

Jeffrey Sterling's Selective Prosecution

Exclusive: The leak conviction of ex-CIA officer Jeffrey Sterling exposed a range of double standards, from how the spy agency treats African-Americans to how favored officials like Gen. David Petraeus get a pass while others get prison, an issue now before President Obama, writes Chelsea Gilmour.

By Chelsea Gilmour

Holly Sterling, the wife of a former CIA officer convicted of leaking details about a botched CIA plan to give flawed nuclear blueprints to Iran, has asked President Barack Obama to pardon her husband who was targeted for prosecution after accusing the CIA of racial discrimination and taking his concerns about the Iran scheme to congressional authorities.

In a 14-page letter to President Obama, Holly Sterling recounted the personal nightmare of the U.S. government's relentless pursuit of her husband, Jeffrey Sterling, an African-American, after an account of the Iran operation codenamed Operation Merlin appeared in *State of War*, a 2006 book by New York Times reporter James Risen.

After a conviction earlier this year based on only circumstantial evidence with Risen refusing to identify his source or sources Jeffrey Sterling was sentenced to 3½ years in prison, a punishment that the judge made more severe because Sterling would not admit guilt and insisted on a trial.

Holly Sterling pleaded with the President to free her husband, noting the disparity between his sentence and the misdemeanor probation given to retired Gen. David Petraeus who admitted to giving highly classified information to his mistress/biographer and lying about it to FBI investigators.

"How do you explain the obvious disparate treatment of General Petraeus?" she asked Obama. "If one strips away the race, financial status, and political clout of Jeffrey and Mr. Petraeus and solely reviewed the alleged crimes of Jeffrey and those pled by the general, it is glaringly obvious this was selective prosecution and sentencing. Mr. Petraeus pled to far more egregious acts than Jeffrey was convicted of, yet Jeffrey is rotting in a prison cell while Mr. Petraeus continues to live his life as he so chooses."

She also reminded Obama that he risked going down in history as the president who prosecuted more whistleblowers than all his predecessors combined. Obama's zealous pursuit of leakers has stifled the normal give-and-take between national security officials and journalists, a process that historically has given the people some insights into what the U.S. government is doing in their name.

In the letter to Obama and at a news conference on Thursday, Holly Sterling sought to provide context for the U.S. government's aggressive prosecution of her husband. She recalled how he joined the Central Intelligence Agency in 1993 and was trained as a case officer for the Iran Task Force, which included him learning Farsi.

In 1997, as Sterling was preparing to be stationed in Germany for his first overseas post, he was approached by a supervisor and told the job had been given to another employee, as Holly Sterling explained in her letter to the President. "It was at that moment, his supervisor stated [the reasoning], 'We are concerned you would stick out as a big black guy speaking Farsi.' With shock and dismay, Jeffrey replied, 'When did you realize I was black?'"

Based on this episode and subsequent disparate treatment, Jeffrey filed an Equal Employment Opportunity complaint based on racial discrimination, the first African-American to do so, but it was dismissed in part because of the "state secrets privilege." During this time, Sterling and Risen were in contact about the lawsuit, which Risen described in a New York Times story in 2002.

Risk of Whistle-blowing

After being dismissed from the CIA, Sterling took the steps that would eventually make him a whistleblower and get him targeted as the number one suspect in the leak investigation regarding Operation Merlin.

"In 2003, Jeffrey went to the Senate Select Committee on Intelligence to voice concerns he had regarding 'Operation Merlin,' which he worked on while at the agency," Holly Sterling wrote. "He had grave concerns about mismanagement of the program and potential harm to our country. This was a legal and proper channel for agency employees to voice any such concerns."

Holly Sterling's appeal to Obama reflected the desperation of a 10½-year legal battle that culminated in Jeffrey Sterling's conviction last May on nine felony counts, including seven under the antiquated Espionage Act, a World War I-era law aimed at spies and saboteurs, not whistleblowers.

Her letter seeking a pardon was the catalyst for a press conference about the Sterling case and the Obama administration's "war on whistleblowers." The speakers included Jesselyn Radack, a former ethics adviser to the Justice Department and herself a whistleblower; Thomas Drake, a former senior executive at the National Security Agency where he exposed both waste and privacy violations; former CIA analyst Ray McGovern; and Delphine Halgand, a representative of Reporters Without Borders.

