

HOW THE STERLING PROSECUTION THREATENS EVEN UNCLASSIFIED TIPS

In a piece for Salon, I describe how the government managed to get Jeffrey Sterling convicted of 7 charges under the Espionage Act for one leak. More importantly, I show how the jury's conviction of him for 2 of those charges – related to “causing” James Risen to write a 2003 NYT story on Merlin that got quashed – may well amount to convicting him for tipping Risen, without sharing any classified information, to the operation.

Here's the key part of that discussion:

D.C. information brokers should be worried that Sterling faces 80 years in prison based off this circumstantial evidence. All the more so, given the evidence supporting the charge that Sterling leaked to Risen in time for and *caused him to write* the article Risen told CIA he had in completed draft on April 24, 2003. After all, the only pieces of evidence that the government submitted from before the time when Risen told CIA he had a completed article were the CNN email, phone calls reflecting Risen and Sterling spoke for four minutes and 11 seconds across seven phone calls, and Sterling's entirely legal **discussion** with staffers from the Senate Intelligence Committee.

No matter what you think all the later phone calls between Sterling and Risen indicate, short of evidence of a face-to-face meeting in this earlier period, the evidence seems to suggest Sterling was doing something that people in DC do all the time: point an investigative

reporter to where she might find classified scoops, without providing those scoops themselves. That's especially true given the way the CIA's own notations about Risen's story seem to track the reporter fleshing out information, from initial outlines of the operation (that happen to map what Sterling told Senate staffers) to, weeks later, inclusion of that elusive document FBI never managed to find. That is, it appears Risen got a tip, possibly from Jeffrey Sterling, but that he spent weeks using his sources to flesh out that tip.

In both the **indictment** and discussions about jury instructions, the government interpreted the Espionage Act to cover what might be an unclassified tip through two means. First, they pointed to language in the Espionage Act that criminalizes someone "caus[ing secrets] to be communicated, delivered, or transmitted," and from that argued Sterling was responsible not just for the leak to Risen but also for the journalist's attempt to publish a newspaper article and his completion and his publisher's delivery to Virginia of a book chapter. Then, for most counts, they argued that Sterling did not have to have handed Risen secret information directly, he could do so indirectly.

If the jury found Sterling *indirectly* got secrets into Risen's hands and, from that, *caused* him to write an article and a book chapter on it (irrespective of the additional work Risen did, the work of his editors at the Times and the publishers at Simon and Schuster and the commercial freight company that carried those secrets in a bound book to Virginia), that was enough to send him to prison for most of the rest of his life.

While it's all well and good that DOJ backed off plans to force James Risen to testify, I think few realize the implications of Sterling being held responsible for an entire NYT story based on four minutes and 11 seconds of phone conversations.

They may well criminalize providing unclassified tips to get reporters to chase down classified stories.