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

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	**Case No. 1:10-cr-00485-LMB**
	)	
JEFFREY ALEXANDER STERLING,	)	
	)	
Defendant.	)	

DEFENDANT JEFFREY STERLING'S REPLY
TO THE GOVERNMENT'S OPPOSITION TO MR. STERLING'S
MOTION FOR ISSUANCE OF RULE 17(c) SUBPOENAS

Defendant Jeffrey Sterling, through undersigned counsel, replies to the Government's opposition to Mr. Sterling's request for the Court to issue four subpoenas to the United States Senate Select Committee on Intelligence (SSCI) and three former staff members of SSCI, returnable in advance of trial, pursuant to Federal Rule of Criminal Procedure 17(c). As noted in the Government's opposition, the parties are attempting to obviate the need for the Court to rule on this motion or, at a minimum narrow the issues, through a voluntary production of documents. Mr. Sterling files this reply to the Government's opposition so that the Court has the benefit of each party's position should the parties' efforts to obtain a voluntary production mooting the issues raised by the pending motion prove unsuccessful.[1]

[1] Mr. Sterling consents to Government's request in its opposition to the pending motion for the Court to holding the motion in abeyance until the SSCI has a chance to voluntarily produce the records Mr. Sterling seeks without the need for further litigation. Indeed, the process of communicating with the SSCI has already resulted in the identification of relevant documents that were previously identified by the Government and which SSCI has agreed to produce. If, however, it does not appear that this process will result in the SSCI producing all of the requested documents in a fashion that gives Mr. Sterling enough time to make meaningful use of these records before trial, Mr. Sterling will advise the Court and ask it to rule on the motion.

Mr. Sterling is charged with several crimes based on allegations that he is responsible for unauthorized disclosures of national defense information about "Classified Program No. 1" to a reporter whom the Government has now confirmed is James Risen. (*See* Indictment [DE 1].) Mr. Sterling has requested that the Court exercise its discretion under Rule 17(c) to order documents in the possession of the SSCI, Donald Stone, Vicki Divoll and Lorenzo Goco to be produced by August 17, 2011, two months before trial. Mr. Stone, Ms. Divoll and Mr. Goco were individuals who gained knowledge about this Classified Program No. 1, directly or indirectly from Mr. Sterling, who lawfully disclosed information to Mr. Stone and Ms. Divoll, who in turn briefed Mr. Goco. Mr. Sterling's lawful disclosure to Mr. Stone and Ms. Divoll occurred just weeks before the Central Intelligence Agency ("CIA") was contacted by Mr. Risen stating that he had obtained classified information about the same program.[2] Given the timing of Mr. Sterling's lawful disclosure to Mr. Stone and Ms. Divoll and Mr. Risen's apparent unlawful receipt of information about this program, documents pertaining to Mr. Sterling's lawful disclosure, what SSCI staff did with that information, and contacts between SSCI staff and Mr. Risen are critical to potential defenses that Mr. Sterling may pursue at trial.

Discussion

The Government has taken eight years to construct its case against Mr. Sterling. Mr. Sterling has a right to defend himself with information beyond what the prosecution has developed and produced to Mr. Sterling in discovery.

The Government, in its opposition, makes several arguments that are based on false assumptions, which predictably lead to flawed conclusions. The Government states that Mr.

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[2] Mr. Sterling met with Mr. Stone and Ms. Divoll as members of the SSCI on March 5, 2003. (*See* Govt Response fn 3.) In early April 2003, Mr. Risen allegedly informed the CIA that he had material relating to a story he was writing about Classified Program No. 1. (*See* Indictment [DE 1] at ¶ 39.)

Stone, Mr. Goco and Ms. Divoll each deny that they were the source for James Risen's book (Govt's Response at 3), but the Government provides no support for those claims beyond statements of the individuals themselves. (*Id.*) Likewise, in a proffer session during the Government's investigation of this case, Mr. Sterling also denied being the source. While the Government has previously represented to this Court that it investigated and eliminated potential sources other than Mr. Sterling[3], it would appear that this elimination was based on nothing more than cursory interviews and summary denials, without any examination of the documentary record. Having never itself reviewed the complete documentary record, the Government now seeks to preclude Mr. Sterling from obtaining access to the relevant documents.

