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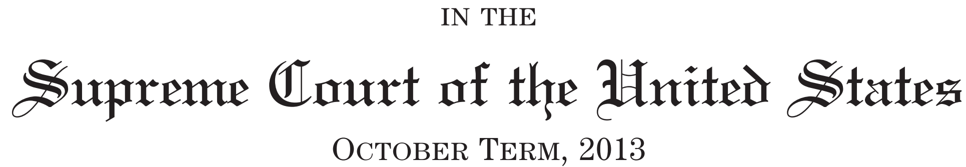

OCTOBER TERM, 2013

JAMES RISEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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January 13, 2014

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UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 11–5028

Argued: May 18, 2012
Decided: July 19, 2013

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

JEFFREY ALEXANDER STERLING,
Defendant-Appellee,

JAMES RISEN,
Intervenor-Appellee,

THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; ABC, INCORPORATED; ADVANCE PUBLICATIONS, INCORPORATED; ALM MEDIA, INCORPORATED; THE ASSOCIATED PRESS; BLOOMBERG, L.P.; CABLE NEWS NETWORK, INCORPORATED; CBS CORPORATION; COX MEDIA GROUP, INC.; DAILY NEWS, L.P.; DOW JONES AND COMPANY, INCORPORATED; THE E.W. SCRIPPS COMPANY; FIRST AMENDMENT COALITION; FOX NEWS NETWORK, L.L.C.; GANNETT COMPANY, INCORPORATED; THE HEARST CORPORATION; THE MCCLATCHY COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL PUBLIC RADIO, INCORPORATED; NBCU

NIVERSAL MEDIA, LLC; THE NEW YORK TIMES COMPANY; NEWSPAPER ASSOCIATION OF AMERICA; THE NEWSWEEK DAILY BEAST COMPANY LLC; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; REUTERS AMERICA LLC; TIME INC.; TRIBUNE COMPANY; THE WASHINGTON POST; WNET,

Amici Supporting Intervenor.

ARGUED: Robert A. Parker, United States Department of Justice, Washington, D.C., for Appellant. Joel Kurtzberg, Cahill, Gordon & Reindel, New York, New York; Edward Brian MacMahon, Jr., Middleburg, Virginia; Barry Joel Pollack, Miller & Chevalier, Chartered, Washington, D.C., for Appellees.

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The Washington Post; Robert A. Feinberg, WNET, New York, New York, for Amicus WNET.

Before TRAXLER, Chief Judge, and GREGORY and DIAZ, Circuit Judges.

Opinion

Affirmed in part, reversed in part, and remanded by published opinion. Chief Judge TRAXLER wrote the opinion for the court in Part I, in which Judge GREGORY and Judge DIAZ joined. Chief Judge TRAXLER wrote the opinion for the court in Parts II–V, in which Judge DIAZ joined. Judge GREGORY wrote the opinion for the court in Part VI, in which Chief Judge TRAXLER and Judge DIAZ joined. Judge GREGORY wrote the opinion for the court in Part VII, in which Judge DIAZ joined. Chief Judge TRAXLER wrote an opinion concurring in part and dissenting in part as to Part VII. Judge GREGORY wrote an opinion dissenting as to Parts II–V.

TRAXLER, Chief Judge:

Jeffrey Sterling is a former CIA agent who has been indicted for, *inter alia,* the unauthorized retention and disclosure of national defense information, in violation of the Espionage Act, 18 U.S.C. § 793(d) & (e). The indictment followed the grand jury's probable cause determination that Sterling illegally disclosed classified information about a covert CIA operation pertaining to the Iranian nuclear weapons operation to James Risen,

for publication in a book written by Risen, and that he may have done so in retaliation for the CIA's decision to terminate his employment and to interfere with his efforts to publish such classified information in his personal memoirs. Prior to trial, the district court made three evidentiary rulings that are the subject of this appeal. We affirm in part, reverse in part, and remand for further proceedings.

I. *Background*

A.

According to the indictment, Defendant Jeffrey Sterling was hired as a CIA case officer in 1993, and granted a top secret security clearance. As a condition of his hire, and on several occasions thereafter, Sterling signed agreements with the CIA explicitly acknowledging that he was not permitted to retain or disclose classified information that he obtained in the course of his employment, without prior authorization from the CIA, and that doing so could be a criminal offense.

In November 1998, the CIA assigned Sterling to a highly classified program intended to impede Iran's efforts to acquire or develop nuclear weapons ("Classified Program No. 1"). Sterling also served as the case officer for a covert asset ("Human Asset No. 1") who was assisting the CIA with this program. In May 2000, Sterling was reassigned and his involvement with Classified Program No. 1 ended.

In August 2000, shortly after Sterling's reassignment and after being told that he had not met performance targets, Sterling filed an equal

opportunity complaint alleging that the CIA had denied him certain assignments because he was African American. The EEO office of the CIA investigated Sterling's complaint and determined that it was without merit. In August 2001, Sterling filed a federal lawsuit against the CIA alleging that he had been the victim of racial discrimination, and seeking monetary compensation. Several settlement demands were rejected, and the lawsuit was dismissed in March 2004, following the government's invocation of the state secrets doctrine. We affirmed the dismissal. *See Sterling v. Tenet,* 416 F.3d 338, 341 (4th Cir.2005).

Sterling was officially terminated from the CIA on January 31, 2002, but he had been "outprocessed" and effectively removed from service in October 2001. As part of his termination, Sterling was asked to sign a final acknowledgment of his continuing legal obligation not to disclose classified information. Sterling refused.

On November 4, 2001, James Risen published an article in *The New York Times,* under the headline "Secret C.I.A. Site in New York Was Destroyed on Sept. 11." J.A. 655. A "former agency official" was cited as a source. J.A. 655. In March 2002, Risen published an article about Sterling's discrimination suit in *The New York Times,* under the headline "Fired by C.I.A., He Says Agency Practiced Bias." J.A. 156, 725. The article states that Sterling provided Risen with a copy of one of his CIA performance evaluations, which is identified as a classified document. The article also states that Sterling "relished his secret assignment to recruit Iranians as spies." J.A. 156.

In January 2002, in accordance with his non-disclosure agreements with the CIA, Sterling submitted a book proposal and sample chapters of his memoirs to the CIA's Publications Review Board. The Board expressed concerns about Sterling's inclusion of classified information in the materials he submitted.

On January 7, 2003, Sterling contacted the Board and expressed "extreme unhappiness" over the Board's edits to his memoirs, and stated that "he would be coming at ... the CIA with everything at his disposal." J.A. 35–36 (internal quotation marks and alterations omitted). On March 4, 2003, Sterling filed a second civil lawsuit against the CIA, alleging that the agency had unlawfully infringed his right to publish his memoirs. The action was subsequently dismissed by stipulation of the parties. *See Sterling v. CIA,* No. 1:03–cv–00603–TPJ (D.D.C. July 30, 2004).

The day after he filed his second civil suit, Sterling met with two staff members of the Senate Select Committee on Intelligence ("SSCI") and raised, for the first time, concerns about the CIA's handling of Classified Program No. 1, as well as concerns about his discrimination lawsuit.[1] According to a SSCI staff member, Sterling "threatened to go to the press,"

[1] CIA employees who are entrusted with classified, national security information and have concerns about intelligence programs or other government activities may voice their concerns, without public disclosure and its accompanying consequences, to the House and Senate Intelligence Committees, or to the CIA's Office of the Inspector General. *See* Intelligence Community Whistleblower Protection Act of 1998, Pub.L. No. 105–272, Title VII, 112 Stat. 2396 (1998).

although it was unclear "if Sterling's threat related to [Classified Program No. 1] or his lawsuit." J.S.A. 29.

Telephone records indicate that Sterling called Risen seven times between February 27 and March 29, 2003. Sterling also sent an e-mail to Risen on March 10, 2003—five days after his meeting with the SSCI staff—in which he referenced an article from CNN's website entitled, "Report: Iran has 'extremely advanced' nuclear program," and asked, "quite interesting, don't you think? All the more reason to wonder ..." J.A. 37, 726; J.S.A 31.

On April 3, 2003, Risen informed the CIA and the National Security Council that he had classified information concerning Classified Program No. 1 and that he intended to publish a story about it in *The New York Times*. In response, senior administration officials, including National Security Advisor Condoleezza Rice and Director of the CIA George Tenet, met with Risen and Jill Abramson, then Washington Bureau Chief of *The New York Times,* to discuss the damage that publication would cause to national security interests and the danger to the personal safety of the CIA asset involved in the operation. Several days later, Ms. Abramson advised the administration that the newspaper would not publish the story.

Approximately three months later, Sterling moved from Virginia to Missouri to live with friends. During this time, 19 telephone calls took place between the *New York Times'* Washington office and Sterling's friends' home telephone number. Sterling's friends denied any involvement in these calls. A forensic analysis of the computer Sterling used during this

time revealed 27 e-mails between Sterling and Risen, several of which indicated that Sterling and Risen were meeting and exchanging information during this time period.

Although *The New York Times* had agreed not to publish information about Classified Program No. 1, Risen published a book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War* "), in January 2006, which did disclose the classified information. J.A. 721. Specifically, Chapter 9 of the book, entitled "A Rogue Operation," reveals details about Classified Program No. 1. J.S.A. 219–32. In the book, Risen entitled the program "Operation Merlin" and described it as a "failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapon blueprints to Iran." J.A. 722. Risen does not reveal his sources for the classified information in Chapter 9, nor has he indicated whether he had more than one source. However, much of the chapter is told from the point of view of a CIA case officer responsible for handling Human Asset No. 1. The chapter also describes two classified meetings at which Sterling was the only common attendee.

B.

On December 22, 2010, a federal grand jury indicted Sterling on six counts of unauthorized retention and communication of national defense information, in violation of 18 U.S.C. § 793(d) and (e); one count of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e); one count of mail fraud, in violation of 18 U.S.C. § 1341;

one count of unauthorized conveyance of government property, in violation of 18 U.S.C. § 641; and one count of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1). Sterling's trial was set to begin on October 17, 2011.

On May 23, 2011, Attorney General Eric Holder authorized the government to issue a trial subpoena seeking Risen's testimony about the identity of his source for information about Classified Program No. 1 and asking Risen to confirm that statements attributed to sources were actually made by those sources. The government also filed a motion in limine to admit Risen's testimony. Risen moved to quash the subpoena and for a protective order, asserting that he was protected from compelled testimony by the First Amendment or, in the alternative, by a federal common-law reporter's privilege.[2]

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[2] During the grand jury proceedings, two similar subpoenas were issued for Risen's testimony. The first grand jury subpoena was authorized by United States Attorney General Michael Mukasey, on behalf of the Bush Administration, on January 28, 2008. Risen's motion to quash was granted in part and denied in part. The district court recognized a reporter's privilege under the First Amendment. Because Risen had disclosed Sterling's name and some information about his reporting to a third party, however, the district court found a partial waiver as to this information. *See United States v. Sterling,* 818 F.Supp.2d 945, 947 (E.D.Va.2011). Both Risen and the government sought reconsideration of the district court's order, but the grand jury expired prior to final disposition of the motion.

The second grand jury subpoena was authorized by Attorney General Eric Holder, on behalf of the Obama Administration, on January 19, 2010. On Risen's motion, the district court quashed the subpoena, again based upon the First Amendment

The motions were denied in part and granted in part by the district court. The subpoena was "quashed for Risen's testimony about his reporting and source(s) except to the extent that Risen [would] be required to provide testimony that authenticates the accuracy of his journalism, subject to a protective order." *United States v. Sterling,* 818 F.Supp.2d 945, 947 (E.D.Va.2011). The district court held that Risen had "a qualified First Amendment reporter's privilege that may be invoked when a subpoena either seeks information about confidential sources *or* is issued to harass or intimidate the journalist," *id.* at 951 (emphasis added), and that the government could overcome the privilege only by meeting the three-part test that this circuit established for reporters' claims of privilege in civil cases in *LaRouche v. National Broadcasting Co.,* 780 F.2d 1134 (4th Cir.1986). The district court held that, while the information sought was clearly relevant under the first prong of the *LaRouche* test, the Government had failed to demonstrate that the information was unavailable from other means and that it had a compelling interest in presenting it to the jury.

In addition to the district court's order quashing Risen's trial subpoena, the district court handed

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and its conclusion that there was "more than enough [circumstantial] evidence to establish probable cause to indict Sterling." *Id.* at 950 (internal quotation marks omitted). However, the district court "indicated that it might be less likely to quash a trial subpoena, because ... at that stage the government must prove [Sterling's] guilt beyond a [reasonable] doubt." *Id.*

down two other evidentiary rulings that are the subject of this appeal. The district court suppressed the testimony of two government witnesses as a sanction for the government's late disclosure of impeachment material under *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The district court also denied the government's motion to withhold from Sterling and the jury, pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C.App. 3, the true names and identities of several covert CIA officers and contractors it intends to call to testify at trial.

In a majority opinion written by Chief Judge Traxler, we now reverse the district court's order holding that Risen has a reporter's privilege that entitles him to refuse to testify at trial concerning the source and scope of the classified national defense information illegally disclosed to him (Issue I). In a separate majority opinion written by Judge Gregory, we reverse the district court's order suppressing the testimony of the two Government witnesses (Issue II), and affirm in part and reverse in part the district court's CIPA ruling (Issue III).

Traxler, Chief Judge, writing for the court on Issue I:

II. *The Reporter's Privilege Claim*

We begin with the government's appeal of the district court order quashing the trial subpoena issued to Risen on the basis of a First Amendment reporter's privilege, and Risen's challenge to our jurisdiction to consider this portion of the appeal.

A. *Jurisdiction*

Risen contends that we lack jurisdiction to consider the district court's ruling under 18 U.S.C. § 3731, because the district court stated that the limitations on Risen's testimony might be reconsidered under the *LaRouche* test as the testimony developed at trial. We disagree.

Section 3731 provides for interlocutory appeals by the United States of pretrial orders suppressing or excluding evidence upon certification to the district court that the appeal is not taken for the purpose of delay and that the evidence in question is substantial proof of a fact material to the proceedings. We have held that we have jurisdiction under § 3731 even when the district court "repeatedly indicated that its rulings were preliminary and could change as the trial progressed." *United States v. Siegel,* 536 F.3d 306, 314 (4th Cir.2008); *see also United States v. Todaro,* 744 F.2d 5, 8 n. 1 (2d Cir.1984) (finding that a conditional suppression order may be immediately appealed by the government under § 3731); *cf. United States v. Horwitz,* 622 F.2d 1101, 1104 (2d Cir.1980) ("[W]e do not think that the conditional nature of the district court's ruling, which raises the remote prospect that suppression will not be ordered, necessarily deprives this court of jurisdiction under section 3731 to hear the government's appeal.").

While it is true that the district court left itself some room in its order to adjust the scope of Risen's trial testimony, it also made clear that it did not expect to revisit its decision that Risen was entitled to assert a reporter's privilege under the First Amendment and could not be compelled to reveal his

sources. Thus, we hold that we have jurisdiction over the appeal. "To conclude otherwise would insulate the district court's ruling from appellate review" because once jeopardy attaches, the Government cannot appeal, "thus frustrating rather than furthering the purposes of § 3731." *Siegel,* 536 F.3d at 315.

B. *The First Amendment Claim*

1.

There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source. In *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court "in no uncertain terms rejected the existence of such a privilege." *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1146 (D.C.Cir.2006).

Like Risen, the *Branzburg* reporters were subpoenaed to testify regarding their personal knowledge of criminal activity. One reporter was subpoenaed to testify regarding his observations of persons synthesizing hashish and smoking marijuana; two others were subpoenaed to testify regarding their observations of suspected criminal

activities of the Black Panther Party.[3] All resisted on the ground that they possessed a qualified privilege against being "forced either to appear or to testify before a grand jury or at trial," unless a three-part showing was made: (1) "that the reporter possesses information relevant to a crime," (2) "that the information the reporter has is unavailable from other sources," and (3) "that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure." *Branzburg,* 408 U.S. at 680, 92 S.Ct. 2646. "The heart of the [reporters'] claim [was] that the burden on news gathering resulting from compelling [them] to disclose confidential information outweigh [ed] any public interest in obtaining the information." *Id.* at 681, 92 S.Ct. 2646.

Having so defined the claim, the Court proceeded to unequivocally reject it. Noting "the longstanding principle that the public ... has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege," *id.* at 688, 92 S.Ct. 2646 (internal quotation marks omitted), the Court held as follows:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial

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[3] *Branzburg* was a consolidated proceeding. For ease of reference, we refer to all reporters as the *Branzburg* reporters.

> privilege that other citizens do not enjoy. *This we decline to do.*

Id. at 689–90, 92 S.Ct. 2646 (emphasis added); *see id.* at 690 n. 29, 92 S.Ct. 2646 (noting that "testimonial privileges [are] disfavor [ed] ... since such privileges obstruct the search for truth" and serve as " 'obstacle[s] to the administration of justice' " (quoting 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961))).

The First Amendment claim in *Branzburg* was grounded in the same argument offered by Risen—that the absence of such a qualified privilege would chill the future newsgathering abilities of the press, to the detriment of the free flow of information to the public. And the *Branzburg* claim, too, was supported by affidavits and amicus curiae memoranda from journalists claiming that their news sources and news reporting would be adversely impacted if reporters were required to testify about confidential relationships. However, the *Branzburg* Court rejected that rationale as inappropriate in criminal proceedings:

> The preference for anonymity of ... confidential informants *involved in actual criminal conduct* is presumably a product of their desire to escape criminal prosecution, [but] this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or

> private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial.

Id. at 691, 92 S.Ct. 2646 (emphasis added); *see also id.* at 690–91, 92 S.Ct. 2646 (noting that there was "no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial").[4]

In sum, the *Branzburg* Court declined to treat reporters differently from all other citizens who are compelled to give evidence of criminal activity, and refused to require a "compelling interest" or other special showing simply because it is a reporter who is in possession of the evidence. *Compare id.* at 708, 92 S.Ct. 2646 (holding that government need not "demonstrate[ ] some 'compelling need' for a newsman's testimony"), *with id.* at 743, 92 S.Ct. 2646

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[4] *Branzburg* arose in the context of a grand jury investigation, but its language and reasoning apply equally to subpoenas in the ensuing criminal trials, where the government bears the same charge to effectuate the public interest in law even higher burden of proof. *See* 408 U.S. at 686, 690–91, 92 S.Ct. 2646; *In re Shain,* 978 F.2d 850, 852 (4th Cir.1992); *United States v. Smith,* 135 F.3d 963, 971 (5th Cir.1998).

(Stewart, J., dissenting) (advocating adoption of the three-part test that includes demonstration of a "compelling and overriding interest in the information").

Although the Court soundly rejected a First Amendment privilege in criminal proceedings, the Court did observe, in the concluding paragraph of its analysis, that the press would not be wholly without protection:

> [N]ews gathering is not without its First Amendment protections, and grand jury investigations if *instituted or conducted other than in good faith,* would pose wholly different issues for resolution under the First Amendment. *Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.*

Id. at 707–08, 92 S.Ct. 2646 (majority opinion) (emphasis added)(footnote omitted). This is the holding of *Branzburg,* and the Supreme Court has never varied from it. As the Court observed nearly two decades later:

> In *Branzburg,* the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary. Petitioners there, like petitioner here, claimed that requiring disclosure of information collected in confidence would inhibit the free flow of information in contravention of

> First Amendment principles. In the course of rejecting the First Amendment argument, this Court noted that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. We also indicated a reluctance to recognize a constitutional privilege where it was unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. We were unwilling then, as we are today, to embark the judiciary on a long and difficult journey to ... an uncertain destination.

University of Pa. v. EEOC, 493 U.S. 182, 201, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990) (internal quotation marks omitted); *see also Cohen v. Cowles Media Co.,* 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) ("[T]he First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source.").[5]

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[5] This plain interpretation of *Branzburg* is also confirmed by recent cases from our sister circuits. *See United States v. Moloney (In re Price),* 685 F.3d 1, 16 (1st Cir.2012) ("*Branzburg* ... held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury. Since *Branzburg,* the Court has three times affirmed its basic principles in that opinion." (citations omitted) (citing *Cohen v. Cowles Media*

The controlling authority is clear. "In language as relevant to the alleged illegal disclosure of the identity of covert agents as it was to the alleged illegal processing of hashish [in *Branzburg*], the Court stated that it could not 'seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof....' " *Judith Miller,* 438 F.3d at 1147 (quoting *Branzburg,* 408 U.S. at 692, 92 S.Ct. 2646); *see id.* at 1165–66 (Tatel, J., concurring) ("If, as *Branzburg* concludes, the First Amendment permits compulsion of reporters' testimony about individuals manufacturing drugs or plotting against the government, all information the government could have obtained from an undercover investigation of its own, the case for a constitutional privilege appears weak indeed with respect to leaks [of classified information], which in all likelihood will be extremely difficult to prove without the reporter's aid." (citation omitted)). Accordingly, "if *Branzburg* is

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Co., 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); *University of Pa. v. EEOC,* 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990); and *Zurcher v. Stanford Daily,* 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978))); *ACLU v. Alvarez,* 679 F.3d 583, 598 (7th Cir.2012) (noting that "[t]he [*Branzburg*] Court declined to fashion a special journalists' privilege" because, *inter alia,* "the public interest in detecting, punishing, and deterring crime was much stronger than the marginal increase in the flow of news about crime that a journalist's testimonial privilege might provide" (internal quotation marks omitted)); *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1146–47 (D.C.Cir.2006) (unanimously concluding, in a national security leak case, that *Branzburg* rejected such a First Amendment reporter's privilege).

to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court." *Id.* at 1166.

Notwithstanding the clarity of Justice White's opinion for the Court in *Branzburg,* and the fact that Justice Powell joined that opinion, Risen argues that Justice Powell's concurring opinion in *Branzburg* should instead be interpreted as a tacit endorsement of Justice Stewart's dissenting opinion, which argued in favor of recognizing a First Amendment privilege in criminal cases that could be overcome only if the government carries the heavy burden of establishing a compelling interest or need. *See Branzburg,* 408 U.S. at 739, 743, 92 S.Ct. 2646 (Stewart, J., dissenting).

We cannot accept this strained reading of Justice Powell's opinion. By his own words, Justice Powell concurred in Justice White's opinion for the majority, and he rejected the contrary view of Justice Stewart:

> I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in MR. JUSTICE STEWART's dissenting opinion, that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.' ...
>
> As indicated in the concluding portion of the [majority] opinion, the Court states that *no harassment of newsmen will be tolerated.* If a

> newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, *if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement,* he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 709–10, 92 S.Ct. 2646 (Powell, J., concurring) (emphasis added).

Justice Powell's concurrence expresses no disagreement with the majority's determination that reporters are entitled to no special privilege that would allow them to withhold relevant information about criminal conduct without a showing of bad faith or other such improper motive, nor with the majority's clear rejection of the three-part compelling interest test advocated by the *Branzburg* reporters. To the extent Justice Powell addressed any further inquiry that might take place in a *criminal* proceeding, he appeared to include within the realm of harassment a request that "implicates confidential

source relationships without a *legitimate* need of law enforcement," *id.* at 710, 92 S.Ct. 2646 (emphasis added), and he again rejected the dissent's contrary view that the heavy burdens of the three-part, compelling interest test were appropriate:

> Moreover, absent the constitutional pre-conditions that ... th[e] dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—*when called upon to protect a newsman from improper or prejudicial questioning*—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by th[e] dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

Id. at 710 n. *, 92 S.Ct. 2646 (emphasis added).

For the foregoing reasons, Justice Powell's concurrence in *Branzburg* simply does not allow for the recognition of a First Amendment reporter's privilege in a criminal proceeding which can only be overcome if the government satisfies the heavy burdens of the three-part, compelling-interest test. Accepting this premise is "tantamount to our substituting, as the holding of *Branzburg,* the dissent written by Justice Stewart ... for the majority opinion." *Storer Commc'ns v. Giovan (In re Grand Jury Proceedings),* 810 F.2d 580, 584 (6th Cir.1987).[6]

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[6] *See also Judith Miller,* 438 F.3d at 1148 ("Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by

The *Branzburg* Court considered the arguments we consider today, balanced the respective interests of the press and the public in newsgathering and in prosecuting crimes, and held that, so long as the subpoena is issued in good faith and is based on a legitimate need of law enforcement, the government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding. The reporter must appear and give testimony just as every other citizen must. We are not at liberty to conclude otherwise.

2.

Although *Branzburg* alone compels us to reject Risen's claim to a First Amendment privilege, we are also bound by our circuit precedent, for this is not the first time we have passed upon the question of whether and to what extent a reporter's privilege can be asserted in *criminal* proceedings.

a.

In reaching its decision in this case, the district court relied upon our precedent in *LaRouche v.*

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its terms, rejecting none of Justice White's reasoning on behalf of the majority."); *id.* ("Justice White's opinion is not a plurality opinion.... [I]t is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by" the reporters.); *Scarce v. United States (In re Grand Jury Proceedings),* 5 F.3d 397, 400 (9th Cir.1993) (noting that Justice Powell's concurrence does not authorize a "rebalancing [of] the interests at stake in every claim of privilege made before a grand jury").

National Broadcasting Co., 780 F.2d 1134 (4th Cir.1986). In *LaRouche,* we considered a civil litigant's right to compel evidence from a reporter and the First Amendment claim of the press to protect its newsgathering activities. We recognized a reporter's privilege in this *civil* context that could only be overcome if the litigant met the three-part test that the *Branzburg* Court rejected in the criminal context. Specifically, we held that district courts, before requiring disclosure of a reporter's source in a civil proceeding, must consider "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *Id.* at 1139.

In *LaRouche,* we followed the lead of other circuits, including the Fifth Circuit in *Miller v. Transamerican Press, Inc.,* 621 F.2d 721, *modified,* 628 F.2d 932 (5th Cir.1980), which held that *Branzburg* did not preclude recognition of a qualified reporter's privilege or application of the three-part test in civil cases. In such cases, of course, "the public interest in effective criminal law enforcement is absent." *Zerilli v. Smith,* 656 F.2d 705, 711–12 (D.C.Cir.1981).[7]

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[7] Like the Fifth Circuit, the D.C. Circuit also held "that the balancing approach employed [in civil actions] survived the Supreme Court's decision in *Branzburg*." *Zerilli v. Smith,* 656 F.2d 705, 712 n. 43 (D.C.Cir.1981) (citation omitted). Both circuits subsequently confirmed that the privilege does not apply in the absence of harassment or bad faith, and refused to apply the three-part test to subpoenas issued in criminal proceedings. *See Judith Miller,* 438 F.3d at 1149; *Smith,* 135 F.3d at 971–72.

b.

LaRouche, however, offers no authority for us to recognize a First Amendment reporter's privilege in this *criminal* proceeding. Not only does *Branzburg* preclude this extension, the distinction is critical, and our circuit has already considered and rejected such "a qualified [reporter's] privilege, grounded on the First Amendment, against being compelled to testify in [a] *criminal* trial." *In re Shain,* 978 F.2d 850, 851 (4th Cir.1992) (emphasis added).

The *Shain* reporters were held in contempt for their refusal to comply with subpoenas to testify in the criminal trial of a former state senator whom they had previously interviewed. At the time, two of our sister circuits had extended the three-part test that had been adopted in civil actions to criminal proceedings, albeit with little to no discussion of the *Branzburg* opinion. *See United States v. Caporale,* 806 F.2d 1487, 1503–04 (11th Cir.1986) (citing *Miller,* 621 F.2d at 726); *United States v. Burke,* 700 F.2d 70, 76–77 (2d Cir.1983) (citing *Zerilli,* 656 F.2d at 713–15).

This court in *Shain,* however, declined to follow that path. We did not recognize a broad privilege nor did we extend the *LaRouche* three-part test to criminal proceedings. Instead, we followed *Branzburg* and held that "absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution." *Shain,* 978 F.2d at 852. We also considered the effect of Justice Powell's concurring opinion in *Branzburg,* explaining that

Justice Powell "joined in the Court's opinion" and wrote separately only

> to emphasize the Court's admonishment against official harassment of the press and to add, "We do not hold ... that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.' " Justice Powell concluded that *when evidence is presented to question the good faith of a request* for information from the press, *a "proper balance" must be struck* "between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

Id. at 853 (emphasis added) (citation omitted) (quoting *Branzburg,* 408 U.S. at 710, 92 S.Ct. 2646 (Powell, J., concurring)); *see id.* (citing *United States v. Steelhammer,* 539 F.2d 373, 376 (4th Cir.1976)) (Winter, J., dissenting), *adopted by the court en banc,* 561 F.2d 539, 540 (4th Cir.1977) (per curiam) (noting that "[i]n *Steelhammer,* we applied *Branzburg* to compel testimony from the press in a civil contempt trial, recognizing that *only* when evidence of harassment is presented do we balance the interests involved" (emphasis added)).

To the extent our court has addressed the issue since *Shain,* we have continued to recognize the important distinction between enforcing subpoenas issued to reporters in criminal proceedings and enforcing subpoenas issued to reporters in civil litigation. Subpoenas in criminal cases are driven by the quite different and compelling public interest in effective criminal investigation and prosecution, an interest that simply is not present in civil cases. *See*

Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir.2000) (applying the *LaRouche* test to confidential source information in the *civil* context, but noting *Branzburg*'s "holding that [a] reporter, like [an] ordinary citizen, must respond to grand jury subpoenas and answer questions related to *criminal* conduct he personally observed and wrote about, regardless of any promises of confidentiality he gave to subjects of stories" (emphasis added)).

There is good reason for this distinction between civil and criminal cases. It has roots in both the majority and concurring opinions in *Branzburg,* both of which highlight the critical importance of criminal proceedings and the right to compel all available evidence in such matters. As the Court has subsequently observed as well:

> Th[is] distinction ... between criminal and civil proceedings is not just a matter of formalism.... [T]he need for information in the criminal context is much weightier because "our historic[al] commitment to the rule of law ... is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' " [*United States v. Nixon,* 418 U.S. 683, 708–09, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)] (quoting *Berger v. United States,* 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314] (1935)). In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, 418 U.S. at 709, 710 [94 S.Ct. 3090], ... privilege claims that shield information from a grand jury proceeding or a criminal trial are not

> to be "expansively construed, for they are in derogation of the search for truth," *id.* at 710 [94 S.Ct. 3090]. The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*.... [T]he right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions." *Id.* at 711 [94 S.Ct. 3090].

Cheney v. United States Dist. Court for the Dist. of Columbia, 542 U.S. 367, 384, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (third alteration in original); *see also Judith Miller,* 438 F.3d at 1149; *Smith,* 135 F.3d at 972.

3.

Like the *Branzburg* reporters, Risen has "direct information ... concerning the commission of serious crimes." *Branzburg,* 408 U.S. at 709, 92 S.Ct. 2646. Indeed, he can provide the *only* first-hand account of the commission of a most serious crime indicted by the grand jury—the illegal disclosure of classified, national security information by one who was entrusted by our government to protect national security, but who is charged with having endangered it instead. The subpoena for Risen's testimony was not issued in bad faith or for the purposes of harassment. *See id.* at 707–08, 92 S.Ct. 2646; *id.* at 709–10, 92 S.Ct. 2646 (Powell, J., concurring). Risen is not being "called upon to give information bearing only a remote and tenuous relationship to the subject

of the investigation," and there is no "reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." *Id.* at 710, 92 S.Ct. 2646 (Powell, J., concurring). Nor is the government attempting to "annex" Risen as its "investigative arm." *Id.* at 709, 92 S.Ct. 2646 (internal quotation marks omitted). Rather, the government seeks to compel evidence that Risen alone possesses—evidence that goes to the heart of the prosecution.

The controlling majority opinion in *Branzburg* and our decision in *Shain* preclude Risen's claim to a First Amendment reporter's privilege that would permit him to resist the legitimate, good faith subpoena issued to him. The only constitutional, testimonial privilege that Risen was entitled to invoke was the Fifth Amendment privilege against self-incrimination, but he has been granted immunity from prosecution for his potential exposure to criminal liability. Accordingly, we reverse the district court's decision granting Risen a qualified First Amendment reporter's privilege that would shield him from being compelled to testify in these criminal proceedings.

III. *The Common–Law Privilege Claim*

Risen next argues that, even if *Branzburg* prohibits our recognition of a First Amendment privilege, we should recognize a qualified, federal common-law reporter's privilege protecting confidential sources.[8] We decline to do so.

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[8] The district court, having recognized a First Amendment reporter's privilege, did not address Risen's

A.

In the course of rejecting the First Amendment claim in *Branzburg,* the Supreme Court also plainly observed that the common law recognized no such testimonial privilege:

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.

Branzburg, 408 U.S. at 685, 92 S.Ct. 2646; *id.* at 693, 92 S.Ct. 2646 ("[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court *reaffirms* the prior common-law and constitutional rule regarding the testimonial obligations of newsmen" (emphasis added)); *id.* at 698–99, 92 S.Ct. 2646 ("[T]he common law recognized no such privilege, and the constitutional argument was not even asserted until 1958"); *Swidler & Berlin v. United States,* 524 U.S. 399, 410, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (noting that "*Branzburg* dealt with the creation of [a] privilege[ ] *not* recognized by the common law" (emphasis added)); *see also Judith Miller,* 438 F.3d at 1154 (Sentelle, J., concurring) (*Branzburg* is "as dispositive of the question of common law privilege as it is of a First Amendment

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claim to a common-law privilege. *See Sterling,* 818 F.Supp.2d at 951 n. 3.

privilege"); *In re Special Proceedings,* 373 F.3d 37, 44 (1st Cir.2004) (*Branzburg* "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or a newly hewn common-law privilege").

B.

Risen does not take issue with the clarity of *Branzburg*'s statements regarding the state of the common law. Rather, he argues that Federal Rule of Evidence 501, as interpreted by the Supreme Court in *Jaffee v. Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), grants us authority to reconsider the question and now grant the privilege. We disagree.

Federal Rule of Evidence 501, in its current form, provides that:

> [t]he common law—*as interpreted by United States courts in the light of reason and experience*—governs a claim of privilege unless [the United States Constitution, a federal statute, or the rules prescribed by the Supreme Court] provide[ ] otherwise.

Fed.R.Evid. 501 (emphasis added).

Congressional enactment of Rule 501 postdates *Branzburg,* but the Rule effectively left our authority to recognize common-law privileges in *status quo*. The Rule implemented the previously recognized authority of federal courts to consider common-law privileges " 'in the light of reason and experience.' " *Jaffee,* 518 U.S. at 8, 116 S.Ct. 1923 (footnote

omitted). "The authors of the Rule borrowed th[e] phrase from [the Supreme Court's] opinion in *Wolfle v. United States,* 291 U.S. 7, 12 [54 S.Ct. 279, 78 L.Ed. 617] (1934), which in turn referred to the oft-repeated observation that 'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.' " *Jaffee,* 518 U.S. at 8, 116 S.Ct. 1923 (footnote omitted) (quoting *Funk v. United States,* 290 U.S. 371, 383, 54 S.Ct. 212, 78 L.Ed. 369 (1933)).

Indeed, Rule 501 seems to be more notable for what it failed to do, than for what it did. The proposed Rules originally "defined [nine] specific nonconstitutional privileges which the federal courts [would have been compelled to] recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer)" and "provided that only those privileges set forth [therein] or in some other Act of Congress could be recognized by the federal courts." Fed.R.Evid. 501 advisory committee's note; *see also Jaffee,* 518 U.S. at 8 n. 7, 116 S.Ct. 1923 This exclusive list of enumerated privileges was ultimately rejected. Instead, Congress "left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under" the "reason and experience" standard. Fed.R.Evid. 501 advisory committee's note.

Since enactment of Rule 501, the Supreme Court has twice noted that, while not dispositive of the question of whether a court should recognize a new privilege, the enumerated privileges proposed for

inclusion in Rule 501 were "thought to be either indelibly ensconced in our common law or an imperative of federalism." *United States v. Gillock,* 445 U.S. 360, 368, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980) (declining to recognize under Rule 501 a legislative privilege for state legislators in a federal, criminal prosecution, in part, because it was not one of the nine enumerated privileges recommended by the Advisory Committee); *see also Jaffee,* 518 U.S. at 15, 116 S.Ct. 1923 (noting that, unlike in *Gillock,* the inclusion of the psychotherapist-patient privilege was one of the nine, and supported the Court's adoption of the privilege under Rule 501). Notably absent from the nine enumerated privileges was one for a reporter-source relationship.

In *Jaffee,* the Supreme Court recognized a psychotherapist-patient privilege protecting private communications that took place during counseling sessions between a police officer and a licensed clinical social worker following a fatal shooting. Applying Rule 501, the Court weighed the competing interests and concluded that the plaintiff's interest in obtaining evidence of the confidential communications in the ensuing excessive-force action was outweighed by the patient's private interest in maintaining confidence and trust with his mental health provider and the public's interest in protecting that privacy in order to "facilitat[e] the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id.* at 11, 116 S.Ct. 1923. As noted above, the Court also relied, in part, upon the fact that a psychotherapist-patient privilege was one of the nine, enumerated privileges

considered when Rule 501 was adopted and had found near unanimous support in state laws as well.

Contrary to Risen's claim on appeal, Rule 501 and the Supreme Court's use of it to recognize a psychotherapist-patient privilege in *Jaffee* does not authorize us to ignore *Branzburg* or support our recognition of a common-law reporter-source privilege today.

Clearly, neither Rule 501 nor *Jaffee* overrules *Branzburg* or undermines its reasoning. *See In re Scarce,* 5 F.3d at 403 n. 3 ("We discern nothing in the text of Rule 501 ... that sanctions the creation of privileges by federal courts in contradiction of the Supreme Court's mandate" in *Branzburg*.).[9]

"In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege," but "rather ... to provide the courts with the flexibility to develop rules

[9] Risen's reliance upon our decision in *Steelhammer,* 539 F.2d at 377–78 (Winter, J., dissenting), *adopted by the court en banc,* 561 F.2d at 540, also does not avail him. In the panel decision in *Steelhammer,* Judge Winter stated, in a footnote in his dissenting opinion, his view that reporters "should be afforded a common law privilege [under Rule 501] not to testify in civil litigation between private parties," but declined to "prolong th[e] opinion by developing th [e] point." *Steelhammer,* 539 F.2d at 377 n. * (Winter, J., dissenting). Given the odd manner in which the *en banc* court decided the case, it is difficult to discern what if any precedential effect remains, particularly since *Branzburg* did not preclude recognition of a First Amendment privilege in the civil context and we recognized one and adopted the three-part test in *LaRouche*. In any event, we are satisfied that Judge Winter's undeveloped dicta has no effect one way or the other on the First Amendment or common-law issues before us today.

of privilege on a case-by-case basis." *Trammel v. United States,* 445 U.S. 40, 47, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (internal quotation marks omitted); *see also United States v. Weber Aircraft Corp.,* 465 U.S. 792, 803 n. 25, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984) ("Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them."); *United States v. Dunford,* 148 F.3d 385, 390–91 (4th Cir.1998) (same). Rule 501 thus leaves the door open for courts to adopt new common-law privileges, and modify existing ones, in appropriate cases. But nothing in Rule 501 or its legislative history authorizes federal courts to ignore existing Supreme Court precedent.

Even if we were to believe that *Jaffee* signals that the Supreme Court might rule differently on the existence of a common-law reporter's privilege today, we are not at liberty to take that critical step. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Under Risen's view of Rule 501 and *Jaffee,* inferior federal courts would be at liberty to reconsider common-law privileges that have been rejected by the Supreme Court, based upon the passage of time. Rule 501 does not sanction such authority on our part.

Here, "[t]he Supreme Court has rejected a common law privilege for reporters" and "that rejection stands

unless and until the Supreme court itself overrules that part of *Branzburg." Judith Miller,* 438 F.3d at 1155 (Sentelle, J., concurring). Just as the Supreme Court must determine whether a First Amendment reporter's privilege should exist, *see Judith Miller,* 438 F.3d at 1166 (Tatel, J., concurring), "only the [Supreme Court] and not this one ... may act upon th[e] argument" that a federal common-law privilege should now be recognized under Rule 501, *id.* at 1155 n. 3 (Sentelle, J., concurring).

C.

Even if we were at liberty to reconsider the existence of a common-law reporter's privilege under Rule 501, we would decline to do so.

As the Supreme Court made clear in *Jaffee,* the federal courts' latitude for adopting evidentiary privileges under Rule 501 remains quite narrow indeed. Because they "contravene the fundamental principle that the public has a right to every man's evidence," *University of Pa.,* 493 U.S. at 189, 110 S.Ct. 577 (internal quotation marks and alteration omitted), such privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth," *Nixon,* 418 U.S. at 710, 94 S.Ct. 3090. "When considering whether to recognize a privilege, a court must begin with 'the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.' " *Virmani v. Novant Health Inc.,* 259 F.3d 284, 287 (4th Cir.2001) (quoting *Jaffee,*

518 U.S. at 9, 116 S.Ct. 1923). New or expanded privileges "may be recognized 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Dunford,* 148 F.3d at 391 (quoting *Trammel,* 445 U.S. at 50, 100 S.Ct. 906).

Risen contends that the public and private recognizing a reporter's privilege "are surely as significant public interest at stake in patient and psychotherapist communication." Risen's Brief at 50. But we see several critical distinctions.

1.

First, unlike in the case of the spousal, attorney-client, and psychotherapist-patient privileges that have been recognized, the reporter-source privilege does not share the same relational privacy interests or ultimate goal. The recognized privileges promote the public's interest in full and frank communications between persons in special relationships by protecting the confidentiality of their private communications. *Jaffee,* 518 U.S. at 10, 116 S.Ct. 1923. A reporter's privilege might also promote free and full discussion between a reporter and his source, but Risen does not seek to protect from public disclosure the "confidential communications" made to him. *Id.* Risen *published* information conveyed to him by his source or sources. His primary goal is to protect the *identity* of the person or persons who communicated with him because their communications violated federal, criminal laws. *See*

e.g., 1 *McCormick on Evidence* § 72 n.7 (Kenneth S. Broun ed., 7th ed.2013) (requiring for all privileges that "[t]he communications must originate in a confidence that they will not be disclosed" (internal quotation marks omitted)). In sum, beyond the shared complaint that communications might be chilled in the absence of a testimonial privilege, Risen's proffered rationale for protecting his sources shares little in common with the privileges historically recognized in the common law and developed under Rule 501.[10]

We are also mindful that the Court in *Branzburg* considered and was unpersuaded by a virtually identical argument that a reporter's privilege was necessary to prevent a chilling effect on newsgathering.

> We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and

[10] This important distinction was also not lost on the *Branzburg* dissent. In the context of advocating a First Amendment reporter's privilege, the dissent also noted the "longstanding presumption against creation of common-law testimonial privileges," but distinguished common-law privileges from the constitutional one sought because the former are "grounded in an individual interest which has been found ... to outweigh the public interest in the search for truth rather than in the broad public concerns that inform the First Amendment." *See Branzburg,* 408 U.S. at 738 n. 24, 92 S.Ct. 2646 (Stewart, dissenting) (internal quotation marks omitted).

> the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

Id. at 698–99, 92 S.Ct. 2646; *see also id.* at 693, 92 S.Ct. 2646 ("[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.").

Branzburg also weighed the public interest in newsgathering against the public's interest in enforcing its criminal laws:

> More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities. Misprison of a felony—that is, the concealment of a felony "which a man knows, but never assented to ... [so as to become] either principal or accessory," 4 W. Blackstone, Commentaries, was often said to be a common-law crime.... It is apparent from [the federal statute defining the crime of misprison], as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium,

> and we decline now to afford it First Amendment protection....

Id. at 695–97, 92 S.Ct. 2646; *see also id.* at 695, 92 S.Ct. 2646 ("Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.").

We fail to see how these policy considerations would differ in a Rule 501 analysis. Unlike the individual privacy interests in confidential communications shared by those protected by a common-law privilege, "[t]he preference for anonymity of those confidential informants involved in actual criminal conduct ..., while understandable, is hardly deserving of constitutional protection." *Id.* at 691, 92 S.Ct. 2646. The preference is equally undeserving of protection under the common law. Indeed, even those common-law privileges that do protect confidential communications between persons in special relationships have yielded where the communication furthers or shields ongoing criminal activity. *See United States v. Zolin,* 491 U.S. 554, 562–63, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) ("The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that

protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing") (internal quotation marks omitted); *Clark v. United States,* 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."); *Dunford,* 148 F.3d at 391 (declining to decide whether parent-minor child testimonial privilege exists in criminal proceedings because, "even if such a privilege were to be recognized, it would have to be narrowly defined and would have obvious limits, ... such as where ... ongoing criminal activity would be shielded by assertion of the privilege").

Just as the First Amendment and the common-law attorney-client privilege do not "confer[ ] a license to violate valid criminal laws," *Branzburg,* 408 U.S. at 691, 92 S.Ct. 2646, the common law would not extend so far as to protect illegal communications that took place between Risen and his source or sources in violation of the Espionage Act.

2.

Risen's reliance upon state statutes and decisions that have adopted a reporter's shield also fails to persuade us that we can or should create a federal common-law privilege.

