so, it's just not accurate to suggest that it has been overruled or that it is not good law on that point.

THE COURT: All right, thank you.

All right. Well, obviously, I am not going to give you an answer today. We will think about this and get an

opinion out to you as quickly as possible.

I will ask the Government to as quickly as you can get those grand jury materials unsealed and uploaded to the docket.

And I have now been putting those grand jury materials in this case, so they need to go from the DM number, which is how they were docketed initially, to be uploaded into the criminal number so they are publicly accessible.

All right. Anything further?

MR. MacMAHON: No, Your Honor.

MR. TRUMP: Judge, before you adjourn, may I speak with Mr. MacMahon about one matter to see if he wants to address it now?

THE COURT: Yes, sir. All right. Actually, I did want to speak to Mr. MacMahon about something at the bench anyway. So--

MR. TRUMP: There is a pending discovery motion that I guess we can talk about before--

THE COURT: Getting it docketed?

MR. TRUMP: It's been docketed. We've responded. I believe our response was filed yesterday. And it references some other matters relating to experts and scheduling, which I think we will take up with counsel, but we may have to either notice that discovery motion or discuss it at some point with the Court.

THE COURT: Is it that motion going to require a CIPA hearing?

MR. TRUMP: The motion and response I don't think go into any classified matters. But if we, if we have to dig into specific documents that are responsive or unresponsive, it would require CIPA.

THE COURT: All right. We can schedule it, if you need to, next week. The following week I am not available. And then I am pretty much available the rest of July and August.

MR. TRUMP: We will discuss all those matters and then get back with the Court.

THE COURT: All right. Mr. MacMahon, can you just approach? This is just for you.

NOTE: A sidebar discussion is had between the Court and Mr. MacMahon as follows:

[redacted]

NOTE: The side-bar conference is concluded; whereupon the hearing continues as follows:

THE COURT: Just so you all are not wondering, that had to do solely with a Criminal Justice Act administrative issue that nobody else has the right to know about, but I needed to take it up with Mr. MacMahon, that's all.

All right. If there is nothing further, we will recess court for the day.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/s/ Norman B. Linnell

Norman B. Linnell, RPR, CM, VCE, FCRR