

THE NARRATOLOGY OF THE RUSSIAN SCIENTIST WE'RE ALLOWED TO MEMORIALIZE BUT NOT QUOTE

I was meaning to write a post on this filing in the Jeffrey Sterling case, largely to point out the government is trying to prevent Sterling from arguing that everyone—particularly John Brennan—leaks.

The Court should bar the defendant from presenting any evidence, argument or comments of selective prosecution or that everybody leaks classified information.

[snip]

Not only is such evidence not probative on the issue of whether the defendant committed the charged crimes, but the introduction of such evidence or arguments would force mini-trials over the similarities and differences between the present prosecution and every other specific instance of leaked classified information. Fights over the classification levels of the information, the potential damage caused to the United States, and a host of other issues would consume and overwhelm the real issues in this case.

The motion is particularly amusing not just because it was submitted at the very same time senior officials—including Brennan, who was involved in the underlying issues in this case—were leaking state secrets for days. And because, a week after this, the Defense did file a still-sealed selective prosecution motion. Moreover, the government's case citations don't

address the instant issue: that the prosecuting agency itself—DOJ—leaks with impunity. It's one thing to say other non-governmental criminals commit the same crime without being prosecuted; it's another to say the agency prosecuting Sterling doesn't prosecute people within its own agency that commit the same alleged crime.

Alas, I am going to have to, instead, focus instead on the motion to prevent Sterling from presenting any evidence that the Russian Scientist tasked with handing off faulty blueprints to the Iranians might be James Risen's source.

The court should bar the defendant from presenting any evidence or any argument regarding alternative perpetrators absent some non-speculative evidence of a connection to Risen and some knowledge of or access to Classified Program No. 1. Specifically, absent such nonspeculative evidence, the caselaw forecloses the defendant from presenting any evidence or making any argument regarding the following:

[snip]

Arguments or comments that Human Asset No. 1 was Risen's source and disclosed the national defense information contained within Chapter 9;

Of course, all this is happening while the government is simultaneously trying to get comments the Russian Scientist made to his case officer when Risen's book came out admitted into evidence, while at the same time trying to prevent Sterling from subpoenaing the underlying documents that might show the Russian had to be Risen's source.

The government, you see, wants to admit evidence that the Russian was scared Risen's revelations put his safety at risk.

On or about January 23, 2006, after

having read Chapter 9 and the information contained therein for the first time, Human Asset No. 1 contacted his CIA case officer and requested an unscheduled meeting. Human Asset No. 1 subsequently met with his CIA case officer and reported his fears and personal safety concerns for himself and his family. The case officer contemporaneously memorialized Human Asset No. 1's fears in a cable. See Dkt. 153, CIPA Exhibit 47. That cable demonstrates that Human Asset No. 1 made his statements to his CIA case officer while still "under the stress of excitement" caused by the level of detail identifying him as the asset involved in Classified Program No. 1. In addition, the CIA case officer will testify at trial that he had never seen Human Asset No. 1 so shaken and scared than on that day as Human Asset No. 1 reported his fears and concerns to him.

The government moved to enter this cable after the defense had already apparently (the filing is heavily redacted) pointed out that Risen's book had not identified the Russian scientist—the defense appears to want to call Pat Lang to support this point—but also to note that the Russian would have had as much reason to want to discredit the CIA as Sterling allegedly would after he had been put in the position of dealing bad documents to Iran.

More interesting, Sterling suggests that the Russian may be the only person who had a document mentioned in Risen's book. One possibility is a written report the Russian made of his trip. Another is the content of the cover letter he wrote warning the Iranians that there was something wrong with the blueprints.

But most notably—given the claims and counter-claims about what Risen's narrative style might indicate about his sources—the Defense notes that much of the narrative of MERLIN is

focalized through the Russian.

Human Asset No. 1 obviously had knowledge of almost all of the information that appears in Chapter Nine. Indeed, there are portions of that Chapter that detail actions about which only Human Asset No. 1 had first-hand knowledge and those portions of the Chapter are written from the perspective of Human Asset No. 1. See, e.g. State of War at 194-95 (“I’m not a spy, he thought to himself. I’m a scientist. What am I doing here?”); (“He [Human Asset No. 1] still couldn’t believe the orders he had received from CIA headquarters.”)