At the time of *Branzburg,* "[a] number of States ha[d] provided newsmen a statutory privilege of

varying breadth." *Id.* at 689, 92 S.Ct. 2646. And, as Risen argues, nearly all of the remaining states have since "recognized a reporter's privilege in one context or another." Risen's Brief at 55. Generally speaking, such "policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee,* 518 U.S. at 12–13, 116 S.Ct. 1923. However, there is still no "uniform judgment of the States" on the issue of a reporter's privilege or shield, nor was the privilege "among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules." *Id.* at 14, 116 S.Ct. 1923. If anything, the varying actions of the states in this area only reinforces *Branzburg*'s observation that judicially created privileges in this area "would present practical and conceptual difficulties of a high order," *Branzburg,* 408 U.S. at 704, 92 S.Ct. 2646, that are best dealt with instead by legislatures of the state and federal governments. As the Court noted in *Branzburg:*

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and

> press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

Id. at 706, 92 S.Ct. 2646; *cf. Judith Miller,* 438 F.3d at 1161 (Henderson, J., concurring) (noting that courts "should proceed as cautiously as possible when erecting barriers between us and the truth, recognizing that the Legislature remains the more appropriate institution to reconcile the competing interests—prosecuting criminal acts versus constructing the flow of information to the public—that inform any reporter's privilege to withhold relevant information from a bona fide grand jury" (citation and internal quotation marks omitted)).

The *Branzburg* Court's observations regarding the practical difficulties of defining and managing a reporter's privilege, and its "unwilling[ness] to embark the judiciary on a long and difficult journey to such an uncertain destination," *Branzburg,* 408 U.S. at 703, 92 S.Ct. 2646, are well-taken, and we see nothing in "reason [or] experience" that would lead us to a contrary view today, Fed. Rule Evid. 501. Since *Branzburg,* additional state legislatures have exercised their "free[dom], within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." *Branzburg,* 408 U.S. at 706, 92 S.Ct. 2646. Despite continued efforts, however, Congress has still not provided a reporter's shield by federal

statute. *See id.* at 689 & n. 28, 92 S.Ct. 2686 (noting the earlier federal legislative attempts to provide a privilege).

We decline the invitation to step in now and create a testimonial privilege under common law that the Supreme Court has said does not exist and that Congress has considered and failed to provide legislatively. If Risen is to be protected from being compelled to testify and give what evidence of crime he possesses, in contravention of every citizen's duty to do so, we believe that decision should rest with the Supreme Court, which can revisit *Branzburg* and the policy arguments it rejected, or with Congress, which can more effectively and comprehensively weigh the policy arguments for and against adopting a privilege and define its scope.

IV. The LaRouche Test

For the foregoing reasons, we hold that there is no First Amendment or federal common-law privilege that protects Risen from having to respond to the government's subpoena and give what evidence he has of the criminal conduct at issue. We note, however, that even if we were to recognize a qualified reporter's privilege and apply the three-part *LaRouche* test to the inquiry, as the district court did, we would still reverse.

In *LaRouche,* we recognized a reporter's privilege in civil cases that can be overcome if (1) the information is relevant, (2) the information cannot be obtained by alternative means, and (3) there is a compelling interest in the information. *LaRouche,*

780 F.2d at 1139. Here, the government has met all three prongs.

A.

There is no dispute that the information sought from Risen is relevant. Moreover, it "can[not] be obtained by alternative means." *Id.* at 1139. The circumstantial evidence that the government has been able to glean from incomplete and inconclusive documents, and from the hearsay statements of witnesses with no personal or first-hand knowledge of the critical aspects of the charged crimes, does not serve as a fair or reasonable substitute.

1.

The district court held that the government had failed to establish the second factor of the *LaRouche* test because it has successfully obtained substantial circumstantial evidence that Sterling is the source of the illegally-disclosed information. Fundamentally, the holding appears to be grounded in the premise that circumstantial evidence of guilt should serve as an adequate substitute for a direct, first-hand account of the crime because " 'circumstantial evidence is no less probative than direct evidence.' " *Sterling,* 818 F.Supp.2d at 956 (quoting *Stamper v. Muncie,* 944 F.2d 170, 174 (4th Cir.1991)). Because the district court believed that the government has uncovered substantial circumstantial evidence that Sterling is guilty, the court's ruling deprives the jury of the best and only direct evidence that supports the prosecution of this crime.

It is true, of course, that a defendant cannot ordinarily overturn a conviction based solely upon the claim that the jury had only circumstantial evidence to consider. *See United States v. Bonner,* 648 F.3d 209, 213 (4th Cir.2011); *Stamper,* 944 F.2d at 174. But this does *not* mean that circumstantial evidence of a fact presented to a jury will always be as convincing as direct evidence of it, particularly where the identity of the perpetrator is contested. *See Bonner,* 648 F.3d at 214 (reversing conviction because "[w]hile it is possible to convict a defendant solely on circumstantial evidence, in cases where the identity of the perpetrator is in dispute, usually there is some specific 'identity' evidence or uncontroverted physical evidence that links the defendant to the scene of the crime"). Nor is it likely that a jury, charged with finding guilt beyond a reasonable doubt, would equate circumstantial evidence of the crucial facts with the direct testimony of the only witness with first-hand knowledge of them. The nature and strength of the evidence is very different. *See* 1 *McCormick on Evidence* § 185 (Kenneth S. Broun ed., 7th ed.2013) ("Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence also may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion." (footnote omitted)).

As the government correctly points out, "no circumstantial evidence, or combination thereof, is as probative as Risen's testimony or as certain to foreclose the possibility of reasonable doubt." Government's Brief at 14. *See, e.g., New York Times Co. v. Gonzales,* 459 F.3d 160, 170 (2d Cir.2006) (

"[A]s the recipients of the disclosures, [the reporters] are the only witnesses—other than the source(s)—available to identify the conversations in question and to describe the circumstances of the leaks.... There is simply no substitute for the evidence they have."); *Judith Miller,* 438 F.3d at 1181 (Tatel, J., concurring) (noting that while "special counsel appears already to have at least circumstantial grounds for a perjury charge, if nothing else [,] [the reporter's] testimony ... could settle the matter"). Risen is the only eyewitness to the crime. He is inextricably involved in it. Without him, the alleged crime would not have occurred, since he was the recipient of illegally-disclosed, classified information. And it was through the publication of his book, *State of War,* that the classified information made its way into the public domain. He is the only witness who can specify the classified information that he received, and the source or sources from whom he received it.

In any event, the *LaRouche* test does not ask whether there is *other* evidence, circumstantial or direct, that the government might rely upon as a substitute to prove guilt; it asks "whether *the information* [sought from the reporter] can be obtained *by alternative means." LaRouche,* 780 F.2d at 1139 (emphasis added). Clearly, it cannot be. There are no other witnesses who can offer this testimony, nor is it found in any other form of evidence. *Cf. Gonzales,* 459 F.3d at 172 n. 5 (noting that such circumstances do not fall within "the paradigmatic case where a newsperson is one of many witnesses to an event and the actions and state of mind of the newsperson are not in issue"). Other

than Sterling himself, Risen is the only witness who can identify Sterling as a source (or not) of the illegal leak.

2.

Even if circumstantial evidence could serve as a reasonable alternative to direct evidence, the circumstantial evidence in this case does not possess the strength the district court ascribes to it—particularly when one remembers the prosecution's high burden of proof.

Sterling was not the only CIA agent involved in Classified Program No. 1. Moreover, Sterling met with staff members of the SSCI to voice complaints about the program not more than a month before the government learned that Risen had the classified information, and Sterling claims to be in possession of evidence that an SSCI employee was implicated in a previous unauthorized disclosure of classified information that made its way to Risen.[11]

During these proceedings, Sterling has often represented that he intends to point his finger at these third parties as the source of the leak.[12] The

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[11] *See, e.g.,* J.A. 893 (asserting that Sterling has been "given discovery that stated unequivocally that [one SSCI staffer] was fired from her SSCI job for leaking information to Mr. Risen").

[12] *See* J.A. 667 (stating that "[a]n obvious defense at trial will be that any disclosure to the third party was done by another person or by multiple individuals—and not by Mr. Sterling"); J.A. 665 (noting that "while the Indictment alleges Mr. Sterling had familiarity with 'Classified Program No. 1' since 1998, and knew James Risen since at

district court's ruling, however, would require the government to compel the testimony of every other possible source, sources who could do little more than assert their own privilege or offer a simple denial of guilt, while allowing Risen, the only person who can identify the perpetrator or perpetrators, to protect his sources from the criminal consequences of their behavior. By depriving the jury of the only direct testimony that can link Sterling to the charged crimes and allowing Sterling to present argument that several others could have been the primary source or sources, the district court would allow seeds of doubt to be placed with the jurors while denying the government a fair opportunity to dispel those doubts. As the government notes, the ruling would open the door for Sterling to mislead the jury and distort the truth-seeking function of the trial.

The telephone records and e-mail messages, and the hearsay statements by witnesses who were in contact with Sterling, which were relied upon by the district court to uphold a reporter's privilege, also fail to serve as reasonable alternatives to Risen's first-hand testimony.

Telephone records, e-mail messages, and the like indicate that Risen and Sterling were communicating

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least November 2001, there is no indication that Mr. Risen came into possession of any information relating to 'Classified Program No. 1' until April 2003, less than a month after Senate staffers learned about the Program" (citation omitted)); J.A. 667 (arguing that "[t]he timing [of Sterling's contact with the Senate staffers and Risen's contact with the CIA] is highly suggestive that it was one of the staff members and *not* Mr. Sterling who unlawfully disclosed classified information").

with one another. However, it appears that none of the records contain classified information, and the contents of the conversations and communications are otherwise largely unknown. This category of proof is an obviously poor substitute for Risen's direct testimony. *See e.g., Judith Miller,* 438 F.3d at 1175 (Tatel, J., concurring) ("Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee. Of course, in some cases, circumstantial evidence such as telephone records may point towards the source, but for the party with the burden of proof, particularly the government in a criminal case, such evidence will often be inadequate.").

The proffered hearsay testimony from the former CIA agent and Sterling's then-girlfriend also pales in comparison to Risen's first-hand testimony. Even assuming that the hearsay testimony would be admissible, which we need not decide today, it is not a reasonable equivalent to Risen's testimony.

It is represented to us that Sterling's girlfriend will testify that Sterling told her at some unspecified point that he had a meeting with "Jim" and, during a much later trip to a bookstore, told her that Chapter 9 of *State of War* was about his work in the CIA. However, it is undisputed that Risen and Sterling had been in contact about other matters, such as his firing by the CIA, and the proffered testimony tells us nothing about the substance of any leak of classified information. Moreover, the persons to whom Sterling points as alternative sources of the leak would have been privy to the same information

at about the same time, and Risen has not disclosed whether there is more than one primary source of classified information.

It is also represented to us that a former CIA agent will testify that Risen told him that Sterling was his source. This characterization of the hearsay testimony, however, is much more generous than warranted. The proffered testimony does not establish whether Sterling was the primary or only source of classified information that made its way into *State of War,* nor does it address the breadth of information found in the book. It too is a poor substitute for Risen's testimony.

Additionally, Sterling has indicated that he will offer another defense to this hearsay testimony, either through cross-examination of Risen or through other expert testimony. Specifically, Sterling has sought to present expert testimony that "[j]ournalists commonly use techniques to disguise their sources," and that "statements made to third parties, including prospective sources, purporting to identify other sources from whom the author has obtained information are inherently suspect and should not be accepted at face value." J.A. 863. Whether or not Sterling can persuade the jury on this point, the argument is not a lost one. Unlike Risen, the former CIA agent simply cannot testify that he *knows* Sterling to be Risen's source, because he does not know that to be true. He cannot refute the possibility that Risen might have falsely pointed the finger at Sterling to protect his real source from scrutiny, or to entice the former CIA agent to provide similar or confirming information. Only Risen can answer these questions.

Accordingly, even if we were to recognize a reporter's privilege that could deprive a jury of the only direct, firsthand evidence of guilt or innocence, Risen's statement to the former CIA agent would be in violation of the confidentiality agreement that he relies upon to create the privilege. Notwithstanding any evidence of a standard journalistic practice of deception in investigative techniques, Risen has waived any privilege by violating the promise of confidentiality and disclosing the information to a third party. To rule otherwise would not only allow journalists to protect their confidential sources in criminal proceedings, but would also permit journalists to promise confidentiality to those engaged in ongoing criminal conduct, while at the same time disclosing their identities to anyone *except* law enforcement, grand juries investigating the crimes, and juries called upon to determine innocence or guilt.

Clearly, Risen's direct, first-hand account of the criminal conduct indicted by the grand jury cannot be obtained by alternative means, as Risen is without dispute the only witness who can offer this critical testimony. The information sought from Risen is not reasonably or fairly equaled by the inconclusive records of phone calls and emails, or the hearsay testimony of the other witnesses.

B.

The government has also demonstrated a compelling interest in presenting Risen's testimony to the jury.

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee,* 453 U.S. 280, 307, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). This interest extends to "protecting both the secrecy of information to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *United States v. Abu Ali,* 528 F.3d 210, 247 (4th Cir.2008) (quoting *CIA v. Sims,* 471 U.S. 159, 175, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985)). Clearly, the government also has a compelling interest in obtaining direct evidence that Sterling compromised these critical national-security interests by disclosing classified information in violation of validly-enacted criminal laws, and in presenting this evidence to the jury charged with determining his guilt or innocence. *See LaRouche,* 780 F.2d at 1139.

Risen's testimony is the best evidence to prove Sterling's guilt beyond a reasonable doubt to a jury charged with the search for the truth. He is the only one who can identify Sterling as the perpetrator of the charged offenses, and he is the only one who can effectively address Sterling's expected efforts to point the finger at others. If Risen identifies Sterling as his source, he will have provided unequaled evidence of guilt on this point, yet not deprived Sterling of his defense that the information in Risen's book was not, in fact, national defense information at all. And should Risen identify different or additional sources of national defense information, which could exculpate Sterling, the government maintains an equally compelling interest in obtaining the only available inculpatory evidence against all who

jeopardized the security of the United States and at least one of its covert assets.

To date, Sterling has not sought to compel Risen to testify regarding the identity of his source, and he professes to "take[] no position" as to whether Risen has properly invoked a reporter's privilege. Defendant–Appellee's Brief at 5. Sterling has, however, seized upon the government's unsuccessful attempts to compel Risen's testimony to repeatedly point out "how little evidence the Government really has [against him] in this case." J.A. 892. Sterling even goes so far as to point out the absence of *direct evidence* of his guilt, arguing that:

> [w]hile it is crystal clear that the Government believes ... that Mr. Sterling was at least *one* of the sources for *State of War,* the Government admits now publicly that *it has no direct evidence that Mr. Sterling ever told Mr. Risen anything about Classified Program No.* 1.

J.A. 892 (emphasis added); *see also* J.A. 893 (asserting that "[t]he Government now admits that its case is entirely speculative even as to venue. *It admits that it has 'no direct evidence, other than Risen's testimony,* that establishes where the substantive disclosures of classified information occurred'.... In short, the Government is so fixated on compelling Mr. Risen's testimony—or perhaps jailing him—that it is willing to concede that its case is weak and that it needs Mr. Risen ... to come to the rescue." (emphasis added) (citation omitted)). Hardly a better argument could be made as to why the evidence sought from Risen is unavailable from

alternative sources and why the government has demonstrated a compelling need for it.

V.

For the foregoing reasons, we reverse the district court's order granting Risen's motion to quash his trial subpoena and denying the government's motion in limine to admit his testimony, which would allow Risen to protect the identity of the source of the classified, national security information that the grand jury found probable cause to believe was illegally leaked to Risen.

GREGORY, Circuit Judge, writing for the court on Issues II and III:

VI. *District Court's Suppression Order*

The Government challenges the district court's order excluding two of its witnesses as a sanction for violating a discovery order. The discovery order at issue, entered by the district court with the parties' consent, provided that all *Giglio*[13] material had to be turned over to the defense no later than five calendar days prior to the start of trial. The trial was initially slated to begin on September 12, 2011. However, in early July 2011, Sterling and the Government requested a continuance based on the complexity of

[13] *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (requiring the government to disclose to the defendant prior to trial any evidence tending to impeach a prosecution witness).

the pretrial discovery issues. *See* 18 U.S.C. § 3161(h)(7)(B)(ii). The district court agreed, rescheduling the trial to begin on October 17, 2011. Thus, the new discovery deadline was October 12, 2011, five days prior to the trial date.

During the months leading up to trial, the Government produced nearly 20,000 pages of discovery material, along with various items in electronic format. As the trial date approached, the Government continued to search the CIA's files, and at the eleventh hour it discovered impeachment materials in the personnel files of six of its witnesses. Due to the risk of classified information being contained in the CIA's files, all of this discovery material had to be presented to the CIA for a line-by-line classification review before the information could be turned over to the defense.

The CIA completed its line-by-line review of the disputed material and provided it to the Government on the evening of October 12, 2011. The Government turned the information over to the defense on the morning of October 13, 2011–the day after the discovery period expired.

At a pre-trial hearing on October 13, the defense did not object to the late disclosure. At a hearing on October 14, the Friday before the Monday on which the trial was to commence, the district court noted that the Government had not timely complied with the discovery schedule. The Government apologized for the delay and thanked the defense for not objecting—at which point, defense counsel lodged an objection. In addressing a possible remedy, the defense stated the court could grant a brief continuance, but observed that this option would not

be particularly palatable to the court. The defense then stated that the court could sanction the Government by striking a witness. At that point the district court decided to strike two witnesses, to "even up the playing field." J.C.A. 577.

The Government objected to the court's order arguing that the delay in production was not in bad faith. As an alternative sanction for the delay, the Government suggested that the court grant a continuance and offered to assist the defense in locating three people whose unfavorable ratings of a CIA colleague comprised a portion of the *Giglio* material as to that colleague. The court asked the defense about its schedule, seeking to determine whether counsel's other obligations would accommodate a brief continuance. However, the court had already struck two crucial prosecution witnesses, and the defense preferred this sanction to a continuance. Thus, although the court subsequently found the Government did not act in bad faith, it maintained its decision to strike the two witnesses.

We have jurisdiction over the Government's appeal of this order pursuant to 18 U.S.C. § 3731.

The Due Process Clause requires the prosecution to disclose upon request evidence that is favorable to the defense and material to guilt or punishment. *United States v. Higgs,* 663 F.3d 726, 734–35 (4th Cir.2011). Evidence is favorable if it is exculpatory, *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or if it may be used for impeachment, *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The government breaches its duty if it fails to produce evidence that it is obligated to turn over to the defense, or if it fails to

timely comply with a discovery order in turning over required evidence. A failure to disclose violates due process only if the evidence in question (1) is favorable to the defendant because it is either exculpatory or impeaching; (2) was suppressed by the government; and (3) is material in that its suppression prejudiced the defendant. *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Vinson v. True,* 436 F.3d 412, 420 (4th Cir.2006). Undisclosed evidence is material when its cumulative effect is such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotation marks and citation omitted). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 434, 115 S.Ct. 1555.

When the government's contumacious conduct involves a delay in producing discovery, rather than a failure to turn over required materials, the relevant inquiry is "whether the defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case." *United States v. Ingraldi,* 793 F.2d 408, 411–12 (1st Cir.1986). "As long as evidence is disclosed before it is too late for the defendant to make effective use of it, there is no due process violation." *United States v. Russell,* 971 F.2d 1098, 1112 (4th Cir.1992) (discussing allegation of delay in producing exculpatory evidence in violation of *Brady*).

The district court is permitted, but not required, to impose sanctions upon the government's failure to

timely comply with a discovery order. Fed.R.Crim.P. 16(d)(2); *see United States v. Lopez,* 271 F.3d 472, 483 (3d Cir.2001). If the court decides to impose a sanction, it may:

> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
>
> (B) grant a continuance;
>
> (C) prohibit that party from introducing the undisclosed evidence; or
>
> (D) enter any other order that is just under the circumstances.

Fed.R.Crim.P. 16(d)(2). "A continuance is the preferred sanction." *United States v. Hammoud,* 381 F.3d 316, 336 (4th Cir.2004) (en banc) (citing *United States v. Gonzales,* 164 F.3d 1285, 1292 (10th Cir.1999)), *vacated on other grounds,* 543 U.S. 1097, 125 S.Ct. 1051, 160 L.Ed.2d 997 (2005).

When the government fails to timely provide *Giglio* material, the district court's determination of whether to impose a sanction, and what sanction to impose, is reviewed for abuse of discretion. *Hammoud,* 381 F.3d at 336. "A district court abuses its discretion only where it 'has acted arbitrarily or irrationally[,] has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises.' " *L.J. v. Wilbon,* 633 F.3d 297, 304 (4th Cir.2011) (quoting *United States v. Hedgepeth,* 418 F.3d 411, 419 (4th Cir.2005)); *see James v. Jacobson,* 6 F.3d 233, 239 (4th Cir.1993). Likewise, a district court abuses its discretion when it commits

an error of law. *United States v. Delfino,* 510 F.3d 468, 470 (4th Cir.2007); *see United States v. Wilson,* 624 F.3d 640, 661 n. 24 (4th Cir.2010) ("It is an abuse of discretion for the district court to commit a legal error-such as improperly determining whether there was a *Brady* violation-and that underlying legal determination is reviewed de novo.").

In fashioning a remedy for a *Giglio* violation, the district court must consider several factors: the reason for the government's delay, and whether the government acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice to the defendant and deter future wrongdoing by the government. *Hammoud,* 381 F.3d at 336 (citing *United States v. Hastings,* 126 F.3d 310, 317 (4th Cir.1997)); *Gonzales,* 164 F.3d at 1292. "When a court sanctions the government in a criminal case for its failure to obey court orders, it must use the least severe sanction which will adequately punish the government and secure future compliance." *Hastings,* 126 F.3d at 317; *see also United States v. Ivy,* 83 F.3d 1266, 1280 (10th Cir.1996). Indeed, it " 'would be a rare case where, absent bad faith, a district court should exclude evidence.' " *Hammoud,* 381 F.3d at 336 (quoting *United States v. Golyansky,* 291 F.3d 1245, 1249 (10th Cir.2002)).

Neither the district court nor Sterling suggests that the Government acted in bad faith, and our review of the record dispels any such notion. It is clear that the sheer volume of materials, along with the inherent delays involved in classification review, was the genesis of the Government's error. The other

contributing factor, of course, was the Government's failure to recognize the necessity of reviewing the personnel files of likely witnesses at an earlier stage of the discovery process. We cannot, of course, condone the Government's oversight; as Sterling points out, the Government had many months to examine the relevant records, and the evidence at issue here would have been an obvious source for potential *Giglio* material. However, other factors guide our decision.

Sterling suggests that because the material was not submitted by the discovery deadline, he "could not possibly have fully investigated and developed the belatedly-disclosed evidence prior to the start of trial, three to four days later."[14] (Appellee Sterling's br. at 6). Although we do not take lightly the impact of the Government's delay on Sterling's ability to prepare, it is difficult to imagine that Sterling could have fully prepared with regard to the *Giglio* material if he received it on the last day of the discovery period, but "could not possibly" have prepared having received the material the next day, four days prior to trial. Sterling alleges that, if he

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[14] Indeed, the possibility of delay could not have come as a surprise. The parties submitted to the district court a letter accompanying the proposed pretrial order; this letter characterized the proposed discovery schedule as "very aggressive" given the plethora of classified materials, and acknowledged that the parties might have difficulty meeting the deadlines they jointly proposed. The letter further provided that the parties "have agreed to remain flexible with regard to the proposed filing deadlines without having to change any of the proposed hearing dates if at all possible." (E.D. Va. PACER docket entry 146, filed Aug. 4, 2011).

had received the *Giglio* material at an earlier time, he could have thoroughly investigated the information and the witnesses to which that information pertained. As to the error, the prejudice from the brief delay in disclosure could plainly have been alleviated with a continuance.

Both Sterling and the district court suggest the Government should have produced the *Giglio* material earlier in the discovery process. Although efforts at earlier review and disclosure of the relevant personnel files might have ameliorated the error, and would certainly have eased the defense's undoubtedly hectic pretrial preparations, the Government was not obligated to accelerate its production to complete discovery in advance of the deadline—a deadline to which the parties and the district court agreed. We can only find error in the Government's one-day delay in production—not in its perhaps ill-advised document review strategy, nor in its failure to produce the materials at an earlier stage of the discovery process.

We are convinced, moreover, that the Government has been adequately chastened, and that it will proceed more judiciously in the future. Further, as the Government is surely aware, any similar future transgression will not be forgiven as easily.

In sum, although the district court did not abuse its discretion by imposing a sanction, the sanction that it chose to impose was simply too severe a response to conduct that was not undertaken in bad faith, that can be remedied with a continuance, and that is unlikely to be repeated. As we said in *Hammoud,* a continuance is the preferred sanction for a delay in production of *Giglio* material. Nothing

in the record suggests that Sterling would not have been able to make use of the impeachment evidence if given a continuance. *See Golyansky,* 291 F.3d at 1249–50. We discern no justification for the more severe sanction of striking witnesses. Accordingly, we reverse the district court's order striking the two witnesses.

VII. *CIPA Ruling*

Prior to trial the Government moved for a protective order, pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 § 6, prohibiting the disclosure of classified and sensitive information. The list of protected information included:

[ ] The true name of any current or former covert CIA employee, or other information (such as a physical description) that reasonably could be expected to identify any current or former covert CIA employee, with the exception of those current or former covert CIA employees who testify using their full, true names.

[ ] The true name of any CIA employee, covert or overt, who testifies using his or her last initial only.

J.C.A. 400. The Government sought to protect the identities of some of its witnesses—as relevant here, current or former CIA operatives—through use of a screen or light disguises (wigs, false beards, half glasses), use of a non-public entrance to the courtroom, and, of critical importance to this appeal, by allowing the witnesses to use last initials rather than their full names (for example, "Mr. D." instead of John Doe).

The district court initially granted in part and denied in part the Government's request for security measures when the CIA operatives testified. The court agreed that the CIA operatives would not have to reveal their names, and allowed that those witnesses could use a non-public entrance to the courtroom. The court stated that no sketch artists would be permitted in the courtroom, but denied the Government's request for the witnesses to testify from behind a screen.[15] The Government moved for reconsideration of this ruling, stating that the witnesses needed more protection than was permitted by the district court's prior ruling. Specifically, the Government argued for the use of a portable screen between the witnesses and the public,[16] or permitting the witnesses to testify wearing light disguises. Sterling opposed the Government's motion for reconsideration, stating that the Government had offered no new information justifying reconsideration of the court's prior ruling. Sterling also contended that the security measures proposed by the Government would infringe upon Sterling's right to a public trial and to confront the witnesses against him. He contended that the use of screens or disguises was unduly suggestive of the existence of national defense information, problematic because one of his planned defenses was that the information in Risen's book was not, in fact,

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[15] The court ordered that another witness, Human Asset No. 1, would be permitted to testify behind a screen.

[16] The screen would shield the witnesses from public view; Sterling, his counsel, and the jury would be able to see the witnesses.

national defense information. Although Sterling expressed frustration with the security measures previously imposed by the court, he did not ask the court to alter its ruling permitting the CIA operatives to use partial names or pseudonyms.

At the October 14 hearing, the court reversed course as to both the screen and the witnesses' names. The court agreed to permit a screen between the trial participants and the public seating section of the courtroom.[17] And although the witnesses could use pseudonyms while testifying, the Government was ordered to provide to defense counsel, Sterling, and the jury a key with the witnesses' true names.[18] The Government appealed the portion of the order requiring it to provide a key with the witnesses' true names to Sterling and the jury.

Sterling contends we do not have jurisdiction to review the order requiring disclosure of the witnesses' true identities to Sterling and the jury.

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[17] Sterling has not cross-appealed as to the order permitting the screen.

[18] The record reflects no legally significant change in circumstances between the court's initial order permitting the name substitutions and its later order denying substitutions. In the hearing on the Government's motion for reconsideration, the court stated that as long as the Government planned to appeal the *Giglio* ruling, the court might as well rule on the name issue, too, to give the Fourth Circuit a crack at it. The Government implies that the court may have changed its ruling to persuade the Government to narrow its witness list. While the district court did state that the Government might not need all of the witnesses on its list, and instructed the Government to call the absolute minimum number of witnesses it needed, we decline to ascribe to the district judge any improper motive.

The Government raises two bases for its argument that the disclosure order is immediately appealable: 18 U.S.C. § 3731, and CIPA section 7, 18 U.S.C. app. 3, § 7. Section 3731, as recounted at Section II.A, does not confer jurisdiction for an immediate appeal as to this issue because the order is not one suppressing or excluding evidence. Thus, we turn to CIPA.

A.

CIPA provides a framework for determining how to proceed with discovery and admissibility of classified information in criminal cases. *See United States v. Moussaoui,* 591 F.3d 263, 281–82 (4th Cir.2010). It was designed to balance the defendant's interest in a fair trial and the government's interest in protecting national security information. *United States v. Passaro,* 577 F.3d 207, 219 (4th Cir.2009). When classified information may come into play at trial, the government may move for a hearing in the district court "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceedings." 18 U.S.C. app. 3, § 6(a). The district court's order was, we conclude, an order concerning the use of classified information encompassed by CIPA section 6.

It is true, as Sterling contends, that this is not a run-of-the-mill CIPA appeal. CIPA generally comes into play when the defendant seeks to obtain, or plans to disclose, national security information, and the government opposes disclosure. *United States v. Moussaoui,* 333 F.3d 509, 514 (4th Cir.2003). In *Moussaoui,* we held that an order permitting a

deposition of an enemy combatant witness was not immediately appealable under CIPA. We reasoned that CIPA was concerned with disclosure of classified information at trial, rather than the defendant's pretrial discovery of classified information. Thus, we concluded, CIPA was only applicable by analogy, and in that instance CIPA § 7 did not authorize an interlocutory appeal.

Following *Moussaoui,* we considered a case in which the government introduced classified information at trial, and relied upon CIPA in protecting that information from disclosure. *United States v. Abu Ali,* 528 F.3d 210, 255 (4th Cir.2008). There, the government used classified information to which neither Abu Ali nor his counsel was privy. We held that:

> If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions so long as these alternatives do not deprive the defendant of a fair trial.

Id. The procedural posture of this case is, of course, different from *Abu Ali; Abu Ali* was an appeal following conviction, not an interlocutory appeal. Nevertheless, it is illustrative; evidence sought to be admitted at trial by the government, like that proffered by the defense, is subject to the protections afforded by CIPA.

The order at issue authorizes disclosure of classified information at trial, unlike the order in *Moussaoui,* which involved the defendant's pretrial discovery request. *Cf. United States v. Moussaoui,* 336 F.3d 279, 280 (4th Cir.2003) (Wilkins, C.J., concurring in the denial of en banc rehearing) (noting that CIPA § 6 applies to the use of classified information at trial or in pretrial proceedings, and not to pretrial discovery of classified information). Given our recognition in *Abu Ali* that CIPA applies to evidence proffered by the government for use at trial, we have jurisdiction over this interlocutory appeal pursuant to Section 7 of CIPA, which provides:

> An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

18 U.S.C. app. 3, § 7(a). Having determined that we have jurisdiction to review the district court's order, we turn to the merits, reviewing for abuse of discretion. *Abu Ali,* 528 F.3d at 253–54 (applying abuse of discretion standard, but striking a balance between the defendant's Confrontation Clause rights and the government's need to protect classified information).

B.

There can be no doubt that the identity of CIA operatives is sensitive information. The identity of CIA operatives is, and always has been, subject to rigorous protection. *See, e.g., In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141 (D.C.Cir.2006). To disclose the identities of CIA operatives, even if not to every spectator in the courtroom, subjects the operatives to targeting by hostile foreign intelligence services and terrorist organizations, and creates a grave danger to the operatives, their families, and the operations in which they are engaged. *Cf. United States v. Ramos–Cruz,* 667 F.3d 487, 500 (4th Cir.2012) (recognizing that defendant's rights under the Confrontation Clause to identifying information about witnesses is not absolute; if the government shows an actual threat, the district court has discretion to determine whether effective cross-examination is possible if the witness's identity is concealed).

We find no abuse of discretion in the district court's decision to make available to Sterling and his counsel a key to the witnesses' true names. Sterling knows, or may know, some of the witnesses at issue, and depriving him of the ability to build his defense in this regard could impinge on his Confrontation Clause rights. *See generally Maryland v. Craig,* 497 U.S. 836, 848–49, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Moreover, and unlike the usual cases where witnesses have been permitted to use pseudonyms, the Government in this case has made no showing that Sterling or his counsel pose an actual threat to

the safety of these witnesses. *See Ramos–Cruz,* 667 F.3d at 506; *United States v. El–Mezain,* 664 F.3d 467, 492 (5th Cir.2011). Thus, we discern no potential for harm from disclosure of their identities to Sterling and his counsel. We cannot, however, take the same approach when it comes to the jury.

Sterling contends that the security measures proposed by the Government will serve to impermissibly heighten the jury's sensitivity to the classified nature of the information Sterling is accused of disclosing, increasing the odds of his conviction. The district court understandably sought to limit to the extent possible the elements of secrecy in this case, and we, too, are mindful of the risk of tainting the jury if unduly suggestive security measures are used at trial. If a security measure is inherently prejudicial, it may be employed "only where justified by an essential state interest specific to each trial." *Holbrook v. Flynn,* 475 U.S. 560, 568–69, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). However, we can discern no real benefit that would inure from providing the jury with the full, true names of the CIA operatives at issue. The court sought to limit the risk of disclosure by proposing to instruct the jurors not to write down the witnesses' true names, but nothing will prevent a juror from remembering the names-and, for that matter, the other classified information presented at trial. Unlike the information Sterling is charged with disclosing to Risen, though, the true names of the CIA operatives at issue will do nothing to enhance the jury's understanding of the facts and legal issues presented at trial. And although we are mindful that the jurors are unlikely to disseminate the names in

contravention of the district court's instructions, it simply is not worth the risk to the lives of these operatives (and their families and associates) to disclose the operatives' true names to anyone who does not have a genuine need to know their identities.

Although Sterling may dispute at trial that the information at issue was classified, or that he was the person who passed to Risen the information in Chapter Nine, there is no escaping the fact that Sterling has been charged with disclosing classified information, and the jury will be well aware of that fact from the very outset of the proceedings. The district court has made clear that it will instruct the jury that Sterling's guilt cannot be inferred from the use of security measures in the courtroom. Balancing Sterling's concerns with the very real danger to the CIA operatives if their identities are disclosed, we conclude that a proper jury instruction will alleviate any potential prejudice, and that the district court abused its discretion in taking the more perilous approach of ordering that the jury be given a key with the operatives' true names. Thus, we reverse this portion of the district court's order. We affirm, however, the portion of the order permitting Sterling and his counsel to receive the key with the operatives' true names.

C.

For the foregoing reasons, we reverse the court's exclusion of two Government witnesses, and affirm in part and reverse in part the court's ruling pursuant

to CIPA. We remand for further proceedings consistent with this opinion.

TRAXLER, Chief Judge, concurring in part and dissenting in part as to Issues II and III:

I concur in the majority's decision as to Issue II, which reverses the district court's order striking two of the government's witnesses as a sanction for violating the discovery order. With regard to Issue III, I concur in the reversal of the district court's order requiring disclosure of the identities of the covert CIA agents and operatives (the "CIA witnesses") to the jury. I respectfully dissent, however, from the majority's decision to affirm the district court's order requiring disclosure of this information to Sterling.

Prior to trial, the government filed a motion under Section 6 of the Classified Information Procedures Act ("CIPA"), see 18 U.S.C.App. III, requesting permission to substitute pseudonyms for the true names of the CIA witnesses. The government also asked that a screen be used to shield the witnesses from the public's view, but not the view of Sterling or the jury. The motions were accompanied by CIA and FBI declarations explaining in detail that public disclosure would jeopardize the personal safety of the witnesses, their families, and associates, and would jeopardize the effectiveness of the CIA witnesses as agents and operatives. Additionally, foreign intelligence and terrorist organizations have a significant interest in identifying CIA agents and operatives, and use information gleaned from trials to expose their activities, sources, and methods.

The district ruled that the CIA witnesses would be allowed to testify using pseudonyms and from behind a screen, but that their true identities would have to be disclosed to Sterling and the jury. The majority reverses the district court's ruling as to the jury, but affirms as to Sterling. Because disclosure of the identities of the CIA witnesses endangers the personal safety of the witnesses and others associated with them, and jeopardizes the witnesses' effectiveness as agents and operatives, and there has been no demonstration that Sterling cannot effectively cross-examine the witnesses without this information, I would reverse the disclosure ruling as to both the jury and Sterling.

A.

As a general rule, "the Confrontation Clause guarantees a defendant the right to question an adverse witness about identifying information, including his full name and address." *United States v. Ramos–Cruz,* 667 F.3d 487, 500 (4th Cir.2012) (citing *Smith v. Illinois,* 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968)). However, "th[e] right is not absolute," and "a trial court may limit cross-examination if the information sought could endanger the witness." *Id.* (internal quotation marks omitted). "When the government seeks to withhold a witness's true name, address, or place of employment, it bears the burden of demonstrating that the threat to the witness is actual and not a result of conjecture." *Id.* (internal quotation marks and alteration omitted). Once the government meets this burden, the court must "review relevant

information and determine whether disclosure of the witness's identifying information is necessary to allow effective cross-examination." *Id.*

B.

There is "no governmental interest ... more compelling than the security of the Nation," and "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." *Haig v. Agee,* 453 U.S. 280, 307, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981); *see also Snepp v. United States,* 444 U.S. 507, 509 n. 3, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980). "[T]he Government must tender as absolute an assurance of confidentiality as it possibly can" to intelligence officers and sources, *C.I.A. v. Sims,* 471 U.S. 159, 175, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985), and courts should exercise particular caution before "order[ing] [their] identit[ies] revealed," *id.* at 176, 105 S.Ct. 1881. Protecting the classified identities of covert CIA agents and operatives is of particular concern because disclosure places not only our national security at risk, but also the personal safety of those who have committed their lives to the service of our country. Indeed, Congress has criminalized such disclosure, *see* 50 U.S.C. § 421, given the "behavior's 'intolerable' consequences: '[t]he loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure.' " *In re Grand Jury*

Subpoena, Judith Miller, 438 F.3d 1141, 1179 (D.C.Cir.2006) (Tatel, J., concurring) (quoting S.Rep. No. 97–201, at 10–11 (1981)); *see also* 50 U.S.C. § 403g (noting that "the interests of the security of the foreign intelligence activities of the United States" require that the names of CIA personnel be protected).

The actual threat to CIA witnesses has been well documented in this case, and it appears that we all agree on this point. As the majority notes: "To disclose the identities of CIA operatives, even if not to every spectator in the courtroom, subjects the operatives to targeting by hostile foreign intelligence services and terrorist organizations, and creates a grave danger to the operatives, their families, and the operations in which they are engaged." Majority op. at 75. Accordingly, we unanimously conclude that the district court abused its discretion in requiring disclosure of the identifying information to the jury.

I depart from the majority's view, however, that disclosure to Sterling is nevertheless required because there has been no showing that Sterling poses an actual threat to the safety of the witnesses. "[T]he appropriateness of using pseudonyms to protect witnesses does not depend on whether the threat to the witness comes directly from a defendant or from another source." *Ramos–Cruz,* 667 F.3d at 501 (internal quotation marks omitted). But, in any event, the grand jury in this case has found probable cause to believe that Sterling has already revealed classified information about a covert operation and a covert CIA asset for publication in the public domain. In my opinion, no more needs to be shown to demonstrate that disclosure of the true identities of

the CIA witnesses to Sterling poses an actual and specific risk, sufficient to require serious inquiry into the necessity of the disclosure for purposes of confrontation.

Because the government seeks to protect the confidentiality of the CIA witnesses' identities to minimize the actual threat disclosure poses to them, Sterling was required to demonstrate that disclosure is necessary to conduct an effective cross-examination. *See id.* at 500; *see also United States v. El–Mezain,* 664 F.3d 467, 492, 493 (5th Cir.2011) (holding that the defendants' Confrontation Clause rights were not violated by allowing Israeli security officers to testify using pseudonyms, due to the "serious and clear need to protect the true identities of [the witnesses] because of concerns for their safety" and the defendants' adequate opportunity "to conduct effective cross-examination"); *United States v. Lonetree,* 35 M.J. 396, 410 (C.M.A.1992) (rejecting argument that Confrontation Clause was violated by allowing a United States intelligence agent to testify without disclosing his true name because it endangered the agent and "was not essential to a fair resolution of the cause").

I have much respect for the district court, which has dealt with difficult questions arising from the classified nature of this case. On this particular point, however, I am constrained to find an abuse of discretion. Given the dangers involved, the district court should have granted the government's motion to withhold disclosure of the witnesses' identifying information because there had been no showing that the disclosure was "necessary to allow effective cross-examination." *Ramos–Cruz,* 667 F.3d at 500. Instead,

the district court merely ruled that the identities of the CIA witnesses should be revealed because "the defendant may know things about [a] witness," and could "turn to counsel and say: Hey, ask him about such-and-such on cross-examination." J.C.A. at 487. The majority similarly concludes only that failure to disclose the identifying information might "depriv[e] [Sterling] of the ability to build his defense" and, "in this regard could impinge on his Confrontation Clause rights." Majority op. at 516–17. In my opinion, this is too speculative a basis upon which to require disclosure of the identities of the CIA witnesses to Sterling.

Sterling has been provided with discovery on all of the witnesses by their pseudonyms, including prior statements, interview reports, cables, and other documents. Sterling therefore appears to already know the factual connection that each witness has to his case. *See Ramos–Cruz,* 667 F.3d at 501 (noting that "because the government disclosed to the defense details of the[ ] witnesses before the trial, the defendants were able to effectively cross-examine the witnesses without threatening their safety" (internal quotations marks omitted)). Because disclosure of the identities of the covert CIA witnesses endangers their safety, and Sterling has not made the required demonstration that he needs this information in order to conduct a meaningful cross-examination of the witnesses, I would reverse the district court's order requiring disclosure of the identities of the CIA witnesses to Sterling as well.

GREGORY, Circuit Judge, dissenting as to Issue I:

Today we consider the importance of a free press in ensuring the informed public debate critical to citizens' oversight of their democratically elected representatives. Undoubtedly, the revelation of some government secrets is too damaging to our country's national security to warrant protection by evidentiary privilege. Yet the trial by press of secret government actions can expose misguided policies, poor planning, and worse. More importantly, a free and vigorous press is an indispensable part of a system of democratic government. Our country's Founders established the First Amendment's guarantee of a free press as a recognition that a government unaccountable to public discourse renders that essential element of democracy—the vote—meaningless. The majority reads narrowly the law governing the protection of a reporter from revealing his sources, a decision that is, in my view, contrary to the will and wisdom of our Founders.

The district court ruled that under *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), and subsequent precedent from this Circuit, the Government could not compel Risen to reveal his source for chapter nine of his book, *State of War.* We review de novo the district court's legal determination that the reporter's privilege exists in the criminal context, and we examine the district court's application of that privilege to the instant facts under a deferential abuse-of-discretion standard.[1] *Church of Scientology Int'l v. Daniels,* 992

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[1] As the majority notes, we have jurisdiction pursuant to 18 U.S.C. § 3731.

F.2d 1329, 1334 (4th Cir.1993); *LaRouche v. Nat'l Broad. Co.,* 780 F.2d 1134, 1139 (4th Cir.1986).

A.

The freedom of the press is one of our Constitution's most important and salutary contributions to human history. *See* U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press[.]"). Reporters are "viewed 'as surrogates for the public,' " *United States v. Criden,* 633 F.2d 346, 355 (3d Cir.1980) (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 573, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)), who act in the public interest by uncovering wrongdoing by business and government alike. Democracy without information about the activities of the government is hardly a democracy. The press provides "a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama,* 384 U.S. 214, 219, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). A citizen's right to vote, our most basic democratic principle, is rendered meaningless if the ruling government is not subjected to a free press's "organized, expert scrutiny of government." Justice Potter Stewart, *Or of the Press,* 26 Hastings L.J. 631, 634 (1975).

The protection of confidential sources is "necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain." *Ashcraft v. Conoco, Inc.,* 218 F.3d 282, 287 (4th Cir.2000). If reporters are compelled to divulge their confidential sources, "the free flow of

newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Id.; see also Zerilli v. Smith,* 656 F.2d 705, 711 (D.C.Cir.1981) ("Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability" and threaten "a vital source of information," leaving citizens "far less able to make informed political, social, and economic choices.").

Yet if a free press is a necessary condition of a vibrant democracy, it nevertheless has its limits. "[T]he reporter's privilege ... is not absolute and will be overcome whenever society's need for the confidential information in question outweighs the intrusion on the reporter's First Amendment interests." *Ashcraft,* 218 F.3d at 287. And we must be mindful of the "fundamental maxim that the public ... has a right to every man's evidence." *Jaffee v. Redmond,* 518 U.S. 1, 9, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (quoting *United States v. Bryan,* 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950)).

The public, of course, does not have a right to see all classified information held by our government. But public debate on American military and intelligence methods is a critical element of public oversight of our government. Protecting the reporter's privilege ensures the informed public discussion of important moral, legal, and strategic issues. Public debate helps our government act in accordance with our Constitution and our values. Given the unprecedented volume of information available in the digital age—including information considered classified—it is important for journalists

to have the ability to elicit and convey to the public an informed narrative filled with detail and context. Such reporting is critical to the way our citizens obtain information about what is being done in their name by the government.

