JUDGE BRINKEMA CITES ESPIONAGE ACT TO PROTECT REPORTER'S PRIVILEGE

Charlie Savage tells the headline story from Leonie Brinkema's opinion on whether or not James Risen must testify in Jeffrey Sterling's leak trial.

> "A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook," wrote the judge, Leonie Brinkema of the United State District Court in Alexandria, Va.

But I'm just as interested in a few other things she says. First there's the way she dismisses the government's claim that two of the people who testified to the Grand Jury—Jeffrey Sterling's ex-girlfriend and a former CIA officer with knowledge of the MERLYN operation—would be unable to testify at he trial.

The government had argued that the girlfriend was protected by spousal privilege and that the former CIA officer would be hearsay.

> Separate and apart from Risen's concession regarding the admissibility of his grand jury affidavit at trial, see Mot. p. 45, other evidence relied upon by the Court in its Memorandum Opinion similarly would be inadmissible at trial. For example, the grand jury testimony of the witness cited by the Court at page 7 of its Memorandum Opinion would be inadmissible under Rules 801(c), 802 and 803 of the Federal Rules of Evidence and United States v. Acker, 52 F.3d 509, 514-515 (4th Cir. 1995)(availability of spousal privileges to testifying and non-testifying

> spouses). The grand jury testimony of the witness cited by the Court at pages 7, 9, 10, 20, and 34 of its Memorandum Opinion — testimony that this Court deemed one of the key facts in its conclusion — is inadmissible hearsay on its face absent some exception; yet Risen treats the admissibility of the testimony of both witnesses as a foregone conclusion.

But as Risen's lawyer Joel Kurtzberg pointed out during the hearing on Risen's subpoena, she's not his wife!

> They actually cite in their papers as to the testimony of Mr. Sterling's ex-girlfriend, suggest that it wouldn't be admissible because they cite to a Fourth Circuit case about the marital privilege.
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> And in fact, if you look at the case they cite, the case holds the exact opposite. It holds that if you are not married, even if you have been living together I believe for 26 years in that case, the marital privilege doesn't apply.

Here's how Brinkema dismisses this William Welch gimmick.

> Although the government argues that the spousal privilege would prevent this witness from testifying, nothing in the record indicates thta Sterling and the witness are married now or were married during the time of Sterling's alleged statements.

More interesting still is the way Brinkema dismisses the government's claim that the CIA officer's testimony would be inadmissible hearsay.

Brinkema starts by citing Federal Rules of Evidence describing the exception for 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.

After noting that Risen's testimony would be unavailable if she found that reporter's privilege prevented his testimony or if he refused to testify, she then invokes the Espionage Act.

> 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
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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.

Brinkema uses the overzealous interpretation of the Espionage Act the government itself has been floating lately as a way to force the government to have the former CIA officer testify, which I suspect they'd much rather not do.

And note that footnote about immunity. I'm not sure whether we knew the government had discussed offering Risen immunity or not, but particularly given claims they're pursuing his testimony so aggressively as a way to jail him for protecting his sources, it is an interesting revelation.

Finally, there's one more passage I find telling. In the middle of a passage discussing whether the government has access to the information Risen would testify to via other means, she notes,

> 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.

In a case in which the government has pointed to **records** of emails and calls, Brinkema notes, the government has never said whether or not it has the content of those emails and calls. Given that this statement is a non sequitur (it appears amid a discussion of circumstantial evidence), and given that Brinkema knows the government may have improperly accessed Risen's phone records in the warrantless wiretap case, I find her comment mighty suggestive.