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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

14-cr-68 (KBF)

5 ROSS WILLIAM ULBRICHT,

6 Defendant.

7 -----x

New York, N.Y.
December 15, 2014
(Sealed Excerpt)

10 Before:

11 HON. KATHERINE B. FORREST

12 District Judge

14 APPEARANCES

15 PREET BHARARA
16 United States Attorney for the
17 Southern District of New York
BY: TIMOTHY T. HOWARD, ESQ.
SERRIN A. TURNER, ESQ.

18 JOSHUA DRATEL, ESQ.
19 LINDSAY LEWIS, ESQ.
20 Attorneys for Defendant
Law Offices of Joshua Dratel, P.C
-and-
21 JOSHUA HOROWITZ, ESQ.
22 Attorneys for Defendant
Tech Law Ny

23 Also Present: Nicholas Evert
24 Molly Rosen
25 Paralegals, U.S. Attorney's Office

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1 All right, folks. So I reviewed the letters. Here is
2 one of the issues that I think we're confronting, which is,
3 when the government presented the letter, it presented it in
4 terms of, you didn't really need to, but in an abundance of
5 caution you were going to make a disclosure. And there are a
6 number of times when what I'm going to refer to generically as
7 *Brady*-type disclosures are made and they're not necessarily
8 even really *Brady* disclosures because they are not necessarily
9 material or exculpatory but, in an abundance of caution, the
10 government just wants to get certain things out there. That
11 happens with relative frequency. Here of course we have the
12 unusual situation where this could never be that kind of
13 disclosure because the defendant isn't able to use the
14 information. So in order to obtain the protection of an "even
15 if" *Brady* disclosure, the defendant would have to be able to
16 utilize the information in some manner. Otherwise, it's as if
17 he never told them, because his hands are completely tied. So
18 one issue is, I just want to make sure that nobody has any case
19 law. I've looked extensively on sealed disclosures like this
20 where the defendant can't even use the name or any of the
21 pieces, as opposed to a portion which is sealed, which happens,
22 with more frequency, and that therefore I think we need to go
23 on to -- we're going to have to grapple with the *Brady* issue, I
24 think, right now. Because if he can't use it, then we've got
25 to be sure that the defendant is protected, and that there is

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1 no basis for use that's -- and he has asserted that it is --
2 there is an ex -- you know, he has asserted he would like to
3 have it unsealed because he would like to use it. And you
4 folks have seen that letter. And I want to be careful,
5 Mr. Dratel, not to disclose things in the ex parte letter. I
6 must say I think you're going to need to say a little more in
7 order to get this discussion going.

8 But first, Mr. Howard, let me just ask you, do you
9 think it is not possible, from the government's point of view,
10 to disclose not the letter, which had lots of detail, but the
11 following facts: Carl Force, who was involved in the Silk Road
12 investigation, who utilized the user name Nob, is under
13 investigation by the DOJ or however you want to phrase that,
14 *inter alia* with regard to his role in investigating Silk Road.
15 That, I think, would give the defendant an ability to use the
16 information, to use that information, and to conduct whatever
17 investigation he deems appropriate. But from your letter this
18 morning, I understand that there is lots of sensitivity, even
19 around perhaps even that.

20 MR. HOWARD: Yes, your Honor. The public disclosure
21 of even the fact of the investigation would incur great damage
22 to the San Francisco investigation. We have consulted directly
23 with them. This would be a very high-profile investigation.
24 And we are concerned about flight, dissipation of assets, and
25 destruction of evidence at this point. And that's what San

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1 Francisco affirmed to us very strongly.

2 THE COURT: Why don't you give me a sense as to
3 whether -- you said Mr. Carl Force does know he's under
4 investigation. He knows he's a target.

5 MR. HOWARD: Yes, your Honor, he is aware because he
6 was interviewed. But the scope of the investigation, he is not
7 familiar with that. He does not know what the government or
8 the grand jury is looking at. It's an active investigation in
9 its early steps.

10 I think what we need to focus on is, there is really
11 no basis, based on what the government is presented at trial,
12 that this could be exculpatory. Because the only place where
13 Nob is referenced at all is with respect to the first murder
14 for hire. And the fact is it's irrelevant whether or not he
15 stole the bitcoins. The question is, what did Mr. Ulbricht
16 think from his point of view.

17 THE COURT: Tell me -- and this is what I didn't get
18 from the various submissions -- as I understand it, Nob, acting
19 as Nob, was not supposed to have administrative privileges. He
20 was supposed to be just pretending to be a user of the site and
21 then engaged in additional conduct.

22 MR. HOWARD: That is correct, your Honor.

23 THE COURT: But he obtained administrative privileges
24 as part of his what I'm going to call going rogue.

25 MR. HOWARD: That is actually under investigation at

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1 this point. We're not able to confirm that. All we know is
2 that San Francisco and the grand jury is looking into that.
3 But I think the point we were trying to make in our opposition
4 is that, let's assume that that investigation reveals that in
5 fact those allegations are accurate and that he obtained the
6 access of Flush, that he got his user credentials, and he used
7 those credentials to steal bitcoins from the site.

8 THE COURT: Could he have used those credentials to
9 have faked any other conduct of Flush, or could he have used
10 those credentials to have faked any conduct by Cimon? I don't
11 know how you pronounce his name, C-i-m-o-n.

12 MR. HOWARD: He had access to his account. Cimon,
13 Cimon, was TorChat. Those weren't communications that occurred
14 over the website. That was over a different facility, using
15 TorChat communications, that were recovered from Mr. Ulbricht's
16 computer.

17 THE COURT: No. I understand. What I'm trying to
18 figure out is the extent to which this could -- which I think
19 is part of the defendant's position -- unravel if it turns out
20 that -- I mean, just tell me if it's possible or not -- could
21 Nob, this fellow, if he did obtain some inside ability to use
22 the site, does it throw into doubt all the evidence relating to
23 that particular murder for hire?