A reporter's need for keeping sources confidential is not hypothetical. The record on appeal contains affidavits proffered by Risen detailing the integral role of confidential sources in the newsgathering process. Scott Armstrong, executive director of the Information Trust and former *Washington Post* reporter, points to three ways in which investigative journalism uses confidential sources: "developing factual accounts and documentation unknown to the public," "tak[ing] a mix of known facts and new information and produc [ing] an interpretation previously unavailable to the public," and "publiciz [ing] information developed in government investigations that has not been known to the public and might well be suppressed." Joint App'x (J.A.) 531. "It would be rare," Armstrong asserts, "for there not to be multiple sources—including confidential sources—for news stories on highly sensitive topics." *Id.* In turn, "[m]any sources require such guarantees of confidentiality before any extensive exchange of information is permitted." J.A. 350. Such guarantees of confidentiality enable sources to discuss "sensitive matters such as major policy debates, personnel matters, investigations of improprieties, and financial and budget matters." *Id.* Even in ordinary daily reporting, confidential sources are critical. "[O]fficial government pronouncements must be verified before they are published," and this is frequently done through discussion with officials not

authorized to speak on the subject but who rely on assurances of confidentiality. J.A. 352. These discussions can often lead to "unique and relevant, contextual comments" made by the confidential source, comments that deepen the story. *Id.*

The affidavits also recount numerous instances in which the confidentiality promised to sources was integral to a reporter's development of major stories critical to informing the public of the government's actions. *See, e.g.,* J.A. 378–80 (affidavit of Dana Priest) (noting, among many stories, her reporting on the existence and treatment of military prisoners at Guantanamo Bay, Cuba; the abuse of prisoners in Abu Ghraib, Iraq; the existence of secret CIA prisons in Eastern Europe; and the "systematic lack of adequate care" for veterans at Walter Reed Army Medical Center relied upon confidential sources). Carl Bernstein, who has worked for the *Washington Post* and ABC News, writes that without his confidential source known as "Deep Throat," the investigation into the Watergate scandal—the break-in of the Democratic National Committee's offices in the Watergate Hotel and Office Building that led to the resignation of President Nixon—would never have been possible. J.A. 361–62. "Total and absolute confidentiality" was essential for Bernstein to cultivate the source. J.A. 362.

For all that the record establishes, common sense tells us the value of the reporter's privilege to journalism is one of the highest order. *See Riley v. City of Chester,* 612 F.2d 708, 714 (3d Cir.1979) ("The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require

belaboring.”). Indeed, reporters “depend[ ] upon an atmosphere of confidentiality and trust” to carry out their mission, a mission critical to an informed and functioning democracy. *Jaffee,* 518 U.S. at 10, 116 S.Ct. 1923.

B.

Any consideration of the reporter’s privilege must start with *Branzburg,* where the Supreme Court upheld, by a vote of five to four, the compulsion of confidential source information from reporters. *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). The majority opinion highlighted the “longstanding principle that ‘the public ... has a right to every man’s evidence,’ except for those persons protected by a constitutional, common law, or statutory privilege.” *Id.* at 688, 92 S.Ct. 2646 (citations omitted). The opinion also stated that “news gathering is not without its First Amendment protections,” *id.* at 707, 92 S.Ct. 2646, but the Court did not specify exactly what those protections might encompass, although it indicated that “[o]fficial harassment of the press” and bad faith investigations might fall within the parameters of the First Amendment’s protection of reporters. *Id.* at 707–08, 92 S.Ct. 2646.

Further complicating matters is Justice Powell’s “enigmatic concurring opinion,” *id.* at 725, 92 S.Ct. 2646 (Stewart, J., dissenting), which is in part at odds with the majority opinion he joined. In the concurrence, Justice Powell emphasized “the limited nature of the Court’s holding,” and endorsed a balancing test, according to which “if the newsman is

called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation," then courts should consider the applicability of the reporter's privilege on a "case-by-case basis" by "the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 709–10, 92 S.Ct. 2646 (Powell, J., concurring).

The full import of Justice Powell's concurrence continues to be debated. Some analogize the *Branzburg* majority opinion to a plurality opinion, and therefore assert Justice Powell's concurrence as the narrowest opinion is controlling. *See In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1148 (D.C.Cir.2006) (describing appellants' argument that in a five-to-four decision, "the opinion of the least encompassing justice [ ] determines the precedent set by the decision"); *cf. McKoy v. North Carolina,* 494 U.S. 433, 462 n. 3, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (arguing that a separate opinion "cannot add to what the majority opinion holds, binding the other four Justices to what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority") (Scalia, J., dissenting). Others, like my good friends in the majority, treat Justice Powell's concurrence as ancillary, *see* ante 495–96, and simply rejoin that "the meaning of a majority opinion is to be found within the opinion itself." *McKoy,* 494 U.S. at 448 n. 3, 110 S.Ct. 1227 (Blackmun, J., concurring).

Given this confusion, appellate courts have subsequently hewed closer to Justice Powell's

concurrence—and Justice Stewart's dissent—than to the majority opinion, and a number of courts have since recognized a qualified reporter's privilege, often utilizing a three-part balancing test. *See, e.g., United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir.1986) (applying the reporter's privilege in the criminal context); *United States v. Burke,* 700 F.2d 70, 76–77 (2d Cir.1983) (recognizing the qualified privilege in criminal cases); *Zerilli v. Smith,* 656 F.2d 705, 711–13 (D.C.Cir.1981) (applying the reporter's privilege in a civil case). Indeed, a mere five years after *Branzburg,* a federal court of appeals confidently asserted that the existence of a qualified reporter's privilege was "no longer in doubt." *Silkwood v. Kerr–McGee Corp.,* 563 F.2d 433, 437 (10th Cir.1977). In short, Justice Powell's concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud.

The Fourth Circuit, like our sister circuits, has applied Justice Powell's balancing test in analyzing whether to apply a reporter's privilege to quash subpoenas seeking confidential source information from reporters. We first explicitly adopted Justice Powell's balancing test in an en banc opinion in *United States v. Steelhammer,* 539 F.2d 373, 376 (4th Cir.1976) (Winter, J., dissenting), *adopted by the court en banc,* 561 F.2d 539, 540 (4th Cir.1977). Then in *LaRouche,* we applied the reporter's privilege doctrine to a civil case, again citing Justice Powell's concurrence in *Branzburg* for authority. 780 F.2d at 1139. Following the lead of the Fifth Circuit, we applied a three-part test to help us balance the interests at stake in determining whether the

reporter's privilege should be applied; that is, we considered "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *Id.* (citing *Miller v. Transamerican Press, Inc.,* 621 F.2d 721, *modified,* 628 F.2d 932 (5th Cir.1980)). We went on to find that there was no abuse of discretion when the district court denied LaRouche's motion to compel discovery of a reporter's sources because LaRouche "had not exhausted reasonable alternative means of obtaining [the] same information." *LaRouche,* 780 F.2d at 1139.

In a subsequent case in the criminal context, *In re Shain,* four reporters in South Carolina asserted the reporter's privilege to protect information gleaned from interviews with a state legislator. 978 F.2d 850, 851–52 (4th Cir.1992). But applying Justice Powell's principles, we rejected the reporters' claim on the ground that none of the reporters asserted that the interviews were confidential, that there were agreements to refuse revealing the identity of the interviewee, or that the government sought to harass the reporters. *Id.* at 853. Thus, although the reporter's privilege was not recognized in "the circumstances of this case," *see id.* at 854, it is clear to me that we have acknowledged that a reporter's privilege attaches in criminal proceedings given the right circumstances.

The most recent federal appellate court decision to address the reporter's privilege at length is *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1145–49 (D.C.Cir.2006). In that case, the court rejected the reporter's privilege claim asserted by

Judith Miller of *The New York Times,* stating that the *Branzburg* decision was dispositive. The majority there—as in this case—reasoned that the Supreme Court had not revisited the question of a reporter's privilege under the First Amendment after *Branzburg,* and that Justice Powell's concurrence did not detract from the precedential weight of the majority's conclusion that there was no First Amendment reporter's privilege, at least when there was no suggestion that the reporter was being pressed for information as a means of harassment or intimidation. *Id.* at 1145–49. In a thoughtful concurrence, though, Judge Tatel pointed to the ambiguities of the *Branzburg* decision, and noted that nearly every state and the District of Columbia has recognized a reporter's privilege. Nevertheless, Judge Tatel concluded that "if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court." *Id.* at 1166 (Tatel, J., concurring). And although he felt constrained to deny applying a First Amendment privilege, Judge Tatel would have held that Rule 501 of the Federal Rules of Evidence provides for a reporter's privilege (though on the facts of that case, the privilege would have given way due to the extraordinary national security issue involved). *See id.* at 1177–78 (Tatel, J., concurring).

C.

On this background, I turn to the question now before the court: Are there circumstances in which a reporter may refuse to testify as to the identity of one of his confidential sources, when the government

seeks this information as part of a criminal investigation, and there is no evidence of prosecutorial bad faith or harassment? Some appellate courts have used a three-part test, essentially identical to the test we announced in *LaRouche* in the civil context, to help determine whether to apply the reporter's privilege in criminal cases. *See, e.g., United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir.1986); *United States v. Burke,* 700 F.2d 70, 76–77 (2d Cir.1983). They require the moving party, i.e. the government, "to make a clear and specific showing" that the subpoenaed information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Burke,* 700 F.2d at 77 (internal citations and quotation marks omitted). *Cf.* 28 C.F.R. § 50.10 (policy in regards to the issuance of subpoenas to members of the news media).

I, too, would recognize a qualified reporter's privilege in the criminal context, and evaluate the privilege using the three-part test enunciated in *LaRouche* as an "aid" to help "balance the interests involved." 780 F.2d at 1139. I would add a caveat to this general rule, however; in cases involving questions of national security, *if* the three-part *LaRouche* test is satisfied in favor of the reporter's privilege, I would require consideration of two additional factors: the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed.[2] *Cf. id.*

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[2] By "newsworthiness," I mean the value to the public of the leaked information concerning the issues of the day.

at 1139 (establishing a balancing test for the reporter's privilege in the civil context); *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d at 1175 (Tatel, J., concurring) (stating that courts must "weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value"). Thus, even when the *LaRouche* test favors recognizing the reporter's privilege, in matters of national security this privilege can still be overridden by pressing government interests. It is important to note that such a test does not depart from established precedent, to the contrary, it adheres to Justice Powell's concurrence in *Branzburg* that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 710, 92 S.Ct. 2646 (Powell, J., concurring).

Necessarily included in the concept of "newsworthiness" is the recognition that because this privilege is qualified, it will likely deter some potential sources from disclosing their information. Because the newsworthiness of the information cannot be adjudged by a court at the time of disclosure, a source takes a chance that a court will not protect the source. While this is somewhat speculative—not all reporters with confidential sources are routinely subpoenaed—to the extent this is a problem, the potential of this chilling effect counsels a broad definition of "newsworthiness." On the other hand, I would reject an absolute privilege because some discussions should be chilled—precisely those that seriously endanger individuals or our nation's security without an outweighing, compelling civic benefit.

D.

Whatever the limits of who may claim reporter's privilege, it is clear that Risen—a full-time reporter for a national news publication, *The New York Times*—falls into the category of people who should be eligible to invoke the privilege. I also note that Risen has been offered immunity by the Government, so there is no Fifth Amendment issue with regard to compulsion of his testimony. The threshold inquiries having been satisfied, I turn to the question of whether the reporter's privilege should apply in this case, applying the test I announced herein.[3]

1.

The inquiry when applying the first *LaRouche* factor is the relevance of Risen's testimony to the Government's case. Unlike the *Branzburg* case, where the reporters had knowledge of suspected crimes that could be seriously damaging to individuals and the government, the Government here seeks a conviction for the very act of disclosure. The Government claims that Risen's testimony is valuable to its case against Sterling for revealing national defense secrets for two reasons: establishing venue and supporting the Government's case on the merits. With respect to the former, the Government bears the burden of proving by a preponderance of

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[3] I emphasize that these factual assertions have yet to be proven, and my analysis would not, even if it were the majority opinion, constrain the jury's resolution of disputed factual issues at trial.

the evidence that "the essential conduct elements" of the charged offenses occurred within the Eastern District of Virginia. *United States v. Ebersole,* 411 F.3d 517, 524 (4th Cir.2005) (internal quotation marks omitted).

The record suggests the Government can show that Risen made phone calls from the Eastern District of Virginia to Sterling's Missouri residence. Furthermore, emails exchanged with Sterling used a server located in the Eastern District of Virginia. Of course, in order to prove venue, the Government must show that classified information was disclosed during these communications. It appears venue can be established without requiring Risen to disclose his confidential sources, limiting the relevance of his testimony. And as addressed below with regard to the value of Risen's testimony to the Government's case-in-chief, the circumstantial evidence that classified information was discussed appears to be strong,[4] indicating that Risen's testimony regarding his confidential sources is by no means pertinent to the Government proving Sterling guilty.

2.

Turning to the second *LaRouche* factor, whether the information sought—the identity of the source of the leak—is available by other means, the

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[4] In determining the relevance of the evidence sought to be protected by the reporter's privilege and whether the Government may prove its allegations by other means, we necessarily make a preliminary inquiry into the merits of the case, although such an inquiry is not equivalent to a judgment as a matter of law.

Government claims Risen's testimony is a critical part of its case against Sterling largely because Risen is the only eyewitness to the crime; the other evidence is circumstantial.[5] The Government's demonstration of its good-faith effort to obtain similar evidence through other means is a necessary part of its showing. *See United States v. Cuthbertson,* 651 F.2d 189, 195–96 (3d Cir.1981) (requiring a demonstration that the party seeking to overcome the reporter's privilege "demonstrate that he has made an effort to obtain the information from other sources") (quoting *Criden,* 633 F.2d at 358–59). But it is precisely because of the Government's diligence that it doth protest too much. An analysis of the circumstantial evidence shows the Government's case is not as weak as it or the majority claims, limiting the need for Risen's testimony.

First, the Government can demonstrate that Sterling showed Risen's book to Sterling's then-girlfriend in a bookstore and, without so much as

[5] As the district court stated, the privilege should extend to information that would lead the government to the identity of the confidential source. *See United States v. Sterling,* 818 F.Supp.2d 945, 955 (E.D.Va.2011) ("Courts have long held that the reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to the discovery of a source's identity."). That the coverage of the privilege should extend so far is commonsensical; otherwise, the questions could be tailored to swallow the privilege. *Cf. New York Times Co. v. Gonzales,* 459 F.3d 160, 168 (2d Cir.2006) (recognizing that the subpoena of a reporter's phone records "is a first step of an inquiry into the identity" of the source and that a balancing test should be applied to determine whether the reporter's privilege covers the records).

opening it, Sterling told her that chapter nine discussed his work at the CIA.[6] The book itself reveals details about Classified Program No. 1 that tend to link Sterling to chapter nine. For example, sections of the chapter are told from the point of view of the case officer responsible for Human Asset No. 1—which was Sterling's responsibility—and the Government asserts that the chapter describes two classified meetings at which Sterling was the only common attendee.

Second, the Government has the aforementioned phone records demonstrating that Sterling and Risen called each other seven times between February 27 and March 31, 2003. The Government also has evidence that Sterling attempted to delete emails referencing meetings and shared information between Sterling and Risen, and parts of the emails were indeed obliterated. In one email that was not fully deleted, Risen asks Sterling, "Can we get together in early January?" J.A. 40. In another, Risen tells Sterling "I want to call you today[.] I'm trying to write the story.... I need your telephone number again." J.A. 40. Risen sent another email to Sterling,

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[6] The Government suggests that the bookstore witness is now (or was for a time) Sterling's wife, and argues that her testimony might not be admitted at trial because she might assert a testimonial privilege. *See Trammel v. United States,* 445 U.S. 40, 53, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (only the witness-spouse can assert the spousal privilege). Whether this testimony is subject to privilege is a question for the district court in the first instance, and I seek neither to answer this question nor to remove from the district court's purview the ability to decide whether the testimony could properly be admitted.

this time stating "I'm sorry if I failed you so far but I really enjoy talking to you and would like to continue," J.A. 41, an apparent reference to *The New York Times's* refusal to publish Risen's story on Classified Program No. 1.

Third, the prosecution expects to elicit at trial the testimony of a former United States intelligence official. Risen allegedly told this official, who occasionally discussed Risen's reporting with him, that Sterling was involved in recruiting a source for "an important operation" that "targeted [ ] the Iranian nuclear program," and that Sterling was frustrated by the perceived lack of recognition he received within the CIA for his efforts. Joint Classified App'x (J.C.A.) 622, 624–25. This official, the district court wrote, "told the grand jury that Risen had told him that Sterling was his source for information about the Iranian nuclear weapons operation."

Finally, the Government can also link Risen and Sterling in the reporting of classified information on a prior occasion: Risen's March 2002 *New York Times* article entitled "Fired by the C.I.A., He Says Agency Practiced Bias" noted that Sterling provided Risen with one of Sterling's classified performance evaluations. In short, the Government has made "[a]ll reasonable attempts ... to obtain information from alternative sources" as recommended by the Department of Justice's internal guidelines on subpoenas for testimony by news media, *see* 28 C.F.R. § 50.10. The Government's efforts have yielded multiple evidentiary avenues that, when presented together, may be used to establish what the Government sought to establish solely with

testimony from Risen—that Sterling leaked classified information, rendering Risen's testimony regarding his confidential sources superfluous.

3.

The third *LaRouche* factor is whether the Government has a compelling interest in the information it seeks from Risen. Suffice it to say, the prosecution's body of evidence without Risen's testimony is strong.[7] The frequency of the phone calls between Risen and Sterling, the forensically retrieved emails, the stories published in *The New York Times,* the testimony of a former United States intelligence official, and the bookstore eyewitness provide extensive circumstantial evidence of the crime and the court's venue. While Sterling may argue that other staff members who had access to national security information could have been the source of the leak, the Government, as it acknowledges, may simply call to the stand those staff members to ask whether they were Risen's source.

While the prosecution would undoubtedly be better off with Risen's testimony—none of the remaining pieces of evidence is a smoking gun—the balancing test cannot mean that the privilege yields simply because "no circumstantial evidence, or combination

[7] There may yet be further motions in limine challenging some of the evidence that the Government may wish to present at trial. I do not suggest a view one way or the other on the merits of any potential challenges; my analysis is limited to Risen's claim of reporter's privilege.

thereof, is as probative as Risen's testimony or as certain to foreclose the possibility of reasonable doubt."[8] Brief for the United States at 14. The specificity of the information contained in chapter nine of Risen's book, coupled with the limited universe of individuals who had access to the information, the circumstantial evidence, and proof by negative implication, compose a reasonably strong case for the Government. As we have stated before, "circumstantial evidence is no less probative than direct evidence." *Stamper v. Muncie,* 944 F.2d 170, 174 (4th Cir.1991). I would therefore conclude that the Government has failed to demonstrate a sufficiently compelling need for Risen's testimony.

4.

Satisfied that the *LaRouche* factors weigh in favor of Risen's privilege from testifying as to his confidential sources, I turn next to newsworthiness and harm, the two additional factors I suggest should apply in a case involving national security information. On the present record, the newsworthiness of the leaked information appears to be substantial. The information contained in chapter

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[8] My good colleagues observe that circumstantial evidence is not always as effective as direct evidence. (Opinion of Traxler, C.J., at 49). I do not disagree. Rather, I observe that in *this* case, the circumstantial evidence proffered by the Government appears *strong enough* for the jury to draw a conclusion regarding the identity of Risen's source. I do not dispute that direct evidence would be more effective than circumstantial evidence to establish the identity of the source, but other factors are at play.

nine of *State of War* covers the United States intelligence community's efforts concerning the development of the Iranian nuclear program. The chapter questions the competence of the CIA's management of Classified Program No. 1. Chapter nine discusses a plan to have a former Russian scientist give Iranian officials incorrect nuclear weapon design specifications in an attempt to determine the status of the Iranian nuclear weapons program, and to stall or thwart the progress of that program, perhaps for years. The blueprints were so deficient, the chapter opines, that the Russian scientist spotted a flaw almost immediately. Although the scientist explained this flaw to the CIA, Risen writes, the CIA proceeded with the plot. In a letter accompanying the blueprints, the Russian scientist disclosed to the Iranians the flaw he spotted in the plans. Because the Iranians had received scientific help from Russian and Chinese scientists, the chapter continues, and because Iran already had black market nuclear blueprints, Iranian scientists could likely differentiate the good from the flawed in the American blueprints. In other words, Risen asserts, Classified Operation No. 1 may have helped Iran advance its nuclear program. The chapter also describes the inadvertent disclosure to an Iranian double-agent of the identities of every spy the CIA had within Iran—information that was then turned over to Iranian security officials, who in turn arrested a number of those agents. Finally, the chapter recounts the CIA's inability to obtain more than "fragmentary information about Iran's nuclear program." J.S.A. 208.

This information is not extraneous. Quite the opposite, it portends to inform the reader of a blundered American intelligence mission in Iran. Since the United States' invasion of Iraq in 2003, our nation's focus has shifted to the nuclear capabilities of Iran, specifically whether Iran is attempting to build a nuclear bomb and how soon it can achieve the technical capabilities to do so. *State of War* was released in 2006—three years after the Iraq invasion. The Iraq invasion was undertaken in part based on concerns that Iraq had developed weapons of mass destruction, possibly including nuclear weaponry. *See* J.S.A. 182. The apparent lack of weapons of mass destruction in Iraq, it has been argued, highlights a significant failure of United States intelligence. *See* J.A. 381. Risen himself contributed to our understanding of this alleged failure. *See* James Risen, "C.I.A. Held Back Iraqi Arms Data, U.S. Officials Say," *The New York Times,* July 6, 2001, at A1; J.S.A. 218–232 (chapter nine of *State of War*).

In a similar vein, Risen's investigation into the methods and capabilities of the United States foreign intelligence community with respect to the Iranian nuclear program is surely news of the highest import, particularly given the apparent contretemps made in the National Intelligence Estimate of 2007. *See* National Intelligence Council, *National Intelligence Estimate, Iran: Nuclear Intentions and Capabilities* (Nov. 2007), http://www. odni.gov/press_releases/20071203_release.pdf (asserting with "high confidence" that Iran in 2003 halted its nuclear weapons program, despite 2005 intelligence estimate noting that Iran is "determined to develop nuclear weapons"). Significant public speculation about the

possibility of a conflict with Iran has repeatedly surfaced in recent years. *See* Seymour M. Hersh, "Iran and the Bomb," *The New Yorker,* June 6, 2011, http://www.newyorker. com/reporting/2011/06/06/110606fa.facts.hersh ("There is a large body of evidence ... including some of America's most highly classified intelligence assessments, suggesting that the United States could be in danger of repeating a mistake similar to the one made with Saddam Hussein's Iraq eight years ago—allowing anxieties about the policies of a tyrannical regime to distort our estimations of the state's military capabilities and intentions."). Risen's reporting on Iran's nuclear capabilities is also particularly relevant given the criticism of the national press for its perceived failure to scrutinize United States intelligence regarding Iraq's weapons capabilities. *See* James Risen, "C.I.A. Held Back Iraqi Arms Data, U.S. Officials Say," *N.Y. Times,* July 6, 2004, at A1. Indeed, it is hard to imagine many subjects more deserving of public scrutiny and debate.[9]

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[9] The district court declined to consider newsworthiness as a factor in its ruling on reporter's privilege because no court had identified newsworthiness as a factor in the balancing test. The district court stated that considering newsworthiness would cause the court to "serve as editor-in-chief, unilaterally determining whether reporting is sufficiently accurate or newsworthy as to be deserving of First Amendment protection." *United States v. Sterling,* 818 F.Supp.2d 945, 954 (E.D.Va.2011). In the absence of precedential case law identifying this factor, it is understandable that the district court declined to consider newsworthiness. But I do not doubt the district court's ability to determine the value to the public of particular news stories. Courts already conduct this analysis in other

As a final step in the First Amendment inquiry, I would require the district court to balance the newsworthiness of the information against the harm caused by the leak.[10] The present record is not well developed on this point. The district court understandably declined to conduct fact-finding on this issue because this factor had not been identified in prior case law. Moreover, the Government has not clearly articulated the nature, extent, and severity of the harm resulting from the leak.[11] Without such

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First Amendment contexts; for example, when assessing restrictions on government employee speech. *See, e.g., City of San Diego v. Roe,* 543 U.S. 77, 84, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (per curiam) (requiring courts to evaluate the "legitimate news interest," meaning the "value and concern to the public at the time of publication").

[10] I would find a reporter's claim of privilege to be at its strongest when the disclosure at issue covers governmental methods and policies that challenge what is moral, legal, and, broadly speaking, strategic for our government to do. *Cf. In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1174 (D.C.Cir.2006) (Tatel, J., concurring in the judgment) ("It seems hard to imagine how the harm in leaking generic descriptions of [a top-secret satellite] program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary by leading Senators from both parties."). In contrast, I would find it unlikely that a reporter could avail himself of the privilege when the leak concerns "the design for a top secret nuclear weapon, for example, or plans for an imminent military strike.". *Id.* at 1173 (Tatel, J., concurring). Such leaks convey little information useful to the public in its civic role yet present great risks to national security.

[11] I am well aware that the revelation of classified government information can surely be among the most harmful of crimes. However, it is not the fact that the

evidence, it is impossible for a reviewing court to determine whether the First Amendment interest in presenting newsworthy information to the public—if indeed the district court finds the information newsworthy—is outweighed by the consequences of the leak. Moreover, although I recognize the difficulty of evaluating the government's interests in a case involving national security information, I am also mindful of the fact that "[t]he First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security.' " *United States v. Morison,* 844 F.2d 1057, 1081 (4th Cir.1988) (Wilkinson, J., concurring). With all things considered, the district court was correct in holding that Risen was protected from disclosing his confidential sources by a First Amendment reporter's privilege.

I find it sad that the majority departs from Justice Powell's *Branzburg* concurrence and our established precedent to announce for the first time that the First Amendment provides no protection for reporters. Ante 496. Under the majority's articulation of the reporter's privilege, or lack thereof, absent a showing of bad faith by the government, a reporter can *always* be compelled against her will to reveal her confidential sources in a criminal trial. The majority exalts the interests of the government while unduly trampling those of the press, and in doing so, severely impinges on the press

information is classified that renders the crime so harmful; the harm derives from the content of that information, and what is, or may be, done with the information if it falls into the wrong hands.

and the free flow of information in our society. The First Amendment was designed to counteract the very result the majority reaches today. In sum, I would affirm the district court's ruling as to Risen's assertion of a First Amendment reporter's privilege, albeit using the three-part *LaRouche* test and balancing the two additional factors identified herein: newsworthiness of the leaked information and the harm resulting from the leak.

E.

Even if I were not inclined to recognize a First Amendment privilege for a reporter in the criminal context given *Branzburg,* I would recognize a common law privilege protecting a reporter's sources pursuant to Federal Rule of Evidence 501.[12] Rule 501 was promulgated three years after the Supreme Court's decision in *Branzburg. See* Pub.L. No. 93–595, 88 Stat. 1926 (1975). The Rule authorizes federal courts to create new evidentiary privileges using the "common law ... in the light of reason and experience." Fed.R.Evid. 501. The Rule "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.' " *Jaffee v. Redmond,* 518 U.S. 1, 9, 116 S.Ct. 1923, 135

[12] To be sure, the district court ruled that the reporter's privilege is a constitutional one guaranteed by the First Amendment. *United States v. Sterling,* 818 F.Supp.2d 945, 954. This court may, however, affirm on any grounds supported by the record. *MM v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, 536 (4th Cir.2002).

L.Ed.2d 337 (1996) (quoting *Trammel v. United States,* 445 U.S. 40, 47, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)). By adopting Rule 501, Congress has given authority to the courts to use case-by-case adjudication to find new evidentiary privileges. *United States v. Weber Aircraft Corp.,* 465 U.S. 792, 803 n. 25, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984) ("Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them."). In light of *Branzburg*'s insistence that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, 92 S.Ct. 2646, a full discussion of the reporter's privilege must reckon with Rule 501.

Testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon,* 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). But the Supreme Court and the circuit courts, using Rule 501, have recognized a number of testimonial privileges. *See, e.g., Jaffee,* 518 U.S. at 15, 116 S.Ct. 1923 (recognizing psychotherapist-patient privilege); *Upjohn Co. v. United States,* 449 U.S. 383, 386–90, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (recognizing attorney-client privilege); *Trammel v. United States,* 445 U.S. 40, 51–53, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (recognizing marital communications privilege); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.,* 332 F.3d 976 (6th Cir.2003) (recognizing settlement communications privilege); *Riley v. City of Chester,* 612 F.2d 708, 715 (3d

Cir.1979) (recognizing a qualified reporter's privilege). All of these privileges are "distinctly exceptional," and have only been recognized because they serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee,* 518 U.S. at 9, 116 S.Ct. 1923 (internal quotation marks and citations omitted). In my view, the reporter-source privilege meets this high bar.

The Supreme Court has stated that "the policy decisions of the States bear on the question [of] whether federal courts should recognize a new privilege or amend coverage of an existing one," and "[i]t is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision." *Id.* at 12–13, 116 S.Ct. 1923. When the *Branzburg* decision issued, only seventeen states had recognized some protection for a reporter regarding his or her confidential sources. *Branzburg,* 408 U.S. at 689 n. 27, 92 S.Ct. 2646. Today, only one state, Wyoming, has not enacted or adopted a reporter's privilege. Thirty-nine states and the District of Columbia have shield laws for reporters, whether those shields are absolute or qualified. *See* Ala.Code § 12–21–142; Alaska Stat. § 09.25.300; Ariz.Rev.Stat. Ann. § 12–2237; Ark.Code Ann. § 16–85–510; Cal. Const. Art. I, § 2(b); Cal. Evid.Code § 1070; Colo.Rev.Stat. §§ 13–90–119, 24–72.5–101; Conn. Gen.Stat. Ann. § 52–146t; Del.Code Ann. tit. 10, § 4320; D.C.Code § 16–4701; Fla. Stat. § 90.5015; Ga.Code Ann. § 24–9–30; Haw.Rev.Stat. § 621, *as amended by* 2011 Haw. Sess. Laws ch. 113 (June 14, 2011); 735 Ill. Comp. Stat. 5/8–901; Ind.Code Ann. §§ 34–46–4–1,

–2; Kan. Stat. Ann. § 60–480; Ky.Rev.Stat. Ann. § 421.100; La.Rev.Stat. Ann. § 45:1451; Md.Code Ann. Cts. & Jud. Proc. § 9–112; Mich. Comp. Laws § 767.5a; Minn.Stat. § 595.021; Mont.Code Ann. § 26–1–901; Neb.Rev.Stat. § 20–144; Nev.Rev.Stat. Ann. § 49.275; N.J. Stat. Ann. § 2A:84A–21; N.M. Stat. Ann. § 38–6–7; N.Y. Civ. Rights Law § 79–h; N.C. Gen.Stat. § 8–53.11; N.D. Cent.Code § 31–01–06.2; Ohio Rev.Code Ann. § 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or.Rev.Stat. § 44.510; 42 Pa. Cons.Stat. Ann. § 5942; R.I. Gen. Laws § 9–19.1–1; S.C.Code Ann. § 19–11–100; Tenn.Code Ann. § 24–1–208; Tex. Civ. Prac. & Rem.Code Ann. §§ 22.021–22.027; Utah Order 08–04 [Utah R. Evid. 509]; Wash. Rev.Code Ann. § 5.68.010; 2011 W. Va. Acts 78 (to be codified at W. Va.Code § 57–3–10); Wis. Stat. Am. § 885.14. In ten states without statutory shield laws, the privilege has been recognized in some form or another by the courts. *See State v. Salsbury,* 129 Idaho 307, 924 P.2d 208 (1996); *Winegard v. Oxberger,* 258 N.W.2d 847 (Iowa 1977), *cert. denied,* 436 U.S. 905, 98 S.Ct. 2234, 56 L.Ed.2d 402 (1978); *In re Letellier,* 578 A.2d 722 (Me.1990); *In re John Doe Grand Jury Investigation,* 410 Mass. 596, 574 N.E.2d 373 (1991); *Sinnott v. Boston Retirement Bd.,* 402 Mass. 581, 524 N.E.2d 100, *cert. denied,* 488 U.S. 980, 109 S.Ct. 528, 102 L.Ed.2d 560 (1988); *State ex rel. Classic III v. Ely,* 954 S.W.2d 650, 653 (Mo.Ct.App.1997); *State v. Siel,* 122 N.H. 254, 444 A.2d 499 (1982); *Hopewell v. Midcontinent Broad. Corp.,* 538 N.W.2d 780, 782 (S.D.1995), *cert. denied,* 519 U.S. 817, 117 S.Ct. 69, 136 L.Ed.2d 30 (1996); *State v. St. Peter,* 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth,* 214 Va. 755, 204

S.E.2d 429 (1974); *Hawkins v. Williams,* No. 29,054 (Hinds County Circuit Court, Mississippi, Mar. 16, 1983) (unpublished). A number of these jurisdictions—Alabama, Arizona, California, Delaware, the District of Columbia, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, and Pennsylvania—make the privilege an absolute bar to compelling a reporter to divulge his sources. On the basis of "the uniform judgment of the States," the Supreme Court recognized the psychotherapist-patient privilege. *Jaffee,* 518 U.S. at 14, 116 S.Ct. 1923. The landscape in regards to the reporter's privilege has changed drastically since *Branzburg.* The unanimity of the States compels my conclusion that Rule 501 calls for a reporter's privilege.

F.

The paramount importance of the free press guaranteed by our Constitution compels me to conclude that the First Amendment encompasses a qualified reporter's privilege. Using the factors identified herein and given the facts at hand, Risen must be protected from disclosing the identity of his confidential sources. This is consistent with *Branzburg* and the need for courts to balance "freedom of the press" against "the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 724, 92 S.Ct. 2646 (Powell, J., concurring). Moreover, given the near unanimity of the states with regard to a reporter's privilege, I would recognize the privilege under Federal Rule of Evidence 501. Thus, I would affirm

the district court's order quashing the trial subpoena and denying the Government's motion to admit Risen's testimony as to the source relied upon by Risen for Chapter Nine of *State of War*. As to Issue I, then, I respectfully dissent from the majority's holding.

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

UNITED STATES OF AMERICA,	)	
v.	)	1:10cr485
JEFFREY ALEXANDER STERLING,	)	(LMB)
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, which will be publicly docketed after it is reviewed for classified information, the Motion of James Risen to Quash Subpoena and/or for Protective Order [Dkt. No. 115] and the Government's Motion in Limine to Admit the Testimony of James Risen [Dkt. No. 105] are DENIED IN PART and GRANTED IN PART, and it is hereby

ORDERED that pursuant to the May 23, 2011 subpoena, James Risen must appear to testify at the above-captioned trial; however, the scope of his testimony is limited to confirming the following topics: (1) that Risen wrote a particular newspaper article or chapter of a book; (2) that a particular newspaper article or book chapter that Risen wrote is accurate; (3) that statements referred to in Risen's newspaper article or book chapter as being made by an unnamed source were in fact made to Risen by an unnamed source; and (4) that statements referred to in Risen's newspaper article or book chapter as being made by an identified source were in fact made by that identified source.

The Clerk is directed to forward copies of this

Order and the accompanying Memorandum Opinion to counsel of record and the Classified Information Security Officer.

Entered this 29th day of July, 2011.

Alexandria, Virginia

/s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

No. 1:10cr485 (LMB)

July 29, 2011

UNITED STATES OF AMERICA,

—v.—

JEFFREY ALEXANDER STERLING,
Defendant.

William Michael Welch, Andrew Peterson, James L. Trump, Timothy James Kelly, United States Attorney's Office, Alexandria, VA, for Plaintiff.

Edward B. MacMahon, Barry Joel Pollack, Miller & Chevalier, Washington, DC, for Defendant.

MEMORANDUM OPINION

LEONIE M. BRINKEMA, District Judge.

The government has issued a subpoena that would require journalist James Risen ("Risen") to testify at the criminal trial of Jeffrey Sterling ("Sterling"), a former Central Intelligence Agency

officer charged with disclosing classified information to Risen. Before the Court is the Government's Motion in Limine to Admit the Testimony of James Risen [Dkt. No. 105] and the Motion of James Risen to Quash Subpoena and/or for Protective Order [Dkt. No. 115]. For the reasons stated below, the motions will be denied in part and granted in part, and the subpoena will be quashed for Risen's testimony about his reporting and source(s) except to the extent that Risen will be required to provide testimony that authenticates the accuracy of his journalism, subject to a protective order.

I. *Background*

A. *Risen's reporting*

In January 2006, Risen published *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War* "), a book about the CIA. Chapter 9 of *State of War* describes "Operation Merlin," an allegedly failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapon blueprints to Iran. Ex. 2 to Risen's Mot. to Quash at 193–218. Chapter 9 includes an account of how, despite the former scientist immediately spotting the flaws in the plan, the CIA instructed him to deliver the blueprints to the Iranian embassy in Vienna. Chapter 9 concludes that because the defects in the blueprints were easily identifiable, Operation Merlin was deeply flawed. Much of Chapter 9 is told from the perspective of a CIA case officer who was assigned to persuade the scientist to go along with the operation.

B. *Grand jury proceedings*

A grand jury sitting in the Eastern District of Virginia began investigating the unauthorized disclosures about Operation Merlin sometime in March 2006.[1] Grand Jury Op. at 9. On January 28, 2008, the government issued its first grand jury subpoena to Risen, seeking testimony and documents about the identity of the source(s) for Chapter 9 and Risen's communications with the source(s). Invoking the reporter's privilege, Risen moved to quash the subpoena. *Id.*

Risen's motion to quash was granted in part and denied in part, after the Court found that the government already had sufficient evidence to establish probable cause and that Risen's testimony would simply amount to "the icing on the cake." However, because Risen had disclosed Sterling's name and some information about his reporting to another source, the Court found a waiver as to that information. *Id.* at 9–10. Both Risen and the government sought reconsideration, but the grand jury expired before the Court could rule on the motions. *Id.* at 10.

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[1] On November 30, 2010, the Court issued a Memorandum Opinion regarding Risen's motion to quash the grand jury subpoena, 1:08dm61 ("Grand Jury Opinion"). The Court adopts the facts as stated in the Grand Jury Opinion, which summarized the government's evidence, much of which came from a classified government declaration. The government has since redacted classified information from the Grand Jury Opinion, and on June 28, 2011, the Court unsealed the redacted version of the Grand Jury Opinion. This Memorandum Opinion quotes only from the redacted version of the Grand Jury Opinion.

On January 19, 2010, Attorney General Holder authorized prosecutors to seek a second grand jury subpoena for Risen. That subpoena, which issued on April 26, 2010, did not explicitly request the identity of confidential sources; instead, the subpoena sought information about "the where, the what, the how, and the when" regarding disclosure of the classified information published in Chapter 9. Specifically, the government identified four general categories of information that it sought to obtain from Risen about Chapter 9: 1) testimony about where the disclosures occurred; 2) testimony about what information each source disclosed and when the disclosure occurred; 3) testimony about how Risen received classified information; and 4) testimony to authenticate Chapter 9. Grand Jury Opinion at 23.

Risen moved to quash the subpoena, arguing that information about his confidential sources was protected by the qualified reporter's privilege both under the First Amendment and the common law. Risen justified invoking the reporter's privilege on the basis of his confidentiality agreement with his sources and on his belief that the government issued the subpoena to harass him. *Id.* at 14. He also argued that the government had not overcome the qualified reporter's privilege because it had not demonstrated that it had a compelling interest in the information, that the information was relevant, and that the information was unavailable from alternative sources.

The government responded that the Fourth Circuit does not recognize a reporter's privilege under those facts; however, even if such a qualified privilege were recognized, it would not apply to this

case because Risen did not have a confidentiality agreement with his source, nor did the government issue the subpoena to harass him. Finally, the government argued that the privilege did not apply because the government had a compelling interest to establish probable cause and the information sought from Risen was not available from alternative sources.

In a classified affidavit filed in March 2008 in connection with the first grand jury subpoena, the government summarized the evidence it had developed indicating that Sterling had disclosed classified information to Risen.[2]

That evidence showed that Sterling was hired as a CIA case officer in 1993. Grand Jury Opinion at 2–3. After being told that he failed to meet performance targets, Sterling, who is African American, filed a discrimination complaint with the CIA on August 22, 2000, followed by a lawsuit that was dismissed after the CIA invoked the State Secrets privilege. His employment with the CIA ended on or about January 31, 2002. *Id.*

On March 2, 2002, Risen published a *New York Times* article about Sterling's discrimination lawsuit against the CIA. The article identifies Sterling by name, quotes him extensively, and reports that Sterling "was assigned to try to recruit Iranians as spies." *Id.* at 4. This article supported the government's conclusion that Sterling began communicating with Risen during the last stages of his employment with the CIA.

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[2] Because the government has not filed a similar affidavit in connection with the trial subpoena, this section summarizes the information in the 2008 affidavit that the government has since unclassified.

The government also described evidence that after Sterling was fired by the CIA, he attempted to draw attention to the Iranian nuclear weapons project. On March 5, 2003, Sterling met with two staffers for the Senate Select Committee on Intelligence to discuss the nuclear weapons project, as well as his unsuccessful discrimination lawsuit. One of the staffers later told the government in an interview that during the meeting "Sterling also threatened to go to the press, though he could not recall if Sterling's threat related to the [nuclear weapons plan project] or his lawsuit." *Id.*

Through telephone and other communication records, the government has evidence that between February 27, 2003 and March 29, 2003, there were seven phone calls from Sterling's home telephone in the Eastern District of Virginia to Risen's home telephone in the District of Columbia. *Id.* at 5. Email evidence includes a March 10, 2003 email message from Sterling to Risen referencing a CNN.com article entitled: "Report: Iran has 'extremely advanced' nuclear program." Sterling wrote, "I'm sure you've already seen this, but quite interesting, don't you think? All the more reason to wonder . . ." *Id.*

On April 3, 2003, four days after the last of the seven phone calls from Sterling's home to Risen's home, Risen called the CIA Office of Public Affairs and the National Security Council's Office of Public Affairs for comment about the Iranian nuclear operation. On April 30, 2003, former National Security Advisor Condoleezza Rice, former CIA director George Tenet, and three other CIA and NSC staff members met with Risen and *New York Times* Washington Bureau Chief Jill Abramson in

an effort to convince them not to publish an article about the Iranian nuclear project because it would compromise national security. *Id.* at 5–6. On or about May 6, 2003, Abramson told the government that the newspaper had decided not to publish the story.

In approximately August 2003, Sterling moved from Virginia to Missouri, where he stayed with friends. Phone records for the telephone in his friends' home document 19 calls between the *New York Times* office in Washington D.C. and the friends' home. *Id.* at 6. The friends testified before the grand jury that they did not receive calls from anyone at the *New York Times*. The government also has records of phone calls between the *New York Times* and Sterling's cell phone and work phone extension at Blue Cross/Blue Shield in Missouri, where he began working in August 2004. Sterling had access to his friends' computer; an FBI search of the computer revealed 27 emails between Sterling and Risen. *Id.* at 6–7. In addition, a search of Sterling's personal computer revealed a letter to "Jim" that was created on March 19, 2004, describing Sterling's discrimination complaint and his meeting with Senate staffers. The letter states that "[f]or obvious reasons, I cannot tell you every detail." *Id.* at 7. Of particular significance was the testimony of a former government intelligence official with whom Risen consulted on his stories. He told the grand jury that Risen had told him that Sterling was his source for information about the Iranian nuclear weapons operation. *Id.* at 7–8. Another witness testified before the grand jury that Sterling told her about his plans to meet with "Jim," who had

written an article about Sterling's discrimination case and was then working on a book about the CIA, and that when she and Sterling saw *State of War* in a bookstore, Sterling, without first looking at the book, told her that Chapter 9 was about work he had done at the CIA. *Id*. at 7.

Chapter 9 describes, in detail, two key classified meetings about Operation Merlin. Few people attended the meetings, and the government determined that Sterling was the only person who was present at both, leading to the conclusion that Sterling was the source for that part of Chapter 9.

In its papers, the government conceded that the above-described evidence would establish probable cause to indict Sterling:

> The evidence gathered to date clearly establishes that there is at least probable cause to believe that Jeffrey Sterling is responsible for the unauthorized disclosure of classified information regarding the [ ] Operation to James Risen, and three federal judges have also made a similar finding by authorizing the search warrants described above. The Government believes that there is also probable cause to suggest that Jeffrey Sterling is further responsible for the [ ] disclosures described above. However, the Government further believes that this matter warrants additional investigation to insure a proper charging decision before an indictment is presented to the Grand Jury.

Id. at 8.

In a Memorandum Opinion issued on November 30, 2010, the Court explained its reasons for

quashing the subpoena. In essence, the Court found that "[i]f a reporter presents some evidence that he obtained information under a confidentiality agreement or that a goal of the subpoena is to harass or intimidate the reporter, he may invoke a qualified privilege against having to testify in a criminal proceeding." Grand Jury Op. at 19. Concluding that Risen's confidentiality agreement with his source(s) established that he could invoke a qualified privilege, the Court applied the Fourth Circuit's three-part balancing test, which requires the Court to consider (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information. *Id.* at 17, citing *LaRouche v. National Broadcasting Co.,* 780 F.2d 1134 (4th Cir.1986).

