

# **IS THE GOVERNMENT HIDING FISC'S "ERRONEOUS" 215 OPINION UNTIL AFTER BASAALY MOALIN'S HEARING FOR A NEW TRIAL?**

As I mentioned in this post, the government is due to turn over the remaining documents in the ACLU FOIA for Section 215 documents on November 18. Among the documents it may release is a February 24, 2006 FISC opinion. This may be the only comprehensive opinion written to authorize the Section 215 dragnet ... and if it's not, **no** comprehensive opinion authorized the opinion until August 29, 2013.

In short, that release will answer a lot of questions about what former Assistant Attorney General David Kris suggests may have been an erroneous decision authorizing the entire phone dragnet. We'll learn more November 18.

But that won't help Basaaly Moalin, who on Wednesday, November 13, will argue he should have a new trial in light of disclosures that the government only started wiretapping him after being tipped by the Section 215 dragnet. If the Judge in his case, Jeffrey Miller, decides he doesn't merit a new trial, then he will be sentenced on November 18. And then, later that same day, the government will release what could be evidence that the very foundations of the Section 215 dragnet that caught Moalin are "erroneous."

That seems to be the way things have gone for Moalin since June 18, when the government pushback on the Snowden leaks first led Moalin to learn his entire prosecution rested on the Section 215 dragnet, and since August 28, when

Moalin first started pushing for a delay in sentencing so he could push for a new trial.

Back in July, the ACLU demanded the government turn over all responsive documents by August 12. That would have brought the release of all documents a month before Moalin's then-scheduled sentencing. Instead, the government asked to have until September 15, the day before the date scheduled for his sentencing. That request would have been almost two weeks after the 60 day extension James Clapper asked for on July 5, 2013.

On August 16, Judge Pauley set up this production schedule.

The Government will review the Foreign Intelligence Surveillance Court (FISC) Opinions at issue and release any segregable information not exempt under FOIA by September 10, 2013. The Government will review a second tranche of documents and release any segregable information not exempt under FOIA by October 10, 2013. The Government will review the remaining documents at issue, excluding the FISC orders in the final row of the Government's Vaughn index, and release any segregable information not exempt under FOIA by 10/31/2013. The parties will submit a status report to the Court by 11/8/2013.

The October 10 and 31 dates got pushed back because of the shut-down (which, of course, was not DOJ's fault).

But the results has been to limit the argument Moalin should be able to make. In the Motion for a new trial (submitted on September 5), for example, Moalin's team relies on the October 3, 2011 John Bates opinion (released on August 21) rather than the slew of documents showing systemic problems with the very program that tipped Moalin admitted in 2009 (released September 10). The government even taunts them

about it in their Response.

Defendants' reliance on an October 3, 2011 FISC Opinion is misplaced. The opinion documented the FISC's judicial review of the Government's Certifications of Collection and Interception pursuant to Section 702 of FISA and is hence irrelevant here where Section 702 is not at issue.

Of course. But the only reason the defendants weren't able to make the very same argument – that the NSA had almost no meaningful controls over the querying they were doing of the Section 215 dragnet – and make it with collection closer to the time when the dragnet tipped Moalin is because ODNI sat on the Section 215 disclosures until after Moalin submitted his motion.

Of particular concern is the delay in revealing details of contact chaining (and that at the time Moalin was tipped, it was possible to chain a fourth hop in). The defense clearly focused on the government's admission that Moalin had been **indirectly** in contact with Aden Ayro. That's a point the government almost entirely ignored in their response. Add in that the government is still largely hiding how it uses the phone dragnet to find burner phones (and the evidence the government used Moalin's calls with Ayro to find the warlords new phone after he had ditched an old one), and the defense was only given delayed access to some of the details that might best undermine the case that such indirect contacts might constitute probable cause for a FISA warrant.

The defense integrated some of the revelations about the 2009 disclosures in their reply, submitted October 10. That left unavailable the documents released on October 28, some of which showed the government in violation of FISA Amendment's Act's requirement to provide all significant FISC opinions on the topic at hand to the Intelligence and Judiciary Committees. Those documents would also present additional

challenges to the legitimacy of the two reauthorizations of the dragnet since 2006.

Now, maybe this is just coincidental, that the one person who might challenge his conviction through the use of Section 215 would be prevented from using documents that might show the program itself is "erroneous."

But as people like Dianne Feinstein squawk that the program is "legal," they'd be well advised to consider the remarkable way that Moalin was deprived of the documents that might allow a challenge to the law as erroneous from the very start.