WILLIAM WELCH APPEARS TO COMMIT PROSECUTORIAL MISCONDUCT. AGAIN.

DOJ has submitted its statement of issues it plans to appeal in the Jeff Sterling case. They are:

> (1) Whether the district court erred in finding that author James Risen was protected by a "reporter's privilege" and, therefore, could not be compelled to testify at trial as to the identity of persons who unlawfully communicated highly classified national defense information to Risen and as to other relevant matters regarding the receipt by Mr. Risen of that information;
>
> (2) Whether the district court erred in ordering the disclosure to the defendant and jury of classified information regarding the identity of certain government witnesses (CIPA issue); and
>
> (3) Whether the district court erred in striking the testimony of two government witnesses for the late pre-trial disclosure of potential impeachment information about these witnesses.

It was always likely they were going to appeal the James Risen subpoena.

And I noted here that the government was likely going to try to hide the identities of its CIA witnesses, even from Sterling, for all that would seem to violate the Sixth Amendment.

But then there's what appears to be more of William Welch's practice of withholding relevant material from defendants (Carrie Johnson first reported this aspect here).

While we don't know which witnesses Leonie Brinkema has excluded, I think it possible that one of the witnesses in question was investigated, but not prosecuted, for leaking in the past.

Sterling moved to dismiss his case for selective prosecution on October 11, less than a week before the case was scheduled to go to trial. That's obviously late to raise an issue like selective prosecution. That filing ~~and a later response~~ has not been redacted yet. But the government response makes it clear that Sterling complained about what appears to be another CIA officer who leaked classified information, but was not prosecuted.

> The defendant claims that he was selectively prosecuted. At bottom, he alleges that because someone else was not prosecuted for the unauthorized disclosure of classified information, then he must have been selectively prosecuted.
>
> [snip]
>
> Here, prior prosecutors reviewed the circumstances surrounding Person A's statements and concluded that Person A's statements had been obtained in violation of Garrity v. New Jersey, 385 U.S. 493 (1967). Person A's statements are the only evidence against Person A cited by the defendant. Person A had been interviewed a number of times by internal security investigators, and Person A had an employment obligation to cooperate with those internal security investigators. Failure to do so meant loss of security clearances and potentially loss of employment for Person A. Thus, the threat of loss of employment, whether implied through the loss of security clearances or express, supplied the requisite coercion to render Person A's statements inadmissible, and Person A never waived

> any Garrity rights or executed any Garrity waivers prior to making the statements at issue. Thus, the situation of this defendant and Person A are starkly different, not similarly situated.

Given the late date of Sterling's motion to dismiss, it seems likely he got information on this person about a month ago, which makes it likely he received it in late discovery.

In her most recent ruling (which she issued in sealed form the day before the CIPA conference at which the government announced it would appeal), Brinkema responded to Sterling's selective prosecution attempt with this comment.

> The defendant's Motion to Dismiss Based on Selective Prosecution or, in the Alternative, to Take Discovery Related to Selective Prosecution [Dkt. No. 254] is unsupported by the facts before the Court and the law. Moreover, there is not enough time before the start of the trial to conduct further discovery.

Given her dismissal based on time considerations, I think it likely this may be the impeachment evidence: that at least one of the witnesses who would testify against Sterling had, in the past, leaked herself, and yet Sterling had not been given enough time to learn about the nature of this leak.

Gosh, it seems like just a few hours ago I was posting on the capriciousness with which our government treats leaks. And it seems like just days ago that I was recalling William Welch's series of prosecutorial screw-ups.

You'd think that DOJ would start to get the idea that none of this stuff is cool.

Update: I made an error before. Sterling's reply to the government's response on selective prosecution was not sealed. Here's one more

detail that adds to the picture of his selective prosecution claim.

> With respect to the Government's first contention, as set forth in his motion, Mr. Sterling has made a detailed showing. Mr. Sterling showed that the conduct of Person A was more egregious, Person A was not prosecuted, Mr. Sterling had sued the CIA for discrimination, and Mr. Sterling was prosecuted.

So whatever Person A leaked, Sterling claims it was worse than what he is accused of leaking.

Also note, Sterling's reply came on October 13, the same day Brinkema issued her ruling rejecting the selective prosecution. So it's possible that Sterling's lawyers raised this issue in the CIPA hearing the next day, which is when the government decided to appeal.