24 MR. HOWARD: Your Honor, we believe that it does not.
25 We have independent evidence, in terms of TorChat

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1 communications that did not occur over the Silk Road servers,
2 over the Silk Road messaging system -- a separate system, in
3 which he spoke with two other employees, other co-conspirators,
4 Inigo and Cimon, regarding --

5 THE COURT: "He" being Mr. Ulbricht?

6 MR. HOWARD: Yes, your Honor.

7 THE COURT: But do you know that Inigo and Cimon were
8 not Nob, and they could not have been Nob? Do you know, is
9 there enough that you would be able to show, that would satisfy
10 that Cimon and Inigo are not aliases for Nob? He wasn't acting
11 in multiple capacities?

12 MR. HOWARD: We would show that they were two separate
13 people, your Honor.

14 THE COURT: All right. So the government's, as I
15 understand it from the letter, the government's position is
16 that you're not going to introduce any evidence directly from
17 or between Nob and Mr. Ulbricht. The references to Nob would
18 be -- the only way Nob is even going to enter the case is by
19 references in the context of Inigo and Cimon and Mr. Ulbricht's
20 separate communications. Is that right?

21 MR. HOWARD: That is correct, your Honor. Even though
22 they are highly incriminated in the conversation with Nob over
23 TorChat and the private message system, we're taking a step
24 away from those chats involving Nob, given the ongoing grand
25 jury investigation, and focusing solely on the communications

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1 he had with others about the murder for hire. It would be also
2 interesting to note that with respect to Cimon, there is not
3 only, in the chats directly that were excerpted as an exhibit
4 to our opposition, but previously, Cimon and Mr. Ulbricht
5 talked about whether or not Nob is actually an undercover
6 officer. It's speaking against Nob. He speaks against Nob's
7 purpose. So they're not the same person. They are two
8 different people.

9 MR. TURNER: Can I just add one point on this thought,
10 your Honor? This is not an issue where Nob is supposed to have
11 hacked into Flush's account, hacked into the site, anything
12 like this. This is an undercover agent who arrested this
13 person who actually controlled a Flush account and then got
14 consent to take it over, to some extent. And that's how he
15 would control it. So he wouldn't have had access to other
16 people's accounts.

17 THE COURT: No, but I understand that he apparently
18 went rogue, and when he went rogue, he apparently did certain
19 things that caused another user's account to act in a certain
20 way, as I understand it, potentially taking bitcoins and moving
21 them out of one account and into other.

22 MR. TURNER: Still, your Honor, that's with respect to
23 the Flush account. That was the user's account, the user that
24 he arrested. That user happened to be an administrator. So
25 that user had extra privileges that a normal user would not

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1 have.

2 THE COURT: Right. So could Nob, once he took over --
3 and maybe the chronology is the answer here, I don't know what
4 the chronology is -- but when Nob became Flush, whatever
5 consents and agreements with people he had, when he became
6 Flush, did he obtain Flush's administrative privileges?

7 MR. TURNER: Yes. But those would have been limited
8 administrative privileges.

9 THE COURT: Could he have faked being somebody else?

10 MR. TURNER: No, you can't do that. No. And, as
11 Mr. Howard said, in terms of the chat to Cimon, that didn't
12 occur on the Silk Road system. That occurred on a whole
13 separate TorChat that's not associated with Mr. Ulbricht, not
14 controlled by Mr. Ulbricht. There were TorChat e-mail
15 services, that were TorChat services. It's completely
16 different. That would be like saying, you know, you had taken
17 somebody's AOL account and now all of a sudden you could create
18 Gmail accounts. It is a completely different system.

19 THE COURT: All right. Mr. Dratel.

20 MR. DRATEL: Your Honor, first we object to that
21 letter being filed ex parte. The Court's order did not suggest
22 that it be ex parte. I think certainly the questions --

23 THE COURT: Hold on. Which letter?

24 MR. DRATEL: The letter that the Court received today,
25 that was submitted ex parte. I don't have that.

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1 THE COURT: Did I say anything that treads upon that?
2 I had not focused on the fact that it was ex parte.

3 MR. DRATEL: I think --

4 THE COURT: Hold on. Let me see -- you have not seen
5 the government's letter today?

6 MR. DRATEL: No.

7 THE COURT: Mr. Howard and Mr. Turner, have I -- stop
8 me if I'm about to do something that's going to be a problem.
9 Have I said anything today that's a problem? Because I was not
10 focused on the distinction.

11 MR. HOWARD: You have not, your Honor.

12 THE COURT: All right. So, Mr. Dratel, it didn't
13 form -- it wasn't so important that it formed the basis of all
14 of my comments. I had not yet realized --

15 MR. DRATEL: They may just be not remembering, or
16 just --

17 THE COURT: Oh, your letter was ex parte.

18 MR. DRATEL: No, no, no. The Court has already said,
19 in answer to one of the questions in the letter, that we
20 haven't seen it. So regardless of what the government says, it
21 has informed the Court, in terms of what we're discussing
22 today. The answer to the question, the answer to question 2.

23 THE COURT: Let me see whether or not -- yes.

24 MR. DRATEL: The answer to question 2.

25 THE COURT: Yes. Government has actually --

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1 MR. DRATEL: I didn't know that until the Court said
2 it.

3 THE COURT: Well, the government has also confirmed it
4 today.

5 MR. DRATEL: Well, because the Court mentioned it to
6 them. You know.

7 THE COURT: All right. Let me just ask Mr. Howard,
8 Mr. Turner if you have a copy of your letter right there?

9 MR. HOWARD: Yes, your Honor.

10 THE COURT: Are there pieces of it which can be shown
11 to defense counsel in light of the fact that the other,
12 November 21st letter was also shown?

