THE BUSINESS RECORDS AND CLASSIFIED (?) EMAILS OF JAMES RISEN

Jeffrey Sterling's lawyers are throwing a number of interesting theories against the wall. In a filing demanding a bill of particulars (and presumably ultimately supporting a greymail defense),they demand to know which "defense information" is tied to each count of leaking or possessing such information, arguing that they need to know that to prevent double jeopardy. As part of that argument, though, they note that the 10 year statute of limitations on this crime exists only to make sure crafty Communists don't evade the law.

> In this case, the Government will surely claim that there is a ten year statute of limitations applicable to violations of 18 U.S.C. 793. See Internal Security Act, Ch. 1024, 64 Stat. 987, P.L. 831 (§19) (1950).
>
> As set forth in the statute, this law was passed, by its terms, because of the then existing threat of global communism.
>
> > There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose is by treachery, deceit…espionage, sabotage, terrorism, and any other means necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization. Id. at § 2 (1)
>
> In this regard, the Court can see that

> when this law was passed in 1950, it appears that the Congress extended the statute of limitations applicable to 18 U.S.C. § 793 because the "agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form and manner successfully evasive of existing law." Id. at § 2 (11).
>
> As such, the defense reserves the right to challenge the application of this McCarthy era law to the charges in this case which challenge would result in the application of the general five year statute applied to felonies. 18 U.S.C. § 3282.

Sterling is alleged to have leaked to James Risen in 2003; if a 5 year SOL applied, then it would have expired after the time when the Bush DOJ declined to charge Sterling. Charging him at this late date, he seems to suggest, is just McCarthyite.

But the other interesting aspect of this filing is the one Josh Gerstein points out: the details Sterling's lawyers provide about what they've gotten in discovery.

> In this case, for example, the United States has provided in unclassified discovery various telephone records showing calls made by the author James Risen. It has provided three credit reports – Equifax, TransUnion and Experian – for Mr. Risen. It has produced Mr. Risen's credit card and bank records and certain records of his airline travel. The government has also provided a copy of the cover of the book State of War written by Mr. Risen and published in 2006. It has provided receipts and shipping records from Borders and Barnes and Noble indicating that State of War was sold in this District between November 1, 2005 and

> March 1, 2006.4 From this document production, it can be inferred that Mr. Risen is Author A and that the "national defense information" at issue can perhaps be found somewhere in State of War.
>
> But State of War is a long book containing many chapters. Just pointing the defense to the book, or even a particular chapter in the book, is not legally sufficient to provide notice.
>
> 4 Count Eight is a mail fraud count under 18 U.S.C. §§1341 & 2, that seeks to hold Mr. Sterling criminally liable for the decision of Author A's publisher to sell in the Eastern District of Virginia a book allegedly containing "national defense information" obtained from Mr. Sterling. Author A and his publisher are not charged with any crime.

Now, obviously this passage does several things. It sets up a future argument—one that might be modeled on the AIPAC case—that if they're going to charge mail fraud they also need to charge Risen's publishers. Also, it exploits the fact that the government has sent an entire book full of highly classified disclosures—including details of the warrantless wiretap program—to introduce selective prosecution. Why is the government choosing to prosecute the alleged leaker of MERLIN information, but not the leakers of the illegal surveillance program?

But it seems Sterling's lawyers are just as interested in getting details about the government surveillance of Risen into the record.

Now, some of this is unsurprising. We knew the government had Risen's phone records, because the indictment cites at least 46 phone calls between Risen and Sterling. The indictment also mentions a trip Risen made (presumably to

Vienna), so it's unsurprising they have his credit card and airline information.

But that leaves two other items.

The filing mentions Risen's three credit reports and bank records. The only possible application of this information in the indictment is the repeated distinction between Risen's office and his residence. Presumably the latter would show up on the credit report. But that information would also be available by public means (publicly available property records, for example). So why collect Risen's credit reports and bank records?? Was the government trying to argue Risen was in some way induced to publish this?

Also, given that this would have qualified as a counterintelligence investigation, one wonders whether the government used the PATRIOT Act to collect these records.

More interesting, though, is what Sterling's lawyers don't mention in this passage: emails. We know they got emails, since they refer to at least 13 emails between Risen and Sterling (and point out that the emails went through a server conveniently located in the CIA's home district!). But for some reason, Sterling's lawyers don't mention having received the emails in what they specify is "unclassified discovery."

The probable explanation for that, of course, is that they have received those emails. It's possible they can't mention them, though, in an unclassified filing (one clearly targeted to the public), because they were turned over in classified discovery.

It's troubling that the government collected Risen's credit report and bank records to develop its case against Sterling. But the possibility that the government considers the email traffic between Risen and Sterling classified suggests some even more troubling possibilities.