WORKING POST ON GOVERNMENT MOTION IN MOALIN PROSECUTION

As I described in this post, the government's opposition motion to Basaaly Saeed Moalin's challenge to the FISA intercepts used to convict him is a doozy. I showed there how complex the collections used to convict him were (and presumably still are).

This is going to be a working post cataloging all the other interesting aspects of the government's motion.

The page numbers are to hard page numbers; PDF page numbers are one number higher.

P1: Note the first redacted footnote modifying FISA. The footnote may discuss the other things also including under FISA, including the Section 215 application.

P1: For a variety of reasons — not least that the government only noticed the physical surveillance application under FISA after Moalin challenged the FISA intercepts — I think the "physical" searches have some relation to the electronic surveillance as well. Note the footnoted sentence is followed by an entirely redacted passage (on P2) that itself is footnoted.

P3: The last sentence of the first paragraph reads, "After [Aden] Ayrow [the Somali warlord Moalin may have first been targeted off of] was killed, the defendants continued to collect funds and transmit them to Somalia to support violence against the TFG and its supporters." Note, most of the money Moalin transfered did not go to al-Shabaab (and given footnote 5, I suspect the government knows of even more money that went to entirely acceptable charitable causes).

P3: Note the structure of footnote 6, which starts with classified material amending the entirely redacted paragraph bridging the donations to Ayrow and the FISA notice. It then states that under FISA, AG may also be the Acting AG, the DAG, or (with designation) the Assistant AG for National Security. In the lead-up to the period of the first intercepts (which date to December 2008), Alberto Gonzales quit under weird circumstances,with SG Paul Clement acting and then telecom lawyer Peter Keisler as Acting AG until Michael Mukasey came in. The AAG during the period was Ken Wainstein. Recall that during this transition period, Wainstein was pushing to resume expanded link-chaining on the collection of Internet metadata. It took several months for Wainstein to get Mukasey to sign off on that plan, spanning the period when the government first reported intercepts involving Moalin. So it is fairly likely that this footnote pertains to Wainstein's role. Also note, as we'll see, some of this collection involved an emergency FISA application.

P5: It is fairly bizarre that DOJ needed an entire section to provide an overview of the FISA collection, but I suppose they needed to explain the role 215 plays in the process.

P6: Note the definition of aggrieved person in FN 18. I suspect that some of the intercepts involving Moalin actually constitute incidental conversations off Ayrow. But there, Moalin would still be aggreived as an incidental collection, as were the two co-defendants who were picked up in intercepts of Moalin and Yusuf.

P7: Note the time period applied to the FISA law: from the PATRIOT renewal on March 9, 2006, to the passage of FISA Amendments Act on July 9, 2008.

P8: Note the reference to "judicial order or warrant." I think this case involves both.

P8: I find the footnote on "United States person" of particular interest. That may just be describing the kabuki they invoke when a USP is

collected as “incidental” collection on a targeted non-USP. But I wonder if there’s something else funky here, like signals from a switch in the US that is therefore a USP?

P9: As I said, this collection involves emergency collection of some sort. Which makes FN 22 discussing emergency collection of particular interest.

P11: Note the footnote to “warrant” here. This is a generalized description. I wonder if there’s a secret kabuki surrounding the word “warrant” now?

P12: This is the reference to the 8 judges who’ve approved this collection

P13: Note the repeat of the explanation that the AAG can do this. Which again leads me to believe Ken Wainstein did this.

P13: Note the reference to a “federal officer.” Given the involvement of NSA in the 215 collection, I wonder if there’s discussion of their role as federal officer.

P14: Paragraph E seems to be the one that would apply to Moalin.

P14: Note this language:

> Additionally, FISA provides that “[i]n determining whether or not probable cause exists … a jury may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

Remember, they collect everything from some places. So it is possible that they could use events from the present showing probable cause to justify “targeting” a USP “in the past” via that already collected content. I suspect that’s what happened here: sometime in 2008 the govt decided to go back and access the calls between Moalin and Ayrow.

P19: Here's the reference to the 11 dockets, which follows onto the claim these are "relatively straightforward" on the following page.

