DOJ DOESN'T WANT YOU TO KNOW ABOUT ANY INSPIRE-RELATED FISA SURVEILLANCE PROGRAMS

I have written repeatedly about the case of Adel Daoud (see these two posts). The FBI caught him in a sting in 2012 where they had him perform bombing a night club. He was 18 at the time he caught.

While the government immediately informed Daoud they would use evidence derived from FISA against him, subsequent information — both comments Dianne Feinstein made during the debate about renewing the FISA Amendments Act and in further details we've gotten about back door searches — have suggested there might be something exotic about his targeting. (I have speculated he got identified via a back door search off a traditional FISA tap on someone — or something — else.)

On Monday, the government submitted its appeal of Judge Sharon Coleman's decision.

DOJ complains that Judge Sharon Coleman did not reveal the classified things she finds so problematic about this case

Hilariously, key to their appeal is that Coleman didn't lay out what it was she saw in the FISA materials she reviewed that led her to grant Daoud's lawyer review of the underlying application materials.

> Rather than address the specific facts of this case, the district court ordered disclosure because it believed that resolving the legality of the FISA collection is "best made in this case as part of an adversarial proceeding." Id. at 5; SA 5. The court noted that "the

> adversarial process is integral to safeguarding the rights of all citizens" and quoted the Supreme Court's language that the Sixth Amendment "right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Id.
>
> [snip]
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> For FISA and its procedures to have meaning, the need for disclosure must stem from unique, case-specific facts, and not a general preference that would apply to all FISA litigation. After all, the statute mandates that courts review the FISA applications and orders in camera and ex parte before even contemplating disclosure. Thus, a court cannot order disclosure of FISA materials unless it concludes, based on facts specific to the FISA applications in that case, that it cannot accurately resolve the legality of the collection without such disclosure.
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> The legislative history of FISA reinforces the conclusion that disclosure cannot be "necessary" absent a case-specific reason that would justify a departure from the default ex parte process.

Think about this. The government is arguing Coleman was wrong to grant Daoud's lawyers review — which would effectively allow a lawyer to conduct a secret review of the FISA application — without explaining in a court opinion what is so unique about this case that it merits such a review.

To do so, she'd either have to reveal the secrets the government says Daoud's lawyers can't review, even in secret. Or she'd have to issue a partially classified opinion that would

deprive Daoud's lawyers of an opportunity to support her decision on appeal.

DOJ complains that Coleman did not think their secret declarations they insist are persuasive are persuasive

DOJ is also angry that Coleman was not sufficiently impressed by their plea of national security, insisting that their sworn declarations were "persuasive" even though she obviously was not persuaded.

> The "need-to-know" prerequisite matters all the more here because, as persuasively articulated in the sworn declarations from the Attorney General of the United States and the FBI's Acting Assistant Director for Counterterrorism, these FISA applications deal with exceptionally sensitive issues with profound national security implications.
>
> [CLASSIFIED MATERIAL REDACTED]
>
> The district court's order ignored these declarations and brushed aside the considered judgment of two senior executive branch officials who carefully concluded—based on the particular facts of this case—that disclosure may lead to an unacceptable risk of compromising the intelligence gathering process and undercut the FBI's ongoing ability to pursue national security investigations. If permitted to stand, the district court's order would impose upon the government a lose-lose dilemma: disclose sensitive classified information to defense counsel—an option unlikely to be sanctioned by the owners of that information—or forfeit all FISA-derived evidence against the defendant, which in many cases may be critical evidence for the government.

In other words, in spite of FISA's clear

provision allowing for review in certain circumstances, DOJ maintains that judges must accept whatever classified declarations they submit even if — as Coleman said — they're not at all persuasive.