13 MR. HOWARD: If you can just give us a minute, your
14 Honor?

15 THE COURT: Sure, yes.

16 (Government counsel confer)

17 MR. HOWARD: Your Honor, at the current stage, based
18 on our consultation with the U.S. Attorney's Office in San
19 Francisco, we believe that the parsed letter could be disclosed
20 under seal in this proceeding at this time. But what we would
21 ask not be disclosed would be paragraph 1, which references
22 certain witnesses that have appeared before the grand -- that
23 have been part of the investigation, and paragraph 4.

24 THE COURT: All right.

25 MR. HOWARD: But in terms of the reasons that perhaps

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1 would inure that were addressed more generally in the other
2 paragraphs, we believe that those may be disclosed.

3 THE COURT: All right. And so can you summarize for
4 Mr. Dratel, and then provide afterwards an exact copy of the
5 letter, but can you summarize for the defense the information
6 which you believe can be disclosed, under seal, in the context
7 of today's hearing?

8 MR. HOWARD: Yes, your Honor. I'll just read the
9 paragraphs. Paragraph 2 says that "Carl Force is aware that
10 he's under investigation insofar as he has been interviewed in
11 connection with the grand jury investigation. He is not,
12 however, aware of the full range of misconduct for which he is
13 being investigated."

14 Paragraph 3 reads as follows: "USAO San Francisco
15 briefs that the ongoing grand jury investigation would be
16 harmed by public disclosure of the investigation at this time
17 for the following reasons."

18 "(a) As noted before, although Carl Force is aware
19 that he is under investigation, he is not aware of the full
20 range of misconduct that is the subject of the investigation.
21 Public disclosure of the full scope of the investigation could
22 threaten the integrity of the investigation, as it might cause
23 Mr. Force or any potential subjects, co-conspirators, or aiders
24 and abettors to flee, destroy evidence, conceal proceeds of
25 misconduct and criminal activity, or intimidate witnesses."

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1 "(d) Based on the significant level of media attention
2 that the allegations against Carl Force would likely generate,
3 there is a serious risk that media report could influence the
4 information or testimony provided by witnesses, bias grand jury
5 members, or otherwise impact the integrity of the investigative
6 process.

7 "(c) The grand jury investigation is ongoing and the
8 scope of any charges the government may end up pursuing against
9 Carl Force is not yet known. Disclosure of the investigation
10 at this juncture would risk publicly airing suspicion or
11 allegations of wrongdoing that may not ultimately be charged
12 due to lack of evidence.

13 And paragraph 5 reads, "At present, for the reasons
14 set forth above in answer no. 3, the government does not
15 believe there are any facts that could be released regarding
16 Mr. Force's conduct that may be revealed without jeopardizing
17 the grand jury investigation."

18 THE COURT: All right. My deputy has redacted
19 paragraphs 1 and 4, and if it meets with the government's
20 approval, we could hand that in written form to Mr. Dratel.

21 Let's go on. Mr. Dratel, I interrupted you because I
22 wanted to resolve that issue to the extent we were able to.

23 Mr. Dratel is being handed a redacted copy of that
24 letter, with paragraphs 1 and 4 redacted.

25 MR. DRATEL: Thank you, your Honor.

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1 So the Court, to some extent, has recognized a problem
2 in this sense. We have information -- the government doesn't
3 know the full scope of what it's going to learn in the course
4 of its investigation of Mr. Force. But we're not permitted to
5 pursue it ourselves. That is unfair. That is a huge problem
6 under *Brady*, under the Sixth Amendment in terms of counsel, the
7 effective of assistance of counsel. It's a huge problem. What
8 they're saying is, this is off limits. So even though at the
9 end of the day -- I think right now we have enough. But I'm
10 just focusing on what they have said --

11 THE COURT: He's speaking about, in terms of the
12 exculpatory nature of the conduct, what could be material and
13 exculpatory about this? Just give me -- I've given you my
14 hypotheticals. Apparently mine don't meet the way the world
15 would work. What is it that could be material and exculpatory?

16 MR. DRATEL: Well, I'm not going to reveal that here
17 with the government. I put it *ex parte* for a specific reason.
18 I'm very, very disciplined about not giving the government an
19 opportunity to do something it doesn't have the right to.

20 THE COURT: I understand. But let me tell you my
21 conundrum, OK --

22 MR. DRATEL: And we have more, your Honor.

23 THE COURT: -- I cannot test -- I have on the one hand
24 the government, who is making a very vigorous argument that
25 there would be prejudice if there was disclosure of the facts

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1 that are the subject of this hearing. And I take that very
2 seriously. And I don't know any more than they tell me about
3 that. Then I have what you're saying, which they may or may
4 not agree with factually. And I want to -- in other words, I
5 don't know whether or not --

6 MR. DRATEL: Factually? I mean, but they don't think
7 it's exculpatory at all. So what's the difference in what they
8 think about what we put to the Court? They acknowledge it,
9 they give it because it is exculpatory, and this is the way
10 *Brady* material is provided by the government, except in capital
11 cases if it's a statutory mitigating factor. They don't say,
12 hey, this is *Brady*. They say, oh, this is Rule 16 but we're
13 not saying what it is. It's *Brady*. And the fact is that at
14 the end of the day, when this investigation is concluded and
15 this guy is indicted and it all comes out and it's all
16 exculpatory and material and relevant to this case and we
17 weren't able to use it, that's not fair.

18 THE COURT: Maybe --

19 MR. DRATEL: It's not just about now. By the way,
20 they can't say, we're going to put in this whole transaction
21 with Nob but you can't touch Nob, Nob is off limits. That's
22 not fair. That's not the way the system works. He's in play.
23 That's number one.

