

THE 8-FISA JUDGE 11-DOCKET SPYING AUTHORIZATION TO IDENTIFY LESS THAN \$10,000 TO AL-SHABAAB

In a hearing last month, FBI Deputy Director Sean Joyce described a case in which the phone metadata database helped catch terrorists. (after 1:07)

Lastly, the FBI had opened an investigation shortly after 9/11. We did not have enough information, nor did we find links to terrorism, so we shortly thereafter closed the investigation. However, the NSA, using the business record FISA, tipped us off that this individual had indirect contacts with a known terrorist overseas. We were able to reopen this investigation, identify additional individuals through legal process, and were able to disrupt this terrorist activity.

While he didn't name it, subsequent discussions of the case made it clear he meant Basaaly Saeed Moalin, a Somali-American convicted with three others in February for sending less than \$10,000 to al-Shabaab (altogether Moalin was charged with sending \$17,000 to Somalia, the balance of it to non-Shabaab figures the government claims are also terrorists).

Moalin's lawyer Joshua Dratel unsuccessfully challenged the government's use of material derived from FISA (the judge's opinion rejecting the challenge has never been released). Yet even with that challenge, Dratel was never informed of the use of Section 215 in the case.

All that said, the government's opposition to

his challenge is utterly fascinating, even with huge chunks redacted. I'm going to do a weedy post on it shortly. But for now, I want to point to three indicia that reveal how much more complex this surveillance was than Joyce described to the House Intelligence Committee.

First, as part of the introduction, the government provided an (entirely redacted) Overview of the FISA Collection at Issue. While we have no idea how long that passage is, the government needed 9 footnotes to explain the collection (they are also entirely redacted). Similarly, a section arguing "The FISA Applications Established Probable Cause" has the following structure and footnotes (the content is entirely redacted):

[footnote to general material]

1.

a.

2.

a. [6 footnotes]

b.

i. [2 footnotes]

ii.

iii. [1 footnote]

iv. [2 footnotes]

v. [3 footnotes]

Now it may be that section 1 here pertains to physical collection, and section 2 pertains to electronic collection (both were used, though I suspect the physical collection was metaphorical in some way). But even there, there seem to be at least 6 and possibly far more orders involved, with two types of collection – perhaps one pertaining to bulk 702-style collection (most of the intercepts happened under Protect America Act) and the other to the use of Section

Then, as part of a discussion about the minimization requirements tied to the application(s) involved, the government revealed **8 different FISC judges** signed off on orders pertaining to the collection.

In order to fulfill the statutory requirements discussed above, the Attorney General has adopted standard minimization procedures for FISC-authorized electronic surveillance and physical search that are on file with the FISC and that are incorporated by reference into every relevant FISA application that is submitted to the FISC. As a result, the **eight FISC judges who issued the orders authorizing the FISA collections at issue in this case** found that the applicable standard minimization procedures met FISA's statutory requirements. The FISC orders in the dockets at issue directed the Government to follow the approved minimization procedures in conducting the FISA collection. [my emphasis]

But it appears this surveillance involved even more than 8 orders. In a section claiming that this surveillance is not complex, the government cited 11 sealed exhibits that include the dockets at issue.

There is nothing extraordinary about this case that would prompt the Court to be the first to order the disclosure of *highly* sensitive and classified FISA materials. Disclosure is not necessary for the Court to determine the legality of the collection. **Here, the FISA dockets – at Sealed Exhibits 16-26** – are well-organized and easily reviewable by the Court *in camera* and *ex parte*. The *Index of Materials in the Government's Sealed Exhibit* and this memorandum serve as a road map through the issues

presented for the Court's in camera and ex parte determination. The FISA materials contain ample information from which the Court can make an accurate determination of the legality of the FISA collection; indeed, they are "relatively straightforward and not complex." [my emphasis]

15 footnotes addressing probable cause approved by 8 judges over 11 different dockets.

This is not a simple check of the phone database. (I'll explain what I think actually happened with the surveillance we know about in a future post.)

Now, some of this clearly invokes the iterative approval of programmatic orders as described by Eric Lichtblau and the WSJ. The May 2006 opinion authorizing the use of Section 215 to collect phone records for every American surely is one of the authorizations cited. That opinion may rely on the 2004 one that authorized the use of Pen Register/Trap and Trace to collect all the Internet metadata in the country. I suspect there may be several orders authorizing collection on al-Shabaab and/or Somalia generally – one that precedes Protect America Act, one that collects under PAA, and probably one that collects under FISA Amendments Act (the key conversations took place in late 2007 through much of 2008). I suspect, too, there's an order governing collection of all signals off some switch. Then there may be traditional FISA warrants to collect on Moalin and his co-conspirator Mohamud Abdi Yusuf (the other co-conspirators appear not to have been targets of collection).

Still, that only gets you to 8 dockets, even assuming they used a new one for Somalia each time.

"Relatively straightforward ... not complex," the government said, in arguing the defendant shouldn't get a look at this jerry-rigged system

of surveillance. And we still can't see the logic Judge Jeffrey Miller used to agree with them.