

ARE EVEN THE BASAALY MOALIN CLAIMS FALLING APART NOW?

I'll have a much longer post later on what PCLOB has to say about the efficacy of the dragnet, which is actually far more interesting than I've seen reported thus far. But I want to look in detail at the passage in which they treat Basaaly Moalin.

And we believe that in only one instance over the past seven years has the program arguably contributed to the identification of an unknown terrorism suspect. In that case, moreover, the suspect was not involved in planning a terrorist attack and there is reason to believe that the FBI may have discovered him without the contribution of the NSA's program.

Note the verb: "may have," not "might have" or "could have." Thus, the passage has a (presumably intentionally) ambiguous meaning which could suggest either that the FBI did find Moalin on their own or they had the ability to.

But in conjunction with the adverb "arguably," the use of "may" here sure seems to suggest PCLOB thinks a case could be made that FBI did, in fact, find Moalin on their own. Without the dragnet.

That is, PCLOB seems to suggest that even the claim that the dragnet helped find a cab driver giving \$8,500 to al-Shabaab in hopes of protecting his tribal lands against US-backed invaders may be false.

Does the fact that DOJ didn't include Moalin in its claims of success to the 3 lawsuits against the dragnet reflect growing questions within DOJ about how they really rediscovered Moalin?

As I see it, there are two obvious ways that FBI

might have discovered Moalin on their own, and a third that would be even more interesting.

Recall that Moalin was actually prosecuted with the help of his *hawala*, who also happened to be in contact with people close to Aden Ayro, the warlord Moalin is presumed to be a second hop from (the case against the *hawala* is largely sealed). It's possible the FBI found Moalin through the investigation of the *hawala*. That's particularly likely given PCLOB's later comment that Moalin "was the user of a telephone number already linked to pending FBI investigations."

Alternately, it's possible the FBI got a tip off content related to Ayro and investigated using NSLs and found Moalin (though I think this is less likely because NSA has so few Somali translators). It's also worth considering that at one point NSA contacted FBI because they had lost Ayro, asking if FBI had seen a new number for Ayro in Moalin's calls. Which suggests, at least after they got a tap on Moalin, FBI may have had an easier time of tracking Ayro than NSA did.

More interesting still, it's possible FBI found Moalin in October 2007 by accessing dragnet results directly (as was possible for FBI to do until NSA shut this access down in June 2009), without having received a formal report from NSA reporting the link. If that's the case, it'd be interesting for a slew of reasons, because it'd be a patently illegal lead, but it would technically come from the dragnet. If that were the case, I can see everyone wanting to lie about it, which might lead to ... the kind of seemingly conflicting and increasingly cautious statements we're seeing now (as well as DOJ's silence on this "success" in recent court filings).

I have suggested that the timing of Moalin's prosecution at least hints that they pursued it to have a first Section 215 success in time for PATRIOT reauthorization in 2011. Certainly, they were quick to roll out his case as a "dragnet success" last June. But if he wasn't found via

the dragnet, or if DOJ misrepresented precisely how he was found back in court filings in 2012 to hide that FBI had direct access to databases at NSA they weren't legally entitled to have, then it'd put DOJ in a tight spot now, as Moalin appeals to the 9th Circuit. At least in September, they claimed to Judge Jeffrey Miller Moalin had been caught by the dragnet, and Miller didn't think it harmed their case (though even there, Miller's language made it clear he learned new information in those filings he hadn't been told on the first FISA review). But if he wasn't – or if FBI had legally impermissible access to the dragnet results – then Moalin's appeal might get more interesting, either because DOJ misrepresented to the District what happened and/or because there's something funky about the use of the dragnet with Moalin.

Of course, all that assumes Moalin would ever get to see the FISA related evidence against him, which PCLOB may have but which no FISA-related defendants ever have been able to do. Which is unlikely to happen.