Applying the *LaRouche* balancing test to the four categories of information sought, the Court determined that the government had not overcome the qualified reporter's privilege, given the strong circumstantial evidence already before the grand jury, concluding that there "is more than enough evidence to establish probable cause to indict Sterling and the government has essentially admitted that fact." *Id.* at 34. The Court indicated that it might be less likely to quash a trial subpoena, because reasonable at that stage the government must prove guilt beyond a doubt. *Id.* at 35.

C. Sterling's indictment and the trial subpoena

On December 22, 2010, a grand jury indicted Sterling, charging him with ten counts: Unauthorized Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(d) (Counts

One, Four, and Six); Unauthorized Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(e) (Counts Two, Five, and Seven); Unlawful Retention of Classified Information, in violation of 18 U.S.C. § 793(e) (Count Three); Mail Fraud, in violation of 18 U.S.C. § 1341 (Count Eight); Unauthorized Conveyance of Government Property, in violation of 18 U.S.C. § 641 (Count Nine); and Obstruction of Justice, in violation of 18 U.S.C. § 1512(c)(1) (Count Ten).

On May 23, 2011, the government served a subpoena on Risen, seeking his trial testimony. The subpoena does not specify the scope of testimony sought from Risen; however, in a Motion in Limine filed the same day, the government clarified this scope, explaining that it planned to ask Risen to identify Sterling as his source for Chapter 9, and to provide other information about Risen's relationship with Sterling, such as the time and place of the disclosures, as well as to authenticate *State of War*. On June 21, 2011, Risen moved to quash the subpoena. Sterling filed an opposition to the government's Motion in Limine, in which he simply argues that the Court should defer ruling on the motion.

II. *Discussion*

A. *Scope of the First Amendment reporter's privilege*

As it did during the grand jury proceeding, the government argues that no reporter's privilege exists under these facts, repeatedly placing the term "Reporter's Privilege" in quotation marks,

suggesting that the Fourth Circuit has never recognized the privilege. Mot. in Limine at 6, Opp. to Mot. to Quash at 16.

The government relies upon *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) to support its argument that there is no reporter's privilege here. *Branzburg* consolidated three cases in which journalists sought to quash grand jury subpoenas for their notes and testimony about their reporting. The majority held that there was no reporter's privilege in these cases, finding:

> Nothing in the record indicates that these grand juries were "prob[ing] at will and without relation to existing need." *DeGregory v. Attorney General of New Hampshire,* 383 U.S. 825, 829, 86 S.Ct. 1148, 16 L.Ed.2d 292 (1966). Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed, *cf. NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Bates v. Little Rock,* 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. *See* Fed. Rule Crim. Proc. 6(e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. *Costello v.*

> *United States,* 350 U.S. 359, at 364, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

Id. at 700, 92 S.Ct. 2646.

As this Court explained in the Grand Jury Opinion, the Fourth Circuit recognizes a qualified First Amendment reporter's privilege that may be invoked when a subpoena either seeks information about confidential sources or is issued to harass or intimidate the journalist.[3]

Justice Powell, one of the five justices in the *Branzburg* majority, wrote a concurring opinion to emphasize the "limited nature" of the majority's ruling:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate pro-

[3] Risen also argues that the Court should apply a federal common law reporter's privilege. Mot. to Quash at 25. The Fourth Circuit has only mentioned a common law privilege in *United States v. Steelhammer,* 539 F.2d 373 (4th Cir.1976), a civil contempt proceeding, and has never applied the common law privilege in a criminal case. Although other circuits have recognized a strong reporter's privilege under the federal common law, because the Fourth Circuit has not done so, the Court will limit its analysis to the reporter's privilege under the First Amendment.

> tective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. at 709–10, 92 S.Ct. 2646 (Powell, J., concurring).

The Fourth Circuit first applied Justice Powell's concurrence to recognize a qualified First Amendment reporter's privilege in *United States v. Steelhammer,* 539 F.2d 373 (4th Cir.1976), in which a divided Fourth Circuit panel vacated a district court's contempt order issued to several journalists who refused to testify at a civil contempt trial. Sitting *en banc,* the Fourth Circuit reversed the panel's decision, adopting Judge Winter's dissent from the panel decision, in which he outlined the contours of the reporter's privilege:

> In the instant case it is conceded that the reporters did not acquire the information sought to be elicited from them on a confidential basis; one of them (Steelhammer) so testified in the district court. My study of the record fails to turn up even a scintilla of evidence that the reporters were subpoenaed to harass them or to embarrass their newsgath-

> ering abilities at any future public meetings that the miners might hold. It therefore seems to me that, in the balancing of interests suggested by Mr. Justice Powell in his concurring opinion in *Branzburg v. Hayes,* 408 U.S. 665, 709, 92 S.Ct. 2646, 33 L.Ed.2d 626 . . . (1972), the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify. These absences convert the majority's conclusion into a broad holding that journalists called as witnesses in civil cases have a privilege to refuse to testify about all events they have observed in their professional capacity if other witnesses to the same events are available, despite the avowal that the holding is limited to the facts of the case.

Id. at 376 (Winter, J., dissenting), *adopted by the court en banc* 561 F.2d 539, 540 (4th Cir.1977).

In *LaRouche v. National Broadcasting Co.,* 780 F.2d 1134 (4th Cir.1986), the Fourth Circuit reaffirmed its recognition of a qualified reporter's privilege and established the balancing test for deciding whether that privilege can be enforced. That test, adopted from *Miller v. Transamerican Press, Inc.,* 621 F.2d 721, *modified,* 628 F.2d 932 (5th Cir.1980), *cert. denied* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981), provides that the Court must consider "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *LaRouche,* 780 F.2d at 1139.

The Fourth Circuit reaffirmed the qualified reporter's privilege in *Ashcraft v. Conoco,* 218 F.3d 282 (4th Cir.2000), which involved a contempt order against a journalist who refused to identify the sources of his information about a confidential settlement. Finding that the sources' identities were confidential, the Fourth Circuit applied the *LaRouche* balancing test and reversed the district court, holding that disclosure was not justified by a compelling interest. "If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Id.* at 287.

The Fourth Circuit has addressed the reporter's privilege in only one criminal case, *In re Shain,* 978 F.2d 850 (4th Cir.1992), which involved four reporters, each of whom had interviewed a state senator about his relationship with a registered lobbyist, and later published portions of those interviews in their news stories. After the senator was indicted in a bribery scandal, the government subpoenaed the reporters to testify at the criminal trial, and the reporters moved to quash the subpoenas. The district court denied the motions, and the Fourth Circuit affirmed, finding that

> the incidental burden on the freedom of the press in the circumstances of this case does not require the invalidation of the subpoenas issued to the reporters, and absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that

> of any other citizen not to testify about knowledge relevant to a criminal prosecution.

Id. at 852. Relying on this passage, the government argues that the *LaRouche* test applies to subpoenas in criminal cases only if the journalist has demonstrated that the subpoena was issued in bad faith. Mot. in Limine at 12. The government's interpretation of *In re Shain* is incorrect. As the Fourth Circuit made clear, the holding was limited to "the circumstances of this case," which did not involve any confidentiality agreement between the reporters and their source(s). Under these facts, the Fourth Circuit recognized that "the absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters' claim to a First Amendment privilege." *Id.* at 853 (emphasis added). The government also tries to rely on *In re Shain* for the proposition that the qualified reporter's privilege is applied differently in criminal cases, but the Fourth Circuit has not drawn any distinction between civil actions and criminal cases. Accordingly, the only proper reading of *In re Shain* is that in criminal cases, as in civil actions, the *LaRouche* test is triggered by either an agreement to keep sources confidential or evidence of harassment. *See, e.g., United States v. Regan,* Criminal No. 01–405–A (E.D.Va. Aug. 20, 2002) (quashing subpoena of journalist in criminal case); *United States v. Lindh,* 210 F.Supp.2d 780, 783 (E.D.Va.2002) (recognizing that a First Amendment reporter's privilege applies in a criminal case "where the journalist produces some evidence of confidentiality *or* governmental harassment") (emphasis added).

Both the government and Risen incorrectly urge the Court to consider subjective factors that the Fourth Circuit has not recognized as part of the reporter's privilege analysis. The government argues that the reporter's privilege does not apply in this case because Risen's reporting was premised on "false and misleading" information that Sterling provided to him. Response to Mot. to Quash at 24. Citing to several First Amendment cases, none of which dealt with the reporter's privilege,[4] the government maintains that "well-settled Supreme Court precedent" bars the application of the qualified reporter's privilege to dissemination of false information. *Id.* Risen, meanwhile, urges the Court to consider the "newsworthiness" of the leaks and the public interest in reporting on the progress of Iran's nuclear program. Mot. to Quash at 41. This line of argument would have the Court serve as editor-in-chief, unilaterally determining whether reporting is sufficiently accurate or newsworthy as to be deserving of First Amendment protection. Neither the Fourth Circuit nor any other court has ever recognized such factors as pertinent to the reporter's

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[4] *United States v. Stevens,* ___ U.S. ___, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) involved a First Amendment challenge to a prohibition on depictions of animal cruelty; *Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) held that a public figure in a defamation action is required to demonstrate actual malice; *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) involved a plaintiff's efforts to inquire into the editorial process in a libel lawsuit; and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) held that a private figure plaintiff in a defamation action is not required to plead actual malice.

privilege, and this Court declines to be the first to do so.

In sum, the Fourth Circuit's qualified First Amendment reporter's privilege caselaw has two steps. First the Court must determine whether the subpoena seeks confidential reporting information or was issued to harass the reporter. Upon a finding of either, the Court applies the three-part *LaRouche* test.

B. *Whether the qualified reporter's privilege applies to Risen*

The qualified reporter's privilege applies to this subpoena because it seeks confidential source information.[5] The government does not dispute that Risen had a confidentiality agreement with the source(s) of information for Chapter 9. *See* Grand Jury Opinion at 20. In an affidavit filed with his Motion to Quash the trial subpoena, Risen avers that he received the information from confidential source(s):

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[5] As he did in the grand jury proceedings, Risen argues that the government issued the subpoenas to harass him. Risen bases his harassment claim on his record of writing stories that exposed the government's national security and intelligence practices, including articles that revealed the government's domestic warrantless wiretapping program, and the criticism that he received from members of the Bush administration. The government argues that the trial subpoena was not issued by the Bush administration and therefore there is no evidence of harassment. It is unnecessary to decide whether the subpoena was issued, at least in part, to harass or intimidate Risen given the clear evidence of confidentiality, which is all that is needed to trigger the privilege.

> I could not have written Chapter 9 of *State of War* (and many, if not all of the above-referenced articles and books) without the use of confidential source(s). My source(s) for Chapter 9 provided me with information with the understanding that I would not reveal their identity/ies. In circumstances in which I promise confidentiality to a source, I cannot break that promise. . . .
>
> > Any testimony I were to provide to the Government would compromise to a significant degree my ability to continue reporting as well as the ability of other journalists to do so. This is particularly true in my current line of work covering stories relating to national security, intelligence, and terrorism. If I aided the Government in its effort to prosecute my confidential source(s) for providing information to me under terms of confidentiality, I would inevitably be compromising my own ability to gather news in the future. I also believe that I would be impeding all other reporters' ability to gather and report the news in the future.

Risen Aff. ¶¶ 51–52.

The government argues that even if Risen had a confidentiality agreement with his source(s), it would not cover much of the testimony sought by the subpoena, including the time and place of the alleged disclosure and testimony about Risen's 2002 newspaper article concerning Sterling's civil lawsuit against the CIA. Mot. in Limine at 17.

Risen responds that his confidentiality agreement(s) extend beyond the name of the source:

> I understand that, if the Government cannot get testimony from me about the identity of my confidential source(s), the Government may seek testimony from me about the details of my conversations with my confidential source(s) (without actually asking me the name(s) of my source(s)). I cannot provide this testimony to the Government either. The agreement I have reached with my confidential source(s) for Chapter 9 of my book, *State of War,* does not merely cover the name of the source(s). Rather, I understand my agreement(s) to require me not to reveal any information that would enable someone to identify my confidential source(s). . . .
>
> I have never heard of any confidentiality agreement made by a journalist that merely requires the journalist not to name his or her source. Such an agreement would be of little value to a source or potential source. If a journalist were to withhold a source's name but provide enough information to authorities to identify the source, the promise of confidentiality would provide little meaningful protection to a source or potential source.

Risen Aff. ¶¶ 54–55.

The government's narrow view of the scope of Riser's confidentiality agreement is incorrect. Courts have long held that the reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to

the discovery of a source's identity. *See, e.g., Miller v. Mecklenburg Cnty.,* 602 F.Supp. 675, 679 (W.D.N.C.1985) (recognizing "a *qualified* privilege under the First Amendment for the reporter both against revealing the identity of confidential sources and against revealing material that is supplied to the reporter by such confidential source.") (emphasis in original); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League,* 89 F.R.D. 489, 491 (C.D.Cal.1981) (quashing subpoena to reporters for "any and all notes, file memoranda, tape recordings or other materials reflecting" conversations with listed individuals); *Loadholtz v. Fields,* 389 F.Supp. 1299, 1303 (M.D.Fla.1975) ("The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants."). Risen's testimony about his reporting, including the time and location of his contacts with his confidential source(s), is protected by the qualified reporter's privilege because that testimony could help the government establish the identity of Risen's source(s) by adding or eliminating suspects.

Having found that the qualified reporter's privilege applies, the Court must conduct the three-part *LaRouche* balancing test to determine whether Risen can be compelled to testify about his source(s) for Chapter 9.

C. *Authentication of Risen's reporting*

The government seeks "to elicit testimony from Risen that the book offered into evidence is in fact the book that *he* authored." Mot. in Limine at 23 (emphasis in original). Risen concedes that he is

willing to provide authentication testimony, subject to a protective order limiting the testimony to confirmation:

> (1) that he wrote a particular newspaper article or chapter of a book; (2) that a particular newspaper article or book chapter that he wrote is accurate; (3) that 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 by that identified source.

Mot. to Quash at 45–46. Risen's agreement to authenticate his newspaper articles and book provides significant evidence to the government. Most importantly, Risen will testify that statements referred to in the March 2, 2002 newspaper article as being made by Sterling were in fact made by Sterling. Risen, therefore, will testify before the jury that he interviewed Sterling for that newspaper article. Although this is not a direct admission that Sterling was a source for Chapter 9, it provides direct evidence of Risen's contacts with Sterling.

D. *Application of the LaRouche balancing test to the subpoena for Risen's testimony about his reporting and confidential source(s)*

The remainder of the subpoena seeks Risen's testimony about: 1) who disclosed national security information to him, 2) where and when the national security information was disclosed to

him, and 3) information about Risen's relationship with Sterling before 2003. Mot. in Limine at 18–23.

1. *Relevance*

It is undisputed that testimony about the source of the classified information is relevant in a criminal case chat charges Sterling with unauthorized disclosure of that information. Moreover, Risen does not dispute that testimony about the venue and timing of the disclosure is relevant to the government's case. Therefore, the first *LaRouche* factor weighs in favor of enforcing the trial subpoena.

2. *Availability of information by alternative means*

The second prong of the *LaRouche* test requires the Court to consider "whether the information can be obtained by alternative means." The government argues that the information is unavailable by alternative means because "[n]o other person can provide eyewitness testimony that directly, as opposed to circumstantially, identifies Sterling as the individual who disclosed the national defense information concerning Classified Program No. 1 and Human Asset No. 1 to Risen." Mot. in Limine at 24–25. This argument fails because nowhere in *LaRouche* or any other reporter's privilege opinion cited by either party is the analysis of "alternative means" restricted to comparing direct to circumstantial evidence. As the standard jury instructions and case law establish, "circumstantial evidence is no less probative than direct evidence." *Stamper v. Muncie,* 944 F.2d 170, 174 (4th Cir.1991). The government has

not stated whether it has nontestimonial direct evidence, such as email messages or recordings of telephone calls in which Sterling discloses classified information to Risen; nor has it proffered in this proceeding the circumstantial evidence it has developed.

The government also argues that it "has exhausted its attempts to obtain the information from Risen" and that "it is self-evident that, in a leak case such as this one, Risen is the only source for the information that the Government seeks." Gov. Response at 22 and 22, n. 11. This argument clearly misstates the evidence in the record, which as described in Section I–C, *infra,* includes numerous telephone records, email messages, computer files, and testimony that strongly indicates that Sterling was Risen's source. Indeed, in its Motion in Limine, the government acknowledges that if Risen does not testify, the government "will rely on the numerous telephone calls between Risen and Sterling's home in Herndon, Virginia in February and March 2003—immediately before Mr. Risen made it known to the CIA that he possessed information about Classified Program No. 1—in order to prove venue[.]" Mot. in Limine at 25, n. 14.

In addition to the documentary evidence, the government has the testimony of the former intelligence official with whom Risen consulted on his stories. The former intelligence official testified before the grand jury that Risen told him that Sterling was his source for information about the classified operation. Such testimony at trial would provide exactly what the government seeks to obtain from its subpoena: an admission that Ster-

ling was Risen's source for the classified information in Chapter 9.

The government briefly argues that the former government intelligence official's testimony would be inadmissible because it is hearsay, although the government does not elaborate on its reasons for this conclusion. Response to Mot. to Quash at 26. Contrary to the government's view of inadmissibility, any statements by Risen to a third party that Sterling was his source would be admissible hearsay under Fed.R.Evid. 804(b)(3) as a statement against interest. "A statement is admissible under this exception if: (1) the speaker is unavailable; (2) the statement is actually adverse to the speaker's penal interest; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement." *United States v. Smith,* 383 Fed.Appx. 355, 356 (4th Cir.2010) (internal quotation marks omitted). Risen would be unavailable if the Court finds that the reporter's privilege prevents the government from eliciting his testimony, or he refuses to testify even if the privilege were denied and he was ordered to testify. Risen's statements are adverse to his penal interest because receiving classified information without proper authorization is a federal felony under 18 U.S.C. 793(e); *see* U.S. Sentencing Guidelines Manual § 2M3.3 (providing a base offense level 29 for convictions for the "Unauthorized Receipt of Classified Information.").[6] The corroborating circumstances, including the emails

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[6] The government clearly recognizes Risen's potential exposure to criminal liability and has offered to obtain an order of immunity for him.

and phone records discussed above, indicate the trustworthiness of Risen's statement to that official that Sterling was his source. Therefore, the former government official's testimony about Risen's comments would not be excluded as hearsay.

Nor would such testimony violate the Sixth Amendment's Confrontation Clause under *Crawford v. Washington,* 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which has limited the use of hearsay in criminal trials. Whether hearsay is admissible depends on whether it is characterized as "testimonial." The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,' " *id.* at 68, 124 S.Ct. 1354, but it held that at minimum the term covers police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial. The Court described the "core class of 'testimonial statements' "

> [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and] [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial

Id. at 51–52, 124 S.Ct. 1354 (citations and quotations omitted).

Risen's statements to this official do not fit any of the categories that would qualify them as "testimonial." The Fourth Circuit has held that the test for determining whether statements fall into the third general category of testimonial statements is "whether the declarant would have expected or intended to 'bear witness' against another in a later proceeding." *United States v. Udeozor,* 515 F.3d 260, 268 (4th Cir.2008) (holding that recorded telephone conversations in which defendant's unavailable co-conspirator admitted to bringing a victim to the United States illegally was not testimonial because the co-conspirator "did not expect that his statements would be used prosecutorially"); *see also United States v. Jordan,* 509 F.3d 191, 201 (4th Cir.2007) ("To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates."); *United States v. Blackwell,* 436 Fed.Appx. 192, 2011 WL 2558845, 2011 U.S.App. LEXIS 13512 (4th Cir. June 29, 2011) ("A statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for Confrontation Clause purposes.") (quoting *United States v. Watson,* 525 F.3d 583, 589 (7th Cir.2008)). Whether a statement is "testimonial" for Confrontation Clause purposes, therefore, turns on the purpose of the statement. In this case, Risen made the comments in the course of his reporting. Given Risen's rigorous invocation of the reporter's privilege, it strains credulity to find that a journalist would ever reasonably expect that his efforts to verify the verac-

ity of a confidential source would be used in court against that source in a criminal trial. Under these facts, Risen's statements to the former government official cannot be deemed testimonial, and therefore the Confrontation Clause does not bar admission of the former official's testimony at trial.[7]

The government also claims that hearsay rules and the spousal privilege would prevent the admission of testimony from the witness who testified before the grand jury that Sterling told her about his plans to meet with "Jim," who had written an article about Sterling's discrimination case and that Sterling commented about Chapter 9 when they saw *State of War* in the bookstore, Resp. to Mot. to Quash at 26. Of course, these statements by the defendant are a party admission under Fed. R. Evidence 801(d) and are not hearsay. Although the government argues that the spousal privilege would prevent this witness from testifying, nothing in the record indicates that Sterling and the witness are married now or were married during the time of Sterling's alleged statements. If this witness is currently married to Sterling, and if she were to assert the spousal testimonial privilege, then her testimony will be unavailable to the government. *See Trammel v. United States,* 445 U.S. 40, 53, 100 S.Ct. 906, 63

[7] Neither Risen, the government, nor Sterling has argued that the former government official can claim a privilege, and the former official has already testified before the grand jury without invoking a privilege. Although the reporter's privilege protects a journalist from testifying about his sources, no court has ever held that the privilege protects a source from testifying about the journalist.

L.Ed.2d 186 (1980) (only the witness-spouse can assert the spousal privilege).

Had the government provided the Court with a summary of its trial evidence, and that summary contained holes that could only be filled with Risen's testimony, the Court would have had a basis upon which to enforce the subpoena. The government has not provided such a summary, relying instead on the mere allegation that Risen provides the only direct testimony about the source of the classified information in Chapter 9. That allegation is insufficient to establish that compelling evidence of the source for Chapter 9 is unavailable from means other than Risen's testimony. The information provided to the Court during the grand jury proceeding, particularly the testimony of the former government intelligence official, provides the exact same information that the government is seeking in the subpoena: Risen's statement about the identity of his source for Chapter 9. Therefore, the second *LaRouche* factor weighs heavily in favor of quashing the subpoena.

3. *Compelling interest*

Under the third *LaRouche* factor, the Court must consider whether there is a compelling interest in obtaining the information. *See Church of Scientology Int'l v. Daniels,* 992 F.2d 1329, 1335 (4th Cir.1993) (affirming the denial of a request to compel a reporter to produce his notes, tapes, and draft articles because the information sought by the plaintiff was "questionable, rather than critical to the case, as the law requires"); *In re Petroleum Products Antitrust Litig.,* 680 F.2d 5, 7

(2d Cir.1982) (stating that compelled disclosure of confidential sources is required only upon a "clear and specific" showing that the information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."); *Miller v. Transamerican Press, Inc.,* 621 F.2d 721, *modified,* 628 F.2d 932 (5th Cir.1980) (finding that "knowledge of the identity of the informant is necessary to proper preparation and presentation of the case").

The government attempts to avoid the reasoning in these cases by arguing that such analysis applies only to civil actions, not criminal cases. Resp. to Mot. to Quash at 21–22. This argument fails because the case law does not distinguish between civil actions and criminal cases. Accordingly, for a compelling interest to exist, the information must be necessary or, at the very least, critical to the litigation at issue.

The government argues that the government's burden of establishing Sterling's guilt beyond a reasonable doubt creates a compelling interest in obtaining Risen's testimony. Mot. in Limine at 26. To be sure, in the Grand Jury Opinion, this Court stated that the government's interest in the enforcement of a trial subpoena might be more compelling than in the grand jury context, where the burden of proof is probable cause, a much lower evidentiary standard. Grand Jury Opinion at 34–35. The government, however, in specifying the compelling interest, has not pleaded that Risen's testimony is necessary or critical to proving Sterling's guilt beyond a reasonable doubt; instead, it has argued that Risen's testimony will

"simplify the trial and clarify matters for the jury" and "allow for an efficient presentation of the Government's case." Mot. in Limine at 5. An efficient and simpler trial is neither necessary nor critical to demonstrating Sterling's guilt beyond a reasonable doubt. If making the trial more efficient or simpler were sufficient to satisfy the *LaRouche* compelling interest factor, there would hardly be a qualified reporter's privilege. Having failed to establish a compelling interest in Risen's testimony, the government does not prevail on the third element of the *LaRouche* test.

Balancing the three *LaRouche* factors, those aspects of the subpoena addressing the identity of Risen's source(s) will be quashed because the government has failed to demonstrate that the equivalent information is unavailable from other sources and that there is a compelling interest in Risen's testimony.

III. *Conclusion*

The Fourth Circuit recognizes a qualified reporter's privilege, which is not limited only to civil actions. When a reporter invokes the privilege, the Court must balance the reporter's need to protect his or her sources against the legitimate need of prosecutors or civil litigants for the journalist's testimony to establish their case.

Rather than explaining why the government's need for Risen's testimony outweighs the qualified reporter's privilege, the government devotes most of its energy to arguing that the reporter's privilege does not exist in criminal proceedings that are brought in good faith. Fourth Circuit prece-

dent does not support that position. Moreover, the government has not summarized the extensive evidence that it already has collected through alternative means. Nor has the government established that Risen's testimony is necessary or critical to proving Sterling's guilt beyond a reasonable doubt. A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook. The government must establish that there is a compelling interest for the journalist's testimony, and that there are no other means for obtaining the equivalent of that testimony. Under the specific facts of this case, as discussed above, the government has evidence equivalent to Risen's testimony. Accordingly, the Government's Motion in Limine to Admit the Testimony of James Risen [Dkt. No. 105] and the Motion of James Risen to Quash Subpoena and/or for Protective Order [Dkt. No. 115] will be granted in part and denied in part, and Risen will be required to provide testimony limited to confirming the following topics: (1) that Risen wrote a particular newspaper article or chapter of a book; (2) that a particular newspaper article or book chapter that Risen wrote is accurate; (3) that statements referred to in Risen's newspaper article or book chapter as being made by an unnamed source were in fact made to Risen by an unnamed source; and (4) that statements referred to in Risen's newspaper article or book chapter as being made by an identified source were in fact made by that identified source.

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

/stamped/ Filed
Oct 12 2011
Clerk, U.S. District Court
Alexandria, Virginia

UNITED STATES OF AMERICA,	)	
v.	)	1:10cr485
JEFFREY ALEXANDER STERLING,	)	(LMB)
Defendant.	)	

ORDER

For the reasons stated on the record, the Government's Motion for Clarification and Reconsideration [Dkt. No. 162] is DENIED to the extent that the Government seeks reconsideration of the legal underpinning of the Court's holding reflected in the July 29, 2011 Order [Dkt. No. 142], but it is GRANTED to the extent that the Court has provided clarification as to the proper scope of Mr. Risen's testimony. Because such testimony will include limited inquiry into the document the Government has labeled Risen's proposal for State of War, it is hereby

ORDERED that the Government make available to counsel for Risen its unredacted copy of the proposal to enable Risen to review it with his attorney before trial.

The Clerk is directed to forward copies of this Order to counsel of record and the Classified Information Security Officer.

Entered this 12th day of October, 2011.

Alexandria, Virginia

/s/ LMB
Leonie M. Brinkema
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	Criminal No. 1:10cr485
vs.	Alexandria, Virginia October 12, 2011 11:00 a.m.
. JEFFREY ALEXANDER STERLING,	
Defendant.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONTINUED ON PAGE 2)

(Pages 1 - 41)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S
(Defendant present.)

THE CLERK: Criminal Case 10-485, United States of America v. Jeffrey Alexander Sterling. Would counsel please note their appearances for the record.

MR. WELCH: Good morning. William Welch on behalf of the United States.

MR. KELLY: Tim Kelly for the government, Your Honor.

THE COURT: Good morning.

MR. TRUMP: And Jim Trump. Good morning.

MR. KURTZBERG: Good morning, Your Honor. Joel Kurtzberg on behalf of James Risen.

MR. STACKHOUSE: Peter Stackhouse on behalf of James Risen.

THE COURT: Good morning.

MR. MAC MAHON: Good morning, Your Honor. Edward

MacMahon for Mr. Sterling.

MR. POLLACK: And Barry Pollack also for Mr. Sterling.

Good morning, Your Honor.

THE COURT: Good morning.

Mr. Kurtzberg, I'm sorry we messed up your schedule. I assume—I hope you didn't make some other judge unhappy.

MR. KURTZBERG: I appreciate that, Your Honor. I was able to, to manage it in the end.

THE COURT: All right. The reason we have to do this is this trial is looming on the horizon, and as I started to try to craft an opinion, I realized

there was too many back-and-forth nuances. It was probably easier just to have you-all in the courtroom so I could go through this issue.

This is—we're hearing today the government's motion for reconsideration, much of which I really am not going to address, because I'm not going to reconsider the legal findings that I made in my original opinion; that is, I'm still holding to the proposition that there is clearly a qualified newsman's privilege that protects Mr. Risen from having to testify to most of what the government wants him to testify to.

I also have considered with care the government's argument that some of the factors that the Court used in the LaRouche balancing test have shifted. I'm not satisfied that they have shifted that dramatically. For example, there's a discussion about Mr. Manners' testimony changing. Well, frankly, until he's in the courtroom and testifies, I have no way of truly evaluating whether or not his testimony has changed in any material degree. After all, we were working off of grand jury information, which is under affirmation and the penalty of perjury, which is a much more reliable indicator of what he's going to say than some proffer that may have happened after the fact.

One of the problems with motions in limine, which this hearing actually comes out of, is that a court often cannot make a final and definitive ruling on a motion in limine until the trial gets started and issues are raised or not raised, and so that's another reason why I was uncomfortable in committing anything to formal writing because of the flexibility of this kind of an issue, but in any case, the factors which the government notes in its memorandum for reconsideration in my view do not change the LaRouche balancing, so to that

extent, the Court is not going to reconsider or grant the request to reconsider and to change any of the fundamental legal underpinnings of its previous opinion.

I am concerned, however, about the government's request for clarification, and I think there the government is justified that some of the ruling of the Court leaves open a certain amount of questions as to the scope of those rulings, and there are certain issues that actually were never really addressed in the motion in limine which are raised in my view for the first time in this motion for clarification, and the first of those issues is the authentication of the book proposal.

Now, I wanted to ask counsel, Mr. Kurtzberg, have you received now the copy of the proposal? Did the government give it to you?

MR. KURTZBERG: Your Honor, I have received a copy of the proposal that contains some redactions of, of certain names, but I have received the proposal.

THE COURT: More than one name was redacted from what you received?

MR. KURTZBERG: I believe there are two names that were redacted. I believe there was—well, I believe two names were redacted.

THE COURT: All right. But the most important question is your opposition to that aspect of the government's motion was, as I read it, purely procedural; that is, you felt that this was trying to get a second bite at the apple and did not—was not permissible. I don't agree with that. I don't think the book proposal was ever discussed, and I think within the scope of what it means to authenticate a book, the book proposal would be encom-

passed, so I want to hear if there's any substantive argument you want to make on that issue.

MR. KURTZBERG: Thank you, Your Honor. I do want to say a few things about the book proposal. I think probably the most important thing is something that will probably short-circuit most of this, because we were put in a very frustrating position being asked to authenticate a document, and we asked for the document, and we weren't given the document, so we didn't—we were being asked to attest to this is a true and correct copy of a document without actually having the document, and so part of our objection at the time we wrote our papers was the burden is on them, they can't really show it, and we can't really say very much without actually having the document.

I can inform the Court that now having shown the document to my client, my, my client has no objection in principle to giving testimony along the lines of this is a copy of a document that I wrote, but looking at the document, my client is unable to say that it is a true and correct copy of what he wrote for the very simple reason that when he looks at that document standing alone, it is clear to him that there is a substantially—at the very least, a substantially similar document that he had drafted at one point—

THE COURT: Let me ask you this—

MR. KURTZBERG: —but it is not clear to him—

THE COURT: Yeah.

MR. KURTZBERG:—that it wasn't changed or edited in some way so that this copy of the document is, in fact, the copy that was just drafted by him.

He just doesn't know one way or the other. Now, he has no objection to providing that kind of narrow testimony about the extent of his knowledge about whether that document is true and correct, but the reality is the document, you know, he cannot attest to it being a true and correct copy of a document that was, quite frankly, produced to the government by another party. This is not a document that came from Mr. Risen.

THE COURT: All right, let me ask you this: Did he keep a copy of the book proposal?

MR. KURTZBERG: First, people are calling it a book proposal, and we are—I'm not sure that it is, in fact, a book proposal, but the answer is no, he did not keep a copy of that document. He has no copy of that document. That is something that we've made very clear in terms of what documents we have and don't have from the outset. So he has no copy of this document.

Even—the only thing—you're asking if he has it now, with the government having produced it to us?

THE COURT: If he has it in his own computer, a copy of it.

MR. KURTZBERG: Oh, the answer is no, he does not have a copy of the document in any way, shape, or form other than what was provided to us by the government.

THE COURT: You know, it's interesting, when we looked at that document and I saw the number of pages that were redacted, we immediately called the government and said we wanted an unredacted copy, and they advised us, I don't know if they've told you this or not, Simon & Schuster, the publisher, actually did all that

redaction. That's not CIA redaction other than, I guess, these two names that are within the area of the text.

MR. KURTZBERG: I was made aware of that fact.

THE COURT: All right. Now, is it the other redactions that are throwing off Mr. Risen's ability to identify, or is it just the two words apparently or the two names that have been redacted that makes it difficult for him to identify it?

MR. KURTZBERG: I'm not—I'm sorry, Your Honor. I'm not sure that it's either. If the names were there or if he saw the entire document, honestly, I don't think looking at the document that he can say this is an unedited version as opposed to it having been tweaked or changed by his editors one way or the other.

Now, he could say, "It may be a copy of a document that I wrote," but I don't think he, he just looking at it, he's not sure if it is the draft that came solely from him or a slightly changed version of it. He just doesn't know.

THE COURT: All right. But he is willing to talk about it at trial.

MR. KURTZBERG: I should say that he is willing to talk about it, yes, to the extent that I just indicated.

THE COURT: Right.

MR. KURTZBERG: It is not—he is not willing to, as was the case with documents that were intended to be published that were vetted in a very different way than a document like this, go through it and say, "This is true," or things like that, and in particular, there is a line in the document, in the document that I think deals with, you

know, identifying source information, and I think that line in the document is very different than even other facts in the document.

But substantively, I would also want to urge the Court and make very clear to them I don't think there's anything in the document now that I have it that is not in the book. I mean, as I go through line by line—and the government has never identified it and I don't know if the government has identified it to the Court in earlier sessions—but if I go through that document line by line, I mean, everything that it says about the program that is at issue in chapter 9 is information that is contained within chapter 9.

So I'm not sure why there's a need for this—the information in this document beyond what he's already agreed to testify about concerning the chapter.

THE COURT: All right.

MR. KURTZBERG: And I'm arguing with my hands tied behind my back, because the government has never said and we think it's incumbent upon the government at the very least to let us know so that we can respond meaningfully.

THE COURT: All right. Mr. Kelly?

MR. KELLY: Your Honor, a couple of responses. If everything that is in the proposal is something that's in the book, of course, there shouldn't be any reason why Mr. Risen could not authenticate that, just as he would the book itself. There are two issues, and I want to make one thing clear because we are not in a CIPA proceeding.

The government has produced the document to Mr. Risen's counsel, not precisely the same doc-

ument the Court has. What we've produced is the two redactions, the CIPA redactions that the government has requested, that document remains under seal, and what we have simply done is redact completely the words that instead of a substitution, there is no word there as to the document that counsel has.

So as to those two words, we have not publicly indicated what information we have redacted from the document. We have not publicly indicated the nature of the two words in that book proposal that do not appear in the book itself.

We have indicated to the Court, I believe, in closed session what, what those, what those two words are, but we have not—Mr. Risen has a copy that has simply them blacked out without a substitution.

THE COURT: Well, by doing that, I understand why you've done it, but you've also opened the door and created the problem that Mr. Kurtzberg properly points out is that Mr. Risen will probably not be able to definitively get up on the stand and say this is, in fact, the proposal, whatever you want to call it, teaser, whatever it is, that, you know, he submitted to Simon & Schuster out of which the book finally evolved. That's your problem.

MR. KELLY: Understood, Your Honor, and here's how I think we solve it: As to all the other redactions, they don't, they don't pertain to chapter 9, so we're not asking Mr. Risen to authenticate anything about all the redactions that Simon & Schuster took, so that's—I think that issue is to one side.

As to these two other pieces of information, obviously, when we are in trial, we will be able to

provide the—at that point, there'll be a public document. We will provide the substituted version, if you will, to Mr. Risen to authenticate.

Now, even, even there, I understand that he will not see what is underneath that particular substitution.

THE COURT: Look, he wrote it. He knew it. You have to stop playing these types of games. You could show him the document unredacted, because he saw it. He's already seen it. You don't have to ask him to recite it in open court, but you're creating an unnecessary problem in this respect.

And I want to see, because I'm also a bit in the dark right now, do we have in the courtroom right now the version of the document that was given to Mr. Kurtzberg, or if I can borrow yours for one second, Mr. Kurtzberg?

MR. KELLY: We have a separate copy here.

THE COURT: All right. So I want to see what was given to counsel vis-a-vis the unredacted.

MR. MAC MAHON: Can I have a copy, too, Your Honor?

THE COURT: And you're cleared, so you can see the whole thing, yeah.

MR. KELLY: Of course, he already has—

THE COURT: Yeah.

MR. KELLY: Counsel already has that document.

MR. MAC MAHON: I'm sorry, I'm just a little confused about the different versions.

THE COURT: Yeah, you should have a chance to see it, too.

MR. POLLACK: Thanks.

THE COURT: Now, I'm sorry, what you've given me is the redacted one. Do we have the unredacted one in the courtroom or not? I know this is—that would be a CIPA matter.

MR. KELLY: We do not, Your Honor, because we are not proceeding under CIPA.

THE COURT: And this suffers from the same problem we discussed before, which is I understand this may be aesthetic, but I think when the redactions are not shown in blacked-out areas, it's harder to know what's going on, because on page 155, at the end of that first sentence, I think there's a name missing, all right? And somebody looking at this thing wouldn't know that. If there were a piece of black there indicating that something had been redacted—the white redactions in my view do not work. They're very misleading.

Am I not correct that there's a name missing?

MR. KELLY: There is a word missing, correct, Your Honor, and we can certainly change that. We can also if the Court enters an appropriate order perhaps produce, produce that document, the substituted document to Mr. Risen. We just didn't have an order that would bound Mr. Risen's use of that document or at least an order that would permit us to show him, as the Court suggested, show him that document, but given that it was under—the document is currently under seal and we wanted to get them a document as quickly as possible, that was the way we proceeded.

THE COURT: All right. Well, we can give this back to you at this point.

MR. KELLY: But—

THE COURT: I'm trying to avoid a million side issues during this trial. This particular issue

shouldn't be a problem. Mr. Risen is apparently willing to address the issue of the book proposal, which I'm very pleased we'll be able to work that out, but you've got to show him what the proposal is, all right?

So you propose—you do an order that satisfies you-all, but I want him and his counsel to be able to see the unredacted proposal for chapter 9.

MR. KELLY: Wholly unredacted, that is, unredacted at all from the government's—

THE COURT: Completely unredacted, yes.

And I assume, counsel, you'll not be uncomfortable with a little bit of a protective order on that?

MR. KURTZBERG: I'm sure that we would not. We already agreed—

THE COURT: Again, Mr. Risen wrote it. He knows what's in it. This is in some respects one of those games that will drive me crazy if we're going to play this for the next two weeks, all right?

MR. KELLY: We'd ask, Your Honor, we will ask in that that we simply show it to them rather than provide them a separate copy, if that's acceptable to the Court.

THE COURT: Mr. Risen probably needs to look at it for seconds and he'll say, "Yeah, that's what I said," or "That's not what I said." So yes, I don't think that you need to keep a copy, because then you'd need a SCIF and all that kind of stuff, but enough time so that counsel can look at it and they can be left alone with it to discuss it with their client, etc. You need to do that and work it out quickly.

MR. KELLY: We will propose it to the Court.

THE COURT: All right. Is Mr. Risen going to

be available to you, Mr. Kurtzberg, fairly quickly that he could come in?

MR. KURTZBERG: Yes, Your Honor. He will be—I do if we're done with it, I do want to make sure that I'm clear about a couple things in connection with document.

THE COURT: All right, go ahead.

MR. KURTZBERG: So when I say that Mr. Risen is willing to talk about authenticating the document or at least give his state of knowledge, which I am proffering now he will not be able to say, I don't think it will make a difference, even if he sees the unredacted document, he will not be able to say, "I remember this is the version I wrote," as opposed to an edited or changed version, I just want to make that clear, but what he is willing to do is say what his knowledge is about whether or not this is an authentic copy of a document that he wrote.

The government, I believe, has asked for more than that, and I don't think that there is agreement as to everything in connection with this document. The government also wants him to testify about the truth of the statements that are in the document, and in particular, there is a sentence that talks about—again, I'm just not sure if I'm even allowed to quote from the document, because I don't know, I've asked the government, I don't know their position as to whether I'm able to quote from the document in open court, so I should, I should just ask.

THE COURT: Go ahead.

MR. KELLY: Yes.

MR. KURTZBERG: So there is a statement in there about, you know, CIA officers involved have come—in the operation have come to the author to

discuss the case, and it goes on from there. I think they, they did partially refer to it in their papers.

That statement seems to us to be very different qualitatively than the rest of the statements in this document in that they are there trying to get information about Mr. Risen's sources and, you know, is there one, is there more than one. Those are the kinds of questions that they have indirectly tried to ask Mr. Risen about, and we believe that to require Mr. Risen to give testimony about a statement like that in the context of a document like this, which is not a document that, as I said, like the other documents, which is—was fully vetted, was intended to be published and whatnot, we think would indirectly involve an attempt to get at source information, and so that sentence, we believe, should be treated differently than the other sentences.

As far as testifying about the truth of the sentences in the document, I still am at a loss as to why the government claims that there's anything in this document that's not in the book chapter. They haven't made that clear.

They have said, oh, well, if it's all the same, why is that a problem for us? But I respectfully would suggest that the law puts the burden on them to show that if this is an attempt to get at information involving source information, they need to tell us why they have a need for the document as opposed to what's in the book.

Now, if they do, they haven't said what it is, and they again are putting us at a real disadvantage. We can't meaningfully respond to their claim that they need this beyond what's in the book if we don't know why they even claim they need it.

THE COURT: Mr. Kelly, do you want to respond to that?

MR. KELLY: Sure. Your Honor, the two pieces of information that are redacted that we will pursuant to what the Court has ordered provide Mr. Risen and his counsel the opportunity to look at are the two pieces of information that are not in the book, so I think that issue will take care of itself by what the Court has already ordered.

THE COURT: Yeah.

MR. KELLY: As to the issue of this statement in the book proposal in which his sources are specifically mentioned or referred to, I think we would agree that pursuant to the Court's ruling, we would not ask Mr. Risen to verify the accuracy of that. The Court has already ruled that specifi- —that, you know, specifically reflecting who the source was is something the Court has already ruled about.

So I think that particular passage is information that is of a different quality than the rest of the book proposal. Our, our request to the Court then would be that Mr. Risen authenticate or indicate that the other information in the book proposal was truthfully provided by a source or sources, but as to that one passage, we would not ask him any questions about that.

THE COURT: All right. Well, what you need to do is—let's show Mr. Kurtzberg what we're talking about and see if there's any follow-up on that, all right?

MR. MAC MAHON: Can I be heard briefly on this, Your Honor?

THE COURT: Yes, Mr. MacMahon.

MR. MAC MAHON: Your Honor, the paragraph or at least the sentence that Mr. Kurtzberg read—and I'm not sure what the rules are, I mean, it's already been read—it says CIA officers involved in the operation have come forward. I understand why the government wants to ask him if everything else in here is accurate and not—I mean, I'm not sure where they're going.

This is what it says is multiple CIA officers, and we can't—I don't know where this is going that they're going to ask him to say that the Iranian stuff is true, this is what I had, but when you mention multiple CIA officers—

THE COURT: Well, that helps you.

MR. MAC MAHON: That's why I stood up, Judge.

THE COURT: The article speaks for itself. We're not going to have a whole lot of questions about it. It is what it is.

MR. MAC MAHON: I understand, but that's why—if we're going to—I hear—there's no need to ask Mr. Risen about the sentence that says—if the question is were there multiple officers or is this what it says, you can't get into going through this line by line and skipping that line, if that's what I heard.

THE COURT: I don't hear Mr. Kelly saying that the government is going to do that. Mr. Kurtzberg is certainly opposing that, and I'm not going to grant it, so you're okay.

MR. MAC MAHON: Thank you, Your Honor.

THE COURT: The only thing is I don't know—do you plan to call someone from Simon & Schuster?