"I would like to remind everyone that Jeffrey Sterling *is* a whistleblower,"

Radack pointed out. "Sterling is a whistleblower because he met with the Senate Committee on Intelligence [in 2003], a proper internal political channel that we're always hearing people talk about and he made reports about what he saw as a botched CIA operation."

Three years later after Risen's book was published in 2006 the FBI targeted Sterling as the chief suspect, searching his house near St. Louis, where he worked as a fraud investigator. There was a period of relative quiet, until 2011, when Jeffrey was lured by his then-employer to his office under the ploy of a work meeting, and then was arrested by the FBI.

Though there were 90 other CIA officers who knew the details of Operation Merlin – and trial testimony during the Sterling case revealed that the FBI initially believed the leak had come from a member of the Senate Intelligence Committee – Sterling became the focal point of the investigation because he was seen as being a "disgruntled" employee who was fired by the CIA. [See Consortiumnews.com's [Persecution of CIA's Jeffrey Sterling](#)]

During the trial, evidence presented against Sterling consisted almost entirely of the metadata of conversations (phone calls and emails) between Sterling and Risen. The metadata provided the logs of conversations but did not include any actual content of the conversations, only that they took place. At no point were the prosecutors able to find any concrete evidence that Sterling had disclosed information regarding Operation Merlin to Risen.

Adequate Evidence?

The circumstantial evidence was deemed adequate, however, because Sterling was being charged under the Espionage Act, which only requires circumstantial evidence to prove guilt. Besides the relative ease of getting a conviction, the Espionage Act also makes no distinction between revealing information for the benefit of the public interest and engaging in conduct designed to help a foreign enemy in wartime.

"The Espionage Act has become a strict liability law, meaning that the prosecution does not have to prove that the whistleblower had any intent to harm the United States or benefit a foreign nation," said Jesselyn Radack, who heads the Whistleblower and Source Protection Program (WHISPeR) at ExposeFacts. "Worse, Sterling's conviction is based on flimsy circumstantial evidence that almost certainly would not result in a conviction, except under the very vague and overbroad Espionage Act."

Thomas Drake added, "And not only do they [administration officials] go after them [the whistleblowers] under the Espionage Act – it's selective, it's

malicious, and it's vindictive. See the problem, and of course, if you're the government then you know this (they don't like to admit it, but they will say it when necessary), if you're charged with espionage there's no public interest defense.

"If you go to the oversight committee [and the committee officials] decide you might have given something to them [that they] don't like that you gave to them, even though they have oversight responsibilities, that's no defense either. So here you are practicing the First Amendment redress in the public interest, and you find yourself criminalized. And that's what's happened in this country."

Since the enactment of the Espionage Act in 1917, the Obama administration has used it to convict more people than all other administrations combined.

"The Obama administration presided over the most draconian crackdown on national security and intelligence whistleblowers in U.S. history," Radack said. "The Justice Department has used the antiquated Espionage Act as a bludgeon to threaten, coerce, silence, and imprison whistleblowers for alleged mishandling of classified information."

Radack continued, "Meanwhile, powerful and politically connected individuals accused of the same and much worse conduct receive, at most, a slap on the wrist. Like General David Petraeus, who gave away more secret information at a much higher level to his mistress and received a sweetheart plea deal for a minor misdemeanor."

Thomas Drake elaborated, "In this country, National Security reigns supreme, it trumps everything. The primacy of national security gives the elite and those in privileged positions of power no accountability. It gives them immunity from any attempt to hold them responsible. And yet, we have an administration that has no problem licensing unto itself the authorization to leak to the press on an extraordinary level, in fact, leaking highly classified sources and methods for political purposes and to present themselves in the best possible light.

"And yet, if you go to an intel committee which provides oversight on the secret side of government, or if you dare go to the press or have any contact with the press, at all, under any circumstances, then you'll be charged with espionage. Last time I checked, real spies don't go to the press. Real spies go to other spies. Real spies don't make public their secrets."

Targeting Critics

Drake noted parallels between the Sterling case and his own whistleblowing case, in the context of disparate treatment and seeking appropriate redress in the public's best interest. He explained that the government will often chalk these

whistleblowing cases up to “individuals who have ‘personal grievances.’ So you have in my [Drake’s] case and in Jeffrey Sterling’s case, we bear the full punishment, we bear the burden of the politics of abject and outright personal destruction.

