WILLIAM WELCH'S GIMMICK AND THE HARASSMENT OF JAMES RISEN

As Josh Gerstein reports, Leonie Brinkema has unsealed her November 2010 ruling quashing the government's subpoena of James Risen to testify before the grand jury. Gerstain describes several interesting details revealed in the ruling—including that the government withheld information, including details surrounding the 2005 testimony of, apparently, a Senate staffer. Go check out those details.

There are a couple of things I wanted to add to Gerstein's analysis, though.

First, when the subpoena was first announced, I suggested that it appeared that the government's inclusion of ticky tack charges like mail fraud seemed like an effort to invent a reason to require Risen's testimony.

> It appears likely they planned to [subpoena Risen again] all along and crafted the charges against Sterling accordingly. For example, they claim they need Risen to testify, in part, to authenticate his book and the locale where alleged leaks took place.
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> > Risen can directly identify Sterling as the individual who illegally transmitted to him national defense information concerning Classified Program No. 1 and Human Asset No. 1. Because he is an eyewitness, his testimony will simplify the trial and clarify matters for the jury. Additionally, as set forth below, Risen can establish venue for certain of the charged counts; can authenticate his

> > book and lay the necessary foundation to admit the defendant's statements in the book; and can identify the defendant as someone with whom he had a preexisting source relationship that pre-dated the charged disclosures. His testimony therefore will allow for an efficient presentation of the Government's case.
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> Locale issues stem from mail fraud charges that appeared ticky tack charges up to this point. But the government is now arguing that that information—as distinct from whether Sterling served as a source for the information at issue—is critical to these ticky tack charges. Which, it seems they hope, would get them beyond any balancing test on whether Risen's testimony is crucial for the evidence at question.

As it turns out, Brinkema's opinion makes it clear that the biggest window she left the government to call Risen at trial was authentication.

> 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.

But given that she has rejected the government's venue articles, it appears the mail fraud charges are a cheap attempt to enlarge the possible window of necessity of calling Risen for authentication.

In other words, it appears likely that Welch is just using a gimmick to try to force Risen to testify.

Which brings us to Risen's claim the government is harassing him. Of note, Brinkema dismisses the claim that a new Attorney General couldn't harass Risen, because some of the other lawyers on the case might be Bush dead-enders.

> 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.

She also notes that requesting all his book proposals supports a harassment charge; I would suggest it does so more so when you consider the possibility they were harassing Risen for the warrantless wiretap story that would also have been in the book proposal. But Brinkema doesn't consider the way the Obama Administration has made some crazy ass arguments to defend Bush against illegal wiretap charges, which shows Obama's DOJ is protecting the program itself as fiercely as Cheney did. In addition, she doesn't consider Welch's history of being a sloppy, overly aggressive prosecutor (though her disapproval of the broad scope of the Welch subpoena suggests she'd be open to such an argument).

But given my suspicion that a community of interest subpoena in this case might have served as a fishing expedition for the government's investigation in the warrantless wiretap case, I'm particularly interested in the date the grand jury was convened in this case.

> A grand jury sitting in the Eastern District of Virginia began investigating the disclosures about the [MERLIN] operation in
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> or about March 2006.

That’s not surprising, mind you. But it does date when a grand jury subpoena asking for a community of record might have been issued. And it does suggest that this investigation started at the same time as the government was going apeshit over their exposure on the illegal wiretap front.