

DID DOJ PROSECUTE BASAALY MOALIN JUST TO HAVE A SECTION 215 “SUCCESS”?

At yesterday's Senate Judiciary Committee hearing on the dragnet, the government's numbers supporting the value of the dragnet got even worse. At one point, Pat Leahy asserted that the phone dragnet had only been useful in one case (in the last hearing, there had been a debate over whether it had been critical in one or two cases).

Leahy (after 1:09:40): We've already established that Section 215 was uniquely valuable in just one terrorism case, not the 54 that have been talked about before.

In a follow up some minutes later, Keith Alexander laid out numbers that explain how the Administration had presented that 1 case as 12 in previous claims.

Alexander (at 1:21:30): As you correctly stated, there was one unique case under 215 where the metadata helped. There were 7 others where it contributed. And 4 where it didn't find anything of value, and we were able to tell the FBI that.

That is, to publicly claim that the phone dragnet has been useful in 12 cases, the Administration included 7 cases where – as with the Najibullah Zazi case – it proved to be a tool that provided non-critical information available by other means, and 4 cases where it was useful only because it didn't show any results.

To fluff their numbers, the Administration has

been counting cases where the phone dragnet didn't show results as showing results of no results.

With sketchy numbers like that, it's high time for a closer examination of the details – and the timing – of the Basaaly Moalin prosecution, the only case (Alexander now agrees) where the phone dragnet has been critical.

As a reminder, Moalin was first identified via the dragnet – probably on a second hop away from Somali warlord Aden Ayro – in October 2007.

They used that and probably whatever tip they used to investigate him in 2003 to get a FISA warrant by December 20, 2007. Only 2 months later, February 26, 2008, was al-Shabaab listed as a foreign terrorist organization. Ayro was killed on May 1, 2008, though the government kept the tap on Moalin through December 2008, during which period they collected evidence of Moalin donating money (maybe 3 times as much as he gave to al-Shabaab-related people) to a range of people who had nothing to do with al-Shabaab. A CIPA stipulation presented at the trial revealed that during this period after the inculpatory conversations, Moalin's tribe and Shabaab split and Moalin's collections supported other entities in Somalia.

1. Money collected for the Ayr sub-clan was given to individuals including Abukar Suyare (Abukar Mohamed) and Fare Yare, who were associated with the Ilays charity.

2. Money collected by the men in Guracewl on behalf of the Ayr sub-clan was given to a group that was not al-Shabaab. [sic]

3. There was a dispute between al-Shabaab, the Ayr clan and Ilays over the administration of [sic] Galgaduud regions.

4. Members of the Ilays charity and the Ayr sub-clan, including Abukar Suryare,

were opposed to the al-Shabaab and were Ayrow's enemies.

On April 8, 2009, FBI would search the *hawala* used to send money based entirely on Moalin's case. Yet on April 23, 2009, according to a document referenced but not provided to Moalin's defense, the FBI concluded that Moalin not only no longer expressed support for al-Shabaab, but that he had only ever supported it because of tribal loyalties, not support for terrorism.

The San Diego FIG assesses that Moalin, who belongs to the Hawiye tribe/Habr Gedir clan/Ayr subclan, is the most significant al-Shabaab fundraiser in the San Diego Area of Operations (AOR). Although Moalin has previously expressed support for al-Shabaab, he is likely more attentive to Ayr subclan issues and is not ideologically driven to support al-Shabaab. The San Deigo FIG assesses that Moalin likely supported now deceased senior al-Shabaab leader Aden Hashi Ayrow due to Ayrow's tribal affiliation with the Hawiye tribe/Habr Gedir clan/Ayr subclan rather than his position in al-Shabaab. Moalin has also worked diligently to support Ayr issues to promote his own status with Habr Gedir elders. The San Diego FIG assesses, based on reporting that Moalin has provided direction regarding financial accounts to be used when transferring funds overseas that he also serves as a controller for the US-based al-Shabaab fundraising network.

The intercepts on which the prosecution was based support this. They show that Moalin's conversations with Ayro and others focused on fighting the (American-backed) Ethiopian invaders of his region, not anything outside of Somalia.

It was not until October 22, 2010 – after the

FBI had twice indicted the *hawala* owner – that FBI indicted Moalin and searched his house, based on the 2008 data and transfer records from the *hawala*.

None of this changes the fact that the jury found that Moalin gave money to Ayro at a time when he knew al-Shabaab to be on State's sanction list (though it does suggest the donations from before Ayro's designation in February 2008 were not meant to support "terrorism" as much as "tribal defense").

