

THE GOVERNMENT STILL DOESN'T SAY WHETHER OR NOT IT HAS RECORDINGS OF JAMES RISEN

There's an interesting passage in this government filing to get Judge Leonie Brinkema to reconsider her guidelines regarding James Risen's testimony in the Jeffrey Sterling suit. It seems to address Brinkema's suggestion in her ruling that there might be recordings of Sterling passing classified information to Risen.

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.

Here's how the government responds.

There is no non-testimonial direct evidence in this case that can establish what Risen can. There are no recorded telephone calls in which Sterling discloses classified information to Risen, nor are there emails in which Sterling discloses the same. Had there been such recordings or emails, that evidence would have been disclosed in the Bruce Declaration⁵ or in the government's response to Risen's motion to quash the 2010 grand jury subpoena, and the government certainly would have provided such discovery after indictment. There simply is no such evidence.

⁵ The Bruce Declaration, which the Court has had in an unredacted, classified form since 2008, and which the government adopted and re-submitted in 2010, is an accurate and

fair summary of the anticipated trial evidence in this case. See Dkt. 144. The defendant received a redacted, classified version of the Bruce Declaration on June 18, 2011. Pursuant to this Court's Order of June 28, 2011, the government provided counsel for Risen a redacted, unclassified version of the Bruce Declaration (that remains under seal) on June 29, 2011, so that counsel for Risen would have an adequate factual background for the hearing on July 7, 2011.

Note they don't say they don't have any recorded telephone calls between Risen and Sterling. Rather they say, "There are no recorded telephone calls in which Sterling discloses classified information to Risen, nor are there emails in which Sterling discloses the same." They attribute that claim to their Bruce Declaration, which as they note provides a list of all the evidence they intend to use, not all the evidence they have.

That's important, because we know they have the content of emails, at least those from Sterling to Risen. The indictment references a March 10, 2003 email from Sterling to Risen suggesting that Risen read an article on Iran.

Defendant STERLING stated, "I'm sure you've already seen this, quite interesting, don't you think? All the more reason to wonder ... J."

The indictment also accuses Sterling of "meeting with Author A in person to orally disclose classified information.

The only two ways I can think of to know that is if, 1) they knew Sterling didn't pass information via their phone calls because they have all those calls, or 2) if he specifically referenced meeting to give him information in an email. But the government has introduced no evidence of the latter, at least not publicly.

I suspect Brinkema has good reason to suspect the government has wiretaps of Sterling talking

to Risen (if they did, given the circumstances of the case, there'd be a good chance they got those wiretaps from their vacuuming of information at circuits, not from a formal wiretap placed on Sterling's phone). And now, along with the dance over how much Brinkema will permit the government to ask Risen on the stand, they're conducting a dance over whether or not the government will have to admit that.