24 Number two is, you have all these other screen names,
25 you have French Maid, you have Al Pacino, you have Albert

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1 Pacino. You have all the Pacino derivatives. You have more
2 than that. There may be more. We believe there may be more
3 screen names that he used, accounts that he took over. And
4 this administrative-privilege thing, the government doesn't
5 know what the extent was. And they have told you they're at
6 the beginning of stages of their investigation. But it's off
7 limits to us and we can't use it, in a trial that's supposed to
8 start in three weeks. They can't have it both ways. I want
9 the information. If I can't get the information, we should at
10 least wait until the grand jury investigation is over so I can
11 use it. I want it. They can't keep it from me and then have a
12 grand jury investigation, that has gone on for nine months, and
13 then say, oh, yeah, you can't use it but -- what are we going
14 to do? Delay the trial. I mean, that's their choice. It's
15 not mine. It's theirs. We need this.

16 THE COURT: Let me ask you -- I need to know a bit
17 about the chronology, and I also want to be very careful not to
18 reveal strategic items. But I don't think the chronology gets
19 into that. Can the government tell me when, approximately, Nob
20 first engaged with the defendant in the acts which resulted in
21 the murder-for-hire solicitation allegedly?

22 MR. DRATEL: Dread Pirate Roberts, your Honor?

23 THE COURT: For hire. This is all about allegations.
24 I don't know. They'll prove whatever they're going to prove.
25 But that's the allegation. So what's the chronology, and then

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1 when did he allege -- what is the earliest that you could tell
2 me that this individual had access to the administrative
3 aspects, whatever limitations there were on them, of the Flush
4 world? That chronology may help me a lot.

5 MR. HOWARD: Your Honor, this would be the chronology.
6 As we set forth in the November 21st letter on page 3, when --
7 which was disclosed to the defense -- Mr. Green was arrested by
8 Special Agent Force and other agents on January 17th. At this
9 point Nob was already engaged in communications with
10 Mr. Ulbricht about other matters unrelated to the murder for
11 hire. If you look at Exhibit A, which was filed under seal in
12 conjunction with the motion to suppress -- sorry -- the motion
13 in limine filed by defense, on January 26th, about nine days
14 later, is when Inigo, over TorChat, again, a separate
15 communication system that then was provided by the Silk Road
16 site, information the defendant, or Dread Pirate Roberts, that
17 they had identified the fact that 350,000 in bitcoins had been
18 withdrawn from the site through the Flush account. Later that
19 day, approximately six hours later, is the first time over
20 TorChat at which the defendant and Nob start discussing this
21 theft of bitcoins. And this is where the defendant informs Nob
22 about the theft and gives him a copy of the scanned photo ID
23 that the defendant had for Flush, otherwise known as Curtis
24 Green, so that he could be identified. At that point, that's
25 when the conversation starts about how to deal with the

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1 situation, how to deal with Green, that ultimately escalates
2 into the murder for hire solicited by the defendant.

3 THE COURT: Green was arrested, you said, on January
4 17th. When did the administrative privileges, so far as you
5 know, when did the special agent obtain those?

6 MR. HOWARD: Right. Your Honor, it would have
7 happened sometime after that. If proven --

8 THE COURT: Before the 26th, do you think?

9 MR. HOWARD: That's correct, your Honor. And let's
10 just also make sure we're clear, that he didn't receive root
11 administrator privileges. He didn't have privileges to do
12 anything on the site. He only had privileges to do what Flush
13 was able to do on the site. In that way, Flush or whoever was
14 controlling the account reset vendor passwords in order to make
15 withdrawals from those vendor accounts.

16 THE COURT: And what was the list of what Flush could
17 do?

18 MR. HOWARD: At this point I don't think we can give
19 you a list. But he had the ability, I believe, to review
20 customer disputes. He had the ability to reset passwords,
21 which is how -- and PIN numbers -- which is how he was able to
22 access the funds held by certain vendors and withdraw them.

23 THE COURT: And if he could reset passwords and PIN
24 numbers, just -- I don't know enough about the way this
25 technology, or any technology works, to understand the answer

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1 to the question. Could he have utilized their accounts to have
2 sent messages through any of the messaging facilities?

3 MR. HOWARD: We would have to look into that. If --
4 hold on.

5 Your Honor, we would have to check into that.
6 However, the fact is that the evidence that we were looking to
7 use, again, was -- were not communications that occurred over
8 the Silk Road site. So Flush would not have had access, or
9 whoever was controlling Flush, would not have access to the
10 TorChat accounts of Cimon, who was already -- and Inigo, who
11 were already engaged for months over the same channel and
12 communications with the defendant. And those were recovered
13 directly from his laptop, who was seized at the time of his
14 arrest.

15 THE COURT: Would he have been able to reset any user
16 account or password, so far as you know? There may be
17 limitations that you don't yet know about. But so far as
18 you're aware, could he have reset any user name and password on
19 the Silk Road account?

20 MR. HOWARD: Certainly it appeared in terms of vendors
21 and buyers. Beyond that we don't believe he had authority.
22 But that's something we would have to confirm and look at. We
23 do know from the evidence, from the communications the
24 defendant had, that he had the ability to reset vendor
25 accounts.

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1 THE COURT: All right. How much of the government's
2 evidence at trial, putting aside the Nob murder-for-hire event,
3 how much of your evidence at trial -- and I can go back and
4 look, I've got it loaded on my machine -- but of your trial
5 exhibits, just give me a sense, because you'll be more familiar
6 with the dates than I am -- will postdate January 17th? How
7 much of your affirmative evidence?

8 MR. HOWARD: Your Honor, there is evidence of
9 transactions that occurred after that date. There is evidence
10 from the defendant's arrest himself, from the commuter that he
11 possessed at the time of his arrest, and stuff recovered from
12 that. There are communications that were recovered from the
13 Silk Road server between the defendant and other
14 co-conspirators that occurred after that date.