P21: Note:

> CIP A does not provide a basis for disclosure outside of the requirements of FISA. In fact, the opposite is true. These proceedings merely provide a process for protecting classified information in criminal discovery. Indeed, in CIPA proceedings ex parte, in camera consideration of the Governent's applications for protective orders are the rule. See, e.g., United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998), (approving CIPA § 4 ex parte hearngs); United States v. Sarkissian, 841 F.2d 959, 965-66 (9th Cir. 1998) (ex parte proceedings concerning national security informatìon are appropriate under CIPA § 4).

In the FL case where a man tried to access his Section 215 records, the government told him FISA was inappropriate and he had to use CIPA.

P23: Note:

> "Things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods."

A big part of what they were hiding, though, was the 215 tie.

P28: Note:

> Defendant concedes that such disclosure is limited to discovery of exculpatory materials mandated by Brady and its progeny. See id. at 25 (citing Spanjol,

> 720 F. Supp. at 57). A number of other courts have reached the same conclusion. United States v. Amawi, 531 F. Supp. 2d 832, 837 (N.D. Ohio 2008); Abu-Jihaad, 531 F. Supp. 2d at 311; United States v. Thompson, 752 F. Supp. 75, 82-83 (W.D.N.Y. 1990).32 As the Court's in camera, ex parte review wil demonstrate, there is no exculpatory information among the FISA materials; therefore, no disclosure is waranted pursuant to Section 1806(g).33

It's fairly clear given what the Joint IG Report says and a bunch of other things that this can only be true if they're using "FISA materials" in a kabuki sense to mean just that which was kept, after having decided not to keep the stuff that was exculpatory. I suspect this is all the more true in that there are probably intercepts of Moalin also supporting charity.

P29: Note:

> As noted previously, no Court has ever ordered discovery ofFISA materials. See supra at 24

Two things: the government DOES repeat this endlessly. But also note the pagination. The internal page references in this document are to the classified document. This reference appears to go to page 19, not 24. Which says the classified document is about 1/6 longer than what we've got so far (there is far more redacted later in the document).

P30: Note:

> The governent has complied with its Brady obligations with respect to the fruits of the FISA – the intercepted calls and fruits of the physical searches – and will continue to do so should it discover further exculpatory materials.

Note, there were at least two more kinds of evidence collected via intercept: mobile phone browser URLs and Internet content. This either suggests they're treating that content as a physical search (which might explain the dodgy language about it) or perhaps they had no other exculpatory info here (which I don't buy).

P31: Here the government makes several claims that no one wants courts to look that closely.

> Title III standard does not apply to FISA. Courts have unanimously agreed that certifications submitted in support of a FISA application should be "subjected to only minimal scrutiny by the courts," Abu-Jihaad, 630 F.3d at 120; United States v. Badia, 827 F.2d 1458, 1463 (1Ith Cir. 1987), and are "presumed valid." El Mezain, 664 F.3d at 568; Duggan, 743 F.2d at 77 & n.6; Nicholson, 2010 WL 1641167, at *5; accord United States v. Campa, 529 F.3d 980, 993 (lIth Cir. 2008); Warsame, 547 F.Supp.2d at 990 ("a presumption of validity [is] accorded to the certifications"). When a FISA application is presented to the FISC, "(tJhe FISA Judge, in reviewing the application, is not to second-guess the executive branch official's certification that the objective of the surveilance is foreign intelligence information." Duggan, 743 F.2d at 77. Likewise, Congress intended that the reviewing district court should "have no greater authority to second-guess the executive branch's certifications than has the FISA judge." Id; see also In re Grand Jury Proceedings, 347 3

P37: Note the classified material on what the standard for probable cause is. This should be alarming, given that Section 215 probably serves to establish probable cause for Moalin. Also, note the footnote connects back to the discussion of "significant purpose" on the prior

page.

P41: This is interesting given the approach to 215 as an associational database.

> If FISA is valid under the Fourth Amendment, then there can be no independent claim that it violates the First Amendment rights of the FISA targets.

I don't actually think this WAS previously demonstrated, as this paragraph claims. At least not in the unredacted passages. Though I wonder if they do make it?

P46: I discussed this passage, as well as the apparently redacted passage it references, here.