MR. KELLY: Your Honor, I think that that's

still to be determined. If Mr. Risen is going to take the position that even after seeing the unredacted document, that he simply can't verify that his source or sources that he reported—that this document accurately reflects what his source or sources told him, then I think we may be—well, if he, if he—if Mr. Risen is willing to give us testimony that this document would be admitted, that is, pure authentication testimony, we probably would not have to call—well, there is one other outstanding issue now that I think about it, Your Honor, would be the timing of this receipt of this book proposal is also an important fact.

I haven't heard whether Mr. Risen will or will not be able to say he submitted the book proposal at a particular time.

THE COURT: I don't think that was within your memo. I don't recall that being in the memo, but let me just ask Mr. Kurtzberg, do you feel that would be an issue?

MR. KURTZBERG: I believe that, I believe that Mr. Risen does not recall the timing of the submission of this particular document.

THE COURT: All right. I mean, it's sometime between 2003 and 2006, and we've already got in the affidavit that he held off for three years before publishing the book. You need to call Simon & Schuster. I mean, you need—this is just an authentication issue, like any other issue; and you prosecutors are experienced; you know how to do that. So we leave that alone.

So at the present time, Mr. Risen is going to be able to at least admit that he, he submitted some sort of a proposal to Simon & Schuster. This may or may not be the exact one. He could certainly say it looks like it, I don't know, but I

mean—so I'm granting that aspect of the motion for clarification but a very limited scope as to what can be asked, basically authentication question only, all right?

Now, the next issue is a clarification issue, is the date the information was received that's in chapter 9. The government points out, and they're now making really a waiver argument, that to the extent Mr. Risen has made any statements in his affidavit, he certainly should be able without any problem, without impugning the privilege, to be able to testify to that same statement in court, that those affidavits were made under the affirmation to tell the truth and they were submitted to the Court. So my view of that is to the extent to which he has made statements in the affidavit, he should be prepared to testify repeating that.

Now, I don't think he gave a specific date in 2003, and I assume the government's not trying to get that out, but simply an affirmation that he knew all the information by 2003, and you've also got in this record the time frame when he made contact with certain government officials. So it doesn't—you don't need to be a rocket scientist to figure out that certainly by date X in 2003, he had the information.

So to that extent, I'll permit that line of questioning, but again, it's not beyond what's in the affidavit.

Mr. Kurtzberg?

MR. KURTZBERG: If I just may make sure that we're clear?

THE COURT: Yeah.

MR. KURTZBERG: Because what we are concerned about is a situation where the government

is trying—I mean, we don't see—we see this as a back door attempt to open the door beyond what he said in his affidavit, which is just 2003, because if he gets on the stand, he may be subjected to cross-examination.

THE COURT: Well, then who's going to cross—the government's calling him as a witness, and I wanted to ask you about this, because many of your comments in your motion talk about cross-examination. If he's called as a government witness, then it would be Mr. MacMahon or Mr. Pollack who will be doing the cross-examination. Why are you worried about that?

MR. KURTZBERG: Well, I just don't want to have Mr. Risen in a position where he's on the stand and then either Mr. MacMahon or Mr. Pollack, as is their right, wants to cross-examine him and go beyond what he said in his affidavit, because by submitting his affidavit, there really can be no argument that he—by submitting an affidavit of incredible generality in 2003, you really can't say that he waived the right to not be more specific than that, but if he gets on the stand and he is cross-examined and the defense for whatever reason, I don't know what the reason might be, but for whatever reason decides they want more specificity, he is then going to be forced to invoke his privilege.

THE COURT: All right.

MR. KURTZBERG: And we don't want him to be in that situation.

The other thing is that as I think we, we made clear in our papers, they already have sufficient proof about the timing of this. If you even look at their indictment, they talk about conversations that Mr. Risen had in April of 2003 with Mr.

Harlow. They also talk about a meeting that Mr. Risen had with the government and with his employers that was also in April of 2003, and in the indictment, they allege that classified information was conveyed in these meetings in April of 2003.

So we really see this as an attempt to get Mr. Risen on the stand in the hopes that it will open the door to a wider array of questioning about timing. We want to make sure that doesn't happen.

THE COURT: That's the problem again with motions in limine, because you don't know until the actual event occurs what's going to develop, but I would agree with you that the scope of Risen's testimony is going to be very carefully limited, and I don't expect the government to be asking any questions beyond what's literally in the affidavit. So he knew the information in 2003, whatever the quote is, and held onto the story, all right?

And, Mr. MacMahon, I mean, if you start opening doors—do you anticipate doing that?

MR. MAC MAHON: Excuse me, Your Honor?

THE COURT: Do you anticipate vigorous cross-examination of Mr. Risen?

MR. MAC MAHON: I don't know what he's going to say, Your Honor.

THE COURT: All right.

MR. MAC MAHON: I don't know how the trial is going to proceed. I don't know what other statements, hearsay statements of his are coming in. I don't think we can be bound to an answer to that.

THE COURT: Well, I understand that. I mean, obviously, if we have to have a sidebar during the trial, a sidebar or two, we will, but we'll

nip it in the bud if that happens, all right?

MR. MAC MAHON: Thank you, Your Honor.

THE COURT: All right. The next issue was Risen's—let me take care of the other two that are easy. The issue about Sterling's letter, whether or not Mr. Risen ever received it, I'm not going to permit that. That request is denied, because that would in my view be a direct request to identify Sterling as a source for the information, and I think it's actually—I see it as completely irrelevant.

The statement is what it is. I think it's interesting. It's a very interesting letter. It has things that favor the government and statements that favor the defense.

I mean, that document, I don't know whether either side really does want to use it. It would be interesting if you do put it in the record, either side, but any relationship that it has with Mr. Risen, I think, is, is really irrelevant, and in any case, it would bump right into the issues that we were concerned about in our original opinion. That would be to me too close to revealing the source.

Similarly, the government's renewed request or maybe to some degree it's renewed for Mr. Risen to identify who is not the source bumps right into the underpinning of the Court's opinion, and so I'm not going to permit questioning along those lines.

Now, that leaves open what I think is the most interesting issue that they did raise in the motion for clarification, and it's clearly a clarification, and that is, to question Mr. Risen about his writing style and stylistic features of chapter 9, and again, I don't recall there being a substantive

response to this, but it seems to me—and I've read this chapter over several times before—asking an author who has agreed to authenticate and attest to the accuracy of his writing to just, in essence, put a few exclamation points along that testimony by being asked questions such as, "When you use quotation marks, are you directly quoting? Is that a direct quote?" is, I think, absolutely benign, appropriate, and any author should be comfortable answering that.

The same way, the italics, the fact that italics were used particularly for the letter—let me just give you the page where that appears in the book—page 204 over to 205, to be asked, you know, "Mr. Risen, in those two pages of the book, you have, you know, this italicized print. You know, what is the rhetorical point to that? Does that represent a direct quote from the letter or a paraphrasing?" I don't see how there can be a reasoned objection to that line of questioning, so, Mr. Kurtzberg, I'm asking you to respond to that.

MR. KURTZBERG: I think that our concern here about the writing style testimony is again the types of questions that they have indicated that they want to ask. Essentially, they want to ask questions of the sort of, "When there is a statement in italics about an individual that they identify as human asset No. 1, did you speak to human asset No. 1?"

And at the end of the day, what they really want to get at with the writing—testimony about writing style is they want to ask Mr. Risen, "As to particular individuals, was this person someone you spoke to directly? Was this person a source?"

We believe that that kind of questioning is the type of indirect attempt to identify a source,

maybe not by name but to say, "Was this person that is identified in the book a source of yours?" And I think that the government has been pretty clear that that is the type of questioning that they do envision in this.

THE COURT: Well, that may be what they envision, but I've phrased it somewhat differently, so let me ask if you would object if the questions were phrased in that more generic, rhetorical way. As you may or may not know, the defense wants to call an expert, I think it's Mr. Lichtstein, Lichtenstein (sic), to testify just generally about stylistic devices of a journalist. We will address that motion in more detail probably tomorrow. I think it's on the agenda for tomorrow, but frankly, that testimony is in my view not nearly as cogent as asking the actual author of a particular work, "When you use quotation marks, what do you mean? What do you use a quotation mark for?"

Look, we're lawyers. If you wrote a brief for me and you have language inside of quotation marks, I'm going to assume, because that's the proper way to use them, that you are directly quoting from that witness or from that document or from that case, and if you're not, I've got a right to know, oh, that's not a direct quote, and I don't see how that starts to get into the privilege if they're asked in that more rhetorical manner.

MR. KURTZBERG: Your Honor, just so I'm clear, I think if the questions were asked in a generic way, "When you use a particular literally"—

THE COURT: Device.

MR. KURTZBERG:—"quotes, a device, or italics, does that necessarily mean that it is a direct quote from the individual?" I think those ques-

tions Mr. Risen would not have a problem with as opposed to, "For this particular line or this particular person, is this a quote that you spoke directly to this person?" and going through the chapter line by line and asking about each individual identified and did you meet with the person and did they speak to you directly, that's the concern that—

THE COURT: I agree with you, those questions would be beyond the scope of this, but they can certainly ask, it seems to me—and let's get this clear, let's look at page 204 and 205 of the book, all right? It says in regular print, I'm going to get into this, "In his badly broken English, the Russian addressed the Iranians as if they were academic colleagues. He later gave a copy of his letter to the CIA," all right? That's in ordinary print.

And then there is in italics, you know, what I as an ordinary reader would assume is the letter, all right? I would expect that he should be able to answer, you know, "Why did you use italics? Why is this language set out in italics?"

MR. KURTZBERG: Your Honor, I think if the questions were in very general terms along those lines, there would not be an objection to providing testimony that putting something in italics means generically this or that or what a quotation mark might mean, but the objection really would be to the extent that, as I said before, that they are trying to use that as a way to get at did you speak to this particular individual.

THE COURT: All right. All right, does the government understand then how you need to craft your questions?

MR. TRUMP: One moment, Your Honor.

THE COURT: Yeah.

MR. KELLY: Your Honor, we certainly do understand with regard to the specific example the Court articulated regarding the letter. There are other specifics, of course, where quotes—I mean, where either quotes or italics are used when it appears as though a person is being quoted, and so the question is can the government ask, "Is that a direct quote from someone?"

THE COURT: No. I think you can just say, "When you use quotation marks in this chapter, what does that signify?" All right?

MR. KELLY: Okay.

THE COURT: Because Mr. Risen has agreed that he would attest to the accuracy of the book. Part of that is, "When you quote, are you really quoting?" If not, then it may not be that accurate, all right? That's it.

MR. KELLY: From either a document, a person, whatever the source.

THE COURT: Yes.

MR. KELLY: I think we understand, Your Honor. Thank you.

THE COURT: All right? Mr. Kurtzberg, I think done that way, in terms of the concern that you have and that the Court has about invading the privilege, I don't see it being an issue.

MR. KURTZBERG: Your Honor, if it were asked generically in the way that you did, I don't think that we would have had an issue with this from the get-go.

THE COURT: Well, I'll play grammarian during this trial. I'll be watching it.

All right, Mr. Pollack?

MR. POLLACK: Yes, Your Honor. I would like just a slight clarification, if I might, so I understand what it is that the Court is allowing and not allowing and what it is Mr. Kurtzberg is saying that Mr. Risen would answer. I understand if he's asked generically, "What is the significance generally when you use quotation marks?" he will answer that.

THE COURT: In this chapter. I'm going to allow the government to say, "In chapter 9, when you use X rhetorical device, what does that signify?" All right?

MR. POLLACK: What about the specific question that you posed? Is he going to be asked and will he answer, "On page 204, where you used italics, what is the significance of your use of italics on that page?" which seems to me to be getting at, "Did you have a copy of the document itself? Did you get somebody to describe the document to you? If the latter, who described the document to you?"

I'm just not sure—I understand the generic, "Generally, in chapter 9, when you use quotation marks, what does it mean? Generally, in chapter 9, when you use italics, what does it mean?"

What I'm not clear is how far can either side go in asking questions about a particular passage such as this one?

THE COURT: I don't think you can. The generic rhetorical device, all right?

MR. POLLACK: Okay. So there won't be any questions or answers about specific passages.

THE COURT: I don't think it's needed, all right? Again, we'll have to see exactly how the question comes in and how the answer comes out, but basically, I'm giving both sides a clear warn-

ing that we're not going to get into the specific details, you know? I don't think it's necessary, all right?

MR. POLLACK: Okay. Thank you, Your Honor. I appreciate the clarification.

THE COURT: Now, I think that covered all the categories. Mr. Trump?

MR. TRUMP: We had talked a little bit procedurally how to handle these type of issues—

THE COURT: Yes.

MR. TRUMP:—and one thing we thought of, Judge, is that we anticipate that Mr. Risen would be called perhaps in the second week of trial. Unless things went really fast the first week, he would probably fit in somewhere early in the second week.

THE COURT: Right.

MR. TRUMP: That the Court take an hour or so without the jury and that we question Mr. Risen on direct and defense cross-examine him, and that way, if there are any issues like this that come up, we air them then.

My concern is not so much that we can't stick to the script as described by the Court but that the testimony gives the defense some reason to believe that their Sixth Amendment rights are at jeopardy and would raise a motion at some point during the trial to that effect, and if that's the case, we need to know it before Mr. Risen testifies, not after, because once the bell is rung, we cannot—

THE COURT: I have no problem with that. I actually at one point had mused in chambers about whether I was going to require you-all to give me the questions in advance so I could vet them. This is even better, because we would get to

see how Mr. Risen answers the question.

MR. TRUMP: I think that that protects every-one. If counsel for Mr. Risen feels that a question goes too far, we can vet it right then and there.

THE COURT: All right. My bigger concern—let me just think about this logistically. I really do not want to delay the trial.

MR. TRUMP: My suggestion would be, Your Honor, that when we know better which day it would be, that at nine o'clock, we, we have a hear-ing in front of Your Honor, and we bring the jury in at ten that day, and I think that would give us plenty of time.

THE COURT: That sounds reasonable. Mr. Kurtzberg, are you or Mr. Stackhouse or some counsel for Mr. Risen going to be able to, to be here?

MR. KURTZBERG: Your Honor, we will make sure that we are here, yes.

THE COURT: All right.

MR. KURTZBERG: I just want to make sure that I understand what's being proposed. The pro-posal is that Mr. Risen come at 9 a.m. or whatever the time designated by the Court—

THE COURT: Right.

MR. KURTZBERG:—before the jury is there and that there actually be questions and answers provided in front of the judge before the jury comes in, and then after that is fully vetted, he would then testify in front of the jury?

Is that how this would work?

THE COURT: That's how to avoid the prob-lem. In case the government asks an improper question, we can let them know they can't ask

that in front of the jury, and also, it gives the defense an opportunity to ask any questions that they have, and then if there is an issue about due process or Sixth Amendment issues, we can face it when we face it.

MR. KURTZBERG: And is the government saying that it would not deviate from what was vetted at 9:00? I mean—

THE COURT: That's right.

MR. TRUMP: Of course.

THE COURT: They would not.

MR. TRUMP: Of course.

THE COURT: And defense counsel the same way. I mean, everybody will be locked in, all right? I'm not—

MR. KURTZBERG: Okay. Thank you.

MR. TRUMP: And that way, also, Judge, to address Mr. MacMahon's concern, is that at that point in the trial, we know where we are.

THE COURT: Correct.

MR. TRUMP: It's no longer a motion in limine. It's you've heard the proof at that point, and you can make rulings based upon the evidence as it has unfolded.

THE COURT: Which is one of the reasons why I said before motions in limine are so problematic for the Court, because they often depend upon how the trial evolves, but I agree with you, that's a great suggestion.

MR. TRUMP: And the second point, just so counsel for Mr. Risen understands it, we would ask that Mr. Risen remain under subpoena until the close of the case, because there is the possibility that the defense case would change the balanc-

ing test—

THE COURT: Yes.

MR. TRUMP: —and he would be needed as a potential witness if that occurs.

THE COURT: Yes, there's no question about that.

All right, I think that resolved all the issues. So the motion for—is there still an issue in that motion?

MR. KELLY: Your Honor, I believe there is.

THE COURT: All right.

MR. KELLY: Your Honor, the only outstanding issue is the issue of where Mr. Risen was when he received the information. I think that was another area the government had asked the Court to, to really clarify its ruling.

As you know, the—especially now that we'll have testimony that Mr. Risen received the information in 2003 or, I believe, most of the information in 2003, the government for venue purposes had asked the Court to reconsider again a very—permitting the government to ask a very limited, circumscribed question or questions, it may just be one question, about when—about where Mr. Risen was in 2003 when he received that information, and it could be answered at the level of generality.

That would just simply mean Mr. Risen was in a number of locations, including one of those locations being in the Eastern District of Virginia. End of question. End of answer.

That was another area we had asked the Court to reconsider its ruling—or really to clarify its ruling regarding the scope of Mr. Risen's testimony. This is another area that perhaps again if

we're going to bring Mr. Risen in to vet the questions and answers ahead of time, we could see if there's, if there's a problem, but this is an area we had asked the Court to clarify its ruling.

THE COURT: Mr. Kurtzberg?

MR. KURTZBERG: Your Honor, I think this, this really does fall into the category of an issue that was addressed by the Court fully and was fully vetted and argued, and I think the Court made its decision earlier. As far as I know, there is no new information or no reason why the balance would be tipped in a different way. If there is, once again, the government hasn't pointed out what it is and why to give us any chance to meaningfully respond.

THE COURT: I'm going to withhold ruling on that issue until we do our little voir dire of Mr. Risen. By then, a week of the trial has passed. I'll be able to see more clearly whether there is such a critical venue issue that it might change the balance under *LaRouche*, all right?

All right, I think that takes care of all the Risen-related matters. There is just one additional matter that I want to address to Mr. MacMahon and government counsel and Mr. Pollack. The government's suggestion as to some of the security issues that we have to take up as to the witnesses is brilliant. I don't know who came up with that, but the logistics on that are great.

What I want, however, is this: I want each side to give us a list of all the witnesses, full name of all the witnesses you believe you may call in the case. We're going to merge the two lists into an alphabetical list so no witness is identified as a government witness or defense witness, and what we will do is the practice that was recommended;

that is, after the Court has done the general voir dire, and you know my practice, you've come up to the bench, we've excused people for cause, the remaining of the pool is now without challenge in that respect, we will randomly call the first 14 jurors to sit in the box.

At that point, each of those jurors will be given the list. We will take a moment to ask them if they can identify or they believe they know any name or recognize any name that's on that list. If they do, we'll have a private voir dire on that matter, and we might at that point have to strike that juror or let them go back into that box. Then you would exercise your peremptories in the normal manner. Any jurors that are excused as to peremptories, the new ones will come in and be given the list.

This way we can control the list. There are no fake names. There are no—every name on there is a true, real name, a true living human, breathing human being. That would avoid some of the problems that the defense had, and that will, I think, avoid all those issues, all right?

So since I don't want to have to do a million little housekeeping matters right before the trial, I want those witness lists submitted if not by close of business today, certainly tomorrow so that we can type them up, all right?

Any objection to doing that, Mr. MacMahon?

MR. MAC MAHON: Just so I understand, Your Honor—I'm sorry, I'm a long way from the podium.

THE COURT: I know.

MR. MAC MAHON: You mean for both, both sides to givethe full names of all of their witnesses?

THE COURT: Yes.

MR. MAC MAHON: And, of course, that would be a classified document at this point in time.

THE COURT: Well, a name by itself floating around is not classified unless it's connected to a particular position.

MR. MAC MAHON: Oh, I'm just, I'm just trying to be clear, because I don't—obviously, their list is going to be longer than ours.

THE COURT: Sure.

MR. MAC MAHON: But I just want to be—

THE COURT: I'm going to, I'm going to merge the two so that when the jurors see it, they're just going to see a list of names of witnesses.

MR. MAC MAHON: I'm just—

THE COURT: All right?

MR. MAC MAHON: The only issue I want to be clear on is that the real names of the government's witnesses are going to be shown to the jury, not aliases, not half-names, and how the Court does that is up to you, but we want, we want a true voir dire, meaning if they know who this person is, they're going to raise their hand and say it. And I think that's what you said. I just want to be clear.

THE COURT: I'll say it for the third and last time: the true, real name, not an alias. So it's going to be, you know, Leonie M. Brinkema, not Susie Brinkema, all right? In other words, it's going to be the real name for these people, all right?

MR. MAC MAHON: We have no objection to that process.

THE COURT: Okay. So we've solved that par-

ticular problem. All right, is there any problem from the government on that?

MR. TRUMP: We're not exchanging lists. We're giving them to the Court, correct?

THE COURT: You're giving them to the Court, each side, because neither the defense is not required to give you their witness list this early, nor are you required to give them your witness list this early, but we will have it.

MR. TRUMP: We're going to give them a witness list, but there are certain names on there that will appear in the way they appeared in the discovery, not full names, but we will give the full name to you for the preparation of this list.

THE COURT: And whether or not the jury will be given the full name at some point is an issue we'll discuss as we do the logistics on this thing.

MR. TRUMP: Because the full names of certain covert officers will be on the list, we would ask that the Court treat this list as a classified document.

THE COURT: Well, we're going to keep it—yes, we're going to keep it in the SCIF. We're going to type it on the special computer, and that's why I will have the court security people here to help, you know.

MR. TRUMP: Thank you, Your Honor.

THE COURT: And we can control—there will only be 14 of those lists.

MR. TRUMP: Right.

THE COURT: And we'll have to—

MR. TRUMP: But between now and trial, I'm just making clear that we will give the court security

officer our list, and we will mark it classified because the full names of certain people are on the list.

THE COURT: Right. Now, tomorrow during the CIPA hearing, we will talk in a little bit more detail about some of the logistics, the other logistics that are out there, all right?

MR. TRUMP: That's fine.

THE COURT: Is there anything else we need to address while Mr. Risen's counsel are here?

(No response.)

THE COURT: No? All right. So your order today is just going to be motion granted in part and denied in part. You've got the transcript, with all the, the nuance in it, but we will try to keep, Mr. Kurtzberg, your team advised as to how the trial is going so that you know whether it's Monday or Tuesday.

And can I assume this case is going forward on Monday? Is there any likelihood that it's not going to go forward Monday?

MR. WELCH: It's going to go forward on Monday.

THE COURT: Excellent. All right, then we can get into battle mode. All right, very good. Anything further on this case? If not, I'll see the rest of you tomorrow morning.

(No response.)

THE COURT: All right, we'll recess court until 2:00.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 11–5028

Oct. 15, 2013.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

JEFFREY ALEXANDER STERLING,
Defendant-Appellee,

JAMES RISEN,

Intervenor-Appellee.

THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; ABC, INCORPORATED; ADVANCE PUBLICATIONS, INCORPORATED; ALM MEDIA, INCORPORATED; THE ASSOCIATED PRESS; BLOOMBERG, L.P.; CABLE NEWS NETWORK, INCORPORATED; CBS CORPORATION; COX MEDIA GROUP, INC.; DAILY NEWS, L.P.; DOW JONES AND COMPANY, INCORPORATED; THE E.W. SCRIPPS COMPANY; FIRST AMENDMENT COALITION; FOX NEWS NETWORK, L.L.C.; GANNETT COMPANY, INCORPORATED; THE HEARST CORPORATION; THE MCCLATCHY COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL PUBLIC RADIO, INCORPORATED; NBCUNIVERSAL MEDIA, LLC; THE NEW YORK

TIMES COMPANY; NEWSPAPER ASSOCIATION OF AMERICA; THE NEWSWEEK DAILY BEAST COMPANY LLC; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; REUTERS AMERICA LLC; TIME INC.; TRIBUNE COMPANY; THE WASHINGTON POST; WNET,

Amici Supporting Intervenor.

Lanny A. Breuer, Robert A. Parker, Mythili Raman, Assistant U.S. Attorney, U.S. Department of Justice, Washington, DC, Neil Harvey MacBride, Andrew Peterson, James L. Trump, Assistant U.S. Attorney, Office of the United States Attorney, Alexandria, VA, for Plaintiff-Appellant.

Mia Haessly, Barry Joel Pollack, Miller & Chevalier, Chartered, Washington, DC, Edward Brian MacMahon, Jr., Esq., Middleburg, VA, for Defendant-Appellee.

David N. Kelley, Joel Kurtzberg, Cahill, Gordon & Reindel, New York, NY, for Intervenor-Appellee.

Laurie Ann Babinski, Bruce D. Brown, Baker & Hostetler, LLP, Lee Levine, Jerianne Timmerman, National Association of Broadcasters, Denise Leary, Ashley Messenger, Kurt Wimmer, Covington & Burling, LLP, Kathleen A. Kirby, Wiley Rein, LLP, Levine Sullivan Koch & Schulz, LLP, Karlene Worthington Goller, Cole, Raywid & Braverman, Eric Lieberman, James McLaughlin, Washington Post, Washington, DC, Indira Satyendra, John Zucker, ABC, Incorporated, Richard A. Bernstein, Sabin, Bermant & Gould LLP, Fabio B.

Bertoni, Allison C. Hoffman, ALM Media, Incorporated, Charles J. Glasser, Bloomberg News, Anthony M. Bongiorno, CBS Corporation, Anne B. Carroll, Daily News, L.P., Jason P. Conti, Gail C. Gove, Mark H. Jackson, Dow Jones & Company, Inc., Dianne Brandi, Christopher Silvestri, Fox News Network, L.L.C., Eve Burton, Hearst Corporation, Jonathan R. Donnellan, Hearst Corporation Office of General Counsel, Susan Weiner, National Broadcasting Company, Inc., George Freeman, New York Times Company Legal Department, Randy L. Shapiro, News Week/Daily Beast, Shmuel R. Bulka, Reuters America LLC, Andrew Lachow, Time, Incorporated, David S. Bralow, Associate General Counsel, Tribune Company, Robert A. Feinberg, WNET, Karen Kaiser, New York, NY, Johnita P. Due, David Vigilante, Cable News Network, LLP, Lance Lovell, Cox Media Group, Inc., Atlanta, GA, Barbara W. Wall, Gannett Company, Incorporated, Gregg P. Leslie, Reporters Committee for Freedom of the Press, Arlington, VA, John Joshua Wheeler of Free Expression, Charlottesville, VA, David M. Giles, Cincinnati, OH, Peter Scheer, First Amendment Coalition, San Rafael, CA, Stephen J. Burns, McClatchy Company, Sacramento, CA, Lucy Ann Dalglish, McLean, VA, Karen H. Flax, Tribune Company, Chicago, IL, for Amici Supporting Intervenor.

Opinion

ORDER

Petitions for rehearing en banc filed by appellee Sterling and appellee Risen were circulated to the full court.

No judge requested a poll on Mr. Sterling's petition for rehearing en banc.

On a poll requested and conducted on Mr. Risen's petition for rehearing en banc, Judge Gregory voted in favor of the petition. Chief Judge Traxler, and Judges Niemeyer, Motz, King, Shedd, Duncan, Agee, Davis, Keenan, Wynn, Diaz, Floyd, and Thacker voted against the petition. Judge Wilkinson took no part in the consideration or decision of this case.

The court denies the petitions for rehearing en banc filed by Mr. Sterling and Mr. Risen. Judge King and Judge Keenan filed statements regarding their participation in the case. Judge Gregory filed an opinion dissenting from the denial of rehearing en banc.

KING, Circuit Judge:

I write to briefly explain my decision to participate in the disposition of this petition for rehearing en banc. As my financial disclosure reports reflect, I own stock in Time Warner Inc., the parent company of certain corporate amici supporting intervenor Risen, a prospective prosecution witness. Nevertheless, I have determined that my recusal is not required, in that the outcome of these proceedings cannot substantially affect my

financial interest in Time Warner, and I otherwise discern no reasonable basis to question my impartiality. *See* Code of Conduct for U.S. Judges Canon 3(C)(1)(c) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding [.]"); *see also* Comm. on Codes of Conduct Advisory Op. No. 63 (June 2009) ("[I]f an interest in an amicus would not be substantially affected by the outcome, and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an amicus is not per se a disqualification.").

Indeed, I have concluded that my recusal in these circumstances is not only unnecessary, but inadvisable. Put simply, it could adversely impact our judicial system by inspiring a form of "judge shopping" accomplished by corporate amici being enlisted on the basis of the stock ownership interests of judges. There being no question that they can perform impartially, judges should not be so readily relieved of their solemn obligation to faithfully discharge their duties.

BARBARA MILANO KEENAN, Circuit Judge:

I am participating in the Court's consideration of the petition for rehearing en banc in this matter, despite my ownership of stock in Time Warner, Inc., which owns several companies that

are amici in this case. For the reasons well stated by my good colleague Judge King, I have concluded that my recusal in this proceeding is neither required nor advisable.

GREGORY, Circuit Judge, dissenting from the denial of en banc rehearing:

> Without debate, without criticism, no Administration and no country can succeed—and no republic can survive. . . . And that is why our press was protected by the First Amendment—. . . to inform, to arouse, to reflect, to state our dangers and our opportunities, to indicate our crises and our choices, to lead, mold, educate and sometimes even anger public opinion. . . . [G]overnment at all levels[ ] must meet its obligation to provide you with the fullest possible information outside the narrowest limits of national security. . . . And so it is to the printing press—to the recorder of man's deeds, the keeper of his conscience, the courier of his news—that we look for strength and assistance, confident that with your help man will be what he was born to be: free and independent.
>
> President John F. Kennedy, The President and the Press, Address before the American Newspaper Publishers Association (April 27, 1961).

We have been called upon in this appeal to decide whether there exists in the criminal context a First Amendment privilege for reporters to

decline to identify their confidential sources. Rule 35 provides that we may hear cases en banc in two situations: when "en banc consideration is necessary to secure or maintain uniformity of the [C]ourt's decisions," or when "the proceeding involves an issue of exceptional importance." Fed. R.App. P. 35(a). There can be no doubt that this issue is one of exceptional importance, a fundamental First Amendment question that has not been directly addressed by the Supreme Court or our Sister Circuits.

As noted in my opinion dissenting from the panel's decision on this issue, forty-nine of the fifty United States, as well as the District of Columbia, have recognized some form of reporter's privilege, whether by statute or in case law. *See United States v. Sterling,* 724 F.3d 482, 532–33 (4th Cir.2013) (Gregory, J., dissenting as to Issue I). There is not, as yet, a federal statute recognizing a reporter's privilege, but we have recognized such a privilege in the civil context. *See, e.g., LaRouche v. Nat'l Broad. Co.,* 780 F.2d 1134 (4th Cir.1986).

In the criminal context, the case law is sparse. However, given the speed at which information travels in this Information Age, the global reach of news sources, and the widely publicized increase in federal criminal prosecutions under the Espionage Act, it is impossible to imagine that the issue presented by this case will not come up repeatedly in the future, in every circuit in the country. Courts, prosecutors, and reporters will look to our decision for guidance. Some reporters, including the one in this case, may be imprisoned for failing to reveal their sources, even though the

reporters seek only to shed light on the workings of our government in the name of its citizens. That being the case, I voted for the entire Court to give this issue full consideration.

My good colleagues in the majority concluded that the Supreme Court's decision in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), should be read to preclude a reporter's privilege absent a showing of bad faith or harassment on the part of the prosecution. Although I have the greatest respect for their analysis, I must disagree with their conclusion. As stated in my dissent, I believe that Justice Powell's concurring opinion in *Branzburg* limits the scope of that decision, and permits courts to employ, on a case-by-case basis, a balancing test to determine whether the information sought from the reporter is relevant, whether it may be obtained by other means, and whether there is a compelling interest in the information. Such an approach has been used by this court in the civil context in *LaRouche* and in *United States v. Steelhammer,* 539 F.2d 373 (4th Cir.1976), (Winter, J., dissenting), *adopted by the court en banc,* 561 F.2d 539 (4th Cir.1977). It would be fitting to apply it in the criminal context as well.

By offering reporters protection only when the government acts in bad faith, the majority's rule gives future reporters little more than a broken shield to protect those confidential sources critical to reporting. For when will the government not have a legitimate interest in the prosecution of its laws? And in instances where the prosecution itself is pursued in bad faith for the purpose of harassing a member of the press, it asks far too

much of the reporter, as a mere witness in a case brought against another individual, to prove as much. This is especially so given that the majority rejects application of a balancing test wherein the reporter may attempt to show that his testimony is not necessary to securing a conviction. In practice, then, such protection is no protection at all.

An independent press is as indispensable to liberty as is an independent judiciary. For public opinion to serve as a meaningful check on governmental power, the press must be free to report to the people the government's use (or misuse) of that power. Denying reporters a privilege in the criminal context would be gravely detrimental to our great nation, for "[f]reedom of the press . . . is not an end in itself but a means to the end of a free society." *Pennekamp v. Florida,* 328 U.S. 331, 354–55, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) (Frankfurter, J., concurring).

In light of the exceptional importance of this issue, I must dissent.

U.S. Constitution, Amendment I

The First Amendment to the United States Constitution provides, in relevant part, that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Federal Rules of Evidence Rule 501, 28 U.S.C.A.

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Federal Rules of Criminal Procedure, Rule 17

Federal Rule of Criminal Procedure 17 provides in pertinent part that:

> (a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.
>
> . . .
>
> (c) Producing Documents and Objects.
>
>> (1) In General. A subpoena may order the witness to produce any books, papers, documents, data, 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. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>>
>> (2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.
>
> . . .

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

In re:	)	
	)	1:08dm61 (LMB)
Grand Jury Subpoena to	)	
James Risen	)	**UNDER SEAL**

MEMORANDUM OPINION

A federal grand jury has been investigating how highly classified information about a Central Intelligence Agency ("CIA") operation[redacted material] was leaked to journalist James Risen. Before the Court is Risen's Motion to Quash a grand jury subpoena that seeks his testimony about his reporting. For the reasons discussed below, Risen's Motion to Quash the subpoena has been granted.

I. BACKGROUND

A. Chapter 9 of State of War

In January 2006, Risen published a book about the CIA, State of the War: The Secret History of the CIA and the Bush Administration ("State of War"). Chapter 9 of State of War describes a covert CIA operative's attempt to provide Iran with flawed nuclear weapon plans under a highly classified CIA program.

As reported in Chapter 9, the CIA recruited a former Russian scientist, indentified by the codename "MERLIN," to provide Iranian officials with faulty nuclear blueprints, as part of a CIA plan to undermine Iran's nuclear programs. According to Risen, the flaws in the blueprints were immediately spotted by the former scien-

tist. Nevertheless, the CIA instructed him to continue with the operation and drop the blueprints off at the Iranian embassy in Vienna. Chapter 9 concludes that the operation was deeply flawed and mismanaged, because the latent defects in the blueprints were easily indentifiable, and the operation actually resulted in the transfer of potentially helpful nuclear technology to the Iranians. Much of Chapter 9 is told from the perspective of a CIA case officer, described as the Russian scientist's "personal handler," who was assigned to persuade the scientist to go along with the operation. [redacted material] Decl. of Eric B. Bruce, dated March 7, 2008, ("Bruce Decl.") at ¶ 7, Ex. B to Government's Ex Parte Submission in Supp. of Opp. to James Risen's Mot. to Quash Grand Jury Subpoena, dated June 16, 2010.[1] [redacted material]

B. Risen's contacts with Jeffrey Sterling

The government's target in the leak investigation is Jeffrey Sterling, who was hired as a CIA case officer in 1993. Bruce Decl. at ¶13. From late 1998 or early 1999 through April or May 2000, Sterling was assigned as [redacted material] Id. at ¶¶ 16, 26. Sterling frequently met with [redacted material] and had principal responsibility for drafting classified reports about his progress. Id. at ¶ 27 After being told that he failed to meet performance targets, Sterling, who is African American, filed a discrimination

[1] [redacted material] Bruce Decl. at ¶ 7. Chapter 9 also reports that an Iranian intelligence officer provided the CIA with evidence that Iran was behind a bombing and that CIA officials suppressed that information. [redacted material] Id. at ¶ 116-118.

complaint with the CIA on August 22, 2000. Id. at ¶¶ 17-18. Sterling then filed a lawsuit against the CIA that was dismissed based on the State Secrets privilege. Sterling's employment with the CIA ended on or about January 31, 2002. Id. at ¶¶ at 19-20.

The government has established that Sterling first began communicating with Risen during the final stages of his employment with he CIA. On Novemer 4, 2001, Risen published an article in the New York Times, revealing that a CIA undercover station was located in the 7 World Trade Center building. [redacted material] Risen quoted an anonymous "former agency official" as his source. Id. at ¶ 47-48, 52. Former CIA case officer [redacted material] testified to the grand jury that Sterling told her [redacted material] Id, at ¶ 49.

On March 2, 2002 the New York Times published an article by Risen about Sterling's discrimination lawsuit against the CIA. Id. at 53. The article quotes Sterling extensively. Risen wrote that Sterling "was assigned to try to recruit Iranians as spies," [redacted material] Id, at ¶ 54.

The government alleges that after he was fired by the CIA, Sterling attempted to draw attention to the [redacted material] project. The evidence supporting that allegation is that on March 5, 2003, Sterling met with two Senate Select Commitee on Intelligence staffers, [redacted material] and [redacted material] to discuss the [redacted material] program and his discrimination lawsuit. Id. at ¶ 61-62. [redacted material] later told the government in an interview that during the meeting "Sterling also threatened to go to the press, though he could not

recall if Sterling's threat related to the [redacted material] Operation or his lawsuit." Id. at ¶63.

Risen avers in his affidavit that he learned about the CIA program in 2003. Affidavit of James Risen, dated February 16, 2008 ("2008 Risen Aff.") at ¶ 17. Risen states that he promised confidentiality to the source(s) who provided the information about MERLIN, and that the agreement "does not merely cover the name of the source(s). Rather, I understand my agreement(s) to require me not to reveal any information that would enable someone to identify my confidential source(s)." Reply Affidavit of James Risen, dated July 6, 2010 ("2010 Risen Reply Aff.") at ¶ 5.

Between February 27, 2003 and March 29, 2003, there were seven phone calls from Sterling's home telephone in the Eastern District of Virginia to Risen's home telephone in the District of Maryland. Bruce Decl. at ¶ 65; Government's Opp. to James Risen's Mot. to Quash Grand Jury Subpoena ("Opp.") at 9. On March 10, 2003, Sterling sent an email message to Risen with a reference to a CNN.com article entitled: "Report: Iran has 'extremely advanced' nuclear program." In the message, Sterling wrote, "I'm sure you've already seen this, but quite interesting, don't you think? All the more reason to wonder . . ." Id. at ¶ 66.

On April 3, 2003—four days after the last of seven phone calls from Sterling's home to Risen's home—Risen called the CIA Office of Public Affairs, asking about an operation known as [redacted material] that involved [redacted material] Id. at ¶ 68. Also on April 3, 2003,

Risen called the National Security Council's Office of Public Affairs for comment about the operation. Id. at ¶ 69.

On April 30, 2003, former National Security Advisor Condoleezza Rice, former CIA director George Tenet, and three other CIA and NSC staff members met with Risen and New York Times Washington Bureau Chief Jill Abramson in an effort to convince them to not publish an article [redacted material] because it would compromise national security. Id. at ¶¶ 72-76. During the meeting, Risen stated [redacted material] Id. at ¶ 74. On or about May 6, 2003, Abramson told the government that the newspaper had decided not to publish the story. Id. at ¶ 77.

Risen continued to pursue the [redacted material] story as part of a book that he was writing about the CIA, and the evidence before the grand jury shows that he kept in touch with Sterling. In approximately August 2003, Sterling moved from Virginia to his home state of Missouri, where he stayed with friends, [redacted material] and [redacted material]. Id. at ¶ 78. Phone records for the [redacted material] phone document 19 calls between the New York Times office in Washington D.C. and their home. Id. at 79. [redacted material] and [redacted material] testified before the grand jury that they did not receive calls from anyone at the New York Times. Id. The government also found records of phone calls beween the New York Times and Sterling's cell phone and work phone extension at Blue Cross/Blue Shield in Missouri, where he began working in August 2004. Sterling had

access to the [redacted material] computer, and an FBI search of the computer revealed 27 emails beween Sterling and Risen, including a May 8, 2004 message from Risen to Sterling, stating "I want to call today. I'm trying to write the story." Id. at ¶¶ 81-85. A forensic examination of the [redacted material] computer revealed a string of characters that indicate a file called [redacted material] was once viewed or saved on that computer. Id. at ¶ 86.

Moreover, during a search of Sterling's personal computer, federal agents found a letter to "Jim" that was created on March 19, 2004. See Tab C to Opp. Brief. The letter describes Sterling's discrimination complaint and meeting with Senate staffers. The letter states that "[f]or obvious reasons, I cannot tell you every detail." Id, at 2.

[redacted material], [redacted material] testified before the grand jury that some time between October 2004 and January 2006, Sterling told her about his plans to meet with "Jim," who had written an article about Sterling's discrimination case and was then working on a book about the CIA. Bruce Decl. at ¶ 90. [redacted material] testified that she understood "Jim" to be James Risen. Id, at ¶ 91. According to [redacted material], when the couple saw State of War in a bookstore, Sterling—without looking at the book first—told [redacted material] that Chaper 9 was about work he had done at the CIA. Id, at ¶ 92. Additionally, [redacted material], a former goverment intelligence official with whom Risen consulted on his stories, told the grand jury that Risen told him that Sterling

was his source for information about the [redacted material] operation. Id. at ¶¶ 93-109.

In a book proposal sent to Simon & Schuster in Sepember 2004, Risen described [redacted material] Id, at ¶ 106. Risen and the publishing company reached a publishing agreement and in November 2005, Risen sent a final or near-final version of the manuscript to Simon & Schuster. Id, at ¶ 106.

In a classified filing dated March 7, 2008, the government admitted that the above-described evidence amounts to probable cause to indict Sterling:

> The evidence gathered to date clearly establishes that there is at least probable cause to believe that Jeffrey Sterling is responsible for the unauthorized disclosure of classified information regarding the [redacted material] Operation to James Risen, and three federal judges have also made a similar finding by authorizing the search warrants described above. The Government believes that there is also probable cause to suggest that Jeffrey Sterling is further responsible for the [redacted material] disclosures described above. However, the Government further believes that this matter warrants additional investigation to insure a proper charging decision before an indicment is presented to the Grand Jury.

Id. at 142.[2]

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[2] The Court strongly disagrees with the government's decision to redact Paragraph 142 of the Bruce declaration from the material provided to Risen's counsel. Like much of the redacted information in the declaration, this paragraph contains absolutely no information that would compromise

C. Subpoenas to Risen

A grand jury sitting in the Eastern District of Virginia began investigating the disclosures about the [redacted material] operation in or about March 2006. Id, at ¶ 9. On January 28, 2008, the government issued its first grand jury subpoena to Risen ("2008 subpoena"), seeking testimony and documents about the identity of the source(s) for Chapter 9 and Risen's communications with the sources(s). Risen moved to quash the subpoena, arguing that the reporter's privilege under the First Amendment and federal common law protects him from being compelled to disclose the information.

Risen's motion to quash was granted in part and denied in part, after the Court found that the government already had strong evidence against Sterling and that Risen's testimony would simply amount to "the icing on the cake." However, because Risen had disclosed Sterling's name and some information about his reporting to [redacted material], the Court found a waiver as to that information.

Both Risen and the government sought reconsideration. Risen filed affidavits from himself and [redacted material] that Risen claims establish that their discussions were part of Risen's reporting

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national security. The government's admission that probable cause exists is significant, and it likely would have caused Risen's counsel to present different arguments to the Court. Classification of the entire paragraph is improper because the paragraph does not appear to divulge national security information. Rather, the paragraph confirms a conclusion of law. If the government's concern is that codenames for the programs are revealed, it could have redacted those names but left the remainder of the paragraph unclassified.

and therefore that no waiver occurred. While those motions were pending, the government ordered Risen to appear before the grand jury with less than 48 hours notice. The Court granted Risen's motion to stay, and nothing more occured until July 21, 2009, when the Court asked both parties for a status update because the term of the grand jury which had issued the 2008 subpoena had expired. The government responded that its investigation was continuing and that it had convened another grand jury during the week of July 27, 2009. On August 5, 2009, the Court issued an order staying argument of the motions for reconsideration, to allow the new Attorney General an opportunity to evaluate the wisdom of reauthorizing the subpoena, given its significant First Amendment implications.

On January 19, 2010, the Attorney General authorized the issuance of a second grand jury subpoena ("2010 subpoena"). The subpoena issued on April 26, 2010. Unlike the 2008 subpoena, the 2010 subpoena does not ask for the identity of confidential sources; instead, the subpoena demands Risen's appearance before the grand jury and requires production of a broad list of documents and information. Among the requested documents are all Rolodex and contact information for Sterling, all notes related to Risen's reporting on Chapter 9, all emails or other correspondence relating to Chapter 9, and drafts of book proposals. Risen has denied possessing any of these documents other than the Rolodex contact information.