15 It appears that there was only a very small window of
16 time in which this was occurring. Inigo, in the chats, does
17 indicate to the defendant that he reset Flush's access and
18 password after he realizes -- as he realized this was
19 happening, as the theft was ongoing. So the period of time in
20 which force would have had access to the Flush account was
21 fairly limited.

22 MR. TURNER: Your Honor, could I add one more thought
23 to that?

24 THE COURT: Yes.

25 MR. TURNER: If the allegation, essentially, is that

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1 this undercover agent took over the account of DPR and was
2 running the site, then basically what that would come down to
3 is it would affect any private messages from the Silk Road
4 marketplace that were from DPR. We actually plan to use very
5 few of those private messages. The bulk of the statements of
6 alleged defendant will be from his own computer, the TorChat
7 messages from his own computer, and his forum posts, which were
8 not part of the Silk Road marketplace server. That was a
9 separate server. And moreover, the forum posts that DPR posted
10 were PGP-signed. So that means you have to have DPR's private
11 key to sign those messages. And that was not something you
12 would get off the Silk Road computer. That was in fact found
13 on Ulbricht's laptop computer. But just by taking over his
14 account, which we have absolutely no evidence occurred, by
15 taking over his private message account on the Silk Road
16 marketplace server, you could have no control over what DPR
17 said on the Silk Road forum server.

18 So if the defense theory is, this undercover agent was
19 controlling Silk Road and putting all sorts of things into
20 DPR's mouth, then you're talking about a very small number of
21 messages, private messages, that the government is actually
22 planning on introducing at trial.

23 THE COURT: Do you need them?

24 MR. TURNER: We would certainly like to use them, your
25 Honor. I actually am not even certain that they postdate

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1 January 2013. We'll have to look at it.

2 THE COURT: Could you go back and perhaps -- you might
3 have it in a database of some sort that would be sortable --
4 and just give me a list of exhibit numbers so I've got them? I
5 may have them in the pile that you've given me, of the exhibit
6 numbers which postdate January 17th? Just so I can get a sense
7 of --

8 MR. TURNER: The exhibit numbers, sure.

9 THE COURT: Yes, the exhibit numbers that relate in
10 any way to materials from the Silk Road server.

11 MR. TURNER: Silk Road marketplace server, which is
12 where the private message system resided.

13 THE COURT: Versus the Silk Road --

14 MR. TURNER: Silk Road forum server. That's where the
15 bulk of the evidence is.

16 THE COURT: Whatever Flush had access to.

17 MR. TURNER: That would be the marketplace server, if
18 we're talking about resetting passwords.

19 THE COURT: I'm just trying to figure out, just trying
20 to get a lay of the land.

21 MR. DRATEL: That's their opinion.

22 THE COURT: No, I understand. I'm going to give you a
23 chance to respond. Hold on a second. Mr. Howard stood up.
24 And then we're going to have a chance to respond.

25 MR. HOWARD: I just wanted to discuss the prior point.

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1 It's January 26, 2013 at about 3:30 in the morning when Inigo
2 starts telling the defendant about the fact that -- the
3 detective -- the fact that the Flush account was being used to
4 steal bitcoins. On page 2 of the excerpts we have provided as
5 Exhibit A, Inigo, at 10:58 a.m., which is about ten minutes
6 after the defendant started interacting with Nob about this
7 issue, he indicates that he stopped the theft by resetting the
8 password to Flush's account. And as soon as that happened, no
9 more bitcoins were being stolen. So at that point, whoever was
10 controlling the Flush account, whether it be Flush or whether
11 the investigation ultimately reveals that it was Force at the
12 time, that stopped as of 10:58 a.m. on January 26, 2013.

13 THE COURT: Let me ask you, are you going to have the
14 Inigo person, is that person somebody who you know the human
15 identity of?

16 MR. HOWARD: Yes. In fact Inigo has been fully
17 identified and he has been charged in a separate indictment in
18 this district.

19 THE COURT: All right. And he was charged in
20 connection with some of that conduct?

21 MR. HOWARD: With his role as an administrator, an
22 employee of Mr. Ulbricht on Silk Road.

23 THE COURT: All right. How about Cimon, whoever the
24 person's name is, Cimon?

25 MR. HOWARD: He has not at this point been charged.

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1 There is a continuing investigation into that investigation.

2 THE COURT: All right. Now, Mr. Dratel.

3 MR. DRATEL: All of these murder-for-hire allegations
4 are at issue here because they were on private messages. The
5 second episode, the red-and-white episode, is a private
6 message.

7 And also, we're talking about the government's theory.
8 I am not bound by the government's theory. That's what a trial
9 is about. Just because they don't want to think of it in terms
10 of what his -- is capable in terms of the defense, they don't
11 even know what their investigation is going to uncover at the
12 end of the day with Mr. Force. So I can't subpoena Mr. Force
13 to testify, which is a Sixth Amendment right that Mr. Ulbricht
14 has, which is basically being compromised here, because I can't
15 subpoena him.

16 THE COURT: The question, the preliminary question, is
17 whether or not Mr. Force could have any material exculpatory
18 evidence. Because as you understand, the kind of --

19 MR. DRATEL: It's actually beyond that, though,
20 because he's relevant. We could identify about 15 or 16
21 government exhibits that talk about him directly, that involve
22 him directly. And whether, as Nob or as Al Pacino or -- so --
23 and there's stuff that, it's not a government exhibit. But we
24 can use it. And there's a ton of stuff that he's relevant to.
25 I have a right to call him. What you're saying now, or what

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1 the government is saying now, I don't have a right to call him,
2 because they have a grand jury investigation. And I understand
3 that. But they can't have it both ways. We have to have a
4 fair trial that's not confined to the government's theory and
5 the government's sense of what's possible, because they don't
6 know.

