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

**Alexandria Division**

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

**DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION TO ADMIT THE TESTIMONY OF JAMES RISEN**

**COMES NOW** Jeffrey A. Sterling, by counsel, and for his Opposition to the Government's Motion to Admit the Testimony of James Risen, states as follows:

1. Introduction and Standard.

A motion in limine is a pre-trial mechanism by which a Court can give the parties advance notice of the evidence upon which they may or may not rely to prove their theories of the case at trial. To obtain the exclusion of evidence under such a motion, a party must prove that the evidence is clearly inadmissible on all potential grounds. Ohio Oil Gathering Corporation III v. Welding, Inc., 2010 LEXIS 136428 (S.D. Ohio, December 9, 2010) (citing Luce v. United States, 469 U.S. 38, 41, n. 4 (1984)); see also Rolls Royce, PLC v. United Technologies Corporation, 2011 U.S. Dist. LEXIS 48984 (E.D. Va., May 4, 2011, Judge Brinkema) (citing Luce) ("Fed. R. Evid. 103 (c) allows a court 'to the extent practicable...to prevent inadmissible evidence from being suggested to the jury by any means.'") at 48984, citing Luce. Rulings on a motion in limine are "no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the district court, and the

district court may change its ruling where sufficient facts have developed to warrant a change." United States v. Yannott, 42 F. 3d 999, 1007 (6th Cir. 1994).

Under these standards, this Court cannot grant or deny this motion as there is no credible proffer of what Mr. Risen's testimony may be so there is no basis to admit or exclude any proposed testimony. This is especially true given the fact that Mr. Risen has stated repeatedly that he will not testify in the first place. As such, this Court should simply defer any ruling on this motion as premature.

2. The Court Should Defer Ruling on This Motion.

In this case, the Government has requested that the Clerk issue 50 blank subpoenas for trial witnesses but seeks a ruling in limine as to just one of them. Strangely, that treatment is saved for one witness who has never spoken to the Government about this matter. Though undoubtedly a potential witness in this case, Mr. Risen has not, as far as the defense knows, ever met with the prosecutors in this case or provided them with any indication of what he would say if called as a witness. For example, the Government does not state that Mr. Risen testified before the grand jury because he did not.[1] Though the Government proffers to the Court that Mr. Risen's testimony would "directly incriminate Sterling" (Govt's Mot. In Lim. p. 5.) that is just an aspiration and not a legitimate proffer. Moreover, Mr. Risen has publicly stated that he will not testify in this case and that he would never identify the source for any story he has ever published. Indeed, on May 24,

[1] In its Motion in Limine, the Government repeatedly argues that it needs Mr. Risen's testimony at trial, not just to prevail on the merits, but even to prove venue. Yet the Government indicted Mr. Sterling without any testimony from Mr. Risen and, given Mr. Risen's repeated refusals to testify, it cannot show any good faith belief that it would obtain his "critical" testimony at trial even if subpoenaed. Therefore, it appears that the Government violated its own policies in bringing this indictment given the fact that it could not have believed that there was a probability that it could prove its case at trial.

2011, after the government served a trial subpoena on Mr. Risen, he told the Washington Post that he would fight the subpoena. "I will always protect my sources," he said, "and I think this is a fight about the First Amendment and the freedom of the press." "*Reporter Subpoenaed in Leaks Case*," Ellen Nakashima, Washington Post, May 24, 2011 (copy attached).

Thus, in considering this motion, the Court should presume that the Government has no legal or factual basis to state that it has any idea what information Mr. Risen would actually provide in this case. Instead, the Court should take Mr. Risen at his word, which word has been repeated over and over again, that he will not testify. While such a decision may have dramatic legal ramifications for Mr. Risen, speculation as to potential testimony is not a sufficient proffer as required to support a motion in limine.[2] Because the Government is merely speculating as to the substance of Mr. Risen's testimony a motion in limine should not even be entertained.

Finally, the defense objects to the Government's inclusion of several areas of the ongoing defense investigation of this case in this public filing. On page 19 of the Motion, the Government seeks to describe a letter that was found on Mr. Sterling's computer that was drafted in 2004. If the Government wants the Court to see that letter, then it should be produced and made public and not subject to the Government's spin about why such an exculpatory letter was written almost 7 years ago. At the same time, the defense has been told that the same letter is classified and that all indicia of the same letter has to be maintained in the SCIF. Recently, counsel was instructed to place all copies of the letter in the SCIF and to return CDs that contained the letter. While the defense

[2] The defense did not find any cases where the Government filed a motion in limine to obtain a pretrial order **admitting** any testimony. Rather, by filing this motion, it appears that the Government is seeking to create a basis for appellate jurisdiction of this issue where no appeal would otherwise be allowed. United States v. Moussaoui, 333 F. 3d 509 (4th Cir. 2003) ; see also 18 U.S.C. § 3731,

complied with these instructions, it was troubling and inconsistent to then read a public pleading containing the same information.

