

GOVERNMENT: RISEN SHOULDN'T BE ABLE TO REVEAL WE WANT(ED) TO TRUMP UP WAR AGAINST IRAN

The government has now responded to Risen's attempt to quash his subpoena in the Jeffrey Sterling case. I fear the government will succeed in at least getting Risen to the stand, not least because of the gimmicks they've used to claim they need information not protected by any confidentiality agreement Risen might have had with Sterling.

But a more interesting political debate—albeit one that likely will be dismissed from a legal standpoint—pertains whether Risen was right to expose a program to deal fabricated nuclear materials to Iran at the moment when the government was using fabricated nuclear materials to try to drum up a war against Iran.

The government's weak rebuttal to Risen's harassment claim

I think the government's subpoena of Risen is still very vulnerable to the argument that they are harassing Risen. The government dismisses the claim by emphasizing that the grand jury approved this indictment, as if that eliminated any animus from the government officials presenting the case to them, or the way that the government could "affirmatively operat[e] with furtive design or ill will" (the government's own definition for harassment) to jail Risen in pursuit of his testimony.

Moreover, the Indictment in this matter was returned by a grand jury that found probable cause that serious crimes were committed by Sterling, and that Risen was a witness to those crimes. As such, any alleged harassment prior to that

time – which the Government denies – is of no moment. Risen does not even attempt to address this central fact, or challenge in any way the detailed allegations against Sterling in the Indictment for which he is an eyewitness.

But Risen's team would need to emphasize more strongly the extent to which the government is going to shield illegal behavior in the al-Haramain case. Moreover, the question of how the government got a list of Risen's phone contacts remains a crucial one impacting the proof of harassment.

If secret unrebutted witnesses claim something is false, then journalists have to testify

I'm also amused (or perhaps disgusted) by a new tack the government takes here, by insisting that Risen must disclose his source because—they argue—the grand jury has found that his reporting included false information.

Risen's beliefs that his confidential source(s) provided him truthful information, no matter how sincerely held, do not alter the indisputable fact that the grand jury found otherwise.

Aside from the fact that the government does not dispute that some of what it claims Sterling told Risen is true, the grand jury, of course, is not a confrontational proceeding. Sterling and his Russian asset did not, to the best of my understanding, testify before the grand jury. No final judgment on whether Sterling lied or not has been rendered.

And of course, the government would adamantly refuse to make any information with which the jury could assess such information available in court (indeed, I doubt they have made it available to Judge Brinkema here). In other words, the government wants to be able to force a reporter to testify based solely on its

unrebutted assertion—endorsed by a grand jury—that Sterling lied. Given the asymmetry of access to classified information, given the government’s repeated success in withholding information from such trials, that is a very dangerous approach to allow to stand.

Risen’s efforts to prevent another war

But I’m most interested in the government’s weak response to Risen’s claim to have published the information because it was newsworthy. They don’t deal with the substance of Risen’s claim to newsworthiness, which basically argues he published the information in 2006 because the government was threatening to trump up another war, this time against Iran.

I gave this type of serious consideration to my publication of the information contained in Chapter 9 of State of War. I actually learned the information about Operation Merlin that was ultimately published in Chapter 9 of State of War in 2003, but I held the story for three years before publishing it. I made the decision to publish the information about Operation Merlin only after: (1) it became clear that the main rationale for fighting the Iraq War was based on flawed intelligence about Iraq’s non-existent weapons of mass destruction, including its supposed nuclear program; (2) the press, particularly The New York Times, had been harshly criticized for not doing more independent investigative reporting before the Iraq War about the quality of our intelligence concerning Iraq’s weapons of mass destruction; (3) the March 31, 2005 Report to the President by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction described American intelligence on Iran as inadequate to allow firm judgments about Iran’s weapons programs, making it

clear that the CIA's intelligence on weapons of mass destruction in Iran was just as badly flawed as it had been on Iraq; and (4) there was increasing speculation that the United States might be planning for a possible conflict with Iran, once again based on supposed intelligence concerning weapons of mass destruction, just as in Iraq. After all of this, I realized that U.S. intelligence on Iran's supposed weapons of mass destruction was so flawed, and that the information I had was so important, that this was a story that the public had to know about before yet another war was launched.

Instead, they just talk about how dangerous (because trumped up wars aren't dangerous) it would be excuse Risen from testifying because he published information that was newsworthy.

Moreover, the practical effect of a court's engaging in such an analysis, by explicitly recognizing "good leaks" of classified information, would effectively destroy the system through which the country protects that information. It would encourage government employees who are provided access to classified information to betray their commitment to safeguard it by suggesting that they, too, should undertake their own independent analysis of the effect of their disclosure of that information should they desire to do so. It would also provide a ready-made defense for every disgruntled intelligence community employee or contractor who discloses such information to the press because he harbors a grudge against the institution for which he works.