7 And I don't know why we waited to the eve of trial for
8 this to begin with. I don't know what the status of the
9 investigation is in terms of, temporally, whether they're going
10 to finish in a month? two months? as soon as this trial is
11 over? It's not fair. They can't do that. And there is a
12 solution. You know, I --

13 THE COURT: Well, there are several solutions.

14 MR. DRATEL: Yes. I'm saying, yes, there are several
15 solutions. But to say that the government is in charge of my
16 investigation is not fair. And not only is in charge. I can't
17 even investigate at all. It's bad enough that they are in
18 charge of it solely. I can't even do it. It's an impossible
19 situation to try a case in, where this guy is all over this
20 case, in many different ways. Not just as Nob. As Al Pacino.
21 As French Maid. There's a lot going on here. And to airbrush
22 him out because he's under investigation, fine. Finish the
23 investigation. Or let us have it.

24 THE COURT: Mr. Howard.

25 MR. HOWARD: Your Honor, I think the fact is, the

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1 disclosure that we did provide in the November 21st letter was
2 extremely extensive regarding what we were able to disclose
3 about what the U.S. Attorney's Office in San Francisco is
4 currently aware of. We've discussed it at length with them, if
5 there's any other allegations they're looking into with respect
6 to Nob. And at this point they don't have that information.
7 They don't have anything -- as far as it intersects our case,
8 it's with respect to these \$350,000 of bitcoins.

9 THE COURT: But, Mr. Howard, the point that I think
10 we're struggling with is, while you disclosed it, they can't
11 use it.

12 MR. HOWARD: Yes.

13 THE COURT: And so it's as if the disclosure never
14 occurred. Because in fact it's even more frustrating, because
15 they have information that's been put in their pocket, if you
16 will, so that government can say you disclosed it, but they
17 can't use any of it, that includes the most basic information,
18 which is just Carl Force under investigation.

19 MR. HOWARD: Your Honor, first of all, we're not
20 saying that it can't use anything. If they want it use the Nob
21 chats to prove, to show something --

22 THE COURT: No, but they could not go out and try to
23 talk to Carl Force, because they can't use that -- they know
24 that Carl Force is under investigation. And if they did talk
25 to Carl Force -- presumably his lawyer anyway would tell them

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1 not to talk to him, but that's a different issue, right. But
2 they can't conduct -- they can't take any action in response to
3 your November 21st letter at all. Right?

4 MR. TURNER: Your Honor, no, that's not the case.

5 THE COURT: So what -- tell me what they can do.

6 MR. TURNER: Let's just be clear. We released Carl
7 Force's undercover reports to them long ago. They could have
8 reached out to him as a witness and talked to him long ago.
9 They can still do so today. What they can't reveal is that he
10 is under a grand jury investigation. They know, for example,
11 about the \$350,000 in bitcoins. They could ask him about that.
12 They know about the chats at issue. They can look those up in
13 the Silk Road server. But what they can't do -- and it's
14 really hearsay anyway -- they can't just ask somebody, is this
15 guy under investigation. Any answer that they solicit, A, how
16 is that relevant? It's not a proven fact that he actually did
17 these things. It's just a matter that he's being investigated
18 for them.

19 THE COURT: So tell me -- and I don't understand
20 exactly what you've disclosed and haven't disclosed about what
21 you've mentioned in terms of the Carl Force investigative
22 reports. Tell me what information the government has disclosed
23 in some manner which can be used about Carl Force. You may
24 have just recited all of it. Is there any more?

25 MR. TURNER: Just to be clear, when we're talking

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1 about "can be used," it's a question of, does 6(e) prohibit it,
2 and is it in their possession? Then there is the next
3 question; is it relevant to anything. So in terms of what 6(e)
4 prohibits, we think it prohibits them eliciting somehow that
5 he's under a grand jury investigation. That's the basic point.
6 I mean, that's what 6(e) requires be kept secret while the
7 investigation is pending. They still have many facts in their
8 possession. They've had them in their possession long ago.
9 Now they have the additional fact --

10 THE COURT: They have the fact that he went broke.

11 MR. TURNER: That's what I keep getting concerned
12 about. It is not a fact. It is a matter under investigation.
13 And in terms of eliciting that, I don't know what they expect
14 to do. Are they going to have an investigator investigating
15 this guy? That is not admissible evidence.

16 THE COURT: No, I hear your point. It's no not, oh,
17 there was an investigator who went rogue. That in and of
18 itself is not, I think, the point. It's whether or not -- it
19 actually, I think, is, you folks were saying, you, Mr. Turner,
20 were saying before, what if, in the context of having gone
21 rogue, he did things which, at that point in time, and later,
22 you don't know and/or they don't know, but it could impact on
23 what you are alleging the defendant did. What if the
24 defendant -- I think part of the issue is -- and I don't know
25 either, in terms of what is possible -- but the defendant may

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1 not have done certain things because you've got an investigator
2 who is inside the system doing certain things instead.

3 MR. TURNER: I think that characterization is badly
4 overdrawn. But in terms of what this investigator had access
5 to, again, we've provided the undercover reports. The
6 undercover reports say that he took over this person's account,
7 that Flush provided his log-in credentials, and that gave him
8 access to that account.

9 THE COURT: Are those --

10 MR. TURNER: Those reports were produced, again, to
11 the defense long ago, because all of those reports have
12 statements of the defendant.

13 THE COURT: Can you produce them to me?

14 MR. TURNER: Absolutely, your Honor.

15 THE COURT: All right. Then give those to me so I can
16 understand what the scope is in my fact pattern.

17 MR. TURNER: If they wanted to bring that out, putting
18 aside its relevance, if they want to bring that out,
19 theoretically I guess they could call Carl Force to the stand
20 and ask him whether he took over the account. They could call
21 Curtis Green to the stand, ask him whether Agent Force took
22 over the account, and establish that, by doing so, he gained
23 certain administrative access, which was limited, by the way,
24 but he gained certain administrative access to the Silk Road
25 marketplace at the time that these chats occurred. Agent Force

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1 obviously might invoke his Fifth Amendment privilege. I have
2 no idea.