After oral argument on October 12, 2010, the Court quashed the subpoena as to document

requests, accepting Risen's representation that the only responsive document possibly in his possession was the contact information and finding that the compelled disclosure of that information would divulge the names of confidential sources. The unresolved issue, which is addressed in this Opinion, is the request for Risen's testimony.[3]

In a declaration attached to the government's Opposition brief, Special Assistant United States Attorney William M. Welch II clarifies exactly what the government would ask Risen:

- First, the government wants Risen to confirm the accuracy of the March 2, 2002 article about Sterling's discrimination complaint and the CIA's decision to fire him. Specifically, the government wants to ask Risen where Sterling disclosed the information, what other information Sterling provided, how Sterling provided the information, and when Sterling provided the information, as well as whether Risen and Sterling discussed the discrimination lawsuit after the article was published and whether Risen intends to write future stories about Sterling's discrimination lawsuit.
- Next, the government wants to ask Risen about "the where, the what, the how, and the when" regarding disclosure of classified information published in Chapter 9. The government will allow Risen to discuss sources using

[3] In the October 12, 2010 Order, the Court asked the parties to provide an update on the status of negotiations on the remaining portion of the subpoena. On October 19, 2010, the parties informed the Court that they have been unable to reach a compromise.

agreed-upon pseudonyms, such as "Source A," rather than their real names.

- Last, the government wants to ask Risen about "the where, the what, the how, and the when" regarding the 2004 letter that Sterling sent to Risen.

II. DISCUSSION

On June 3, 2010, Risen filed a Motion to Quash the 2010 subpoena under Federal Rule of Criminal Procedure 17(c) (2), which provides that the Court may quash or modify a subpoena if compliance would be unreasonable or oppressive. Risen argues that the Court should quash the subpoena because it is protected by the reporter's privilege under both the First Amendment and the common law, and that the 2010 subpoena, like the 2008 subpoena, seeks confidential source information. Risen also argues that the benefit of the leaks to the public outweighs any harm they caused, and the government issued the subpoena to harass and intimidate him.

A. Federal Rule of Criminal Procedure 17 (c) (2)

Although the government and Risen disagree about whether a reporter's privilege applies to this case, it is well accepted that grand juries' subpoena powers have some limits. Federal Rule of Criminal Procedure 17 (c) (2) allows a court to quash a grand jury subpoena "if compliance would be unreasonable or oppressive."

The Fourth Circuit has not hesitated to find that Rule 17 (c) (2) imposes limits on grand jury subpoenas.

> [T]he grand jury is not unfettered in the exercise of its investigatory powers. The law forbids it from undertaking those practices that do not aid the grand jury in its quest for information bearing on the decision to indict. This prohibition bars, inter alia, grand jury requests that amount to civil or criminal discovery as well as arbitrary, malicious, or harassing inquires.

United States v. Under Seal (In re Grand Jury Proceedings No. 92-4 Dos No. A93-155), 42 F.3d 876, 878 (4th Cir. 1994) (internal quotation marks and citations omitted). Parties may use Rule 17 (c) (2) to challenge a grand jury subpoena for seeking privileged material, and "[i]n the absence of such a privilege, a subpoena may still be unreasonable or oppressive under Rule 17 (c) if it is irrelevant, abusive or harassing, overly vague, or excessively broad." United States v. Under Seal (In re Grand Jury Doc No. G.J. 2005-2), 478 F.3d 581, 585 (4th Cir. 2007) (internal quotation marks and citations omitted).

B. First Amendment Privilege in the Fourth Circuit

In addition to the Rule 17 (c) (2) protections, Risen argues the First Amendment's guarantee of a free press as well as federal common law establish a qualified reporter's privilege that prevents compelled disclosure of the type at issue.[4] The

[4] Risen also argues that the Court should apply a federal common law reporter's privilege; however, the Fourth Circuit has only mentioned a common law privilege in passing in United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976), a civil contempt proceeding. In Steelhammer, the court's analysis focused mostly on the First Amendment

government counters that there is no reporter's privilege in a criminal case, relying heavily on Branzburg v. Hayes, 408 U.S. 665 (1972), which addressed three consolidated cases in which journalists sought to quash grand jury subpoenas. In the first case, a Kentucky grand jury sought testimony from a newspaper reporter who wrote articles about marijuana production and use. The reporter had agreed not to name the subjects of the stories, and the grand jury sought the subjects' identities. Id. at 667-68. In the second case, a Massachusetts grand jury subpoenaed a television reporter who had been permited to enter the Black Panther Party's headquarters on the condition that he not disclose what he saw or heard inside. The grand jury sought information about what took place in the headquarters. Id. at 672-75. In the third case, a federal grand jury in California subpoened the notes and interview recordings of a newspaper reporter who covered the Black Panther Party. Id. at 675-79.

The majority in Branzburg declined to recognize a reporter's privilege in those cases, finding that

> [n]othing in the recod indicates that these grand juries were probing at will and without relation to existing need . . . Nor did the grand juries attempt to invade protected First Amendment rights by forcing

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privilege. Although other circuits have recognized a strong reporter's privi1ege under the federal common law, the Fourth Circuit has not done so. Therefore, the Court will limit its analysis to the reporter's privilege under the First Amendment.

> wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether a crime has been committed.

Id. at 700 (internal quotation marks and citations omitted).

Although Justice Powell joined in the majority, he wrote a concurring opinion to emphasize the "limited nature" of the majority's opinion:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

Id. at 709-10 (Powell, J., concurring).

With Branzburg as the Supreme Court's only pronouncement on the First Amendment reporter's privilege, circuit courts have varied widely on the protections that they provide journalists. The Fourth Circuit has repeatedly fol-

lowed Justice Powell's concurrence by recognizing that under the right facts there is qualified protection for journalists. In United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976), the district court ordered several journalists to testify at a civil contempt trial about statements made in their presence at a rally. Id. at 374. Although the Fourth Circuit affirmed the order, it applied Justice Powell's balancing jurisprudence:

> [I]t is conceded that the reporters did not acquire the information sought to be elicited from them on a confidential basis . . . . [T]he record fails to turn up even a scintilla of evidence that the reporters were subpoenaed to harass them or th embarrass their newsgathering abilities . . . . [I]n the balance of interests suggested by Mr Justice Powell in his concurring opinion in Branzburg[ ], the absence of any claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify.

Id. at 376 (Winter, J., dissenting), adopted by the court en banc, 561 F.2d 539, 540 (4th Cir. 1977).

The Fourth Circuit has since adopted a three-part balancing test for evaluating whether to enforce subpoenas issued to journalists. In a civil defamation case, LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986), the plaintiff filed a motion to compel defendant NBC to reveal the confidential sources behind the allegedly defamatory statements. Id. at 1137. In affirming the district court's denial of the motion to compel, the Fourth Circuit adopted the

following test to determine whether the reporter had to disclose confidential sources: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." Id. at 1139. Because the plaintiff had not exhausted reasonable alternative means of obtaining the same information, he had not demonstrated that his interests in fact-finding outweighed NBC's interest in maintaining the confidentiality of its sources. Id.

In In re Shain, 978 F.2d 850 (4th Cir. 1992), the Fourth Circuit held that the First Amendment reporter's privilege applies to criminal cases only where the government seeks a reporter's confidential information or issues the subpoena to harass the journalist. As part of their coverage of a bribery scandal in the South Carolina legislature, four reporters each interviewed a state senator about ths relationship with a registered lobbyist, and later published portions of those interviews in the news stories. Id. at 851. After the senator's indictment, the United States Attorney subpoenaed the reporters to testify at the criminal trial, and the reporters moved to quash the subpoenas. Id. at 851-52. The Fourth Circuit affirmed the district court's denial of the motions to quash, holding that "the absence of confidentiality or vindictiveness in the facts of this fatally undermines the reporters' claim to a First Amendment privilege." Id. at 853; cf. United States v. Regan, Criminal No. 01-405-A (E.D. Va. Aug. 20, 2002) (quashing subpoena to a newspaper reporter in a criminal case because it did not satisfy the LaRouche balancing test).

The Fourth Circuit has even extended the reporter's privilege to apply to non-confidential information in civil cases. In Church of Scientology International v. Daniels, 992 F.2d 1329 (4th Cir. 1993), the Church of Scientology sued a drug company executive over his comments to USA Today's editorial board. Although the executives's comments had not been made under a confidentiality agreement, the Fourth Circuit affirmed the magistrate judge's denial of the church's request to compel the newspaper to produce all materials related to the editorial board meeting, including notes, tapes, and draft articles. Applying the LaRouche test, the Court agreed with the magistrate judge's conclusion that the church "had made no effort to pursue alternative sources of information concerning the meeting." Id. at 1335.

In Ashcraft v. Conoco, Inc., 218 F.3d 282 4th Cir. 2000), the Fourth Circuit reversed a contempt order against a journalist for refusing to identify the source of his information about a confidential tort claim settlement, holding that if courts routinely required journalists to disclose their sources, "the free flow of newsworthy information would be a restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." Id. at 287.

These cases articulate a clear legal rule. If a reporter presents some evidence that he obtained information under a confidentiality agreement or that a goal of the subpoena is to harass or intimidate the reporter, he may invoke a qualified privilege against having to testify in a criminal proceeding. The district

court must then determine whether that qualified privilege is overcome using the three LaRouche factors.

> [A] First Amendment journalist privilege is properly asserted in this circuit where the journalist produces some evidence of confidentiality or governmental harassment. Only where such evidence exists may district courts then proceed to strike a balance between the competing interests involved, namely freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

United States v. Lindh, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002) (emphasis added, internal quotations and citation omitted).[5]

C. Confidentiality

The Court has accepted Risen's explanation of his confidentiality agreement with his source

[5] The district court in United States v. King, 194 F.R.D. 569 (E.D. Va. 2000), reached a different result, holding that evidence of confidentiality and harassment is necessary before Justice Powell's balancing test is triggered. Id. at 584. However, that opinion did not discuss Ashcraft, which had been issued five days earlier. Ashcraft did not require any prerequisite showing of harassment or bad faith. Rather, because the journalist acquired his information from a confidential source, the panel applied the LaRouche factors. Moreover, the circumstances in King are vastly different from the present matter. In King, the identity of the journalist's confidential source—a cooperating government witness—had been independently discovered and revealed as a matter of public record. Id. at 584. Accordingly, when he attempted to invoke the qualified privilege, any interest the journalist had in maintaining the confidentiality of the source or her statements had evaporated.

and that his discussion of the source with [redacted material] was also made in confidence as part of his news gathering.

The government argues that the 2010 subpoena does not seek confidential information because it does not require Risen to disclose the identity of his confidential source(s). Risen responds that the agreement with his confidential source(s) for Chapter 9 "does not merely cover the name of the source(s). Rather, I understand my agreement(s) to require me not to reveal any information that would enable someone to identify my confidential source(s)." 2010 Risen Reply Aff. at ¶ 5. The government counters that the promise of confidentiality "only could have extended to their names, <u>not</u> their information, because Mr. Risen published their information in Chaper 9." Opp. at 25.

The government's narrow view of the scope of "confidentiality" has been rejected by many courts, which have found that the reporter's privilege is not narrowly limited to the names of confidential sources but, at minimum, includes information that could lead to the discovery of a confidential source's identity, <u>See, e.g.</u>, <u>Miller v. Mecklenburg Cnty.</u>, 602 F. Supp. 675, 679 (W.D.N.C 1985) (recognizing "a qualified privilege under the First Amendment for the reporter both against revealing the identity of confidential sources and against revealing material that is supplied to the reporter by such confidential source"); <u>Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League</u>, 89 F.R.D. 489, 496 (C.D. Cal. 1981) (quashing subpoena to reporters for "any and all notes, file memoranda,

tape recordings or other materials reflecting" conversations with listed individuals); Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975) ("The compelled production of a reporter's resource materials is equally invidious as the compelled disclosure of his confidential informants.").

As Risen explains, confidentiality pledges that are limited to the name of the source "would be of little value to a source or potential source. If a journalist were to withhold a source's name but provide enough information to authorities to identify the source, the promise of confidentiality would provide little meaningful protection to a source or potential source." 2010 Risen Reply Aff., at ¶6.

The Court finds that Risen did have a confidentiality agreement with his source and that the agreement extended beyond merely revealing the source's name but to protect any information that might lead to the source's identity. Therefore, the Court must conduct the three-part LaRouche balancing test to determine whether the reporter's privilege protects Risen from being compelled to disclose the information sought by the government.[6]

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[6] Risen also argues that the government issued the subpoenas to harass him.

Risen bases his harassment claim on his record of writing stories that criticized and exposed the government's national security and intelligence practices during a time of war. Risen won the 2006 Pulitzer Prize for National Reporting for his articles that revealed the government's domestic warrantless wiretapping program. 2006 Risen Aff. at ¶ 41. Many officials—including former President Bush—criticized Risen's reporting and some threatened investigations and potential prosecution. 2008 Risen Aff. at ¶¶ 25-41.

D. Balancing the equities

In its Opposition Brief, the government has refined the general categories of information that it seeks to obtain from Risen about Chapter 9: 1) testimony about where the disclosures occurred to establish venue; 2) testimony about what information each source disclosed and when the disclosure oocurred to ensure that the grand jury charges the right individual; 3) testimony about how Risen received classified information because oral disclosure of classified information requires greater intent; and 4) testimony to authenticate Chapter 9.

1. Need to establish venue

The government has a compelling interest in establishing venue, "The Supreme Court has cautioned that the question of venue in a criminal case is more than a matter 'of formal legal procedures', rather, it raises deep issues of public policy in the light of which legislation must be construed.'" United States v. Ebersole, 411 F.3d 517, 524 (4th Cir. 2005) (quoting United States v. Johnson, 323 U.S. 273, 276 (1944)).

The issuance of the 2010 subpoena under a new Attorney General does not remove the specter of harassment, because we do not know how many of the attorneys and government officials who sought Risen's testimony in 2008 are still in their jobs and to what extent, if any, they advised the new Attorney General about approving the subpoena. Moreover, the sweeping scope of the 2010 subpoena provides some support to Risen's harassment argument. For example, Risen's book proposals could hardly help the government establish probable cause to charge Sterling or any other suspects. However, because confidentiality is sufficient to trigger the LaRouche balancing test, it is not necessary to decide whether the subpoena was issued, at 1east in part, to harass or intimidate Risen.

As the government correctly points out, there are four possible districts where venue could be established: the Eastern District of Virginia, where Sterling lived until August 2003; the Eastern District of Missouri, where Sterling moved in August 2003; the District of Maryland, where Risen lived; and the District of Columbia, where Risen worked. Opp. at 8. For prosecutions involving disclosure of classified information, venue is proper both where the information is sent and where it is received. Under Fed. R. Crim. P. 18, venue may be in multiple districts as long as part of the criminal act took place in that district. See United States v. Bankole, 39 Fed. Appx. 839, 841 (4th Cir. 2002).

Although the government's pursuit of Risen's testimony to establish venue satisfies the relevance and compelling interest prongs of the LaRouche test, it fails to meet the second prong because the government has not demonstrated that the information is unavailable from other sources. The government merely states that it "cannot establish venue for the substantive disclosures of classified information by any of Mr. Risen's source(s) to him without Mr. Risen's eyewitness testimony concerning the crimes he witnessed." Opp. at 6-9.

The government briefly admits it need only establish venue by a preponderance of the evidence. See Ebersole, 411 F.3d at 524 ("The prosecution bears the burden of proving venue by a preponderance of the evidence and, when a defendant is charged with multiple crimes, venue must be proper on each count. For some offenses, there may be more than one appropriate venue, or even a venue in which the defendant has never set foot.")

(internal citations and quotation marks omitted). As discussed above, the government has e-mail and telephone records indicating communications between Risen and Sterling in the few weeks before Risen's April 3, 2003 inquiries about [redacted material] to the NSC and CIA. All seven phone calls were between Risen's home in the District of Maryland and Sterling's home in the Eastern District of Virginia. Although Sterling may have provided additional information about [redacted material] to Risen after Sterling moved to Missouri, he had already given Risen enough information about the program before April 3, 2003 for the CIA Director and National Security Advisor to personally intervene with the plans of the New York Times to publish the article. Risen's specific questions about [redacted material] on April 3, 2003 indicated that he already knew many details about the classified program. As the government acknowledges, it may "rely upon inferences drawn from telephone records and other evidence to establish venue." Opp. at 9. The government clearly has sufficient circumstantial evidence to meet the preponderance of the evidence standard for establishing venue in the Eastern District of Virginia. Although the government has a compelling interest in establishing venue and information about venue is relevant, the government has failed to satisfy the second prong of LaRouche, because the information can be acquired through alternate means.

2. Need to charge the right individual

The government next argues that it must ask Risen about what specific classified information each source disclosed to him and when it

was disclosed so the grand jury will be able to charge the right individual(s).

Although the government has an obligation to avoid erroneously charging innocent parties with criminal conduct, there is no danger of that happening to this case. The government's classified filings demonstrate that there is no need to exculpate parties other than Sterling because the government does not have any other suspect or target to investigate. As the evidence clearly shows, 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. Bruce Decl. at ¶¶ 110-30. Chapter 9 reports two key meetings: a 1998 meeting in San Francisco with CIA employees and MERLIN, and a 2003 meeting between a former CIA employee and Senate staffers. [redacted material] The government has not presented the Court with any evidence that CIA employees knew that Sterling met with SSCI staffers until after the leak, [redacted material]. As to [redacted material] and [redacted material], the Senate staffers, the government investigated [redacted material] as a possible source, and the investigation "has not revealed any evidence that [redacted material] ever had any direct contact with James Risen, and certainly no contact related to the [redacted material] Operation." Id. at ¶ 113, n. 30. And when the government interviewed [redacted material] in November 2005, he could not remember [redacted material] Id. at ¶ 115.[7]

[7] Risen's counsel cannot fully argue this point because the information about [redacted material] testimony is in a classified filing to which Risen's counsel does not have access.

[redacted material] Id. at ¶ 113. The government has not presented even a remote possibility that anyone other than Sterling could be charged with disclosing this information. Therefore, the government fails to satisfy the second and third prongs of the LaRouche test.

3. Need to establish mens rea

The government next argues that it must ask Risen how he received the classified information because the government needs to ensure that it establishes the proper mens rea under 18 U.S.C. § 793(d), which provides that:

> Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits . . . the same to any person not entitled to recieve it . . . (s)hall be fined under this title or imprisoned not more than ten years, or both.

Specifically, the government argues tbat if Risen's source(s) disclosed the classified information orally, the government would have to eatablish that the disclosure was willful and that the defendant had reason to believe that the disclosure could harm the United States; if the disclosure to Risen involved providing classified

documents, the government would only have to prove willfulness. See New York Times Co. v. United States, 403 U.S. 713, 738 n.9 (1971) (White, J., concurring) (concluding that prosecution for disclosure of classified documents does not require a demonstration of intent to harm the government). The government contends that without Risen's testimony about the form of the disclosure, it will not know which mens rea requirement applies. In his Reply Brief, Risen does not challenge the government's statutory interpretation.

The government's argument fails because it can satisfy the heightened requirement for oral disclosure, making Risen's testimony about the form of disclosure unnecessary. The government already has more than enough evidence to establish probable cause that Sterling had reason to believe that disclosure could harm the United States. Specifically, the government recovered from Sterling's computer a letter, dated March 19, 2004, addressed to "Jim." In that letter, the author expressed great animosity towards the CIA, even implying that the CIA was involved with the death of a federal judge. The government actually claims that the letter demonstrates Sterling's "deep-seated hatred and anger towards the CIA." Opp. at 36. Because the government already has evidence that Sterling wanted to harm the CIA, it has sufficient evidence to establish probable cause that Sterling knew disclosure could injure the United States.

It also is inconceivable that Risen's source did not know that disclosure could harm United States interests. Throughout its Opposition Brief and the classified Bruce Declaration, the

government adamantly alleges that the disclosure of this information harmed United States security interests. Nowhere in its filings does the government suggest that it even considered the possibility that Risen obtained the information from a source(s) who did not know that the disclosure could harm the nation. Because the government does not have a compelling interest in the information, the government has failed to satisfy the third prong of the LaRouche test.

4. Need to authenticate Chapter 9

Lastly, the government argues that Risen's testimony is necessary to authenticate and admit the contents of Chapter 9 and the March 2, 2002 New York Times article. However, this request also fails the second and third prongs of the LaRouche test.

Risen has already authenticated the contents of Chapter 9 in a signed 2008 declaration, in which he discusses, in depth, his reporting of Chapter 9 and his decision to publish the information. See, e.g., 2008 Risen Aff. at ¶ 17 ("I actually learned the information about Operation Merlin that was ultimately published in Chapter 9 of State of War in 2003, but I held the story for three years before publishing it.").

Risen has also authenticated the accuracy of his March 2, 2002 New York Times article. In a signed affidavit, Risen wrote:

> As a preliminary matter, I understand that the Government also now intends to ask whether I stand by the content of an article I published in March 2002, titled

> 'Fired by C.I.A., He Says Agency Practiced Bias.' I do. The facts in that article are true, to the best of my knowledge, and I stand by what by wrote.

Affidavit of James Risen, dated June 3, 2010, at ¶ 10.

Moreover, the authentication, hearsay, and best evidence rules of the Federal Rules of Evidence do not apply to grand jury proceedings. See, e.g., United States v. Calandra, 414 U.S. 338, 344-45 (1974) ("The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence [.]"); In re Grand Jury Subpoena (T-112), 597 F. 3d 189, 196 (4th Cir. 2010) ("[C]ourts for generations have recognized that a grand jury indictment need not be based on evidence conforming to the formal requirements of a trial."). Although the government might have a plausible argument that such authentication may be necessary at trial, it cannot argue that the government has a compelling interest in authenticating Chapter 9 during grand jury proceedings. Because authentication would not aid the grand jury's probable cause evaluation, this justification fails the second and third prong of the LaRouche test, both because there is not a compelling interest to authenticate and because the information sought is already available in Risen's affidavits.

III. CONCLUSION

The grand jury's investigating involves a sensitive national security issue, which both sides argue should be taken into consideration in applying the LaRouche balancing test. The government correctly stresses that few interests are as compelling as the government's interests in protecting national security. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981). The government is investigating the alleged disclosure of highly classified information about [redacted material].

Risen also relies on the significance of the national security element to emphasize the value of the leaked information which, if true, points to a mishandled project by the CIA about which the public needs to be aware. Reporting about national security often serves a significant public interest, and investigative reporting about national security often requires confidentiality agreements, See Affidavit of Scott Armstrong, dated February 16, 2008, at ¶ 14 ("The highest ranking government officials may prefer to be confidential sources to the news media in order to communicate candidly their differences of opinion or fact with others in the same department or administration to an oversight committee. Such confidential source relationships are often the only manner through which the mixture of sensitive and non-sensitive national security information can be integrated and conveyed to the public.")

Both parties present compelling arguments, yet they are unable to cite to any Fourth Circuit precedent that carves out a national security exception to the LaRouche balancing test. Moreover, the subpoena at issue is a grand jury subpoena, not a trial subpoena. As such, the government's compelling interest at this stage is merely to establish probable cause that Sterling or any other suspect disclosed classified information. "A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." United States v. Calandra, 414 U.S. 338, 343-44 (1974).

As discussed above, the circumstantial evidence already before the grand jury—including the testimony of [redacted material] who confirmed Sterling as Risen's source, the telephone and e-mail records, and Sterling's discussion with the Senate staffers—is more than enough evidence to establish probable cause to indict Sterling and the government has essentially admitted that fact. To require a reporter to violate his confidentiality agreement with his source under these facts would essentially destroy the reporter's privilege. Were Sterling to be indicted and a trial subpoena to be issued to Risen, the analysis might well change, because at trial the government would have the much higher burden of proving Sterling's guilt beyond a reasonable doubt. In that context, the government might well satisfy the LaRouche balancing test. It has not satisfied that balancing test in the grand jury context.

For these reasons, James Risen's Motion to Quash the grand jury subpoena has been granted by an Order issued on November 24, 2010.

The Clerk is directed to forward a copy of this Memorandum Opinion to the Court Security Officer, who will provide a copy to the government, arrange for classification review, and provide a redacted copy to movant's counsel.

Entered this 30th day of November, 2010

Alexandria, Virginia

/signed/ LMB
Leonie M. Brinkema
United States District Judge

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

No. 1:10cr485 (LMB)

UNITED STATES

v.

JEFFREY ALEXANDER STERLING,
Defendant.

AFFIDAVIT OF JOEL KURTZBERG

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOEL KURTZBERG, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a partner in the firm of Cahill Gordon & Reindel LLP, attorneys for James Risen, who is a reporter for *The New York Times* and the author of *State of War: The Secret History of the CIA and the Bush Administration ("State of War")*.

2. I have been admitted to practice before this Court *pro hac vice* in this case. My client is not a party to this action, but I was brought into this case by the issuance of a subpoena by the Government for testimony from James Risen in connection with his work as an investigative journalist on Chapter 9 of his book, *State of War*.

3. I am fully familiar with the facts and circumstances set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. I make this affidavit in support of my client's brief in opposition to the Government's motion *in limine* and in support of his motion to quash the subpoena and/or for a protective order and to place before the Court documents that are relied on in support of that motion. The exhibits annexed hereto are true and correct copies of the documents cited herein.

4. I have been personally involved in negotiating with the Government concerning the scope of its current and prior demands for Mr. Risen's testimony. Following is a brief summary of the relevant portions of those discussions.

5. Because this affidavit discusses things that were part of a sealed proceeding, several documents and events referred to herein are being filed under seal. We may revisit with the Court to determine what documents are appropriate to remain sealed.

The 2008 Grand Jury Subpoena

6. The first subpoena directed to Mr. Risen was a grand jury subpoena issued on January 24, 2008. A true and correct copy of that subpoena is attached hereto as Exhibit 1. [REDACTED]

7. After Mr. Risen was subpoenaed by the Government in 2008, I had conversations about the subpoena with Special Assistant United States Attorney Eric B. Bruce. During our conversations, Mr. Bruce confirmed [REDACTED]

8. [REDACTED]

9. [REDACTED]

The 2010 Grand Jury Subpoena

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

13. [REDACTED]

14. [REDACTED]

15. [REDACTED]

The 2011 Trial Subpoena

16. Neither the trial Subpoena recently served on Mr. Risen nor the Government's Motion in Limine seeking to admit Mr. Risen's testimony contain any limitations on the nature and breadth of information sought from Mr. Risen. As the Government's brief in support of its motion *in limine* makes clear, the Government is unwilling to put any limitation on the testimony they will seek from Mr. Risen about his confidential source(s) at trial.

17. The Government has indicated to me that it will recommend that Mr. Risen be granted immunity in the event he is required to testify.

18. Attached hereto as Exhibit 4 is a true and correct copy [REDACTED]

19. Attached hereto as Exhibit 5 is a true and correct copy of [REDACTED]

20. Attached hereto as Exhibit 6 is a true and correct copy of [REDACTED]

21. Attached hereto as Exhibit 7 is a true and correct copy of [REDACTED]

22. Attached hereto as Exhibit 8 is a true and correct copy of [REDACTED]

23. Attached hereto as Exhibit 9 is a true and correct copy of [REDACTED]

24. Attached hereto as Exhibit 10 is a true and correct copy of [REDACTED]

25. Attached hereto as Exhibit 11 is a true and correct copy of [REDACTED]

26. Attached hereto as Exhibit 12 is a true and correct copy of [REDACTED]

27. Attached hereto as Exhibit 13 is a true and correct copy of [REDACTED]

28. Attached hereto as Exhibit 14 is a true and correct copy of the declaration of journalist Scott Armstrong; Attached hereto as Exhibit 15 is a true and correct copy of the declaration of journalist Carl Bernstein; Attached hereto as Exhibit 16 is a true and correct copy of the affidavit of historian Anna Kasten Nelson. Attached hereto as Exhibit 17 is a true and correct copy of the affidavit of journalist Jack Nelson. Attached hereto as Exhibit 18 is a true and correct copy of the declaration of journalist Dana Priest. These affidavits and declarations were submitted in connection with the grand jury subpoenas served on Mr. Risen. Because the same facts are relevant here, these affidavits and declarations are submitted in connection with this proceeding. One of the affiants, Jack Nelson, died on October 21, 2009.

29. Attached hereto as Exhibit 19 is a true and correct copy this Court's decision in *United States v. Regan*, Criminal No. 01-405-A, Memorandum Order (E.D. Va. Aug. 20, 2002) (unpublished) (Lee, J.).

/s/

Joel Kurtzberg

Sworn to before me this
20th day of June, 2011

/s/

Neil I. -- Illegible
Notary Public, State of New York
No. 01FE6162954
Qualified in New York County
Commission Expires March 19, 2015

Exhibits 2, 6, 9, 11, 12, and 13 to the Affidavit of Joel Kurtzberg were filed under seal and can be found in the proposed Supplemental Appendix.

EXHIBIT 14

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 1:08dm61—LMB

In Re:
GRAND JURY SUBPOENA, JAMES RISEN

DECLARATION OF SCOTT ARMSTRONG

(Russell) Scott Armstrong, declares under penalty of perjury as follows:

1. I have been a professional journalist for 31 years. I am the executive director of the Information Trust, a Washington, D.C.-based, not-for-profit organization devoted to improving the quality of journalism. I worked for *The Washington Post* as a reporter covering national security matters from 1976 through 1985. I have worked for many national newspapers, television and radio networks in the course of my career. Along with Bob Woodward, I wrote *The Brethren*, a narrative account of the Supreme Court from 1969 through 1976 describing the Court's inner workings. I assisted Bob Woodward and Carl Bernstein in the research and writing of *The Final Days*. I taught journalism as a visiting scholar at the American University School of Communication and have lectured on journalism and/or investigative techniques at various other institutions including: Brown University, Columbia

University Graduate School of Journalism, Harvard University, George Mason University, George Washington University, Georgetown University, Pennsylvania State University, Princeton University, University of Scranton, Syracuse University, the Universities of California (Berkeley, Davis, UCLA, USC), University of Illinois, lndiana University, University of Maryland, University of Pennsylvania, University of Texas, University of Virginia, as well as law schools at Columbia, Duke, Georgetown, Harvard, Washington School of Law, University of Virginia, and Yale.

2. I make this declaration at the request of attorneys representing James Risen in connection with a filing concerning whether he should be compelled to disclose the identity of one or more confidential sources with whom he spoke while engaged in newsgathering.

3. In addition to my extensive reporting on national security matters, that have been the convener of the ongoing "Dialogue between the Media and the Intelligence Community Unauthorized Disclosures." ("Dialogue"). In the Dialogue, represenatives of the media and senior government officials have met periodically to discuss issues surrounding the media's relationship with confidential sources employed by the government.

4. In 1985, I founded the National Security Archives private, non-profit research institute, which makes available to journalists, historians,

scholars, congressional staffs, present and former public officials, other · public interest organizations, and the general public comprehensive government documentation pertaining to important issues of foreign and national security policy.

5. In addition, I have been invited to address issues relating to government secrecy and unauthorized disclosures (leaks) by such official organizations as "The First Judicial Circuit Court Conference, the National Security Agency's Senior Seminar, the Defense Investigative Service, the Defense Security Service, the National Defense University, the National War College, the Naval War College, the Foreign Service Institute, the National Industrial Security Program, the National Archive and Record Administration, the U.S. Security Policy Board, the General Accounting Office, the Congressional Research Service, and the Commission on Protecting and Reducing Government Secrecy. I have testified or consulted with committee staff on related issues for such congressional committees as the Senate Select Committee on Intelligence, the Senate Judiciary Committee, the House Permanent Select Committee on Intelligence, the House Armed Services Committee, the House Appropriations Committee, and such unofficial organizations as the American Bar Association's Committee on National Security, American Society for Industrial Security, and the American Society of Access Professionals. I have also lectured on myriad occasions to groups of

professional journalists on matters relating to leaks and national security information including: the American Society of Newspaper Editors, the Society of Professional Journalists, the Investigative Reporters and Editors, the Radio and Television News Directors Association, the Associated Press Managing Editors, the National Newspaper Association, the Newspaper Association of America, the Freedom of Information coalitions in Illinois Indiana, New York, Oklahoma, as well as the full gamut of library associations including national and regional groups affiliated with the American Library Association, the Association of Research Libraries, the American Association of Law Librarians and the Society of Archivists. I have also been a board member and consultant to the Government Accountability Project, a whistleblowcr protection organization, which often assists government employees who have become confidential sources to other branches of government or the media on matters involving fraud, waste, abuse, and government improprieties.

6. I have been qualified as an expert witness in the use of secret or classified documents in daily journalism by federal District Judge Joseph Young in the case of *United States. v. Morison,* 655 (D. Md. 1985). I was qualified as an expert witness in media coverage, use of confidential sources and libel by Federal District Court Judge Ewing Werlein, Jr. in *MMAR Group, Inc. v. Dow Jones & Co., Inc.* 987 F. Supp. 535 (S.D. Texas, Houston Division, 1997),

by Judge Geoffrey Alprin in *Prentice v. McPhilemy,* 27 Med. L. Rptr. 2377 (D.C. Sup. Ct. 1999) and by Texas District Court Judge Joseph H Hart in, *Jack Taylor, et al. v. Barry Switzer, et al.,* (No. 4-91-001; 126th District Travis County) and in numerous other federal and state cases involving issues of confidential sources. I was qualified as an expert witness in the analysis of media coverage and editorial decision-making in regard to venue issues by Chief Judge Richard P. Matsch in *United States v. Timothy James McVeigh and Terry Lynn Nichols*, and have prepared and submitted testimony for introduction in other federal court cases on media coverage and editorial decision-making as they relate to venue issues.

7. 1 have been the plaintiff in a number of federal cases designed to preserve and to increase access to classified and sensitive government information and to contest the failure to declassify government information. My involvement has included the selection of special masters with high level government clearances and the preparation of expert testimony.

8. In the course of my experience as a reporter, I have maintained confidential source relationships with thousands of present and former U.S. government and private sector employees. The purpose of these relationships is to get and verify accurate information. In order to promote a free and candid relationship with confidential sources, I have frequently found it

necessary to guarantee them anonymity in regard to information provided about classified or otherwise confidential and sensitive information. Much of the verification process could not be done without the guarantee of anonymity. Over the course of three decades, such guarantees of confidentiality when used to confirm information with multiple confidental sources, have proven to my satisfaction that this process yields more candid and accurate information than to rely solely or predominantly on public or official comments or documentation. In order to secure and sustain cooperation of a series of sources on an issue or topic, the sources must be confident that the full extent of their cooperation and role will remain anonymous and that they will not be subjected to professional recriminations, chastisement, or in very rare cases, even prosecution.

9. Many sources require such guarantees of confidentiality before any extensive exchange of information is permitted. ln my experience, even in public and private institutions that are known for their transparency and openness, officials and staff often require such guarantees of confidentiality before discussing sensitive matters such as major policy debates, personnel matters, investigations of improprieties, and financial and budget matters.

10. Many types of reporting require the use of confidential sources. Prominent among these uses are three types of investigative or "enter-

prise" journalism: (a) original investigative reporting, which involves reporters developing factual accounts and documentation unknown to the public; (b) interpretive investigative reporting, which takes a mix of known facts and new information and produces an interpretation previously unavailable to the public; and (c) reporting on investigations, which publicizes information developed in government investigations that has not been known to the public and might well be suppressed[1]. These different types of investigative reporting are often mixed in the reporting of a single story. They share one key feature: to verify information, the journalist applies enterprise and initiative to examine information from as many knowledgeable and often confidential sources as can be developed.

11. Some information communicated under confidentiality arrangements will include significant "details" or "secrets." At other times, the information communicated simply amounts to candid, relevant background information, context and detailed leads, which in turn allow other information to be sought from yet other sources. Each confidential relationship with a source may provide one or more individual details that eventually are distilled and woven into a comprehensive news story. It would be rare for there not to be multiple sources—including confidential sources—for news stories on highly sensitive topics. The important "enterprise" stories tend to be built on information elicited from and verified with multiple confidential sources.

12. Daily reporting most often does not enjoy the same amount of reporting time and flexibility as the investigative enterprise methods outlined above. Journalists on daily deadlines therefore often make use of confidential sources to report on daily developments in government and other institutions. These confidential relationships are necessary for reporters because even official government pronouncements must be verified before they are published. Official news conferences, daily news briefings, and government reports and studies require further checking by reporters. Traditionally, journalists will talk with other knowledgeable officials who are not authorized to speak to the subject but are individuals with whom they have developed a track record of candor and confidence. In some instances, this additional briefing goes beyond corroboration to add perspective that can be helpful to the rcporter in writing a story but which the individual (or even the government) will not permit to be attributed by name or even position or sometimes even quoted directly in any way. Publicly available or acknowledged information may in turn prompt more detailed or relevant information from a confidential source, which may in turn lead back to additional on-the-record acknowledgments, which increase the pool of accurate and verifiable public

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[1] For a coherent description of these types of reporting see pp. 116-129, *The Elements of Journalism: What Newspeople Should and the Public Should Expect* by Bill Kovach and Tom Rosentiel, Three Rivers Press, 2001.

information and/or may lead to yet more information from other confidential sources. Thus, in daily journalism, as in investigative enterprise journalism, information essential to the verification of facts within a story may come from confidential sources in the form of unique and relevant, contextual comments, which become part of the process of expanding, correcting, confirming or contradicting what other public and confidential sources have said. Thus, a relationship with the confidential source permits, among other things, the authentication of the public information. The maintenance of confidential sources is therefore essential to daily journalism.

13. The broad use of secrecy in government and in the corporate and institutional world creates a need for journalists to rely on confidential sources. In the national security community, the compulsory addition of security clearances, information classification, safeguards, nondisclosure agreements, security monitoring, polygraphs, special-access programs and compartments all inhibit the disclosure of information—even non-sensitive details—through routine means. Because so much information is routinely classified, the verification of something as mundane as a press briefing may involve talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so. In journalism, stories about major national security or diplomatic policy or military activities warrant confirmation, contextual per-

spective, and detailed elaboration. In order to provide readers with informntion as accurate and verified as possible, reporters often find it only available from confidential sources. In my opinion, the vast majority of high level government officials become confidential sources at one time or another. In my experience, they understand that the efficient operation of government and minimal standards of accountability to the public require that they provide confidential briefings to journalists covering daily stories. Moreover, I have observed that frequently important events about government that are embarrassing to senior officials, to important government agencies and/or a presidential administration are cloaked in multiple layers of secrecy, more often than not for political rather than national security reasons.

14. National security is often the rationale used by government officials to deny the public information about illegal or unauthorized intelligence activities, about failed operations and bankrupt policy, about fraud, waste and abuse within national security budgets and about activities that are diplomatically or politically inconvenient to disclose publicly. On a daily basis, the overly broad application of official secrecy occludes accurate descriptions of policy and practice not only for the public, but also for other agencies and even whole branches of government. The highest ranking government officials may prefer to be confidential sources to the news media in order to communicate candidly their differences of opinion or fact with others

in the same department or administration to an oversight committee. Such confidential source relationships are often the only manner through which the mixture of sensitive and non-sensitive national security information can be integrated and conveyed to the public.

15. In cases involving classified or officially-restricted federal government information, journalists customarily seek to develop confidential sources in multiple executive branch agencies among senior officials and their staffs and in multiple congressional offices of members of Congress, their personal staff, and their committee staff. Stories often develop as a result of the alternative flow of information to the reporter from congressional and executive branch offices. Congressional oversight responsibilities enable congressional officials and their staffs to request information and entitle them to receive briefings on most details. Since congressional investigators often conduct their own field research, the intellectual process that develops information often includes a symbiotic relationship between journalists and congressional investigators. I have observed that simimilar interaction occurs between reporters and executive branch officials. The symbiotic interaction between journalists and congressional and executive officials has become the norm in terms of interactions between the press and the government. In recent years this pollination process has often been the most important catalyst for constitutionally critical exchanges

among the branches of federal government and the American public.

16. Executive agencies of the federal government regularly require journalists reporting on national security matters to conduct much of their work through interviews of officials and former officials that are given on background (without direct attribution) or deep background (with guarantees of anonymity). In my experience, these agencies include the Departments of Defense, State, Energy, Justice, Homeland Security, Commerce, and Treasury, the Central Intelligence Agency, the military services, the National Security Council, the Homeland Security Council, and the White House. Officials from these organizations typically say far more on background, deep-background, or off-the-record (a category which had traditionally meant the information could not be pursued for a news story, but which has come to mean the equivalent of deep background) than is ever said on the record. These are "authorized" disclosures, which agencies insist be conducted on background or deep background precisely to avoid specific accountability for any government official. Professional journalists typically find it necessary to obtain verification, perspective, correction, and commentary on these official leaks by interviewing others, who are not authorized to comment on the officially authorized disclosure. This system is largely of the government's making but requires the media to comply with

the requests for anonymity or be excluded from essential information.

17. Elected legislators and congressional staff with acccess to controlled information regularly discuss such information with journalists in order to provide background information to the public and—on occasion—to surface the gravamen of serious concerns about executive branch policy. In my experience, journalists use this access to various officials in different branches of government to provide what is often the only information the public will receive on national security topics for months, years, or even decades.

18. In many instances, national security reporting also involves developing non-U.S. official sources including knowledgeable American experts as well as foreign officials and experts. Former officials of the U.S. and other governments are often able to provide important factual information and policy insights that are identical to classified details but not controlled by confidentiality agreemnents with the U.S. government. For many of the same reasons, these individuals also require a guarantee of confidential source status as a condition of their cooperation.

19. In my experience, journalists usually prefer to ascribe every statement and assertion in news articles to a specific source either by naming the individual or by providing an explicit indication of the individual's position,

affiliations, and an indication of the source's knowledge or perspective about the events or policy reported upon. National security stories, however. commonly require that the identity and the identifying characteristics of the source be protected. This occurs even to the point where a confidential source may be quoted publicly and officially by name and position in a story at one point without disclosing the same source provided additional material anonymously. In such a case, reporters will normally attempt to guide the reader · as candidly as possible to a conclusion about the degree of confidence that is warranted in the source for any specific statement. The attribution may be generic in form and may credit the confirming sources' authority rather than the original source's profile.

20. In the process of evaluating information for publication, national security journalists or their editors normally consult with knowledgeable official sources about the sensitivity of the information and the consequences of disclosure. As a final draft is prepared, they customarily consult with one or more executive agencies in order both to seek official comment and to provide a last opportunity for official expressions of concern—nearly always made "off-the-record"—regarding the sensitive information to be disclosed. Such consultations may result in no changes, the exclusion of certain details or may lead to ongoing discussions which may take months or even years.

21. Once a decision has been made to protect the identity of a confidential source, it is extremely unusual for journalists to reveal their own confidential sources. I can count on one hand the number of instances where journalists or editors have cooperated with a leak investigation and revealed the identity of their sources. In instances where their sources' careers—and indeed their liberty—hang in the balance, journalists customarily take precautions to prevent intentional or inadvertent disclosures by their colleagues or their editors. Most national security journalists operate on the assumption that they will not reveal sources even where their refusal to comply with a court order may yield a contempt citation and even incarceration or fines. This commitment has proven essential to secure the cooperation and candor of sources responsible for virtually all national secuirty stories.

22. In 1975, in the wake of the *Branzburg v. Hayes* decision three years earlier, the Justice Department issued regulations which, in their present form, specify that "[t]he use of subpoenas to members of the news media should, **except under exigent circumstances**, be **limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information."** 28 C.F.R.§§ 50.10(b), 50.10(f(3)). (emphasis added). The Guidelines seek to limit attempts to use grand jury subpoenas to learn "unpublished information" such as the

identities of confidential sources per se. Thus the guidelines stress that the following principle apply when requesting authorization to subpoena a member of the press: the government, must have reasonable grounds to believe, "based on information obtained from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence," *see id* § 50.10(f)(l) (emphasis added); "all reasonable efforts should be made to obtain the desired information from alternative sources," *id.* at§§ 50.10(b); the government should have "unsuccessfully attempted to obtain the information from alternative nonmedia sources," *id.* §50.10(f)(3); the government should treat "[e]ven...requests for publicly disclosed information...should be treated with care to avoid claims of harassment," *id.* § 50.10(f)(5); and, "wherever possible," the government should seek material information on a limited subject matter and for a limited time period; and "avoid requiring the production of large quantities of unpublished material." *id.* § 50.10(f)(6). In particular, "[t]he subpoena should not be used to obtain peripheral, nonessential, or speculative information." *ld.* §50.10(f)(1). It is my understanding that these guidelines continue to embody the policy of the United States government.

23. I am generally familiar with the national security reporting of James Risen that has ap peared in *The New York Times* and that is con-

tained in his book *State of War: The Secret History of the CIA and the Bush Administration ("State of War")*. At the request of Mr. Risen's attorneys, I have again reviewed Chapter Nine (which is entitled, "A Rogue Operation") of *State of War*. The chapter includes an eclectic narrative of newsworthy information and assertions presented regarding U.S. intelligence about Iran, several covert operations conducted by the CIA and other agencies against Iranian targets and broader policy implications of intelligence analysis and operational failures. Certain significant assertions appear to be unique to the book. Other details such as internal government debates, which have been published elsewhere, are woven into Mr. Risen's narrative in a singular manner.

24. *State of War's* publication and the wide serialization of excerpts — including Chapter Nine — created a wave of news coverage in the U.S. and abroad about the information contained in Chapter Nine as well as other information elaborating on previously published information from *The New York Times*. Ensuing commentary about the U.S. intelligence community's perceptions and analysis of the Iranian nuclear program have made regular reference to certain details first revealed in the book. Regardless of whether one agrees with all the Chapter's assertions and analysis, it is by simple definition, "newsworthy."

