

STERLING'S GRAYMAIL ATTEMPT

As Josh Gerstein reported, back in June, Jeffrey Sterling asked the government for details about which parts of James Risen's account of Merlin are true and which are false. His lawyers argue that Sterling cannot be guilty of disseminating national defense information if what he disseminated—as the government claims—was actually not true.

Now, at first glimpse, this seems to be a graymail attempt: an attempt to demand information from the government it will ultimately refuse to turn over.

In addition to details of the alleged operation, the defense is entitled to know if, as a result of the publication of *State of War*, the identity of Human Asset No. 1 was learned by any foreign power at all. It is entitled to know if because of the publication of *State of War*, the Iranians shelved plans to use the blue prints that they allegedly learned, due to the publication of *State of War*, were allegedly flawed. The defense is entitled to know if this "Rogue Operation," as described by Mr. Risen, did help the Iranian nuclear program in any way.

Some of this information, after all, would be the information Risen's sources would have been trying to get out in the first place; this is precisely the kind of information the government is trying to suppress by prosecuting this case. And the emphasis on whether Iran (or another country) learned this information from Risen's book—or from the operation itself—would make for an interesting question (though I suspect the government would retreat to a claim they've made before: that part of the damage comes in letting other countries know about this op).

But I'm also interested in Sterling's focus on expert witnesses: as of June 22, when this was filed, the government had not yet revealed to the defense what expert they would call to verify that this information was actually national defense information. I suspect part of what the defense is trying to do is force that issue—and in particular, learn whether that expert will be someone who was actually involved in the operation (and therefore could refute Sterling's version of what happened) or someone else, who would rely on second-hand information.

At a minimum, it must allow the defense to challenge the accuracy of that testimony by confronting the witness called by the government with the truth of what actually occurred.

I hope to come back to this issue in the coming days.

just as interesting as this attempt to get more information on what the government claims happened with the Merlin program is the timing. At one level, it seems very late in the process, almost a second swipe at a Bill of Particulars (the government responded to the first one by giving Sterling the chapter of Risen's book).

But remember that this filing also came before most of the filings on whether or not Risen will have to testify. I noted that in addition to everything else the government has said to support its subpoena of Risen, they also said he cannot protect a source who passed false information. Of course, they haven't proven that, they've simply gotten a grand jury to buy off on that.

It seems the stakes on whether information Sterling allegedly provided Risen was true or not have gone up. But that seems to be precisely the kind of information the government will want to keep out of court.