3 But point is, we're not trying to say certain
4 witnesses, certain evidence is off limits. It's the fact that
5 this is a grand jury investigation. That's what they're
6 prohibited from disclosing. I don't know how they would elicit
7 that in the form of admissible evidence in any event. But
8 that's what we're saying can't be disclosed. So I don't think
9 we're really tying their hands in any way here.

10 THE COURT: Well, I hear what you're saying. And it's
11 like ships passing in the night. Because on the one hand it's
12 the content of the investigation. And what you're suggesting
13 is it's really not the content, it's the fact of.

14 Mr. Dratel.

15 MR. DRATEL: The reports don't say this is a guy who
16 then stole 350,000. Besides which, we don't know what the full
17 extent of his conduct or misconduct is, because they're still
18 investigating it. And we're not in a position, because we
19 don't have access to all that information, and it's grand jury
20 information, we're going to be hamstrung, we're going to be
21 fighting this fight, with hands tied behind our backs, with
22 respect to this guy. So, in other words, none of the facts in
23 the letter are sealed now. Is that what the government is
24 saying? None of the facts. Other than the fact he's under
25 investigation by the grand jury. I can pursue every one of

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1 those facts in a public manner.

2 MR. TURNER: So, a couple things, your Honor. First
3 of all --

4 MR. DRATEL: This is an easy one. It's yes or no, to
5 me.

6 MR. TURNER: And that's unclear. Because if we're
7 talking about, for example, chats that appear in the Silk Road
8 server, we're already given to them those chats. If we're
9 talking about reports that this man filed where he said he got
10 these log-in credentials for the Flush account, already
11 produced that. It's under a protective order, as is all of the
12 discovery in the case, so we have to have discussions about
13 what can be revealed. But, in terms of there being facts that
14 are off limits, all that is evidence that has been produced in
15 discovery and they are free to use it the same way that they
16 would use other evidence. But it's a different matter just to
17 have allegations publicly aired that a U.S. Attorney's Office
18 somewhere suspects that this person did something, or an
19 investigator suspects they did something. The underlying facts
20 have been made clear, have been spelled out in the letter, have
21 been in the defendant's possession really all this time. We
22 just connected the dots based on the investigation.

23 MR. DRATEL: What facts? What facts? The hundred
24 thousand dollars that he got from DPR was where in the
25 discovery? The fact that he's Al Pacino and the fact that he's

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1 these other people, where is that in the discovery? No. Is
2 that out there now in the public that I can use? No. We're
3 not getting that. This is tactical at this point. This is
4 completely tactical. It's designed to keep this information
5 from our use at a trial that's going to come in three weeks, so
6 that they can then publicize it two months down the road, when
7 they indict this guy, and we are prohibited from using it in
8 defense, when it's -- it's just a violation. The underlying
9 material is *Brady* material and we should have that as well.

10 MR. TURNER: Just to make clear, your Honor, there is
11 no evidence specifically that this man, Carl Force, received a
12 hundred thousand dollars based on leaking information. What we
13 have available are chats under the name French Maid, where it
14 appears, based on evidence obtained from Ulbricht's computer,
15 which it had the whole time, that resulted in Ulbricht paying
16 him a hundred thousand dollars for this information. That's
17 what it says in the log chat -- or, excuse me -- in a log file
18 on Mr. Ulbricht's computer, "paid French Maid a hundred
19 thousand dollars." That's how we know. And then what we did,
20 what we did in the letter is explain some of the reasons why
21 Carl Force might be this user. But it's not like you have a
22 proven fact or a formal charge or something like that. We've
23 laid out the evidence that the grand jury investigation has
24 uncovered. We're not hiding the ball here.

25 Again, the whole -- it's all irrelevant. The murder

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1 for hire is being used to show that this defendant had a
2 certain criminal state of mind. He had knowledge that he was
3 running a criminal enterprise, and an intent to control others
4 in that criminal enterprise.

5 THE COURT: What if the court, to get around this,
6 Mr. Turner, what if the Court was to preclude the government
7 from using any evidence after January 17, 2013? What does that
8 do to your case?

9 MR. TURNER: That would definitely cause problems for
10 our case, your Honor. For example, if you're talking about the
11 totals of drug transactions that occurred, a lot of those drug
12 transactions occurred after January 2013. That was the busiest
13 year of the site. The defendant was arrested after January
14 2013. There's lots of evidence on his computer that postdates
15 that date. There is absolutely no evidence that --

16 THE COURT: How about the murder for hire? How about
17 the Nob-related murder for hire? There are six, right?

18 MR. TURNER: There are six.

19 THE COURT: What is that one -- just tell me, I want
20 to understand how it impacts -- if that one, if every one
21 having to do with Nob was -- and I think Mr. Dratel had a
22 response to this, as he previewed before, but just tell me the
23 impact.

24 MR. TURNER: The impact of that would be much more
25 limited, your Honor. It still would be useful for the

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1 government to explain sort of the full story of the murders for
2 hire. But the remaining five murders are relatively separate,
3 and they have all been gone into. The first murder for hire
4 does show him trying to discipline an employee specifically.
5 So it shows his control over his employees relevant to the
6 continuing enterprise charge. The remaining five have to do
7 with a user who was trying to blackmail him. It's still
8 relevant because it shows that he was going to leak information
9 out, the identities of users, and he was trying to prevent
10 that, and retaliating against them for having done so. So
11 they're relevant, but they are relevant in different ways.