25. In my professional opinion, the government's issuance of a grand jury subpoena to Mr.

Risen is in conflict with the intention and thirty-year practice under the Department of Justice guidelines for issuing subpoenas to news media. A judicial order requiring a national security reporter at a major news media organization, such as James Risen, to disclose confidential sources for the publication of newsworthy information would damage the quality of information available to the public on national security issues. Were Mr. Risen to comply, in my opinion, the damage would significantly undermine the confidence of a wide variety of confidential sources across many U.S. government agencies and institutions as well as many knowledgeable individual sources not associated with the U.S. government. The consequences to the public would be a degradation of the newsgathering capabilities of not only Mr. Risen and his colleagues at *The New York Times* but also of most other journalists providing in-depth coverage of national security matters and the important intricacies of national government affairs. Such an order would further unsettle an untidy but well-established accommodation between government insti tutions and the media that allows critically important information to surface publicly in an era when secrecy, classification and other governmental controls technically cover almost every detail of the most newsworthy national security topics. Without the protection of confidential sources, public policy discussion and debate would be devoid of the most important national security information, that which is essential to sustaining an informed democracy.

26. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2008

/s/
Russell Scott Armstrong

EXHIBIT 15

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 1:08dm61—LMB

In Re:

GRAND JURY SUBPOENA, JAMES RISEN

DECLARATION OF CARL BERNSTEIN

Carl Bernstein hereby deposes and says:

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

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

3. More than thirty years ago, while an Investigative reporter for *The Washington Post*, my colleague Bob Woodward and I reported the facts and circumstance arising out of the break-in of the Democratic National Committee's offices in the Watergate. Those facts and circumstances were among those that ultimately led to the resignation of President Richard M. Nixon. Our work was cited in the Pulitzer Prize award to *The Washington Post* for Public Service in 1973.

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

5. Mr. Felt, like all our confidential sources, would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality. Stated differently, almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat. In fact, we identified no

major sources of information by name in any of more than 150 articles we wrote in the first ten months after the Watergate break-in. In virtually all of them, anonymous sources were the basis for the significant information we developed.

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

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

independence will likely be forever tainted and any potential sources who might have previously approached him with important information may very well be deterred.

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

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

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

investigative reporting across the nation.

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

/s/
Carl Bernstein

Executed on February 16, 2008

EXHIBIT 16

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 1:08dm61—LMB

UNDER SEAL

In Re:
GRAND JURY SUBPOENA, JAMES RISEN

AFFIDAVIT OF ANNA KASTEN NELSON

1. I am Anna Kasten Nelson, the Distinguished Historian in Residence at the American University in Washington, D.C., where I teach courses related to the history of U.S. Foreign Policy. I have also taught history at George Washington University and Tulane University and was a Distinguished Visiting Professor in history at Arizona State University in 1992.

2. I have also been a member of the staff of the Public Documents Commission, which was formed after President Nixon's efforts to destroy his tapes and the U.S. State Department Historical Advisory Committee. I was one of five presidential appointees to the John F. Kennedy Assassination Records Review Board. Each of these was formed to release historical records to the public.

3. I am writing in support of investigative journalist James Risen, who I understand has refused to reveal to the Government the names of

confidential source(s) used for Chapter Nine of his book, *State of War: The Secret History of the CIA and the Bush Administration* (*"State of War"*). The work of journalists such as Mr. Risen is essential to historians such as myself. Compelling him and other journalists like him to testify about the identity of their confidential source(s) would, in my view, have a direct impact on the work of many historians.

4. Historians no longer limit themselves to writing about past centuries. Every year, we see countless historical treatises and articles in scholarly and public interest journals about the rise of the United States as a world power in the last half century. Traditionally, historians have looked to official government records as their primary sources. These materials, however, are often not open to researchers for 25 to 30 years and, even then, are frequently censored for purported national security information or privacy reasons. Thus, researchers seeking to understand the immediate past now frequently look to investigative journalism to provide the first cut of history.

5. In January 2004, for example, I published an article about a woman chosen by Secretary of Defense George Marshall to be an Assistant Secretary in the Defense Department in 1950. She was attacked by supporters of Sen. Joseph McCarthy. Among my most important sources were three articles published at that time in the *Washington Post*. Those articles—which were based on information received from anonymous

sources—helped me determine that masked by false accusations of communist party membership was a deep anti-Semitism among the woman's opponents. Thus, the journalist who had informed his readers also was in a unique position to inform a future historian.

6. Investigative journalism is a particularly indispensable source when it comes to historical research and writing into matters of foreign policy and intelligence. Indeed, most of what we know about the recent use of intelligence in the making of foreign policy—which began in earnest with the beginning of the Cold War and passage of the National Security Act of 1947—originally emerged in articles and books by investigative journalists. Without these journalists, historians would simply be unaware of key elements of their narratives.

7. That journalists write the first draft of history is much more than a cliche when it comes to national security policy. Newspapers like *The New York Times* and books like *State of War* have been important research tools for those of us examining the use of intelligence by America at home and abroad. Since we have only official government documents and statements, we rely upon journalists to tell us what they saw and heard, which is indispensable to our understanding and analysis of events we could not possibly witness.

8. If Mr. Risen and other investigative journalists are unable to report effectively on

matters of intelligence, the historical record will be incomplete, if not erroneous. After World War II, for example, many scholarly books and articles were published explaining the course of the war and the crucial role of intelligence. Many of these accounts were wrong or misleading, however, because they were written before the release of information about the Ultra code breaking machine.

9. In this case, future historians would be hard-pressed to present accurate and informative portrayals of our current foreign policy without the benefit of reporting by journalists like Mr. Risen on the use of human and signal intelligence. Indeed, Mr. Risen's reporting in Chapter 9 of *State of War* deals with an issue that almost certainly will be the subject of countless historical analyses: the incompetence and mismanagement of certain intelligence efforts in Iran. This will be a critically important subject to historians in light of, among other things, recent changes to the National Intelligence Estimate regarding Iran's supposed nuclear capabilities.

10. Consider, as well, the extent to which historians will rely on the work of investigative journalists to explain and evaluate our intelligence agencies' failures to evaluate Iraq's WMD capabilities and the ensuing consequences of those failures. Without the work of investigative reporters, and the information provided by their confidential sources, historians would be left to write the history of the Iraq War

buildup based in large part on the official, often self-serving, statements of government and military officials.

11. Although our own books and articles are stuffed with footnotes, we historians understand that investigative journalists, as observers of the present, must protect their sources. If they do not, the American people will never learn about corruption, incompetence, excessive government secrecy, flaws in homeland security, or disastrous decisions made by policy makers who are advised by their intelligence chiefs. We must depend upon journalists and journalists must be permitted to depend upon confidential sources. If not, the historic record will ultimately suffer.

/s/
Anna Nelson

Date: February 13, 2008

Witnessed by me this 13th day of February, 2008.

/s/
Notary Public

My Commission Expires on October 14, 2011

<u>EXHIBIT 17</u>

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 1:08dm61—LMB

In Re:

GRAND JURY SUBPOENA, JAMES RISEN

AFFIDAVIT OF JACK NELSON

Jack Nelson, being duly sworn, deposes and says:

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

2. In 1960, I was awarded a Pulitzer Prize for reporting that exposed widespread financial corruption and medical malpractice at the Milledgeville (Ga.) State Hospital, then the world's largest menta1 institution. Much of my career has been spent either doing investigative reporting or overseeing investigative reporting. During my career as a reporter, I used confidential sources at all levels of government to report on financial corruption, vote fraud, medical malpractice, and other wrongdoing. I am, through these experiences, personally familiar with

news reporting in general, and with the importance of confidential sources in newsgathering, in particular.

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

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

5. I have covered the activities of six different presidential administrations—four Republican and two Democratic—and have directed the Washington bureau's coverage of five of them. And in all of the administration, we had to rely on confidential sources in

reporting on government developments that were of great public interest but that government officials tried to keep concealed.

6. In Washington, my own reporting and the reporting of staffers I've directed routinely disclosed governmental abuses of one kind or another based on solid sources who insisted on confidentiality for fear of reprisal if their identities became known. Without those sources the *Los Angeles Times* would have been unable to report numerous such stories involving corruption or governmental abuses in at least six administrations. Examples include: aspects of the Watergate scandal and abuses of power of the FBI and other federal agencies in the Nixon Administration; questions surrounding President Ford's pardon of President Nixon; scandals in the Carter Administration involving OMB Director Bert Lance and President Carter's brother Billy Carter's representation of Libya; illegal and inappropriate payments and cover-up attempts in the Iran/Contras scandal in the Ronald Reagan Administration; President George H.W. Bush's role in the Iran/Contra scandal and other wronging in his Administration; and lies told by President Clinton in the Monica Lewinsky scandal. All of these stories contributed in a positive way to important national debates in this country and none of them would have been possible without information obtained from confidential sources.

7. Similarly, the information reported in Chapter 9 of *State of War* provided considerable

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

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

9. In fact, high government officials from presidents on down routinely have leaked classified information when it has promoted their agenda or otherwise suited their purposes. Any reporter who has covered Washington for any

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

10. I believe a federal court order that holds reporters or their news organizations in contempt for refusing to divulge confidential sources would be closely watched by all government sources and potential sources who might be inclined to help the public know how its government is operating. And if a contempt order were to compel a reporter to reveal his source, it

would have a chilling effect on sources and not only damage the reporter's ability to do his job, but the ability of all reporters covering government to do their jobs.

/s/
Jack Nelson

Date: February 15, 2008

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

/s/
Notary Public

My Commission Expires on May 1, 2010

EXHIBIT 18

TO BE FILED UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 1:08dm61—LMB

In Re:

GRAND JURY SUBPOENA, JAMES RISEN

DECLARATION OF DANA PRIEST

I, Dana Priest, hereby declare under the penalty of perjury as follows:

1. I am a staff writer for *The Washington Post*.

2. I was the *Post's* Pentagon correspondent for seven years and subsequently covered the intelligence beat for three years. I also covered the invasion of Panama, reported from Iraq, and covered the Kosovo air war. I have traveled widely with Army Special Forces in Asia, Africa and South America, with Army infantry units on peacekeeping duty in Bosnia, Kosovo and Afghanistan, and with the regional four-star military commanders. In 2003 I authored a book about the military's expanding responsibility and influence, *"THE MISSION: Waging War and Keeping Peace With America's Military,"* which won the New York Public Library Bernstein Book Award and was a finalist for the 2003 Pulitzer Prize for non-fiction. I worked for three years as an analyst and contributor for NBC News and am

currently a contributor to CBS News as well as a fellow at New York University's Center on Law and Security.

3. My work has been recognized by my profession with a number of awards including The Pulitzer Prize, The George Polk Award, the Overseas Press Club Award, the American Academy of Diplomacy's Award for Distinguished Reporting and Analysis on Foreign Affairs, the Gerald R. Ford Prize for Distinguished Reporting on the National Defense, and Harvard University's David Nyhan Award for Political Journalism "for many years of distinguished investigative reporting."

4. Beginning in 1996 and continuing to this day, I have authored hundreds of news articles on matters of national security. Some of those articles have revealed government waste, corruption and wrongdoing. Some have disclosed controversial, secret policy decisions and the real-life effects of those decisions on the lives of Americans and people living outside the United States. A number have revealed the tactics, operations and strategy of the U.S. government's war on terror in a way that allows the public to judge whether government's actions in this realm are achieving the stated goal of these policies, namely the destruction of Al Qaeda-influenced terrorism around the world.

5. Because the U.S. government has made secret nearly every aspect of its counterterrorism program, it would have been impossible to report

even on the basic contours of these decisions, operations and programs without the help of confidential sources. The same is true for most military operations, particularly those involving special operations forces and counterintelligence assets. In my experience, the individuals who provide information about these matters on the condition of anonymity do so because they believe that the information should be made public, but they are not officially authorized to disclose the information or do not wish the information to be attributed to a named official.

6. The subjects that I have been able to cover, based on information provided by confidential sources, include the existence and conditions of hundreds of prisoners, some later to be found innocent, held at the military prison at Guantanamo Bay, Cuba; the capture, treatment and interrogation of prisoners in Afghanistan and Iraq; the workings of the joint CIA-Special Forces teams in Afghanistan responsible for toppling the Taliban and Al Qaeda; the use of the predator unmanned aerial vehicle to target suspected terrorist leaders; the wasteful spending of tens of billions of dollars in taxpayer funds on an outdated and redundant satellite system; the legal opinions supporting the "enhanced interrogation techniques" of prisoners captured in the war on terror; the specifics of those techniques, including waterboarding; the rendition of multiple suspected terrorists by the CIA in cooperation with foreign intelligence services to third countries; the lack of success in capturing Osama bin Laden; the absence of human sources in Iraq,

Iran and Pakistan by the CIA despite the high priority put on those countries by the U.S. intelligence services; the abuse of prisoners at the Abu Ghraib prison in Iraq; the accidental death of an innocent Afghan prisoner at the hands of an inexperienced CIA officer; the imprisonment of innocent Afghans sold for bounties to the U.S. military by Pakistan police and others; the mistaken capture, rendition, abuse and detention of Khalid al-Masri, an innocent naturalized German citizen of Lebanese extraction by the CIA and its allies; the mistaken rendition of Maher Arar, a Canadian citizen, into Syrian hands and his subsequent torture there; and the existence and evolution of the CIA's secret prisons in the countries of Eastern Europe. (These prisons were illegal in those countries, the very countries that the United States had worked so long to liberate from their Soviet-dominated and allied intelligence agencies and to welcome into the world of nations governed by the rule of law.) All of the revelations in my stories on these subjects were at one point secret from the American public. None of them could have been reported without the help of confidential sources.

7. Many of the above stories, which are attached, have resulted in significant, thoughtful and on-going public debate, including within the governments of our closest allies in Europe and in the U.S. Congress, where some of these practices, once revealed by myself and other reporters, have been prohibited or substantially modified. The legality of these programs has

been questioned and defended by the public, interest groups, elected members of Congress, the president and his national security team, and even presidential and Congressional candidates seeking office in 2008. This is, it seems to me, the essence of a democracy.

8. If reporters believe, as I do, that it is their responsibility to describe the broad contours of the war on terror, in order to help the public judge whether the tactics of the war on terror are effective in achieving our goals, then they, together with their editors and publishers, must necessarily delve into the realm of secret information. It can not be avoided.

9. As a reporter covering matters of national security, I am aware that there is no broad prohibition against the publication of secret or classified information per se. Why is that? Justice Potter Stewart, writing in the Pentagon Papers cases, described it this way: "So far as the Constitution goes, the autonomous press may publish what it knows, and it may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy ...in government. But the Press cannot expect from the Constitution any guarantee that it will succeed....The Constitution, in other words, establishes the *contest*, not its resolution. Congress may provide a resolution through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society."

10. The media's responsibility, as I see it, is to play its role in that contest — for, as Justice Stewart reminded us, "it is the contest itself that serves the public interest." If the press fails at this, we fail to meet our responsibility. In times of war and conflict, the stakes can be especially high. Consider what happened when the news media did not work hard enough before the Iraq war to determine whether the Bush administration's assertions of weapons of mass destruction in Iraq were accurate. For the press to have done a better job reporting about Iraq's nuclear capabilities in the run-up to the war, of course, it would have had to have access to secret or classified information, and it would almost certainly have had to have the assistance of confidential sources.

11. Mr. Risen's reporting in Chapter 9 of his book *State of War: The Secret History of the CIA and the Bush Administration* deals with potential incompetence and mismanagement of certain intelligence efforts concerning Iran's WMD capabilities. This is the kind of important and newsworthy subject that, in my experience, cannot be covered without the assistance of confidential sources.

12. In 2007, I co-authored a series of articles in the *Post* that revealed the systematic lack of adequate care for soldiers and Marines returning from wars in Iraq, Afghanistan and elsewhere at the Walter Reed Army Medical Center. The abuses revealed in those articles could not have

been uncovered without the help of people who agreed to speak only in return for promises to keep their identities confidential. These articles, which I have attached, resulted in significant reform to the Veteran's Administration services to Iraq and Afghanistan veterans, and to the Army and wider Defense Department's system of care for the physically and mentally wounded. Defense Secretary Robert Gates cited these articles in his May 2007 commencement speech at the U.S. Naval Academy: "As officers, you will have a responsibility to communicate to those below you that the American military must be non-political and recognize the obligation we owe the Congress to be honest and true in our reporting to them. Especially when it involves admitting mistakes or problems. The same is true with the press, in my view a critically important guarantor of our freedom. When it identifies a problem, as at Walter Reed, the response of senior leaders should be to find out if the allegations are true — as they were at Walter Reed — and if so, say so, and then act to remedy the problem. If untrue, then be able to document that fact. The press is not the enemy, and to treat it as such is self-defeating."

13. The press would be severely hobbled in its efforts to reveal problems if it were not able to rely upon and protect confidential sources. If reporters are compelled to identify their confidential sources in cases such as this one, my ability and the ability of other reporters to obtain newsworthy information in the future on the kinds of subjects described in this Declaration

would be severely impaired. Sources who would otherwise feel a responsibility to reveal potential abuses would be reluctant to do so, and the public would be left without the information necessary ultimately to ensure that government is responsive to its will.

I declare under the penalty of perjury that the foregoing is true to-the best of my knowledge, information and belief.

/s/
Dana Priest

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 1:10cr485 (LMB)

UNITED STATES OF AMERICA,

—v.—

JEFFREY ALEXANDER STERLING,

Defendant.

AFFIDAVIT OF JAMES RISEN

DISTRICT OF COLUMBIA) ss:

JAMES RISEN, being first duly sworn, deposes and says:

1. I am a reporter for *The New York Times (“The Times”)* and the author of *State of War: The Secret History of the CIA and the Bush Administration* (*“State of War”*). I submit this affidavit in opposition to a motion in limine by the Government to admit my testimony and in support of a motion to quash a trial subpoena directed at me in connection with the criminal trial of Jeffrey Sterling. The subpoena, which calls for information about the identity of confidential source(s) that I used in reporting certain information in Chapter 9 of *State of War*, is attached hereto as Exhibit 1. A copy of *State of*

War is submitted with this affidavit as Exhibit 2.

2. I am fully familiar with the facts set forth herein. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. This is the third time a subpoena has been directed at me calling for testimony about my confidential source(s) for Chapter 9. The first subpoena directed at me was a grand jury subpoena issued on January 24, 2008.[REDACTED] A second grand jury subpoena directed at me was issued on April 26, 2010. [REDACTED]

4. [REDACTED]

5. Since my graduation from Brown University in 1977 and receiving a Masters Degree from the Medill School of Journalism at Northwestern University in 1978, I have been a reporter. In 1978 through 1979, I worked as a reporter at the *Fort Wayne* (*Indiana*) *Journal Gazette*. In 1980 and 1981, I worked as a business reporter at the *Miami Herald*. From 1981 to 1984, I was a reporter at the *Detroit Free Press*, covering the auto industry. From 1984 until 1990, I was the Detroit Bureau Chief of the *Los Angeles Times*, covering news in Detroit and throughout the Midwest. In 1990, I transferred to the Washington Bureau of the *Los Angeles Times*, and covered economic policy for five years. In 1995, I began to cover intelligence and national security for the *Los Angeles*

Times in Washington. In 1998, I joined *The New York Times* in the Washington Bureau, where I have worked ever since as an investigative reporter, largely focusing on intelligence, national security and terrorism.

6. I have won a number of awards in connection with my newspaper reporting. In 2002, I was a member of *The New York Times* reporting team that won the Pulitzer Prize for Explanatory Reporting for coverage of the Sept. 11 attacks and terrorism. In 2006, I won the Pulitzer Prize for National Reporting, for reporting that revealed the existence of President Bush's legally questionable domestic wiretapping program. In awarding the prize, the Pulitzer board cited my "carefully sourced stories on secret domestic eavesdropping that stirred a national debate on the boundary line between fighting terrorism and protecting civil liberty."

7. In 2006, I was awarded the Goldsmith Prize for Investigative Reporting, for reporting on President Bush's illegal domestic wiretapping program. The Goldsmith Prize is given annually by the Joan Shorenstein Center on the Press, Politics and Public Policy at the John F. Kennedy School of Government at Harvard University to "honor journalism that promotes more effective and ethical conduct of government by disclosing excessive government secrecy, impropriety, and mismanagement." To the best of my ability, I try to write stories that I believe fit the mission of the Goldsmith Prize.

8. In 2007, I was elected to the American Academy of Arts and Sciences. That same year, after winning a Publisher's Award from *The New York Times*, I received a personal letter from Arthur O. Sulzberger, Jr., the publisher of the newspaper. "Your investigative reporting has been an extraordinary asset to the paper since the day you joined us," Mr. Sulzberger wrote to me. "But it has now become a central reason that our Washington report is admired by our readers—not to mention leaders around the nation and the world."

9. It was my reporting, both in *The New York Times* and my book *State of War*, that revealed that the Bush Administration had, in all likelihood, violated the law and the United States Constitution by secretly conducting warrantless domestic wiretapping on American citizens. My reporting helped to spark a national debate that continues today about the legality and propriety of that wiretapping program. My stories led to judicial examination of that program for the first time. In August 2006, for example, partly as a result of my reporting on the subject, a federal judge in Detroit declared that the Bush Administration's domestic wiretapping program was unconstitutional. Likewise, my disclosure of the previously secret domestic wiretapping program helped lead to Congressional efforts to overhaul the Foreign Intelligence Surveillance Act of 1978. More recently, views on domestic wiretapping were the subject of Congressional questioning of then-Judge (and now Supreme

Court Justice) Sotomayor. For example, on July 16, 2009, then-Senator Arlen Specter asked then-Judge Sotomayor questions about the wiretapping debate, including whether or not she would have granted *certiorari* on the facts of the wiretapping case, *American Civil Liberties Union v. National Sec. Agency*, 493 F.3d 644 (6th Cir. 2007). An excerpt of the Congressional transcript is attached as Exhibit 3. By bringing this issue out into the open for the first time, I believe that my reporting provided a public service to the nation, enabling Congress, the courts, and the American people to openly debate the proper balance between civil liberties and national security for domestic surveillance and to publicly consider a Supreme Court nominee's stance on this important issue concerning the appropriate limits of executive power.

10. In addition to my newspaper reporting, I have also written three books, all of which have been the product of my work as an investigative journalist. Writing books allows me to give more extensive treatment to newsworthy topics of my choice than my newspaper reporting does alone. My first book, *Wrath of Angels: The American Abortion War* (Basic Books, 1998), which I co-authored with Judy L. Thomas, provided the first comprehensive history of the anti-abortion movement ever written. *The New York Times Book Review* hailed it as "far and away the most thorough and knowledgeable history of anti-abortion activism after *Roe*." My second book, *The Main Enemy: The Inside Story of the CIA's*

Final Showdown with the KGB (Random House, 2003), co-authored with Milt Bearden, was a colorful and dramatic history of the espionage wars between the United States and the Soviet Union in the closing days of the Cold War. *The New York Times Book Review* wrote that "revelations twinkle in *The Main Enemy* like stars at sunset." *The Main Enemy* was awarded the Cornelius Ryan Award from the Overseas Press Club for the best book on foreign affairs in 2003.

11. My third book, *State of War: the Secret History of the CIA and the Bush Administration* (Free Press, 2006), was a *New York Times* bestseller. *State of War* included explosive revelations about a series of illegal or potentially illegal actions taken by President Bush, including the domestic wiretapping program. It also disclosed how President Bush secretly pressured the CIA to use torture on detainees in secret prisons around the world; how the White House and CIA leadership ignored information before the 2003 invasion of Iraq that showed that Iraq did not have weapons of mass destruction; documented how, in the aftermath of the invasion, the Bush Administration punished CIA professionals who warned that the war in Iraq was going badly; showed how the Bush Administration turned a blind eye to Saudi involvement in terrorism and revealed that the CIA's intelligence operations on weapons of mass destruction in Iraq, Iran and other countries were completely dysfunctional, and even reckless. In his review in *The New York Times Book Review*, Walter

Isaacson hailed *State of War* and said that "James Risen may have become the new Woodward and Bernstein." *The Dallas Morning News*, in its review of *State of War*, said "Domestic spying, demands for political loyalty in the name of national security, investigating a newspaper's sources: With *State of War*, the Nixonian déjà vu can give a reader whiplash."

12. While the disclosures contained in *State of War* were no doubt embarrassing to the government, I strongly believe that they were important and newsworthy. *State of War* sparked national debate about a number of topics, and that debate continued long after the book was published.

13. The response to *State of War* from the reading public was startling and gratifying to me. Many people actually stopped me on the street, came up to me in restaurants, or wrote to me to thank me for writing it and for uncovering the truth. I believe that the publication of *State of War* contributed to a significant turning point in the American public's understanding of American policies in the post-9/11 era.

14. My investigative reporting, both in my books and in my newspaper articles, has often been critical of the United States government, regardless of the administration in power. Throughout my twenty years of reporting in Washington, I have written stories that angered officials in the first Bush Administration, the Clinton Administration, the second Bush

Administration, and the Obama Administration. In 1996, my stories in the *Los Angeles Times* revealing that President Clinton had given a green light to Iranian arms smuggling into the Balkans prompted the Republican-controlled House of Representatives to take the remarkable step of voting to create a special House Select Subcommittee designed solely to investigate what I had uncovered about the Clinton Administration. A few years later, many of those same Congressional Republicans were calling for me to be thrown in jail for what I had uncovered during the second Bush Administration.

15. My reporting on intelligence and national security has often included major revelations of great public interest:

• I was the first to reveal that the CIA was waterboarding terrorism suspects. *See* James Risen, David Johnston, and Neil A. Lewis, "Harsh C.I.A. Methods Cited In Top Qaeda Interrogations," *New York Times,* May 13, 2004, at A1, attached as Exhibit 4.

• I revealed that, before the invasion of Iraq, the CIA had received information from about 30 relatives of Iraqi scientists that Iraq had abandoned its programs to develop weapons of mass destruction, but failed to share that information with President Bush, even as he was publicly warning of the threat posed by Iraq's quest for such weapons. *See* James Risen, "C.I.A. Held Back Iraqi Arms Data, U.S.

Officials Say," *New York Times*, July 6, 2004, at Al; attached as Exhibit 5; *see also* Exhibit 2 (*State of War*) at 85-107.

• I revealed that, contrary to law and with little oversight, the NSA was monitoring and eavesdropping on large volumes of phone calls, emails, and other Internet communications inside the United States to search for evidence of potential terrorist activity, without first securing search warrants or congressional approval. A number of government officials questioned the legality of the program, but the administration insisted on keeping it secret. *See* James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005, at A1, attached as Exhibit 6; Eric Lichtblau and James Risen, "Spy Agency Mined Vast Data Trove, Officials Report," *New York Times*, December 24, 2005, at A1, Attached as Exhibit 7; *see also* Exhibit 2 (*State of War*) at 39-60.

• I revealed that the Bush Administration was engaged in a secret program that was initiated weeks after the September 11, 2001 attacks and provided counterterrorism officials with access to financial records from the international SWIFT database—including records of banking transactions involving thousands of Americans and others in the United States–in order help detect terrorist financiers. Eric Lichtblau and James Risen, "Bank Data Sifted In Secret By U.S. To

Block Terror," *New York Times*, June 23, 2006, at A1, attached as Exhibit 8.

16. In Chapter 9 of *State of War*, I reported on Operation Merlin, an intelligence operation in 2000 during the Clinton Administration that was intended to stall—but which may have actually helped—Iran in its efforts to develop a nuclear weapons program. The plan behind Merlin, as reported in Chapter 9, was to have a former Russian scientist provide Iranian officials with faulty nuclear blueprints. The CIA hoped that based on those flawed plans, Iran would build an inoperable nuclear weapon. The operation, in theory, would have undermined Iran's efforts to build a nuclear program.

17. As reported in Chapter 9, Merlin was deeply flawed and mismanaged from the start. First, the flaws in the nuclear blueprints were so obvious that the Russian scientist noticed them within minutes of seeing the plans. When the scientist explained this to his CIA handlers, they inexplicably refused to call off the operation and simply told him that he should go ahead and deliver the plans to the Iranians. Thus, notwithstanding their knowledge that the flaws in the plans could be easily spotted, the CIA pushed ahead.

18. I take very seriously my obligations as a journalist when reporting about matters that may be classified or may implicate national security concerns. I do not always publish all information that I have, even if it is

newsworthy and true. If I believe that the publication of the information would cause real harm to our national security, I will not publish a piece. I have found, however, that all too frequently, the government claims that publication of certain information will harm national security, when in reality, the government's real concern is about covering up its own wrongdoing or avoiding embarrassment. As a result, I think long and hard before publishing such pieces.

19. I gave this type of serious consideration to my publication of the information contained in Chapter 9 of *State of War*. I actually learned the information about Operation Merlin that was ultimately published in Chapter 9 of *State of War* in 2003, but I held the story for three years before publishing it. I made the decision to publish the information about Operation Merlin only after: (1) it became clear that the main rationale for fighting the Iraq War was based on flawed intelligence about Iraq's non-existent weapons of mass destruction, including its supposed nuclear program; (2) the press, particularly *The New York Times*, had been harshly criticized for not doing more independent investigative reporting before the Iraq War about the quality of our intelligence concerning Iraq's weapons of mass destruction; (3) the March 31, 2005 Report to the President by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction described American intelligence on Iran as inadequate to allow firm judgments about Iran's weapons programs,

making it clear that the CIA's intelligence on weapons of mass destruction in Iran was just as badly flawed as it had been on Iraq; and (4) there was increasing speculation that the United States might be planning for a possible conflict with Iran, once again based on supposed intelligence concerning weapons of mass destruction, just as in Iraq. After all of this, I realized that U.S. intelligence on Iran's supposed weapons of mass destruction was so flawed, and that the information I had was so important, that this was a story that the public had to know about before yet another war was launched.

20. I was particularly struck by an exclusive interview I had in January 2004 with David Kay, the chief of the CIA's hunt for WMD in Iraq. In his first major interview after returning from Iraq, he told me that the fundamental errors in the CIA's pre-war intelligence assessments were so grave that he would recommend that the CIA and other intelligence agencies completely overhaul their intelligence collection and analytical efforts on weapons of mass destruction. In the interview, he plaintively told me that CIA analysts working for him had come to him, "almost in tears, saying they felt so badly that we weren't finding what they had thought we were going to find—'I have had analysts apologizing for reaching the conclusions that they did.'" It became clear to me that the Bush Administration had lost its credibility on the issue of intelligence concerning weapons of mass destruction.

21. The information in Chapter 9 about Operation Merlin was about an intelligence effort that was approximately six years old at the time of publication and dated back to the Clinton Administration. The story was so old that it could not harm national security, and in fact I believe I performed a vitally important public service by exposing the reckless and badly mismanaged nature of intelligence on Iran's efforts to obtain weapons of mass destruction, so that the nation would not go to war once again based on flawed intelligence, as it had in Iraq.

22. Chapter 9 also discloses another failure of our intelligence efforts in Iran. In 2004, a CIA officer mistakenly sent an email to an American CIA agent in Iran that may have contained information sufficient to reveal the identities of the entire network of spies in that country. It turned out that the recipient of the email was actually a double-agent who eventually turned the information over to his Iranian handlers. This mistake, at a minimum, put the entire CIA spy network in Iran at risk.

23. The subjects covered in Chapter 9 were particularly relevant in light of current events at the time the book was published. The press, including my own newspaper, was soundly criticized for failing to scrutinize U.S. intelligence related to Iraq's WMD capabilities in the period immediately preceding the Iraq War. Then, around the time *State of War* was published, there was considerable public speculation about

a possible future conflict with Iran. As a result, reporting about our intelligence in evaluating Iran's nuclear program was essential.

24. In my view, information about this type of intelligence failure is particularly newsworthy, particularly when dealing with areas of foreign policy in which our political fears about the policies of a foreign regime might cloud our assessment of their military goals and capabilities. That was certainly the case with our assessment of Iraq's WMD capabilities before the Iraq War. And it seems to be the case with Iran even today.

25. I believe my decision to report about the matters discussed in Chapter 9 of *State of War* has been vindicated, particularly given subsequent reports about the unreliability of our intelligence about Iran's nuclear capabilities and about our government's tendency to overstate the threat in a way that is not entirely consistent with the intelligence actually gathered. For example, in December 2007, the United States intelligence community published a National Intelligence Estimate ("2007 NIE") on Iran, in which the U.S. government acknowledged that virtually everything it had been saying about Iran's nuclear program for the last four years had been wrong. The 2007 NIE stated that Iran had abandoned its nuclear weapons program in 2003, a complete reversal from previous intelligence assessments that had concluded that Iran was actively seeking a nuclear weapon. It revealed that almost all of

the public statements by the Bush Administration about Iran and its weapons program had been wrong, and had been based on bad information. The 2007 NIE (attached hereto as Exhibit 9) must be seen as a public disavowal of the CIA's earlier intelligence efforts on Iran's supposed nuclear program.

26. Since then, U.S. intelligence assessments of Iran's nuclear program have swung back and forth. Ever since the 2007 NIE was published, U.S. intelligence analysts have been under pressure to disavow it and issue a new one that concludes that Iran is racing to build a nuclear weapon. But while there is substantial evidence of Iran's ongoing uranium enrichment program, the intelligence about the status of Iran's efforts to actually build a nuclear bomb has been far less conclusive. In an article that was quickly attacked by the Obama Administration, Seymour M. Hersh, wrote recently in *The New Yorker* that a new 2011 NIE from the United States intelligence community reaffirms that there is no conclusive evidence that Iran has made any effort to build a nuclear bomb since 2003. *See* "Iran and the Bomb," by Seymour M. Hersh, published on June 6, 2011 in *The New Yorker* at pp. 30-35 (attached as Exhibit 10). "There's a large body of evidence," wrote Mr. Hersh, "including some of America's most highly classified intelligence assessments, suggesting that the U.S. could be in danger of repeating a mistake similar to the one made with Saddam Hussein's Iraq eight years ago—allowing anxieties about the policies of tyrannical

regimes to distort our estimates of the state's military capacities and intentions." *Id.* at 30.

27. Whether one agrees with Mr. Hersh's article or not, it is clear that, five years after I wrote *State of War*, there is still a serious national debate about Iran's nuclear ambitions and about whether the current administration has incentives to exaggerate intelligence related to this topic.

28. The point of Chapter 9 of *State of War* was that the CIA was just as blind and just as reckless in the way it dealt with intelligence on Iran's weapons of mass destruction as it had been on Iraq. That was clearly the message of the 2007 NIE, and perhaps it is the message of the 2011 NIE as well. Given the CIA's own disavowal of its past work on Iran's nuclear program, it is that much more important to understand *why* our intelligence efforts in evaluating Iran's nuclear threat have failed in the past. Chapter 9 of *State of War* is one of the few sources of information covering this important subject.

29. The Bush Administration was embarrassed by the disclosures I made in the course of my reporting for *State of War* as well as in *The New York Times*, and eventually singled me out as a target for political harassment. That administration speculated publicly about prosecuting me under the Espionage Act for publication of my reporting about their domestic eavesdropping program and about my

reporting in *State of War*, leaked to the press a story about engaging in secret surveillance of journalists' phone calls, and attempted to create an atmosphere of intimidation for reporters, like me, who uncovered wrongdoing and incompetence in the administration. Moreover, the Bush Administration was selective in its attacks. When other journalists reported on the same subjects at the same time that I did, the Bush Administration said and did nothing about potentially prosecuting or even investigating the identity of the source(s) of those journalists, but instead threatened only to "go after" me and *The New York Times*.

30. I believe that the investigation that led to this prosecution started because of my reporting on the National Security Agency's warrantless wiretapping program. The Bush White House was furious over that story. I believe that this investigation started as part of an effort by the Bush Administration to punish me and silence me, following the publication of the NSA wiretapping story. I was told by a reliable source that Vice President Dick Cheney pressured the Justice Department to personally target me because he was unhappy with my reporting and wanted to see me in jail. After he left office in 2009, Cheney publicly admitted that the fact that I won a Pulitzer Prize for the NSA story "always aggravated me."

31. In fact, the first subpoena issued to me was the culmination of a prolonged campaign against me by the Bush Administration and its

supporters. President Bush called the disclosures about the likely-illegal wiretapping program a "shameful act," *see* Dan Eggen, *Fearing More Leaks, White House Targets Officials, Journalists*, *Seattle Times*, Mar. 6, 2006, at A1, attached hereto as Exhibit 11, and the administration and its supporters thereafter publicly speculated about potential prosecutions of me for espionage. Shortly after that, an organized campaign of hate mail from right wing groups with close ties to the White House was launched, inundating me with personal threats. Meanwhile, protesters supporting the Bush Administration picketed my office, calling for me to be prosecuted. Right wing pundits and bloggers supporting the Bush Administration took to television and the Internet to call for the White House and the Justice Department to prosecute me for espionage. Failing that, they called for the Justice Department to subpoena me in a leak investigation, which right wing pundits said would have the same effect as prosecution, since it could force me to go to jail if I refused to testify about the identity of my confidential source(s).

32. Immediately after *State of War* was released, the Department of Justice announced that investigations were underway concerning disclosures in the book as well as other leaks. On January 13, 2006, the week after my book hit the shelves, then-Attorney General Alberto Gonzales held a press conference at which he publicly announced that the Department of Justice was actively considering the prosecution of

journalists under the Espionage Act for publishing truthful, classified information. When he was asked about the investigation and the potential imprisonment of reporters, Gonzales said:

> That's a matter that's being handled by career prosecutors and folks within our Criminal Division. And I think it's too early to make decisions regarding whether or not reporters should go to jail. We have an obligation to ensure that our laws are enforced.

See January 13, 2006 FDCH Capital Transcripts, attached hereto as Exhibit 12.

33. In mid-March, after Attorney General Gonzales raised publicly the possibility of prosecuting journalists, the Director of the CIA, Porter Goss, suggested that it was his "hope" and "aim" that the leak investigations would lead to subpoenas requiring me to testify about the identity of my confidential source(s). Only two months into the investigation, Goss explained: "It is my aim and it is my hope that we will witness a grand jury investigation with reporters present being asked to reveal who is leaking this information." *See* David Westphal, *Bush's Secrecy Push is Excessive, Critics Say*, *The Sacramento Bee*, Mar. 12, 2006, at A1, attached hereto as Exhibit 13.

34. Then, on May 21, 2006, Attorney General Gonzales was asked by George Stephanopoulos on ABC's "This Week" if "he believed that jour-

nalists could be prosecuted for publishing classified information." He replied that "there are some statutes on the book[s] which, if you read them carefully, would seem to indicate that that is a possibility.... We have an obligation to enforce those laws. We have an obligation to ensure that our national security is protected." See Transcript of ABC's "This Week with George Stephanopoulos," 2006 WLNR 9116668 (May 21, 2006), attached hereto as Exhibit 14.

35. When asked several weeks later by the Senate Judiciary Committee for a clarification of Attorney General Gonzales' remarks on ABC's "This Week," Matthew W. Friedrich, Chief of Staff and Principal Deputy Assistant Attorney General Criminal Division, submitted written testimony that adopted the Attorney General's remarks as Department of Justice Policy. Even though, as Mr. Friedrich acknowledged in his responses to the Judiciary Committee's questions, the Justice Department "has never in its history prosecuted a member of the press under [the Espionage Act] or any other statute relating to the protection of classified information," the Department's current position is that "such a prosecution is possible under the law." *See* Friedrich Responses to Questions for the Record, attached hereto as Exhibit 15.

36. By publicly speculating about the possibility of prosecuting journalists, such as myself, under the Espionage Act for publishing truthful stories containing classified information, I believe that the Government was

trying to intimidate journalists, like me, who publish stories that expose excessive government secrecy, illegality, or malfeasance.

37. Around the same time that the Government was making public statements about potentially prosecuting journalists, Brian Ross and Richard Esposito of ABC News rep1ied on May 15, 2006, that senior federal law enforcement officials had informed them that the government was tracking the phone numbers of journalists without the journalists' knowledge as part of an effort to root out the journalists' confidential sources. According to the article, the journalists' phones were not being "tapped," but the government was tracking the incoming and outgoing numbers called and received on the journalists' phones. The story stated that the government was examining the phone calls and contacts of journalists from *ABC News*, *The New York Times*, and the *Washington Post* a part of a "widespread CIA leak investigation." I was mentioned by name as one of the reporters whose work the government was looking into. A copy of the story, entitled "Federal Source to ABC News: We Know Who You're Calling," is attached hereto as Exhibit 16.

38. Even if I was not one of the journalists subject to the surveillance outlined in the story by Messrs. Ross and Esposito, the story indicates that senior federal law enforcement

officials provided Messrs. Ross and Esposito with information about the surveillance. By leaking the story in the manner that it did, the Government further contributed to creating an atmosphere of fear for journalists who publish stories about national security and intelligence issues.

39. The surveillance described in the story by Messrs. Ross and Esposito is disturbing to me as a journalist. If the Government was, in fact, tracking who I was speaking to on the phone, then it can attempt to learn the identity of potential confidential sources on other stories, including those that I am working on and have yet to publish.

40. I have reason to believe that the story by Brian Ross and Richard Esposito is true. Since that story was published, I have learned from an individual who testified before a grand jury in this District that was examining my reporting about the domestic wiretapping program that the Government had shown this individual copies of telephone records relating to calls made to and from me.

41. As noted above, on June 23, 2006, Eric Lichtblau and I wrote another story in *The Times* that disclosed the existence of another government program of questionable legality that was initiated weeks after the September 11, 2001 attacks and provided counterterrorism officials with access to money transfer records

in the SWIFT database as part of an effort to detect terrorist financiers.

42. The same day that the article about the SWIFT program by Eric Lichtblau and me appeared in *The Times*, *The Wall Street Journal* and the *Los Angeles Times* also published articles about the SWIFT program. Those articles are attached hereto as Exhibits 17 and 18.

43. The Bush Administration was outraged by the disclosures about the SWIFT program. Vice President Cheney called the disclosure of the program "a disgrace," while President Bush called it "disgraceful." *See* Transcript of CNN: Paula Zahn Now, *New York Times Guilty of Treason?*; *Old Glory Becomes Burning Issue in Congress*; *Israeli Troops Move Into Gaza to Rescue Captured,* 2006 WLNR 11144252 (June 27, 2006), which is attached hereto as Exhibit 19. Members of Congress close to the administration, such as Rep. Peter King of New York, "call[ed] for the attorney general to begin an investigation and prosecution of *The New York Times*, including its reporters who worked on the case."

44. Significantly, however, all of the administration's expressions of outrage concerning the disclosure of the SWIFT program were directed only at Mr. Lichtblau and me. As CNN reported on June 27, 2006, even though the story was also reported by the *Los Angeles Times* and *Wall Street Journal*, the attacks have focused on *The*

New York Times, including its reporters who worked on the case. As far as I am aware, nobody in the administration complained publicly about the other articles written about the SWIFT program the same day as mine. All of the calls for journalists to be investigated or prosecuted were directed solely at Mr. Lichtblau and me. I cannot help but think that the fact that I had written earlier, both in *The Times* and *State of War*, about the administration's legally questionable domestic eavesdropping program, had something to do with the selective attention that was being focused on *The Times* and me.

45. Public threats from the administration of putting me in jail continued. On August 30, 2006, Republican Congressman Peter Hoekstra publicly predicted that "those reporters," meaning Eric Lichtblau and me, "will be sitting in jail by the end of the year until they reveal their sources." *See* Myron Kukla, *Hoekstra Predicts Jailing of Reporters (NYT Traitors To Be Jailed By Year End)*, *Grand Rapids Press*, Aug. 31, 2006 at B1, attached hereto as Exhibit 20.

46. That was the atmosphere in which I was first subpoenaed to testify concerning my confidential source(s) for Chapter 9 of *State of War*, on January 24, 2008. [REDACTED]

47. I believe that the efforts to target me have continued under the Obama Administration, which has been aggressively investigating whistleblowers and reporters in a

way that will have a chilling effect on the freedom of the press in the United States.

48. The second subpoena directed at me was issued on April 26, 2010. [REDACTED]

49. [REDACTED] I believe that this is further evidence of the Government's intent to harass me in connection with this matter.

50. The subpoena that I am fighting now seeks the identity of and other information relating to my confidential source(s) for Chapter 9 of *State of War*. I cannot agree to provide the testimony that the Government seeks.

51. I could not have written Chapter 9 of *State of War* (and many, if not all of the above-referenced articles and books) without the use of confidential source(s). My source(s) for Chapter 9 provided me with information with the understanding that I would not reveal their identities. In circumstances in which I promise confidentiality to a source, I cannot break that promise.

52. Any testimony I were to provide to the Government would compromise to a significant degree my ability to continue reporting as well as the ability of other journalists to do so. This is particularly true in my current line of work covering stories relating to national security, intelligence, and terrorism. If I aided the Government in its effort to prosecute my confidential source(s) for providing information

to me under terms of confidentiality, I would inevitably be compromising my own ability to gather news in the future. I also believe that I would be impeding all other reporters' ability to gather and report the news in the future.

53. Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of the government. This would seriously compromise journalists' integrity and independence, qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events. Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality but one who would break it in the interest of government prosecutors.

54. I understand that, if the Government cannot get testimony from me about the identity of my confidential source(s), the Government may seek testimony from me about the details of my conversations with my confidential source(s) (without actually asking me the name(s) of my source(s)). I cannot provide this testimony to the Government either. The agreement I have reached with my confidential source(s) for Chapter 9 of my book, *State of War*, does not

merely cover the name of the source(s). Rather, I understand my agreement(s) to require me not to reveal any information that would enable someone to identify my confidential source(s).