And while the government's complaints are, in significant part, about ensuring that allowing defendants to review these applications doesn't begin to happen more frequently, this is also a bid to ensure that any Title III review of FISA warrants remains narrowly limited to whether,

- FISA rightly found probable cause that the target of the FISA warrant was an agent of a foreign power
- The certifications submitted in support of the warrant complied with FISA's requirements
- FISA information was appropriately minimized

The last bullet, which I suspect is the most important one in this case, will measure not whether minimization meets the standards required under the Fourth Amendment, but whether DOJ (or rather NSA and/or FBI) followed the rules approved by FISA. And limiting the review to whether the government met the minimization procedures approved by FISA brackets off the question of whether this use of FISA abided the Fourth Amendment.

Elsewhere, DOJ describes the case they need to make differently.

> A court reviewing the applications would have no difficulty determining that they established probable cause to believe that the target was an agent of a foreign power and that a significant purpose of the collection was to obtain foreign intelligence information.

That's significant because if this does involve a back door search, it raises questions about the degree to which the government collects this data, at this point, just to find young Muslim men to catch in stings.

More bread-crumbs pointing to targeting off Inspire

Which is particularly important given the bread-crumbs in the opinion pointing to the targeting of Daoud off some kind of collection targeted at Inspire, AQAP's magazine.

The appeal presents the Theory of the Case as a kind of virgin birth, at the point where two different undercover FBI Agents are all encouraging Daoud to take up terrorism, followed quickly by a third.

> In mid-May 2012, the FBI's undercover investigation began with two FBI employees who work online.

Just before this, however, there's a classified section that must explain how the FBI came to throw so many resources at Daoud based, ostensibly, on a few online comments.

There have long been hints that this related, in some way, to Inspire. But here, in that very same paragraph, the government refers to Inspire, without any explanation of what it is — suggesting an initial reference to it appears in the classified section at the beginning of the section.

> Daoud sent one of the FBI covert employees jihadist propaganda, including links to Inspire magazine, and mentioned that he may use the magazine's bomb-making instructions to carry out an attack.

Fairly quickly in the narrative, it includes a reference to Anwar al-Awlaki, including a footnote that Awlaki had been named a Specially Designated Global Terrorist.

> Meanwhile, Daoud viewed a number of related videos, such as one by Anwar Al-Awlaki5 explaining why a martyrdom operation is not considered suicide in Islam but rather is an appropriate method of waging jihad.
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> 5 On July 16, 2010, pursuant to an Executive Order, Anwar Al-Awlaki was designated by the United States a "Specially Designated Global Terrorist" because of his position as a leader of AQAP, a Yemen-based terrorist group that has claimed responsibility for several terrorist acts against the United States. R. 1 at 4; App. 9. On September 30, 2011, President Barack Obama announced that Awlaki had been killed in Yemen. Id.

If, indeed, the targeting of Daoud derives from Inspire, it seems likely the Awlaki reference builds the case for probable cause on a warrant tied to the magazine he helped write. After all, if the guy responsible for the magazine had been listed as a SDGT a year before Daoud started reading his work, doesn't that prove any warrant tied to Awlaki meets the probable cause standard?

But that's what raises some very interesting timing issues. The defense has hinted that the targeting of Daoud may pre-date the day he turned 18 in October 2011, and may in some way tie to Awlaki's death.

That is, specifically in the case of Daoud, the coincidence of his birthday and Awlaki's death may raise questions about the propriety of his targeting, if this is, indeed what happened.

Also, look at this more generally. There are a string of FBI stings that seem to derive from reading Inspire. (I would have guessed that FBI found these people using upstream 702 collection, not traditional FISA, but NSA seems to do a number of things under traditional FISA

that would not be patently obvious.) If Daoud were to obtain review of his targeting under that program, it would not only mean that one of the top terrorism defense lawyers in the country would learn of the program, but that other defendants' prosecutions might be put in question by any decision here.

In any case, I suspect the government will win this appeal — or at best, get it bumped back to Coleman so she can explain why she found adversarial review important here. But the stakes seem to extend beyond just whether targeting a then-17-year old for reading a jihadist magazine meets constitutional muster. I suspect DOJ is trying to hide a larger program tied to tracking of Inspire readers — which could affect a lot of its FBI sting business.

Not to mention raise further questions why no one found Dzhokhar Tsarnaev when he read Inspire.