12 Again, I just think in order to establish -- in order
13 to find the government really should not be able to use that
14 Nob evidence is just pure conjecture and speculation that
15 somehow this undercover agent took control of the Silk Road
16 website, notwithstanding all of the evidence we got from the
17 computer at the time of his arrest, where Mr. Ulbricht logged
18 in as the mastermind of Silk Road, logged in as Dread Pirate
19 Roberts, had the Dread Pirate Roberts private key in his
20 computer. I mean, there are troves of evidence on his computer
21 establishing his identity as the DPR. So for them just to say,
22 oh, there's this -- you know, somehow this man took control and
23 put all sorts of words into DPR's mouth, that's a very
24 speculative basis to strike that evidence which we think is
25 relevant.

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1 MR. DRATEL: Obviously we think it goes to more than
2 that? We've set forth to the Court we have additional
3 materials involved that we're comparing as we go through
4 government exhibits and other materials going back, looking at
5 things, because this has opened up a whole new avenue of review
6 for us, because it's obfuscation really to say that we knew
7 anything about what we're talking about today until November
8 21. Because all of that, that's in there, is new, and that's
9 why it's in the letter, because the government knew it was new.

10 THE COURT: All right. Does the government object to
11 the fact that the defendant, through counsel, has submitted to
12 the government a letter ex parte --

13 MR. DRATEL: To the Court.

14 THE COURT: To the Court -- ex parte a letter which
15 describes his trial strategy relevant to this issue? Because I
16 need to consider this. And you haven't said one way or the
17 other whether or not that's a problem for you.

18 MR. HOWARD: Your Honor, I guess the trouble that we
19 have is, on the one hand, we have no issues theoretically with
20 the defense disclosing certain evidence ex parte to your Honor
21 regarding the trial strategy. We're in a position where we
22 can't effectively respond to any hypothetical arguments
23 regarding how this material could be both material and
24 exculpatory. We've set forth our position, how we do not
25 believe it can be, though without even a shred of that we

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1 cannot effectively respond.

2 THE COURT: I understand.

3 MR. DRATEL: But, your Honor, you also -- the standard
4 is not materially exculpatory. That's for disclosure. For the
5 purpose of allowing us to use material and keeping it secret,
6 it's not that. I don't have to -- you know, if I want to put
7 on a witness, I don't have to prove that he's material and
8 exculpatory. I just have to prove it's relevant. I just have
9 to establish relevance.

10 THE COURT: I think the issue is whether or not the
11 disclosure of the information in the November 21st letter needs
12 to be made, needed to have been made in the first instance.

13 MR. DRATEL: I understand there are two levels. I'm
14 just saying there are two different levels. I understand that.

15 THE COURT: All right. I have to go back and think
16 about this, again. And I can't promise you I won't need to
17 talk about it again. If I do, it will be part of the final
18 pretrial. I'll do it in a segment that can be carved out.

19 Yes.

20 MR. DRATEL: Just one other issue that, while we're
21 still sealed, I would like to address -- and I think the
22 government will understand why I want to do it in a sealed
23 context -- is, and I'm sure the Court is aware that, on the
24 Internet, issues about threats against the Court. And I just
25 want to know, because I know how those issues are handled in

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1 the context of security, whether there is anything that the
2 defense should know with respect to what the Court has been
3 informed that could have an impact on the Court, on the case,
4 in that regard. It's really because it would be derelict of me
5 not to do so simply because it's something -- we're all human
6 beings and we need to know where we stand.

7 And let me just also say that I don't know whether the
8 Court has been informed, but I've been informed by the
9 government, the government knows Mr. Ulbricht had nothing to do
10 with that, really isn't connected to that. So it's a court
11 issue.

12 THE COURT: In any event, let me just say that I
13 personally have treated these reports as nothing more than a
14 lot of people who take issue with rulings of mine. 50 percent
15 of the people often, those who don't obtain the result they
16 want, you know, they often have issues. And I have had other
17 cases that have been high-profile cases in the past where there
18 are supporters of individuals or groups, sometimes groups, and
19 people state their opinion on the Internet and say things on
20 the Internet that are ill advised. I have not personally
21 learned of any information that should in any way, Mr. Dratel,
22 cause you to be concerned about the Court's state of mind or
23 whether or not the Court has any view as to any connection of
24 any participant in this case on any side, any issue that's
25 relevant, and actually, I think personally the answer is no.

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1 MR. DRATEL: Thank you, your Honor.

2 THE COURT: All right. So I really -- that's over and
3 done with.

4 MR. DRATEL: My practice as well.

5 THE COURT: All right. Now, I'm going to think about
6 this particular issue that we've been discussing in terms of
7 the November 21st letter more, obviously. I'm hamstrung a
8 little bit because you each are disclosing some things but not
9 others. But I'll figure it out. And we will come back --
10 we're on for Wednesday?

11 MR. DRATEL: At 2.

12 THE COURT: At 2 o'clock. And I will, unless you hear
13 from me, I'll see you folks then.

14 Anything else that you would like to raise?

15 We will now end the sealed portion of this transcript.

16 THE COURT: Counsel, is there anything else that you
17 folks would like to raise with me at this time?

18 MR. TURNER: Could I have one moment, your Honor?

19 THE COURT: Yes.

20 (Government counsel confer)

21 MR. TURNER: Can we just go back to the sealed, for a
22 moment, your Honor?

23 THE COURT: Sure, yes.

24 MR. TURNER: I guess what would be helpful to the
25 government in this whole discussion is what testimony and what

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1 exhibit do they want to use with respect to Carl Force? That
2 would make the discussion much more concrete, because, as I've
3 said, the underlying evidence has been in their hands for
4 months. I understand that they didn't see these issues, and,
5 again, it's not like we knew them months ago either. But we
6 have connected the dots between those pieces of evidence. It
7 would just be helpful to know what they want to introduce at
8 trial and how they plan to introduce it. And then we can have
9 a reasoned, concrete discussion about how it is or is not
10 relevant.

11 MR. DRATEL: We'll consider what we can reveal, your
12 Honor, in that regard.

13 THE COURT: All right. That would be helpful. The
14 sooner the better.

15 (End of sealed excerpt)

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