55. I have never heard of any confidentiality agreement made by a journalist that merely requires the journalist not to name his or her source. Such an agreement would be of little value to a source or potential source. If a journalist were to withhold a source's name but provide enough information to authorities to identify the source, the promise of confidentiality would provide little meaningful protection to a source or potential source.

56. The scope of my confidentiality agreement(s) with my source(s) for Chapter 9 are typical of such agreements as they are used for investigative reporting generally. Such confidentiality agreements do not necessarily preclude a journalist from disclosing anything whatsoever about the source. In fact, when reporting using confidential sources, it is quite common to report some generic information that assists in demonstrating the credibility of the source. For example, one might identify the employer of the source by noting that the source is an employee of Microsoft or management at McDonalds. Additionally, or alternatively, a reporter might identify the location of a source by, for example, noting that they work at Microsoft in Seattle, Washington.

57. The common thread in revealing any identifying information about a confidential source is that such disclosures remain general enough that they do not tend to reveal the identity of the source. The above example might be acceptable because there are a sufficient number of employees of Microsoft in Seattle that those characteristics do not materially threaten to reveal the particular source's identity. However, it might violate the same agreement to disclose that a source was an employee of Microsoft located in a very small town that only had a few such employees.

58. In short, confidentiality agreement(s) are not so formulaic as to define specific categories of information for protection, such as occupation, location, or time. Rather, they are common-sense agreements not to disclose whatever information might, alone or in combination, reveal the identity of ten source in light of the particular circumstances.

59. Based on my review of the Government's papers and the particular nature of the testimony the Government claims to be seeking, I have concluded that I cannot answer the questions the Government wants to ask me consistent with my obligation to maintain the confidentiality of my source(s). First, the subpoena contains no limitations on the scope of testimony. In its motion papers, the Government has demanded that I identify Sterling as the individual who, as charged in Counts One through Seven of the Indictment,

retained and then transmitted national security information to me. The Government's other requests for testimony are also specifically designed to confirm or rule out Mr. Sterling as a source. The Government seeks "(1) testimony about the specific information that the defendant conveyed to [me], much of which was publicly disclosed by [me] in [my] book; (2) [my] recollection of where and when the specific information was transmitted to [me] (3) testimony authenticating [my] book and laying the foundation for admitting the defendant's statements contained in it; and (4) [my] recollection of [my] preexisting non-confidential source relationship with Sterling, including [my] authorship of a newspaper article about Sterling's civil lawsuit in 2002." With the possible exception of #3, it is readily apparent that I cannot testify on these topics without confirming or refuting that Mr. Sterling was a confidential source for Chapter 9 of *State of War,* nor without providing information that would tend to reveal the identities of my confidential source(s).

60. I am willing to testify — as I have told the Government all along — that (1) I wrote a particular newspaper article or chapter of a book; (2) a particular newspaper article or chapter of a book that I wrote was accurate; (3) statements referred to in my newspaper article or book chapter as being made by an unnamed source were in fact made to me by an unnamed source; and (4) statements referred to in my newspaper article or book chapter as being made by an

identified source were in fact made to me by that identified source. But I cannot testify as to the Government's other questions.

61. To answer the Government's other questions would violate my agreement to maintain in confidence not just the name(s) of my source(s), but information that would tend to reveal the identities of my source(s). If I provide the testimony that has been requested of me, including the "what," "how," "when," and "where" of acquiring each piece of confidential information, doing so will reveal my confidential source(s), regardless of whether I directly provide any name(s). Accordingly, I cannot comply with the subpoena.

62. I did have a non-confidential reporting relationship with Mr. Sterling in connection with my March 2002 article entitled "Fired by C.I.A., He Says Agency Practiced Bias." To the extent the Government's seeks to verify the information in that article, I stand by it; the article accurately portrays the information provided to me. However, I cannot testify as to whether I had any other discussion(s) with Mr. Sterling outside the context of that article for one simple reason: the questioning appears to be an attempt to elicit information about my communications with Mr. Sterling so as to confirm or deny that he was a confidential source for Chapter 9. To the extent the Government is asking these questions because the Government believes that they might reveal something about my confidential source(s) for

the information in Chapter 9, then this appears to be just another indirect route to the same source-identifying information that the Government is seeking through its more direct questions about Chapter 9.

63. I cannot answer questions about information provided to me confidentially by any particular individual in connection with Chapter 9, or even answer whether any particular individual did or did not provide me with information, because to do so would reveal my source(s) by process of elimination. For example, if there were only a handful of people that had access to a particular piece of information in *State of War*, asking whether I had any conversations with each of them, one by one, would quickly reveal my source(s). No matter how creative the Government's approach is, in order to protect my source(s)' confidentiality, I must decline to answer any of these questions designed to either confirm or rule out particular people.

64. If I am forced to testify, it will immediately and substantially harm my ability to gather newsworthy information. Recently, it has become more clear than ever to me how important promises of confidentiality are to my sources. In my ongoing reporting and news gathering, numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal

their identities or information. The fact that I have not previously revealed my sources has allowed me to gain access to newsworthy information that I could not otherwise get. Based on these experiences, I have no doubt that if I am forced to reveal my confidential source(s) for Chapter 9 of *State of War*, it will immediately harm my ability to secure the trust of sources in the future.

65. I respectfully urge the Court to deny the Government motion in limine and quash the subpoena.

/s/
James Risen

Sworn to before me this 21st day of June, 2011.

/s/
Notary Public

Barbara Brincefield
Notary Public of District of Columbia
My Commission Expires October 14, 2015

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

Case No. 1:10cr485

UNITED STATES OF AMERICA

v.

JEFFREY ALEXANDER STERLING

Defendant

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: James Risen
17905 Hollingsworth Drive
Derwood , MD 20855

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance:
United States District Court
401 Courthouse Square
Alexandria, VA 22314

Courtroom No.: 600

Date and Time: September 12, 2011 10 a.m

You must also bring with you the following documents, electronically stored information, or objects (*blank if not applicable*):

Date: 05/17/2011

CLERK OF COURT

/s/ [ILLEGIBLE]
Signature of Clerk of Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing (*name of party*) United States of America, who requests this subpoena, are:

James L. Trump, AUSA [/s/ JLT]
U.S. Attorney's Office, Alexandria, VA
Jim.Trump@usdoj.gov
(703) 299-3700

Chapter 9 of *State of War: The Secret History of the CIA and the Bush Administration* (2006), by James Risen

9. A ROGUE OPERATION

SHE HAD PROBABLY done this a dozen times before. Modern digital technology had made clandestine communications with overseas agents seem routine. Back in the Cold War, contacting a secret agent in Moscow or Beijing was a dangerous, labor-intensive process that could take days or even weeks to arrange. But by 2004, it was possible to send high-speed, encrypted messages directly and instantaneously from CIA headquarters to agents in the field who were equipped with small, covert personal communications devices. So the officer at CIA headquarters assigned to handle communications with the agency's spies in Iran probably didn't think twice when she began her latest download. With a few simple commands, she sent a secret data flow to one of the Iranian agents in the CIA's spy network. Just like she had done so many times before.

But this time, the ease and speed of the technology betrayed her. The CIA officer had made a disastrous mistake. She had sent information to one Iranian agent meant for an entire spy network; the data could be used to identify virtually every spy the CIA had inside Iran.

Mistake piled on mistake. As the CIA later learned, the Iranian who received the download was actually a double agent. The agent quickly turned the data over to Iranian security officials, and it enabled them to "roll up" the CIA's agent network throughout Iran. CIA sources say that

several of the Iranian agents were arrested and jailed, while the fates of some of the others is still unknown.

This espionage disaster, of course, was not reported in the press. It left the CIA virtually blind in Iran, unable to provide any significant intelligence on one of the most critical issues facing the United States—whether Tehran was about to go nuclear.

In fact, just as President Bush and his aides were making the case in 2004 and 2005 that Iran was moving rapidly to develop nuclear weapons, the American intelligence community found itself unable to provide the evidence to back up the administration's public arguments. On the heels of the CIA's failure to provide accurate prewar intelligence on Iraq's weapons of mass destruction, the agency was once again clueless in the Middle East. In the spring of 2005, in the wake of the CIA's Iranian disaster, Porter Goss, the CIA's new director, told President Bush in a White House briefing that the CIA really didn't know how close Iran was to becoming a nuclear power.

The Bush administration has never publicly disclosed the extent to which it is now operating in the blind on Iran. But deep in the bowels of the CIA, someone must be nervously, but very privately, wondering: *Whatever happened to those nuclear blueprints we gave to the Iranians?*

The story dates back to the Clinton administration and February 2000, when one frightened Russian scientist walked Vienna's winter streets. Enveloped by the February cold, he dodged the bright red and white Strassenbahn, the quaint electric tramcars that roll in slow circuits around

the city, while he debated whether to go through with his secret mission.

I'm not a spy, he thought to himself. I'm a scientist. What am I doing here?

He fingered the package stuffed in his overcoat, making certain the priceless documents were still there and that this crazy job wasn't just a bad dream.

The Russian pulled the note out of his pocket, looked at the address one more time, and then plowed ahead, confused. He knew nothing about Vienna and quickly found himself lost along the operatic city's broad avenues. Was he looking for something called Rueppgasse, or was it called Heinestrasse? Was he supposed to take Strassenbahn 21? He rode two full circuits on the S-Bahn 21 train, searching in vain for the right stop. Should he switch to the U-Bahn, Vienna's subway? The Permanent Mission of the Islamic Republic of Iran to the International Atomic Energy Agency (IAEA) wasn't the easiest office in Vienna to find.

They could have at least given me good directions.

As he stumbled along into Vienna's north end, in the unglamorous neighborhood surrounding the Praterstern U-Bahn station, the same question pounded in his brain again and again, but he couldn't find an answer.

What was the CIA thinking?

The Russian had good reason to be afraid. He was walking around Vienna with blueprints for a nuclear bomb.

To be precise, he was carrying technical designs for a TBA 480 high-voltage block, otherwise known as a "firing set," for a Russian-

designed nuclear weapon. He held in his hands knowledge needed to create a perfect implosion that could trigger a nuclear chain reaction inside a small spherical core. It was one of the greatest engineering secrets in the world, providing the solution to one of a handful of problems that separated nuclear powers such as the United States and Russia from the rogue countries like Iran that were desperate to join the nuclear club but had so far fallen short.

He still couldn't believe the orders he had received from CIA headquarters. The CIA had given him the nuclear blueprints and then sent him to Vienna to sell them—or simply give them—to the Iranian representatives to the IAEA. With the Russian doing Langley's bidding, the CIA appeared to be about to help Iran leapfrog one of the last remaining engineering hurdles blocking its path to a nuclear weapon. The dangerous irony was not lost on the Russian—the IAEA was an international organization created to restrict the spread of nuclear technology. The IAEA's Vienna headquarters, inside the United Nation's sprawling concrete compound, a jumble of geometric-shaped buildings assembled like a Christmas pile of children's toys along the Danube River just outside the city center, was the leading forum for international debate over the proliferation of nuclear weapons technology. It was the place where the United States came to level charges against rogue nations such as Iran and North Korea over their clandestine nuclear programs. IAEA experts traveled the world to try to police the use of nuclear power, to make certain that peaceful energy-generation programs weren't providing cover for the clandestine development of nuclear weapons. In 2005, the IAEA and its chief,

Mohamed ElBaradei, would win the Nobel Peace Prize for their counter proliferation efforts.

But in 2000, the CIA was coming to Vienna to stage an operation that could help one of the most dangerous regimes in the world obtain a nuclear weapon.

The Russian stood out like a poor eastern cousin on Vienna's jeweled cityscape.

He was a nuclear engineer who had defected to the United States years earlier and quietly settled in America. He went through the CIA's defector resettlement program and endured long debriefings in which CIA experts and scientists from the national laboratories tried to drain him of everything he knew about the status of Russia's nuclear weapons program. Like many other Russian defectors before him, his tiresome complaints about money and status had gained him a reputation within the CIA of being difficult to manage. But he was too valuable for the CIA to toss away.

One secret CIA report said that the Russian "was a known handling problem due to his demanding and overbearing nature." Yet the same report stated that he was also a "sensitive asset" who could be used in a "high-priority covert-action operation."

So despite their disputes, the CIA had arranged for the Russian to become an American citizen and had kept him on the payroll, to the tune of $5,000 a month. It really did seem like easy money, with few strings attached. Life was good. He was happy to be on the CIA gravy train.

Until now. The CIA was placing him on the front lines of a plan that seemed to be completely at odds with the interests of the United States, and it had taken a lot of persuading by his CIA

case officer to convince him to go through with what appeared to be a rogue operation.

The case officer worked hard to convince him—even though the officer had doubts about the plan as well. As he was sweet-talking the Russian into flying to Vienna, the case officer wondered whether he was being set up by CIA management, in some dark political or bureaucratic game that he didn't understand. Was he involved in an illegal covert action? Should he expect to be hauled before a congressional committee and grilled because he was the officer who helped give nuclear blueprints to Iran? The code name for this operation was MERLIN; to the officer, that seemed like a wry tip-off that nothing about this program was what it appeared to be. He did his best to hide his concerns from his Russian agent.

The Russian's assignment from the CIA was to pose as an unemployed and greedy scientist who was willing to sell his soul—and the secrets of the atomic bomb—to the highest bidder. By hook or by crook, the CIA told him, he was to get the nuclear blueprints to the Iranians. They would quickly recognize their value and rush them back to their superiors in Tehran.

The plan had been laid out for the defector during a CIA financed trip to San Francisco, where he had meetings with CIA officers and nuclear experts mixed in with leisurely wine-tasting trips to Sonoma Country. In a luxurious San Francisco hotel room, a senior CIA official involved in the operation walked the Russian through the details of the plan. He brought in experts from one of the national laboratories to go over the blueprints that he was supposed to give the Iranians.

The senior CIA officer could see that the

Russian was nervous, and so he tried to downplay the significance of what they were asking him to do. He told the Russian that the CIA was mounting the operation simply to find out where the Iranians are with their nuclear program. This was just an intelligence-gathering effort, the CIA officer said, not an illegal attempt to give Iran the bomb. He suggested that the Iranians already had the technology he was going to hand over to them. It was all a game. Nothing too serious.

The Russian reluctantly agreed, but he was still clearly suspicious of the CIA's motives.

He was afraid because he fully understood the value of the information he was supposed to pass to the Iranians. He certainly understood it better than did his CIA handlers. Before he defected, he had worked as an engineer at Arzamas-16, the original center of the Soviet nuclear weapons program and the Russian equivalent of Los Alamos, the home of the Manhattan Project. Founded in 1946, when Soviet dictator Joseph Stalin was rushing to catch up with the Americans and trying to turn the Soviet Union into a nuclear power, Arzamas-16 had once been so secret that it was known only as the "installation" or the "site." Built on the grounds of a czarist-era monastery, about 400 kilometers from Moscow at the old town of Sarova, the complex's first name was Arzamas-60, since it was 60 kilometers from the town of Arzamas; but the Soviets realized that name was too revealing about its location, so they changed it to Arzamas-16. In 1947, the entire city of Sarov officially disappeared from Russian maps.

Arzamas-16 was where the Soviets built their first atomic and hydrogen bombs, and today, 30,000 people still work at nuclear weapons-related facilities located within a restricted area in

the heavily guarded Arzamas-16 district. It wasn't until 1995 that Russian President Boris Yeltsin changed its name back to Sarov.

After the collapse of the Soviet Union, the United States feared that poverty-stricken scientists from Arzamas-16 and other facilities like it would be tempted to work for Iraq, North Korea or Iran. Weapons proliferation really meant the spread of scientific knowledge and the spread of scientists.

The end of the Cold War meant the end of regular paychecks for Russian nuclear scientists, and there was a real danger that Russian technical expertise would spread like a virus to the totalitarian states of the third world. In the 1990s, in fact, the director of one Russian nuclear institute killed himself, reportedly over the government's failure to meet his payroll. There were Russian press accounts of uranium being stolen from Arzamas-16. What was to stop underpaid Russian scientists from walking off with technical expertise, and perhaps the blueprints and even the fissile material needed to help rogue states build a bomb?

Fortunately, at just the right moment, two centrist American senators, one Democrat and one Republican, saw the danger and came up with one of the most farsighted U.S. foreign relations programs since the Marshall Plan. In 1991, Sam Nunn, a Georgia Democrat and the party's leading voice on national security, and Richard Lugar, a cautious Republican and former mayor of Indianapolis who had turned himself into a foreign affairs specialist in the Senate, crafted legislation that helped prevent a massive drain of nuclear technology out of the former Soviet Union. Known as the Nunn-Lugar Cooperative Threat Reduction Program, the legislation created joint U.S.-Russian

programs to deactivate thousands of nuclear warheads in the former Soviet Union, and helped rid the Ukraine, Kazakhstan, and Belarus of the nuclear weapons they had inherited at the time of the breakup of the Soviet Union.

Equally important was Nunn-Lugar's impact on the lives of Russian scientists. Nunn-Lugar helped more than twenty thousand Russian experts involved in Soviet weapons programs find alternative, and more peaceful, forms of research. Arzamas-16 even forged new, cooperative ties with Los Alamos. By 1993, Los Alamos and Sarov were officially sister cities.

Behind the public face of Nunn-Lugar, the CIA was also doing its part, quietly helping Russian nuclear scientists to defect and resettle in the United States, rather than go to Iran or Iraq, providing them new lives and enough money to keep their talents off the open market. It was this CIA defector program that brought the Russian to the United States.

But now, the CIA was no longer keeping the Russian engineer off the nuclear market, nor was it keeping Russian know-how under wraps. The blueprints the Russian was to hand over to the Iranians were originally from the Arzamas complex, brought to the CIA by another defector.

What better way for the CIA to hide its involvement in this operation than to have a veteran of Arzamas personally hand over the Russian nuclear designs?

His CIA case officer had coached the Russian as best he could on how to make contact with the Iranians. It wasn't easy; you don't just look up the address for the covert Iranian nuclear weapons program in the Yellow Pages. Still, maybe there was a way you could make contact on the Internet.

Maybe it really was as simple as sending out e-mail.

At the case officer's urging, the Russian started sending messages to Iranian scientists, scholars, and even Iranian diplomats stationed at the IAEA in Vienna. In his e-mails, he would explain that he had information of great interest to Iran and that he was seeking a meeting with someone who could hear him out. The messages were designed to be playfully intriguing, but not quite revealing. Just enough to prompt a response.

He also started attending academic conferences in the United States attended by Iranian-American scientists. These conferences sometimes attracted scientists visiting from Iran, and they might be good contacts. The Russian stood out like a sore thumb among the Iranian academics, but that was the point. He wanted people to notice him. He was a nuclear salesman, ready for business.

Of course, it wasn't unusual for Russian and Iranian scientists to mix, and that was another point the CIA was counting on. There was a well-established channel of Russian technical support for Iran's nuclear power generation program. Moscow had an $800 million contract to help Iran build a light water reactor at Bushehr. The United States had publicly complained that Iran was using Bushehr and the country's commercial nuclear program to advance its nuclear weapons development efforts. American officials, in both the Clinton and Bush administrations, consistently asked why Iran needed a nuclear power program when it had so much oil and natural gas; in one State Department statement, Washington noted that Iran annually flares off more natural gas than Bushehr could produce. For at least a decade, a

key sticking point in U.S.-Russian diplomatic relations has been Russia's ties to Iran and Moscow's willingness to view Iran as an eager customer for Russian arms, rather than as a growing strategic threat in the Middle East.

With Tehran serving as a major shopping bazaar for Russia's post-Cold War arms sales, it certainly wasn't unusual to find Russian and Iranian technicians and bureaucrats mingling. The Russian defector could exploit that tendency to make inroads with the Iranians.

As he mingled with the scientists and other academics, the Russian picked up business cards and e-mail addresses. The Russian began to e-mail his new contacts, sending intriguing messages explaining that he wanted to talk with them about his ability to provide materials of interest to Iran. Finally, at one conference, he hit pay dirt when he met a physics professor visiting from Tehran.

After the CIA checked out his background, the agency decided that the contact with the Iranian professor was promising. The CIA hoped the Iranian academic might serve as the Russian's entrée into the secret world of Tehran's nuclear program. At the least, he might be able to put the Russian in contact with the right people in Iran.

The Russian followed up his chance encounter with e-mails to the scientist back at his university in Iran. The Russian explained that he had information that was extremely important, and he wanted to make an offer. After some delays, the Iranian finally responded, with a wary message, asking what he had in mind.

That was enough for the CIA. Now the Russian could tell Iranian officials in Vienna that he had been in touch with a respected scientist in Tehran before he showed up on their doorstep.

The CIA had discovered that a high-ranking Iranian official would be traveling to Vienna and visiting the Iranian mission to the IAEA, and so the agency decided to take the next step and send the Russian to Vienna at the same time. It was hoped that he could make contact with either the Iranian ambassador to the IAEA or the visitor from Tehran.

The CIA sent him to Vienna without any backup. Langley didn't want to risk exposure. The CIA station in Vienna wasn't asked to play any role to support the Russian; this operation was dubbed a "special access program," and its existence was a tightly held secret. Only a handful of CIA officers knew of the existence of MERLIN. Better to let the Russian get lost and fumble his way around town than tell more officers about the operation. Sending him to Vienna without any minders would also convince anyone watching that he was just what he appeared to be—an amateur at this game, freelancing.

The Russian's cover story was that he was the go-between for the other Russian scientist who had brought the nuclear blueprints out of Arzamas. In truth, he had never met the other defector, but that didn't matter. The story would help answer any questions the Iranians might have about how he came to acquire the blueprints, which were not easy to access or remove from Arzamas.

The Russian was also told not to try to hide the fact that he now lived in the United States. His story should be as close to the truth as possible. Just because he was living in America didn't mean he was working for the CIA.

But now that he was in Vienna, he was playing the role of bumbling scientist too well, unable to

find the Iranian mission, uncertain even where to get off the train. "I spent a lot of time to ask people as I could [language problem] and they told me that no streets with this name are around," the Russian later explained to the CIA, in his imperfect English.

Maybe deep down, he didn't want to get off the tram, and didn't want to find the right office. He had to find time to think.

He could not stop thinking about his trip to San Francisco, when he had studied the blueprints the CIA had given him. Within minutes of being handed the designs, he had identified a flaw. "This isn't right," he told the CIA officers gathered around the hotel room. "There is something wrong." His comments prompted stony looks, but no straight answers from the CIA men in the room. No one in the San Francisco meeting seemed surprised by the Russian's assertion that the blueprints didn't look quite right, but no one wanted to enlighten him further on the matter, either.

In fact, the CIA case officer who was the Russian's personal handler had been stunned by the Russian's statement. During a break, he took the senior CIA officer aside. "He wasn't supposed to know that," the CIA case officer told his superior. "He wasn't supposed to find a flaw."

"Don't worry," the senior CIA officer calmly replied. "It doesn't matter."

The CIA case officer couldn't believe the senior CIA officer's answer, but he still managed to keep his fears from the Russian, and he continued to train him for his mission.

After their trip to San Francisco, the case officer handed the Russian a sealed envelope with the

nuclear blueprints inside. The Russian was told not to open the envelope under any circumstances. He was to follow the CIA's instructions to find the Iranians and give them the envelope with the documents inside. Keep it simple, and get out of Vienna safe and alive, the Russian was told. But the defector was more worried than ever about what kind of game the CIA was getting him into. And he had his own ideas about how he might play that game.

In Vienna, the Russian went over his options one more time and made a decision. He unsealed the envelope with the nuclear blueprints and included a personal letter of his own to the Iranians. No matter what the CIA told him, he was going to hedge his bets. There was obviously something wrong with these blueprints—so he decided to mention that fact to the Iranians in his letter. They would certainly find flaws for themselves, and if he didn't tell them first, they would never want to deal with him again. In his badly broken English, the Russian addressed the Iranians as if they were academic colleagues. He later gave a copy of his letter to the CIA.

> *To University:*
> *First, let me introduce myself. I am a person, who worked for many years in atomic industry. Please check out next page for my personal info please.*
>
> *I would like to inform you I have very valuable information about design and production of atomic weapon. At this time I possess a description of one of key elements of modern system, TBA 480 high-voltage automatic block. Described device is known as a fire switch which lets to initiate simultaneously all detonators at a weapon core (spherical charge). I am sure other devices can be available for*

> *your review in the future. I did not contact right people in your country directly because unfortunately I could not find them. Of course, I tried many other ways to attract attention to this info by telling little bit about what I have but it does not work. Whole misunderstanding, and accordingly wasting time and disappointing. So I decided to offer this absolutely real and valuable basic information for free now and you can evaluate that. Also I sent e-mail to inform [the Iranian professor] about this possible event. Please let him know you have this package.*
>
> *What is purpose of my offer?*
>
> *If you try to create a similar device you will need to ask some practical questions. No problem. You will get answers but I expect to be paid for that. Let's talk about details later when I see a real interest in it.*
>
> *Now just take your time for professional study of enclosed documentation. My contact info on next page.*

The Russian was thus warning the Iranians as carefully as he could that there was a flaw somewhere in the nuclear blueprints, and he could help them find it. At the same time, he was still going through with the CIA's operation in the only way he thought would work.

The Russian slid his letter in with the blueprints and resealed the envelope.

After his day of floundering around Vienna, the Russian returned to his hotel, near the city's large Stadtpark. He did a computer search and found the right street address for the Iranian mission. His courage bolstered, he decided he would go back and finish the job in the morning.

By 8:00 A.M., he found 19 Heinstrasse, a five-story office and apartment building with a flat, pale green and beige façade in a quiet, slightly

down-at-the-heels neighborhood in Vienna's north end. The street was crowded with tobacco shops, bars, and cafes, a tanning salon, even a strip club. Now the Russian realized why he had missed it; there was no sign announcing the Iranian mission. The only proof that this was the right place was a mail directory, with three rows of tenants' names on the wall beside the building's front door. Amid the list of Austrian tenants, there was one simple line: "PM/Iran." The Iranians clearly didn't want publicity.

The Russian's fevered rush of adrenaline as he approached the building suddenly cooled when he realized the Iranian office was closed for the day for some unexplained reason. Once again, he spent the day walking Vienna, and once again mulling over the CIA's orders.

He returned to his hotel again that night, still clutching the undelivered documents.

He returned one last time to the Iranian mission early the next morning and stood for a few agonizing minutes on the empty sidewalk outside.

He came back that afternoon, and an Austrian postman finally helped him make up his mind. As the Russian stood silently by, the postman opened the building door, dropped off the mail, and walked quietly away to complete his neighborhood rounds. His courage finally reinforced, the Russian decided to follow suit; he now realized that he could leave his package without actually having to talk to anyone. He slipped through the front door, and hurriedly shoved his envelope through the inner door slot at the Iranian office.

"At 1:30 P.M. I got a chance to be inside of the gate," at the entrance to the Iranian mission, the Russian later explained in writing to the CIA. "They have two mailboxes: one after gate on left

side for post mail (I could not open it without key) and other one nearby an internal door to the mission. Last one has easy access to insert mail and also it was locked. I passed internal door and reached the mission entry door and put a package inside their mailbox on left side of their door. I cover it old newspaper but if somebody wants that is possible to remove this package from mailbox, in my opinion. I had no choice."

The Russian fled the mission without being seen. He was deeply relieved that he had finally made the handoff without ever having to come face to face with a real live Iranian. He flew back to the United States without being detected by either Austrian security or, more important, by Iranian intelligence.

From its headquarters at Fort Meade, Maryland, the National Security Agency monitors global airline reservation databases, constantly checking on the travel arrangements of foreign officials and others targeted by American intelligence around the world. In February 2000, the NSA was also eavesdropping on the telephone lines of the Iranian mission in Vienna. It could intercept communications between the mission and Tehran. In addition, the NSA had broken the codes of the Ministry of Intelligence and Security, Iran's foreign intelligence service. The Americans had several different ways to track the movements of Iranian officials in and out of Vienna.

Just days after the Russian dropped off his package at the Iranian mission, the NSA reported that an Iranian official in Vienna abruptly changed his schedule and suddenly made airline reservations and flew home to Iran. The odds were

that the nuclear blueprints were now in Tehran.

The Russian scientist's fears about the operation were well founded. He was the front man for what may have been one of the most reckless operations in the modern history of the CIA, one that may have helped put nuclear weapons in the hands of a charter member of what President George W. Bush has called the "axis of evil."

Operation MERLIN has been one of the most closely guarded secrets in the Clinton and Bush administrations. And it may not be over. Some officials have suggested that it might be repeated against other countries.

• • •

MERLIN was born out of frustration. For more than a decade, one post-Cold War CIA director after another went before Congress and the nation to vow that America's spies were now focused on new, gathering threats posed by a set of "hard targets." Terrorists. Rogue nations. Weapons of mass destruction. Each new director promised that the CIA was changing rapidly to adapt to this complex new world in which the Soviet Union was no longer the main enemy. But the CIA has failed in its new mission and has never found out enough about any of these new targets. Iran's nuclear program remains one of the most impenetrable of them all.

Even before the disastrous collapse of its Iranian spy network in 2004, the CIA was able to pick up only fragmentary information about Iran's nuclear program. Officials who are critical of the CIA's efforts say that the agency's counterproliferation programs have relied far too heavily on intelligence collected from technical methods—spy satellites, eavesdropping, and code breaking, as

well as "measurement and signature" intelligence, which includes the collection and analysis of data from hidden equipment like remote ground sensors. Lacking definitive answers about Iran's atomic program, the CIA has instead offered a series of safe and cautious estimates. Over the years, the agency has repeatedly stated that Iran was within five to ten years of becoming a nuclear power. Those five to ten years keep stretching and expanding.

The Counterproliferation Division within the CIA's Directorate of Operations, the agency's clandestine espionage arm, came up with MERLIN and other clandestine operations as creative, if unorthodox, ways to try to penetrate Tehran's nuclear development program. In some cases, the CIA has worked jointly with Israeli intelligence on such operations, according to people familiar with the convert program. None are known to have worked.

One bizarre plan called for the sabotage of Iran's electrical grid in areas of the country near its secret nuclear installations. The CIA conducted tests of the electrical sabotage equipment at the U.S. government's Nevada nuclear test range. The plan called for an electromagnetic pulse device that could be smuggled into Iran and then hidden next to large power transmission lines carrying electricity into the country's nuclear facilities. The CIA would later remotely detonate the device, which would send a massive electrical pulse down the power lines, shorting out the computer systems inside the Iranian nuclear complex.

The CIA worked with Mossad, Israel's spy service, on the plan, and Mossad agents volunteered to smuggle the devices into Iran. The Israelis told the CIA that they had Iranian agents who would

carry out the plan on their behalf.

But there were major technical problems that made the plan unworkable. The electromagnetic devices were so large that they had to be carried in a large truck, and then parked next to the power lines; the CIA realized that was impossible.

Then there was MERLIN. On paper, MERLIN was supposed to stunt the development of Tehran's nuclear program by sending Iran's weapons experts down the wrong technical path. The CIA believed that once the Iranians had the blueprints and studied them, they would believe the designs were usable and so would start to build an atom bomb based on the flawed designs. But Tehran would get a big surprise when its scientists tried to explode their new bomb. Instead of a mushroom cloud, the Iranian scientists would witness a disappointing fizzle. The Iranian nuclear program would suffer a humiliating setback, and Tehran's goal of becoming a nuclear power would have been delayed by several years. In the meantime, the CIA, by watching Iran's reaction to the blueprints, would have gained a wealth of information about the status of Iran's weapons program, which has been shrouded in secrecy.

It's not clear who originally came up with the idea, but the plan was first approved by President Bill Clinton. After the Russian scientist's fateful trip to Vienna, however, the MERLIN operation was endorsed by the Bush administration, possibly with an eye toward repeating it against North Korea or other dangerous states.

The CIA had obtained genuine Russian nuclear weapons blueprints from a Russian scientist and had forwarded them to one of the national laboratories—almost certainly Sandia National Laboratories in New Mexico—to be scrutinized by

American nuclear experts. Sandia, in Albuquerque, is one of the jewels in the crown of the American nuclear establishment. Its origins were in the so-called Z Division of the Los Alamos National Laboratory during the Manhattan Project. Z Division conducted the engineering and design work for the nonnuclear portions of the first atomic bomb, including the weapons assembly. Sandia thus houses the U.S. government's institutional memory for how a nuclear bomb is put together.

Scientists at the national laboratory were asked to implant flaws into the Russian blueprints. The flaws were supposed to be so clever and well hidden that no one could detect their presence.

Next, the agency needed to figure out how to get the designs to the Iranians without Tehran realizing that the blueprints were coming from the CIA.

That job was assigned to the CIA's Counter-proliferation Division. The CPD chose the Russian defector.

That was the idea behind MERLIN, anyway. But like so many of the CIA's other recent operations, this one didn't go according to plan. First, of course, the Russian spotted flaws in the blueprints. Second, the CIA never maintained adequate controls over the nuclear blueprints—or over the Russian. The Russian was supposed to believe that he was handing over genuine nuclear designs. Instead, his cover letter may have convinced the Iranians to be wary of the blueprints. Furthermore, the CIA also gave the blueprints to the Iranians without any certain way of monitoring their use by Iranian scientists. The CIA was flying blind—dangerously so. In effect, the CIA asked the Russian to throw the blueprints over the

transom, and then the agency just hoped for the best.

Several former CIA officials say that the theory behind MERLIN—handing over tainted weapons designs to confound one of America's adversaries—is a trick that has been used many times in past operations, stretching back to the Cold War. But in previous cases, such Trojan horse operations involved conventional weapons; none of the former officials had ever heard of the CIA attempting to conduct this kind of high-risk operation with designs for a nuclear bomb. The former officials also said these kind of programs must be closely monitored by senior CIA managers in order to control the flow of information to the adversary. If mishandled, they could easily help an enemy accelerate its weapons development.

That may be what happened with MERLIN.

The CIA case officer was deeply concerned by the ease with which the Russian had discovered flaws in the designs. He knew that that meant the Iranians could, too, and that they could then fix and make use of the repaired blueprints to help them build a bomb. If so, the CIA would have assisted the Iranians in joining the nuclear club. He grew so concerned about whether he had aided the Iranian nuclear program that he went to the Senate Select Committee on Intelligence to tell congressional investigators about the problems with the program. But no action was ever taken.

For his part, the Russian never understood why the CIA wanted him to give the Iranians blueprints that contained such obvious mistakes. It made no sense. And so he wrote the Iranians his personal letter.

It is not known whether the Russian ever com-

municated again with the Iranians, or whether they tried to contact him. But after receiving his letter warning them that they would need further help to make the blueprints useful, it is entirely possible that the Iranians showed the plans to other experts familiar with Russian nuclear designs and thereby identified the defects.

Iran has spent nearly twenty years trying to develop nuclear weapons, and in the process has created a strong base of sophisticated scientists knowledgeable enough to spot flaws in nuclear blueprints. What's more, the Iranians have received extensive support for years from Russian and Chinese nuclear experts who could help the Iranians review the material. In addition, Tehran also obtained nuclear blueprints from the black-market network of Pakistani scientist A. Q. Khan, and so already had workable blueprints against which to compare the designs obtained from the CIA.

Even if the Iranians were interested in using the blueprints provided by the mysterious Russian, they would certainly examine and test the data in the documents before ever actually trying to build a bomb. Nuclear experts say that they would thus be able to extract valuable information from the blueprints while ignoring the flaws.

"If a country of seventy million inhabitants [Iran], with quite a good scientific and technical community, got [nuclear documents with supposedly hidden flaws], they might learn something," warned a nuclear weapons expert with the IAEA. "If [the flaw] is bad enough, they will find it quite quickly. That would be my fear."

MERLIN has been conducted in the darkest corner of the American national security establishment at one of the most significant moments in the long

and bitter history of U.S.-Iran relations. Iran has bedeviled American presidents since Jimmy Carter and the embassy hostage crisis, and neither Bill Clinton nor George W. Bush have based their policies on an adequate understanding of the volatile political dynamics under way in Iran.

Throughout the late 1990s, the Clinton administration was convinced that political reformers and youthful moderates were ascendant in Iran, and so the White House twisted itself in knots trying to open back-channel talks with Tehran. But in order to reach out to the Iranians, Clinton had to downplay evidence that Tehran was still the world's leading state sponsor of terrorism, that Iran was still an Islamic republic whose security apparatus was controlled by powerful, conservative mullahs who wanted nothing to do with the United States, and that the Iranian regime was eager to become a nuclear power.

Critics say that Clinton and his lieutenants repeatedly tried to ignore intelligence indicating that Iran was linked to the deadly Khobar Towers bombing in Dhahran, Saudi Arabia in June 1996, which killed nineteen American military personnel. Saudi Hezbollah, an offshoot of the Lebanese-based extremist group backed by Iran, carried out the attack, and it did so with training and logistical support from Iran.

Senior CIA officials played an important role in the Clinton administration's efforts to downplay evidence of Iran's terrorist ties in the late 1990s, according to several CIA sources. In 1996 or 1997, a well-placed officer with the Ministry of Intelligence and Security, Iran's foreign intelligence service, was cooperating with the CIA. In meetings in Europe, just months after the Khobar attack occurred, the Iranian source provided the

CIA with evidence that Iran was behind the bombing, according to CIA officials. The Iranian told the CIA he had been meeting with several senior Iranian officials after the bombing, and they were celebrating their successful operation. He also told his CIA contact that sometime after the Khobar bombing, an American government aircraft had secretly landed in Tehran, carrying a senior American official. Several top Iranian officials went out to the airport to meet the American, the source said.

To the officers working on the CIA's Iran Task Force handling the reporting from this Iranian source, it appeared that the Clinton administration was cutting a secret deal with Tehran just after nineteen Americans had been murdered by the same regime. Senior CIA officials responded to this explosive intelligence by suppressing it, according to several CIA sources. According to one CIA source, reports from the Iranian source were delivered to high-ranking CIA officials, but none of the reports was disseminated throughout the intelligence community, and no record of the reports was distributed inside the CIA. It is not known whether President Clinton or other top White House officials were ever told about the reports from the Iranian source. Certainly, then-FBI Director Louis J. Freeh believed that President Clinton and his lieutenants were downplaying intelligence concerning Iran's involvement in Khobar Towers. As he has recently detailed in his memoirs, his anger over the way the Khobar case was handled by the Clinton administration was at the heart of his long-running dispute with the White House. It is not known whether Freeh was ever told about the reports from the source who

detailed Iran's role, however.

It wasn't until June 2001, five years after the bombing, and after Clinton had left office, that the Justice Department issued indictments of fourteen people in the Khobar bombing that alleged that unidentified Iranian officials were behind the terrorist attack.

The indictment notwithstanding, in its first few months, the new Bush team largely ignored Iran while obsessing over Iraq. It was only after 9/11 that senior Bush administration officials began to pay attention to low-level, back-channel talks with Iran that had been under way in Geneva since the Clinton days.

Through those Geneva meetings, the Bush team discovered that Iran was strongly supportive of the U.S.-led invasion of Afghanistan because of Tehran's deep hatred for the ruling Taliban, Sunni Muslims heavily dependent on Pakistani support to retain power in Kabul. Shia-dominated Iran long feared the Taliban's radical influence on its own Sunni minority. Tehran also wanted to retain its influence over western Afghanistan, particularly the trading center of Herat.

In 1998, Iran and the Taliban had come close to a shooting war. After nine Iranian diplomats were murdered in Afghanistan and thousands of Shiites were killed following the Taliban seizure of the northern city of Mazar-i-Sharif, Iran massed troops on the border for a military "exercise," and Pakistan had to step in to calm things down. At the time, Iran's leader, Ayatollah Ali Khamenei, made it clear that Iran's patience with the Taliban was wearing thin. "I have so far prevented the lighting of a fire in this region which would be hard to extinguish, but all should know that a very

great and wide danger is quite near," he declared, prompting a response from the Taliban that the cleric's statements reflected his "mental ineptitude."

Iran had also supported the opposition Northern Alliance against the Taliban, and after 9/11, Iranian officials at the Geneva meetings were actually impatient with the sluggish start to American military operations in Afghanistan. Publicly, the Iranians said little about the war and provided little overt support to the Americans, apart from promising to allow rescue operations for any downed pilots over its territory. But in Geneva, Iranian officials were eager to help and even brought out maps to try to tell the United States the best targets to bomb.

Iran also held some al Qaeda operatives who tried to flee Afghanistan into Iran. In early 2002, Iran detained about 290 al Qaeda fighters who had been picked up as they crossed the border. They weren't willing to turn them over directly to the United States, but they eventually did hand over some to third countries, such as Egypt, Saudi Arabia, and Pakistan, which were working with the United States.

But by that time, the Bush administration's attitude toward Iran was changing, hardening. Iran was now a member of the "axis of evil." The Iranians responded to Bush's axis of evil speech with pique; Tehran released Gulbuddin Hekmatyar, a ruthless Afghan warlord who had been on the CIA payroll during the 1980s but who was now opposed to the American occupation of Afghanistan. Soon after his release, Hekmatyar's Hezb-i-Islami forces were battling U.S. troops in Afghanistan, and in May 2002 the CIA launched a missile from

an armed Predator drone in a vain effort to try to kill him. The 2003 U.S. invasion of Iraq, on Iran's other border, was met with deep ambivalence in Tehran. The Iranians were happy that the United States was getting rid of their old enemy Saddam Hussein, opening the door for Iraq's majority Shia population to gain power, with, of course, the guidance of Iran. But two consecutive wars in two neighboring countries, first in Afghanistan and now Iraq, had placed thousands of American troops on Iran's exposed flanks, and so it was not hard to see why the Iranians might be getting a little paranoid about the Bush administration's intentions.

In May 2003, one month after the fall of Baghdad, the Iranians approached the United States once again, offering to turn over top al Qaeda lieutenants, including both Saif al-Adel, al Qaeda's chief of operations, and Saad bin Laden, Osama bin Laden's son. This time, the Iranians wanted a trade; in return for the al Qaeda leaders, Tehran wanted the Americans to hand over members of the Mujahedin-e Khalq (MEK), an Iranian exile terrorist organization that had been supported by Saddam Hussein and based in Iraq since 1986. After the fall of Baghdad, the U.S. military had disarmed the MEK's thousands of fighters and taken custody of the group's heavy military equipment, more than two thousand tanks, artillery pieces, armored personnel carriers, and other vehicles provided by Saddam Hussein. But the Bush administration was divided over what to do with the group next.

In a principals committee meeting at the White House in May, the Iranian prisoner exchange proposal was discussed by President Bush and his top advisors. According to people who were in the meeting, President Bush said that he

thought it sounded like a good deal, since the MEK was a terrorist organization. After all, the MEK had been a puppet of Saddam Hussein, conducting assassinations and sabotage operations inside Iran from its sanctuary in Iraq. The MEK was officially listed as a foreign terrorist group by the State Department; back in the 1970s, the group had killed several Americans living in Iran, including CIA officers based there during the shah's regime.

Before any exchange could be conducted, the United States would need solid assurances from the Iranians that the MEK members would not be executed or tortured; in the end, that obstacle may have made any such prisoner trade impossible.

But the idea never got that far. Hard-liners at the Pentagon dug in and ultimately torpedoed any talk of an agreement with the Iranians. Defense Secretary Donald Rumsfeld and Deputy Secretary Paul Wolfowitz seemed to think that the MEK could be useful in a future war with Iran, and so they appeared eager to keep the group in place inside Iraq. CIA and State Department officials were stunned that the Pentagon leadership would so openly flaunt their willingness to cut a deal with the MEK; they were even more surprised that Rumsfeld and Wolfowitz paid no price for their actions. At the White House, officials soon learned that the Pentagon was dreaming up excuses to avoid following through on any further actions to rein in the MEK. One argument was that the military was too busy, with too many other responsibilities in Iraq, to devote the manpower to dismantling the MEK. The Pentagon basically told the White House that "we will get around to it when we get around to it," noted one former Bush administration official. "And they got away with it."

The bottom line was that the United States lost a potential opportunity to get its hands on several top al Qaeda operatives, including Osama bin Laden's son. It became clear to frustrated aides that National Security Advisor Condoleezza Rice was not only failing to curb the Pentagon, but was also allowing decision making on Iran policy to drift.

The MEK's political arm, the National Council of Resistance of Iran, understands how to gain attention in the West, particularly after watching the prewar success of the Iraqi National Congress, the Iraqi exile group headed by Ahmed Chalabi. Like Chalabi's group, the Iranian exiles have used the American press to issue claims about Iran's nuclear weapons and ballistic missile programs in order to build the case for a tougher U.S. policy toward Tehran.

While the war in Iraq has overshadowed the issue and forced the Bush administration to move slowly, some administration officials have been advocating a more forceful policy of pressuring the Iranians to disarm. The odds of a confrontation between the United States and Iran seemed to increase in the fall and winter of 2004, when the IAEA reported that Iran was not fully cooperating with international inspectors, and there were new reports that Iran was going ahead with plans to produce enriched uranium despite past assurances to the IAEA that it would freeze such activity. By 2005, Iran's apparent intentions to continue to develop its nuclear program was inevitably leading to a full-fledged diplomatic crisis.