(They also revert to their unproven claim that Sterling provided Risen with false information.)

But consider the environment in which Risen published this. Just a month before the publication of Risen's book, it was becoming increasingly clear that the government had been trying for a year to generate support for actions against Iran by using a dodgy dossier and selectively tailored presentations based on non-traditional intelligence analysis.

The Bush Administration (or at least State Department officials) may not have believed that intelligence was ready for prime time a year ago. But they apparently believe it is ready now. In September we learned BushCo had itself another powerpoint presentation, this one titled "A History of Concealment and Deception" (did they get the same guy who came up with the name for the WHIG product, "A Grave and Gathering Danger" to name this one?):

The PowerPoint briefing, titled "A History of Concealment and Deception," has been presented to diplomats from more than a dozen countries.

[snip]

Several diplomats said the slide show reminded them of the flawed presentation on Iraq's weapons programs made by then-secretary of state Colin L. Powell to the U.N. Security Council in February 2003.

BushCo may think this is ready for prime time. But some people who have seen the presentation are not so sure.

Several diplomats said the presentation, intended to win allies for increasing pressure on the Iranian government, dismisses ambiguities in the evidence about Iran's intentions

and omits alternative explanations under debate among intelligence analysts.

The presenters argue that the evidence leads solidly to a conclusion that Iran's nuclear program is aimed at producing weapons, according to diplomats who have attended the briefings and U.S. officials who helped to assemble the slide show. But even U.S. intelligence estimates acknowledge that other possibilities are plausible, though unverified.

The problem, acknowledged one U.S. official, is that the evidence is not definitive. Briefers "say you can't draw any other conclusion, and of course you can draw other conclusions," said the official, who would discuss the closed-door sessions only on condition of anonymity

Sounds familiar, huh? Omitting alternative explanations ... again? But the most important line from this passage is this: "But even U.S. intelligence estimates acknowledge that other possibilities are plausible, though unverified." Quick, someone tell Condi that somewhere deep in the bowels of the agency there are people who doubt this intelligence, because she will deny it later, mark my words.

We're in the middle of arguments about the intelligence used to get us into the Iraq War, where Republicans try to prove that BushCo didn't withhold information and Democrats point out that the Administration suppressed the doubts within the IC. But why are we having the argument about the last war, when

they're doing it again??? The Bush Administration is withholding information in the present—regardless of what it did in the past.

One more thing. This slide show? You'd think it'd reflect the consensus opinion of the IC, right? Well, no. Rather, it looks a lot more like the product of the reincarnation of OSP or WHIG than something respectable intelligence professionals (if there are any left who haven't been hounded out by BushCo) would buy off on:

The presentation has not been vetted through standard U.S. intelligence channels because it does not include secret material. One U.S. official involved in the briefing said the intelligence community had nothing to do with the presentation and "probably would have disavowed some of it because it draws conclusions that aren't strictly supported by the facts."

The presentation, conducted in a conference room at the U.S. mission in Vienna, includes a pictorial comparison of Iranian facilities and missiles with photos of similar-looking items in North Korea and Pakistan, according to a copy of the slides handed out to diplomats. Pakistan largely supplied Iran with its nuclear infrastructure but, as a key U.S. ally, it is identified in the presentation only as "another country."

Two months ago, the Bush Administration presented an explicitly politicized presentation to diplomats from other

countries in an attempt to drum up support for a hardline against Iran.

Since that time, the IAEA has received evidence that the “laptop of death” on which this fearmongering was based might be a fabrication. Later, evidence came out to suggest the laptop of death came from the MEK (the same terrorist group the neocons are trying to rehabilitate, oddly without being prosecuted for material support for terrorism) via Mossad.

In other words, Risen published a story about the US providing fabricated nuclear plans to Iran. He published it—in spite of the government’s earlier success at persuading the NYT not to publish it—because the US had since been proven to have used fabricated intelligence to trump up a war against Iraq, and the government was in the process of using probably-fabricated materials (which included fabricated blueprints) to trump up action against Iran.

Now, I think Leonie Brinkema will do what District Court judges tend to do when the government says judges are unqualified to measure the importance of secrecy: I think she’ll cede to the government’s argument, no matter what she does on the other legal arguments.

But that doesn’t mean the conflict shouldn’t be one of the primary topics of public discussion about this case.

The government is basically arguing that Risen shouldn’t have published information that helped us (so far) avoid a trumped-up war against Iran. It is quite possible he will end up spending time in jail—for protecting his sources—for having done so (as well as for having exposed illegal wiretapping that has never been punished). While the legal arguments may not work in Risen’s favor, that is what is at stake.