But it does make it clear there was a 22-month delay – from December 2008 until November 1, 2010 – between the time the government apparently found Moalin's communications to be of no interest anymore and the time they decided they were interesting enough to indict. And close to the beginning of that 22-month period, the FBI decided Moalin was really motivated out of tribal, not terrorist, loyalties, even while they were searching the *hawala*.

That 22-month delay becomes all the more interesting when you consider the legal and legislative history of the phone dragnet. In March 2009, before the FBI judged Moalin was motivated out of tribal loyalties but searched the *hawala* anyway, Judge Reggie Walton had started demanding the government provide some measure of how critical the phone dragnet really was. In response to a February 2009 declaration that the FBI had started 3 new preliminary investigations based on phone dragnet queries, Walton suggested he would be more impressed if FBI had identified a "previously unknown terrorist operative" in the US.

However, the mere commencement of a preliminary investigation, by itself, does not seem particularly significant. Of course, if such an investigation led to the identification of a previously unknown terrorist operative in the United States, the Court appreciates that it would be of immense value to the government.

In that order, Walton demanded a declaration from senior FBI officials to certify to the value of the program. It is not inconceivable that the April 2009 report was a response to FBI queries about 215-related cases in preparation for that declaration (which would explain why the government refused to turn over the declaration to Moalin's defense).

Meanwhile, at the end of March, Dianne Feinstein and Kit Bond had tried to get started on the PATRIOT Act reauthorization process. At a roughly equivalent point in 2004, FBI sent out instructions within FBI to "use it or lose it" for PATRIOT authorities, so they could show some results in time for reauthorization the following year.

In August 2009, the NSA and FBI responded to Walton's requirement as part of the application to reauthorize the dragnet in September. Keith Alexander's description of the program's efficacy appears not to have raised Moalin's case (see PDF 89; the syntax seems to talk about a phone tie to a primary suspect in an attack; while Ayro was tied to al Qaeda attacks, it's not clear they believed he was a primary suspect). Robert Mueller's declaration does appear to reference Moalin (see PDF 102-104; I base that on the earlier anonymous tip, the permission to conduct electronic surveillance, the discovery of methods, and the additional associates found, in part). If that passage does pertain to Moalin, Mueller's declaration, dated August 13, 2009, claims DOJ was seeking to indict Moalin on several charges.

This filing was shared with the oversight committees on August 31, 2009.

Two months later, in a briefing for the House Intelligence Committee linked to PATRIOT reauthorization, the NCTC and NSA gave a rather different picture of the phone dragnet's value. For starters, they seem to have provided a lower claim for how many full investigations arose

from the phone dragnet (page 4 of the briefing says FBI opened 15 full investigations, whereas PDF 101 of the court filing says FBI opened or converted preliminary to full investigations in 27 cases).

In addition, the briefing (unsurprisingly) focuses on the dragnet's role in identifying Adis Medunjanin's cell phone in the September Najibullah Zazi investigation (Dianne Feinstein had already publicly claimed Section 215 played a key role in the Zazi investigation). The briefing claimed, improbably, the information was unavailable by other means.

That October 2009 HPSCI briefing cites a second success story, one they appear to have described in just one paragraph, but it is entirely redacted, suggesting it may not be Moalin (as not all of that information is classified).

All that was, as I said, in August to October 2009. It wasn't until November 24, 2009 that FBI charged the hawala owner in the first of two indictments (they would get the owner to flip after charging him the next year with money laundering). In February 2010, PATRIOT got reauthorized for a year amid rising concerns from people in both the House and Senate about the dragnet. In spite of the fact that FBI appears to have predicted Moalin's indictment on August 13, 2009, it was not until October 22, 2010 that they finally indicted him, 14 months after Muller asserted FBI planned to in a filing to Walton. And then, in May 2011, PATRIOT was reauthorized again, this time for 4 years.

I'm not aware of any briefings from between 2010 and 2011 that show the claims the Intelligence Community made for Section 215. Even in internal trainings, NSA would continue to point to the Zazi case, and not the Moalin case, as their big dragnet success (see page 9).

But particularly given how sketchy the Administration's Section 215 success numbers have always been, I do wonder how much pressure

there was, internally and in inter-branch relations, to show at least one "real" "success" from the dragnet.

The FBI did not deliver to Reggie Walton a "previously unknown terrorist operative in the United States." Rather, they delivered a taxi driver who had sent less than \$10,000 to al-Shabaab to support his tribe before finding other entities through which he would support his home country.

But that's all the FBI has to show.