> Moalin claims he was targeted for FISC-authorized surveillance in violation of FISA's stipulation that no United States person may be considered a foreign power or an agent of a foreign power solely on the basis of activities protected by the First Amendment. Docket No 92 at 18-19 (citing 50 U.S.C. §§ 1805(a)(2)(A), 1824(a)(2)(A)). Although protected First Amendment activities canot form the sole basis for FISC-authorized electronic surveillance or physical search, not all speech-related activities fall within the protection of the First Amendment. See infra at 70.

P46: The last "classified material redacted" section here must include section 3 on probable cause and must deal with the FIG — the investigation that determined Moalin was mostly acting out of clan interests. These and the following pages are of interest only for the completely redacted, complexly structured discussion of probable cause.

P51: See this post for the discussion of two different sets of minimization procedures.

P52: Note the authorization of "greater leeway"

in minimization. This suggests they may have kept stuff from Moalin that otherwise would have been dubious.

P52: Note the footnote relying on the original House FISA Report for the principle "minimization can occur by rendering the information 'not retrievable by the name of the innocent person.'" This may be a reference to the 215 database (and if it is, the other language on minimization in this particular passage would be too).

P53: The reliance on the "wheat/chaff" comment in Rahman is another thing that leads me to believe there's a weird temporal aspect to this collection.

P54, The government claims, "to the extent that certain communications of a United States person may be evidence of a crime or may otherwise establish an element of a substantive or conspiratorial offense, such communication need not be minimized." Seemingly to support the second part of that claim – that evidence of "an element of a substantive or conspiratorial offense" need not be minimized – it cites US v. Zein Hassan Isa. But the only apparent evidence to a conspiracy (rather than evidence of a crime itself) appears to be this reference to an unpublished opinion (and Kevork, which the government cites extensively elsewhere, but not here).

> In United States v. Hawamda, No. 89-56-A, 1989 WL 235836 (E.D.Va., April 17, 1989), the district court rejected an argument identical to the one put forth by appellant. In that case, defendants were indicted on wire fraud, credit card fraud, and conspiracies to commit those offenses. Defendants filed a motion to suppress evidence obtained from electronic surveillance authorized under the Federal Intelligence Surveillance Act on the ground that the evidence gathered had nothing to do with foreign intelligence. The court denied the

> motion, stating that "when a monitoring agent overhears evidence of domestic criminal activity, it would be a subversion of his oath of office if he did not forward that information to the proper prosecuting authorities." Id. at 4-5. Although we generally do not cite unpublished opinions, this language is particularly persuasive, and we believe it appropriate to cite here. See also In re Kevork, 788 F.2d 566, 570 (9th Cir.1986) (authorizing use of surveillance information in foreign criminal prosecution for conspiracy to commit murder and murder).

This seems like a stretch to me, its piggy backing of conspiracy onto evidence of a crime. Particularly given the initial activities captured by the FISA surveillance against Basaaly weren't crimes — they were just his voiced support for Shabaab, without any money or goods offered — that seems significant.

P55: Note the government's argument that it only be required to show a good faith effort to minimize properly. Now consider that that applies to minimization of data pertaining to every American. Ultimately, that's no protection for all that data, particularly given that with the phone records, the data is not destroyed until it ages off after 5 years. Any time it makes a query — of up to 3 hops — it need only show good faith effort not to suck up stuff that obviously doesn't relate to the target (which it would have shown with the query in any case).

P56: Then the government takes things a step further, arguing that Congress "intended that any suppression should only apply to the 'evidence that was obtained unlawfully.'" But since it is has gotten authorization to collect everything, nothing will ever be suppressed. That is, precisely the sheer breadth of the collection ensures it will never be thrown out, even if it should be.

P57: In what is probably the only case where a defendant challenged FISA collection tied to the Section 215 dragnet, the government argues,

> To date, no Court has ever ordered the disclosure of FISA materials and there is nothing extraordinary about this case that would warrant it be the first to disclose such materials.

There is a very high likelihood that this motions is the **only one** in which the government had to defend 215 collection and derivative FISA collection. But Judge Jeffrey Miller, way out in San Diego, would have no way of knowing that, and no means to compare notes with other judges about the claim. So the claim, here, that there was nothing extraordinary about this is disingenuous.