The Government argues that Mr. Sterling, by seeking access to the relevant documents, is going on "a fishing expedition" and is not acting in good faith in seeking documents pertaining to contacts between the SSCI staff and Mr. Risen, since the SSCI staff members have denied providing information to Mr. Risen. What the Government omits is that, while Ms. Divoll has denied being a source for Mr. Risen, her statement in this regard has been contradicted by another witness who says that, shortly after Ms. Divoll met with Mr. Sterling about Classified Program No. 1, a decision was made by the SSCI to terminate Ms. Divoll's employment with the Senate because she breached SSCI confidentiality rules by providing information to Mr. Risen. This evidence plainly provides a proper basis for Mr. Sterling's request.

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[3] *See* Redacted Court Order Granting Risen's Mot. to Quash Grand Jury Subpoena (dated 11/30/10) ("The government has not presented even a remote possibility that anyone other than Sterling could be charged with disclosing this information.").

Argument

A. Mr. Sterling's Request Is In Good Faith And Is Not A "Fishing Expedition"

The Supreme Court has held that pretrial production by third parties pursuant to Rule 17(c) is appropriate where the moving party has shown that the documents are relevant and admissible, not otherwise procurable, necessary for the movant's case, and made in good faith. *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). To meet this burden, the defendant "must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id.* at 700. The defense will not rehash what its initial motion has already laid out, but wishes only to clarify its request under *Nixon* in light of the argument advanced by the Government in its opposition. The last facet of the *Nixon* test for issuing Rule 17(c) subpoenas requires that the movant's request is made in good faith and is not "a general fishing expedition" which is properly shown by providing a certain level of specificity. *Nixon*, 418 U.S. at 699, 700. A permissible use of the Rule 17(c) subpoena is indicated when the moving party can "reasonably specify the information contained or believed to be contained in the documents sought." *United States v. Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fla.) (referring to the contrasting situation where the prosecution had asked for audio tapes when the contents was completely unknown to them in the "hopes that something useful [would] turn up."); *see also United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1995) (where the movant was "hard-pressed" to *describe* what it hoped to find in the requested materials and did not even identify by name the requested material). Where a movant makes a specific request and informs the court as to what he believes is in the requested materials, courts have not held that request to be overbroad. *See e.g., United States v. King*, 194 F.R.D. 569 (E.D. Va. 2000) (where movant asked for the unedited recordings and interview notes of the subject

interview, as well as any other recordings of statements by or conversations with other known or potential witnesses to this case, the request was held to be sufficiently specific).

The requests that Mr. Sterling made were narrowly tailored to gather information that shows two things: (1) evidence that shows the knowledge of the relevant SSCI staff about Classified Program No. 1 attained through direct or indirect contact with Mr. Sterling; and (2) evidence of a connection between any of those staff members and Mr. Risen. The defense has been transparent as to why these documents are necessary, that is – Mr. Sterling lawfully transmitted information to these staff members about this program and soon after they had this information it was allegedly illegally disclosed to Mr. Risen.

Broader than the hurdle of specificity enunciated in *Nixon* is the requirement of good faith. The Government begins its brief by characterizing a statement from defense counsel that at least one of the Senate staff served as a source for Mr. Risen regarding issues discussed before SSCI as a "gross misrepresentation of the discovery materials." (*See* Govt's Response at fn 2.) In short, they claim the defense has made a request that lacks good faith. The prosecution then goes on to cite to *Ms. Divoll's* FBI 302 report where she denies ever contacting or giving information to Mr. Risen. (*Id.*) To the Government, it seems, if anyone other than Jeffrey Sterling denies being a source, that should terminate any further inquiry. The Government's rendition of the underlying facts notably failed to reference another FBI 302 report of the interview of another witness (referenced for purposes of this public pleading as "1st witness") who stated, unequivocally, that Ms. Divoll was *fired* from her position with the SSCI for *being a source* for Mr. Risen. The 1st witness was intimately involved in congressional matters.[4] Consideration of the 1st witness's FBI 302 report demonstrates that no "gross misrepresentation"

