REALITY WINNER SEEKS TO USE TRUMP'S DENIALS OF RUSSIAN HACKING IN HER DEFENSE

Last week, Reality Winner had a hearing on her bid to get her interview with the FBI thrown out because they didn't issue her a Miranda warning (Kevin Gosztola covered and discussed it on Democracy Now). Given the precedents on Miranda, I think that bid is unlikely to succeed.

But there is a tack her defense is taking that, as far as I've seen, has gotten no notice, one that is far more interesting. Winner is seeking to use Trump's comments denying that the Russians hacked the election to argue the document she is accused of leaking to The Intercept isn't actually National Defense Information, the standard the government has to prove to secure an Espionage conviction.

In her discovery requests, Winner asked for three (entirely redacted) categories of documents "reflecting statements made by high-ranking governmental officials regarding information contained in the document," all of which were denied (see PDF 87).

A discovery appeal submitted in January (but only released on February 13) makes clear that Winner's defense attorneys are going to argue that the intelligence in the report she is accused of leaking cannot be National Defense Information because the President's statements would be taken to suggest the intelligence is not true.

> However, high-ranking government officials, including the President of the United States, have made statements undermining and/or contradicting that

> contention. 44 That, is of great import because, if the information in the Document is inaccurate (as the President and other high-ranking officials have said), it cannot be NDI. While the defense may seek to capture some of this information in the public domain, 45 it cannot capture statements made privately by these high-ranking officials.

Bill Leonard, the former head of the federal classification authority, ISOO, who has served as expert witness on two other cases involving Espionage charges, laid out the logic of the argument this way (PDF 102-3)

> [T]here are governmental actors, including high-level governmental actors (such as the President of the United States), that have made conflicting and/or contradicting statements in comparison to the Government's position here. In other words, these high-level governmental officials have made statements undermining the veracity of the information contained in the Document, which would impact whether the Document actually contains "national defense information" because, if inaccurate, the Government's contention that its disclosure could harm the national security of the United States would be severely undermined. Indeed, the President is the highest level of authority in our classification system and has virtually unrestricted access to information in our intelligence system. He is, therefore, in the best position to know the particulars of any piece of intelligence, including its sensitivity and its veracity. Consequently, records reflecting statements made by high-ranking governmental officials, including and in particular, the President of the United States, relating to the information contained in the

> Document (including statements contradicting the truth or veracity of the information at issue) are highly relevant and are critical to the determination of whether or not it is closely held and/or whether or not its disclosure would potentially damage the national security.

There are a number of other challenges the government is facing with this case (not least that — as I've pointed out — similar information has been leaked to the press without any apparent prosecution arising from it).

But Trump's self-interested denials are the most interesting. After all, he cannot admit that Russia affected the election, because he has staked so much on the claim that that will lessen his legitimacy (not to mention any risk such an admission exposes him to in the Mueller investigation). As Leonard notes, the entire classification system is built on presidential authority, and if he says something isn't true, it will seriously undermine any claim a prosecutor can make at trial that Winner leaked true National Defense Information.

Effectively, some prosecutor will be in a position of having to point out what we all know, that the President is a liar. Given Trump's propensity towards rage-induced firings, I imagine the government would like to avoid this pickle.