FOURTH CIRCUIT GUTS NATIONAL SECURITY INVESTIGATIVE JOURNALISM EVERYWHERE IT MATTERS

The Fourth Circuit — which covers CIA, JSOC, and NSA's territory — just ruled that journalists who are witnesses to alleged crimes (or participants, the opinion ominously notes) must testify in the trial.

> 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.

With this language, the Fourth applies the ruling in Branzburg — which, after all, pertained to the observation of a drug-related crime — to a news-gathering activity, the receipt of classified information for all the states in which it most matters.

The opinion goes on to echo DOJ's claims (which I recalled just yesterday) that Risen's testimony is specifically necessary.

> 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.
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> [snip]
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> 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.
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> [snip]
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> 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.
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> [snip]
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> 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.

This language will enhance the strength of the reservation DOJ made to its News Media Policies, allowing it to require testimony if it is essential to successful prosecution.

The only limit on the government's authority to compel testimony under this opinion is if the government is harassing the journalist, which (with proof of the way the government collected phone records, which remains secret) might have been proven in this case. There is a strong case to be made that the entire point of this trial is to put James Risen, not Jeffrey Sterling, in jail. But Leonie Brinkema has already ruled against it. I think the subpoena for 20 AP phone lines might rise to that level as well, except that case is being investigated in the DC Circuit, where this ruling doesn't apply.

This pretty much guts national security journalism in the states in which it matters.

Golly. It was just last week when the press believed DOJ's News Media Guidelines would protect the press' work.