

DID DOJ SUBPOENA EX-SPOOK'S LAWYER TO DISCREDIT ANY WHISTLEBLOWER MOTIVE?

Via Jeff Stein, the St. Louis Beacon reports that DOJ not only (unsuccessfully) subpoenaed James Risen in their pursuit of alleged MERLIN source Jeffrey Sterling, but they successfully subpoenaed Sterling's one-time lawyer, Mark Zaid.

Mark Zaid, a Washington, D.C., lawyer who handles national security cases, was subpoenaed to appear before a grand jury to discuss events surrounding his representation of Sterling in a race discrimination case he filed against the CIA, say sources with knowledge of the case.

As both pieces lay out, the guidelines on subpoenaing a lawyer are—at least in theory—limited as subpoenaing a reporter (never mind that the government wiretaps lawyers representing alleged terror suspects). But they appear to have used Zaid to get to other interactions—including Sterling's testimony to a congressional committee—apparently to hone in on an alleged motive.

Prosecutors questioned Zaid about Sterling's motive in allegedly leaking classified information about an intelligence operation in Iran to James Risen of *The New York Times*, a source said. The indictment alleges that Sterling leaked the information to retaliate against the CIA for its refusal to settle his race discrimination claim and to approve a memoir he was writing.

The prosecutors' questions focused on motive and dealt with the circumstances of Sterling's case and contacts Zaid had with third parties, a source said. Zaid had tried to negotiate a settlement of Sterling's issues with the CIA. In addition, prosecutors questioned Zaid about actions he had taken on Sterling's behalf that led to testimony to a congressional committee and that promoted his racial discrimination case through the media, a source said.

Zaid's testimony was entirely about his contacts with third parties on Sterling's behalf and was outside of the attorney-client privilege, a source said. [my emphasis]

Now, there are several interesting implications of this. For starters, Zaid probably represents more disgruntled CIA officers than Risen publishes CIA-related scoops. Subpoenaing him—even with the understanding he didn't testify about protected conversations—may chill others who would seek out Zaid for assistance.

But I'm particularly interested in the way this seemingly links conversations with third parties—notably a Congressional Committee—and motive. Because one of the weakest parts of the indictment is the CIA's effort to dismiss the possibility that Sterling came forward as a whistleblower.

The indictment describes testimony Sterling gave to two staffers at SSCI on March 5, 2003. This happened two weeks before the start of the Iraq War, but after CIA had rejected the employment discrimination settlements Sterling had proposed through Zaid:

On or about March 5, 2003, consistent with his secrecy and non-disclosure agreements with the CIA, defendant STERLING met with two staffers of the Senate Select Committee on Intelligence

and disclosed classified information about Classified Program No. 1 and Human Asset No. 1. However, in doing so, defendant STERLING falsely characterized certain facts and circumstances relating to Classified Program No. 1, falsely reported that he had believed Classified Program No. 1 to have been flawed from its inception based solely upon his mischaracterization of a single remark by a participant in Classified Program No. 1, and claimed, based upon that false information, that Classified Program No. 1 may have enhanced the weapons capability of Country A.

Importantly, the indictment admits that Sterling was entitled to share this information “consistent with his secrecy and non-disclosure agreements.” While the indictment doesn’t ascribe a motive to Sterling in this meeting, it does say Sterling claimed MERLIN had enhanced Iran’s weapons capability. In other words, by all appearances, it seems that Sterling made a legally-allowable effort to alert Congressional oversight staffers that the CIA had engaged in a boneheaded operation that had helped one of the Axes of Evil acquire nukes.

That is, by all appearances, Sterling was acting as a whistleblower.

Note how the indictment claims Sterling misrepresented something to the Committee (which was then headed by Pat Roberts, noted for his efforts to protect Cheney’s gaming of intelligence and the CIA’s use of torture), but it doesn’t provide any evidence that Sterling intentionally misrepresented it. He was wrong, the indictment claims, but it doesn’t claim he knew he was wrong.