[4] This 302 report is classified, but defense counsel has provided copies of it and all of the 302 reports referenced below to the Court.

of the discovery provided to date relevant to the pending Rule 17(c) subpoena was made by the defense.[5]

In addition to the timing of the apparent unlawful disclosure to Mr. Risen on the heels of Mr. Sterling's lawful disclosure to SSCI staff and Ms. Divoll's other unauthorized disclosure of SSCI information that was received by Mr. Risen, there is additional evidence suggesting that SSCI staff were a source of information about Classified Program No. 1 to Mr. Risen. At the time of Mr. Sterling's lawful disclosure, he was represented by an attorney, Mark Zaid. As reflected in Mr. Zaid's 302, Mr. Risen called Mr. Zaid's office on April 3, 2003, inquired about Classified Program No. 1, and asked Mr. Zaid if he would facilitate a meeting between himself and Mr. Sterling, which Mr. Zaid declined to do. Mr. Zaid told the FBI that it was his understanding that Mr. Risen wanted to talk to Mr. Sterling about this Classified Program to confirm information *that Mr. Risen had heard about from some other source.*

When the discovery produced by the Government to date is reviewed in its entirety, rather than focusing as the Government does exclusively on Ms. Divoll's own statements, it is apparent that Mr. Sterling has a good faith basis for the pending subpoena. While the Government has chosen not to gather and review critical documentary evidence, Mr. Sterling should not be precluded from doing so. Indeed, that is the very purpose of the availability of the 17(c) subpoenas.

B. Mr. Sterling Can Use The Evidence From These Rule 17(c) Subpoenas To Do More Than Impeach Witnesses

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[5] In fact, in a second 302 report from the 1st witness, he explicitly states that he thinks it is possible that Ms. Divoll was the source of the leak. Further, there is another witness ("2nd witness") who characterized Ms. Divoll as being someone who had vendetta against the CIA and worked to make things difficult for the CIA on the Hill. That witness goes on to say that Ms. Divoll was known to brag about aspects of her classified work. To this point, the Government has not disclosed to Mr. Sterling and his counsel the two witnesses' last names. The Court should know that this information was requested as part of the First CIPA notice provided by the defense. (*See* Defendant's First CIPA Notice ¶¶ 7, 26, 27.)

Another specious assumption on which the Government relies is that Mr. Sterling can only "at best" use evidence from these subpoenas as impeachment material. (*See* Gov't Response at 8.) The Government predicts the defense will attempt to undermine testimony from Ms. Divoll or Mr. Stone if they are called as Government witnesses and argues the use of Rule 17(c) subpoenas for this purpose pretrial is generally insufficient to justify their issuance. *See Nixon*, 418 U.S. 701. But the Government overlooks the fact that the evidence sought could provide direct evidence that individuals aside from Mr. Sterling who possessed information about Classified Program No. 1 were in contact with Mr. Risen around the time of the alleged unauthorized disclosure. Specifically, much like the Government has created charts of phone calls between Mr. Sterling and Mr. Risen, the defense could make similar charts with phone calls between Mr. Risen and these SSCI staffers. Therefore, beyond merely impeaching a Government witness, such evidence is critical substantive defense evidence undermining the Government's theory that the information at issue was closely held national defense information and that Mr. Sterling was the sole person who provided information about that Classified Program to Mr. Risen.

CONCLUSION

For the reasons set forth above, Mr. Sterling has a good faith basis for seeking the early production of the documents he seeks pursuant to Rule 17(c) subpoenas. Accordingly, should the Court need to resolve this motion, it should grant Mr. Sterling's request for the issuance of the subpoenas.

Dated: August 2, 2011

JEFFREY A. STERLING
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(Attachments Remain Classified)

CERTIFICATE OF SERVICE

I hereby certify that on August the 2nd, 2011, I delivered an original of the following Defendant Jeffrey Sterling's Reply to the Government's Opposition to Mr. Sterling's Motion for Issuance of Rule 17(c) Subpoenas to the CISO as directed by the Classified Information Protective Order issued in this case.

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