Indeed, the passage they cite is the most striking in the chapter, and clearly provides the Russian’s internal thoughts. The observation is interesting not least because the Government has been aware of the fact since they first subpoenaed Risen in this go-around.

In his book proposal, Mr. Risen represented that, in writing his book, he spoke with more than one CIA officer involved in Classified Program No. 1. Consistent with these representations, moreover, the chapter of Mr. Risen’s book that includes information about Classified Program No. 1 appears to reflect the private conversations and inner thoughts of more than one individual.

And it asked for a focus on precisely this kind of content in its response to Risen’s effort to quash his subpoena (though notably, it made no mention that some of the passages it referred to—the italicized ones—are focalized through the Russian).

The Government similarly must be able to ask Risen questions about the meaning

and significance of the indented and italicized information appearing in State of War so that the jury understands the importance, if any, of that information and the manner in which it is reported. See, e.g., *id.* at pp. 204-05. The Government should be able to clarify through Risen that certain references to the word “he” means “the CIA case officer,” and that “the senior CIA officer” is a different person than “the CIA case officer.” See, e.g., *id.* at pp. 197, 203, 206.

The problem for the government is, aside from the italicized direct speech, there is no narrative difference between the way Risen communicates some of the thoughts of the case officer...

As he was sweet-talking the Russian into flying to Vienna, the case officer wondered whether he was being set up by CIA management, in some dark political or bureaucratic game he didn't understand. Was he involved in an illegal covert action? (197)

The Russian...

He was afraid because he fully understood the value of the information he was supposed to pass to the Iranians. (198)

And even, on just one occasion and with less emotional insight, the senior case officer...

The senior CIA officer could see that the Russian was nervous, and so he tried to downplay the significance of what they were asking him to do. (198)

In other words, if the government tries to use the narrative structure of the chapter to convict Sterling, they would have to explain why

that same argument wouldn't, at the same time, indict the Russian scientist.

And there's a chance they might get put in that awkward position.

As Josh Gerstein reported, Leonie Brinkema just amended her order regarding Risen's testimony to require him to explain his writing style.

Brinkema said Wednesday that questions to Risen about whether the quotes he relayed are literal would be "absolutely benign and appropriate." She said she "has a right to know" that legal briefs containing quotes are accurate. As a result, she said, Risen's offer to authenticate the book means he must say what the use of quotes conveys.

Brinkema said she would permit prosecutors and the defense to ask Risen how he handles quotations in the relevant chapter of the book, but she will not permit lawyers to ask Risen on a quote-by-quote basis because that could tend to identify his sources.

"I'll be playing grammarian during this trial," the judge said. She assured Risen's lawyer, Joel Kurtzberg, that Risen's testimony will be "very limited."

I'm guessing the prosecution's successful request that Risen do a dry run, outside the presence of the jury, reflects their own anxiety that this focus on grammar supports Sterling's effort to call the Russian scientist as witness.

Brinkema later agreed to a prosecution proposal to have Risen first be examined outside the presence of the jury. After any disputes were resolved, the questions and answers would be run through again for the jury.

Notably, aside from the possibility that the

government is certain the Russian isn't Risen's source because he didn't show up on the wiretaps they purportedly had on Risen (at 45:00 and following; h/t Jason Leopold), they haven't really investigated whether or not the Russian is one of Risen's sources.

The Government's investigation of Human Asset No. 1 appears to have been limited to asking him whether he was the source, which he denied, and asking him to [redaction—probably not long enough for “take a lie detector test”] Opp. at 9. Thus, Mr. Sterling takes little comfort in the Government's assertion that “there is no evidence suggesting [Human Asset No. 1 and Mr. Risen] have never been in contact.” Id. There is presently no such evidence because the Government never seriously attempted to determine whether such evidence exists. The Government's negligence in this regard cannot be the basis for circumscribing Mr. Sterling's defense. The Government concedes that Mr. Sterling has the right to develop a defense. That right includes compulsory process.

So here's where the government's relentless effort to get Risen to testify and the related legal detour into narratology brings us. On the one hand, they're arguing Brinkema must admit a cable that memorializes the Russian scientist's reported fear in 2006, when Risen's book came out. But they're also arguing that she should not even approve discovery on other documents that might record the Russian's fears more directly, much less justify his direct testimony at trial. And whether or not we get to hear from this Russian may come down to whether Risen says he quoted, or merely memorialized, the Russian's fears experienced in 2000.