If Roberts didn’t squelch any interest in MERLIN himself, then we can probably assume the CIA told SSCI the same thing they’re claiming here, that Sterling was wrong about what he told SSCI.

Now look how the details change as soon as Sterling goes to Risen. Whereas with the meeting with SSCI, the indictment doesn't attribute a motive and doesn't explicitly claim Sterling intentionally provided false information, they claim Sterling made false representations about the operation to "induce" Risen to publish a story on it.

Defendant STERLING caused [Risen's first call to the CIA's Public Affairs director about MERLIN] to occur by having disclosed certain information relating to Classified Program No. 1 to Author A and providing false and misleading information about Classified Program No. 1 to Author A in order to induce Author A to publish a newspaper article about Classified Program No. 1.

Claiming Sterling's alleged misrepresentation was part of what Sterling did to induce Risen to publish this attributes a motive to the allegedly false information. Presumably, they're arguing that without the risk that MERLIN gave Iran nukes, Risen wouldn't have found it as interesting a story (though given that this happened just as it was becoming clear Cheney had lied about Iraq's nukes, I'm not so sure).

And, too, the indictment provides a clear motive behind Sterling's attempts to get Risen to publish information on MERLIN.

Defendant STERLING's anger and resentment towards the CIA grew over time as the CIA rejected the defendant's settlement offers and made other legal decisions. In retaliation for the CIA's refusal to settle on terms favorable to defendant STERLING, as well as other decisions made by the CIA, defendant STERLING caused and attempted to cause the publication of classified information about Classified Program No. 1 and Human Asset No. 1 that defendant STERLING characterized in a false and

misleading manner.

So it seems likely to me the government went to the trouble of subpoenaing Zaid to try to smooth this transition between what appears to be legal whistleblowing to what they claim to be retaliatory, misrepresentative leaking. I would imagine they're very interested in why Zaid (apparently) negotiated the testimony to SSCI.

Mind you, there are three more interesting details of timing. The indictment alleges that Sterling was the source for this November 4, 2001 article revealing that the 9/11 attacks had destroyed CIA's New York office. As the indictment lays out, it appeared just days after the CIA had rejected Sterling's second employment discrimination settlement attempt. So they lay the ground work for retaliation motive early.

Also, the indictment claims that Sterling called Risen on February 27, 2003, two weeks after CIA rejected his last settlement offer, putting it before Sterling told SSCI CIA had had him help deal nuclear blueprints to Iran.

But perhaps the most interesting set of dates appear in a paragraph in Sterling's suit-filed March 4, 2003, so the day before he testified to SSCI-regarding CIA's refusal to let him publish details in his memoir.

By letter dated January 3, 2003, the CIA notified Sterling of additional decisions regarding his October submission [to the Publication Review Board]. Sterling was not only notified that the CIA considered certain information in his manuscript to be classified, which also conflicted with earlier decisions, but the CIA informed Sterling that he should add information into the manuscript that was blatantly false. Upon information and belief, the CIA instructed Sterling to knowingly include false information within his

manuscript solely to maintain a
litigation advantage against Sterling in
the unrelated discrimination lawsuit.
[my emphasis]

That is, it appears that Sterling, not the CIA, is the first party to claim the other was lying (though they may be about entirely unrelated issues).

It seems likely one of the biggest weaknesses of this indictment is the possibility that Sterling will argue he legitimately worried about our government dragging us to war against Iran based on false claims and went to Risen as a whistleblower. That doesn't make it legal, but it's an extenuating circumstance that, 4,300 deaths into the Iraq War, might well make a jury pause before they convict him for leaking this information. And if Sterling can make that case at all credibly, then it'll get into the mother of all CIPA fights over whether Sterling can get information to prove the CIA right or wrong about MERLIN.

So it seems like the government dragged Sterling's lawyer into the Grand Jury to try to rebut the whistleblower excuse from the start.