Also, the Government makes public disclosure of the nature of discovery requests that the defense was compelled to make in the SCIF because those matters were also allegedly classified. The Government states that "consistent with Sterling's representations in the letter - and as evidenced through the discovery process and the defendant's use of trial subpoenas[3] - Sterling's counsel have focused their efforts on identifying other individuals who could have communicated the national defense information to Risen. It is therefore highly likely that, at trial, Sterling will claim that he was not Risen's source for national defense information." (Govt's Mot. In Lim. p. 19.) Each of these referenced discovery requests was made pursuant to CIPA and were not public knowledge until this filing was made.

Regardless, the statements set forth in this paragraph, by themselves, demonstrate why this motion should not even be considered. Mr. Sterling has not testified in this case and he is plainly not required to do so. If the defense calls a witness who received "national defense information" from Mr. Risen, this evidentiary issue may arise but only at that time. But here, and at this early juncture, the Government discloses allegedly "classified" discovery requests that the defense has been required to file under the strictures of CIPA, and does so in an effort to bolster the request that the Court accept and admit the hypothetical testimony of James Risen. In doing so, it doubles down by speculating what it thinks Mr. Sterling may say about Mr. Risen's hypothetical testimony if and when Mr. Risen - who has refused to testify - testifies in this case. The Court's Order should simply be to defer this motion until the trial of this case and the evidence begins to be admitted.

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[3] The defense has not served any trial subpoenas.

WHEREFORE, the defendant requests that the instant motion be deferred.

Dated: June 21, 2011

JEFFREY A. STERLING
By counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2011, I caused an electronic copy of Defendant's Opposition to Government's Motion to Admit Testimony of James Risen to be served via ECF upon William W. Welch, II, James L. Trump, United States Attorney's Office and by email to David Noel Kelley, Cahill Gordon & Reindel, LLP, 80 Pine Street, New York, NY 10005, counsel for James Risen.

By: */S/*
Edward B. MacMahon, Jr. (VSB #25432)
*Counsel for Jeffrey A. Sterling*

The Washington Post

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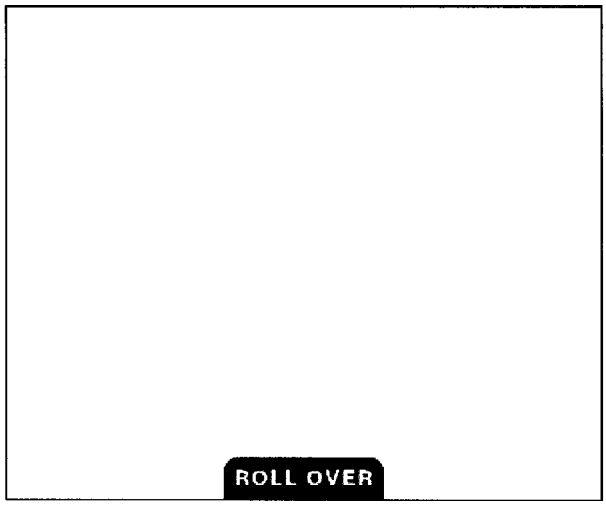


# Reporter subpoenaed in leaks case

**By Ellen Nakashima, Published: May 24**

Federal prosecutors have subpoenaed New York Times reporter James Risen to testify at the trial of a former CIA operative who allegedly leaked classified information that appeared in Risen's 2006 book.

The trial of Jeffrey Sterling, set to begin in September, is one of five leak cases brought so far by the Obama administration, which has aggressively sought to stem the flow of government secrets to the press and public.

Risen said he would fight the subpoena, issued late Monday by prosecutors in the Eastern District of Virginia. "I will always protect my sources," he said, "and I think this is a fight about the First Amendment and the freedom of the press."

A similar subpoena to compel Risen to appear before a grand jury late last year was quashed by U.S. District Court Judge Leonie M. Brinkema in Alexandria. Sterling was indicted in January.

The string of cases, all brought under the 1917 Espionage Act, threatens to undermine the public's right to be informed on legitimate matters of government policy, according to advocates for the press and transparency issues.

"The subpoena to Risen significantly ups the ante," said Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists. "It threatens to turn the administration's fight against leaks into a broader assault on the press."

Justice Department spokeswoman Laura Sweeney said that the government "seeks to strike the proper balance between the public's interest in the free dissemination of information and effective law enforcement."

The government, she said, makes "every reasonable effort to obtain information from alternative sources before even considering a subpoena to a member of the press."

At issue is a chapter in Risen's book, "State of War," in which he described a CIA plan to sabotage Iran's nuclear program by employing a Russian agent. The Russian was to offer the Iranians weapons blueprints that contained fatal flaws. But because the flaws were obvious and possible to overcome, the plan risked helping an adversary "accelerate its weapons development," the book said.

In a motion accompanying the subpoena, prosecutors stated that Risen "can authenticate his book and lay the necessary foundation" to admit statements in the book into the trial.

"I think they're just trying to stick it to Jim," said Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. "I just don't think they have a better chance of making this subpoena stick than they did in the grand jury context."

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**ORDER**

This matter came before the Court on the Government's Motion to Admit the Testimony of James Risen. It appearing to the Court, after reviewing the filings in this case, that the Motion is not proper, it is hereby ORDERED

That the Government's Motion to Admit Testimony by James Risen is hereby DEFERRED until trial.

ENTERED this _____ day of _____, 2011.

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LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE