

GOVERNMENT SUBPOENAS JAMES RISEN FOR THE THIRD TIME

The government appears to hope three time's a charm. The last two times they subpoenaed James Risen in the case of Jeffrey Sterling, Judge Leonie Brinkema quashed the subpoena. But they're trying again, this time to get him to testify at Sterling's trial.

It appears likely they planned to do this all along and crafted the charges against Sterling accordingly. For example, they claim they need Risen to testify, in part, to authenticate his book and the locale where alleged leaks took place.

Risen can directly identify Sterling as the individual who illegally transmitted to him national defense information concerning Classified Program No. 1 and Human Asset No. 1. Because he is an eyewitness, his testimony will simplify the trial and clarify matters for the jury. Additionally, as set forth below, Risen can establish venue for certain of the charged counts; can authenticate his book and lay the necessary foundation to admit the defendant's statements in the book; and can identify the defendant as someone with whom he had a preexisting source relationship that pre-dated the charged disclosures. His testimony therefore will allow for an efficient presentation of the Government's case.

Locale issues stem from mail fraud charges that appeared ticky tack charges up to this point. But the government is now arguing that that information—as distinct from whether Sterling served as a source for the information at

issue—is critical to these ticky tack charges. Which, it seems they hope, would get them beyond any balancing test on whether Risen’s testimony is crucial for the evidence at question. They also point to mentions in the indictment of an on-the-record article Risen did with Sterling, suggesting that at the very least they ought to be able to ask Risen about this at trial since he would not be protecting an anonymous source.

In other words, they crafted the indictment to be able to argue to Brinkema that on some matters, Risen’s testimony is crucial, and on others, it qualifies for no privilege.

Of course, they also have to argue that this subpoena is not harassment. If I were Risen’s lawyer, I’d argue crafting the indictment in such a way as to carve out areas to get Risen into court is itself harassment.

But that’s not all. The government tries to argue for the necessity of Risen’s testimony in one other way, one that is of particular interest. They say that Risen told his publisher that he relied on more than one CIA source for his work on MERLIN.

In addition, Risen’s own representations to his publisher demonstrate the importance of his testimony regarding the defendant’s identity. 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.¹¹ See, e.g., Exhibit A at p. 203. Risen’s testimony is therefore relevant to identifying Sterling as a source and to identifying the specific items of national defense information in his book for which Sterling was his source. Put

simply, Risen's testimony will directly establish that Sterling disclosed to him the national defense information about which he sought to write in a 2003 newspaper article, and which he ultimately included in his 2006 book. The jury should be permitted to hear that evidence in assessing whether the Government has met its burden of proving the defendant's guilt beyond a reasonable doubt.

While this might support the necessity of Risen's testimony on one hand (to identify what he got from Sterling and what he got from other sources), wouldn't it also admit a selective prosecution defense? That is, if the government itself is arguing that Risen spoke to more than one CIA officer about MERLIN, then why are they only charging Sterling?

The answer may be because of the dispute about the accuracy of Sterling's testimony. Remember, the government claims that Sterling lied to Risen about some aspect of MERLIN, presumably about whether or not the blueprints we gave to Iran had an obvious flaw that the Russian defector immediately identified. And they're trying to use that claim—that Sterling lied—to argue that Risen doesn't have an obligation anymore to protect his source.

Finally, whatever interest Risen has in keeping confidential his source for the national defense information at issue here, it is severely diminished by the fact that the defendant characterized some of that information in a false and misleading manner as a means of inducing Risen to write about it. See Ind. ¶ 18, 19(d). In short, the Indictment charges that the defendant perpetrated a fraud upon Risen. If "[s]preading false information in and of itself carries no First Amendment credentials" in the civil context, see *Lando*, 441 U.S. at 171, then it should carry no greater

weight in a criminal prosecution.

They say that even while conceding that some of the information Sterling allegedly leaked to Risen is true.

The Indictment alleges that some of the information that appears in Risen's book is national defense information – and thus is implicitly true – but also notes that some of the information contained therein is characterized in a false and misleading manner. See Ind. ¶¶ 18,19(d). The Government is not here either confirming or denying the accuracy of any particular fact reported in the book.

There's a lot we can conclude from this filing—not least that the government seems to be abandoning the intent of the Attorney General guidelines on subpoenaing journalists (the guidelines are not mentioned once in the filing). But most of all, it seems we can conclude that the government doesn't care so much that Sterling allegedly leaked this information—because they're not charging the other CIA officers they appear to know leaked to Risen—but that Sterling was critical of the operation while he leaked the information.