“We, as sources, whether to hold a mirror to those things in government that are wrong, that violate the law, that actually are, in fact, a danger to our national security, we’re the ones that pay the high price, we’re the ones that are put up on the altar of national security as sacrifices.”

In 2010, the U.S. government accused Drake, who had complained about NSA abuses, of mishandling classified material under the Espionage Act. Eventually all 10 original charges were dropped and Drake pled to one misdemeanor charge of exceeding authorized use of a computer.

As for the disparity between Petraeus’s wrist-slap and Jeffrey Sterling’s prison term, Holly Sterling said, “If you honestly look at the two cases you see that General Petraeus committed far more egregious acts than Jeffrey had allegedly done, and he did it for selfish reasons, while Jeffrey had gone to the Senate Intelligence Committee because he was concerned about the citizens of our country and what this possible Operation Merlin could have done.

“So, with General Petraeus’s punishment and Jeffrey’s punishment, it’s basically saying that the thought in this country is that if you are a Caucasian person and you do wrong, that you don’t need to be punished for it and you get a slap on the wrist, while if you are a man of color, you are guilty until proven innocent and you belong behind bars.”

Ray McGovern cited the troublesome use of metadata during the Sterling trial as evidence of guilt, noting that another name for metadata is circumstantial evidence. McGovern recalled that last May, “the former NSA General Council, Stu Baker, said ‘metadata absolutely tells you everything about anyone’s life. If you have enough metadata, you don’t really need any content.’”

McGovern described a meeting between Stu Baker and former NSA Director Michael Hayden, in which Baker’s metadata quote was repeated in the presence of Hayden. McGovern said, “General Hayden said, ‘If you have enough metadata you don’t need any content, we kill people based on metadata.’ Well, we also imprison people based on, mostly illegally acquired, metadata” a reference to the NSA’s collection of metadata on people around the world, including American citizens.

Dangerous Precedent

Delphine Halgand cited the dangerous precedent for whistleblowers and journalists that the Sterling trial represented because of the use of metadata:

“The Department of Justice built a case against Sterling based entirely on circumstantial evidence and they sustained his conviction in what the BBC called, ‘a trial by metadata.’ How is it possible that proving the simple existence of contacts between a former CIA operative and a journalist is sufficient to convict someone of espionage?”

“Is a relationship with a reporter the new catalyst for government prosecution of whistleblowers, whether alleged or actual? If anybody can be sentenced in the United States just because he was merely talking to a journalist on a regular basis, where is press freedom heading in the country of the First Amendment?”

Halgand continued, “It is really clear that the Department of Justice chose to make an example of Jeffrey, to warn government employees against talking to journalists. Leaks are the lifeblood of investigative journalism in this country given that nearly all information related to national security is considered secret and classified.

“In fact, the war on whistleblowers is designed to restrict all but the officially approved version of events. The United States has witnessed an alarming trend in curtailing freedom on information these recent years, and as we heard earlier, President Obama’s so-called ‘war on whistleblowers’ played an important role in this decline.”

As Thomas Drake put it, “In the United States, national security is currently engaging in unamending the First Amendment. The cornerstone, the foundation of the Bill of Rights and all of our liberties and freedoms. If you don’t have the ability to do redress for grievances, if you don’t have the ability to publish what is in the public interest, to inform people, to associate freely one to another, then what we call our constitutional republic, this special form of democracy, begins to erode and disappear.”

Jesselyn Radack summed up the issue by reminding that whistleblower-leak investigations “mak[e] clear that punishing whistleblowers is a backdoor way of punishing journalists.” While curtailing the freedom of the press may be the ultimate target of this “war on whistleblowers,” Radack and Drake both remarked that, tragically, it is usually the whistleblower, the source, who takes the brunt of the law.

Holly Sterling reiterated that sentiment in her letter to Obama. “Not only has Jeffrey suffered but so have his family, his friends, community and society. And now an intelligent, strong, ethical, and productive member of our world feels as though he ceases to exist while in prison.”

While Holly Sterling has requested a presidential pardon, Sterling’s team is

also appealing the court's decision. But as media critic Normon Solomon, who helped host the press conference, put it, "'Glacial' would be overstating the speed with which the U.S. government is willing to proceed on such appeals."

Radack added, "A pardon is *vastly* preferable to an appeal because appeals can take years and cost tons of extra money whereas a pardon can be done in a snap and it also erases the crime." But she added, "I predict that General Petraeus will have a pardon before Jeffrey Sterling gets either a pardon or an appeal."

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