

THE QAZI BROTHERS: THE CRAZIEST BIT OF BLATANT PARALLEL CONSTRUCTION TO PROTECT FAA

On Monday, the government submitted unclassified and classified motions asking Magistrate Judge John O'Sullivan to reconsider his order that the government defend the constitutionality of the FISA Amendments Act in their case against Raees and Sheheryar Qazi, two Pakistani Americans charged with conspiring to use a WMD. While the government admits there was never a real plot, Raees was allegedly reaching out to al Qaeda and the FBI found batteries and Christmas lights in Sheheryar's place, where Raees lived, which the government claims were to be used to make a bomb.

I'll get into the long, ongoing dispute about the FAA in this case.

But before I do, note that in August 2013, over 8 months after the brothers had been arrested and 4 months after the older brother, Sheheryar, had demanded notice if the government had used FISA Amendments Act against him, the government obtained warrants; the government provided those warrants while handing over content obtained under a warrant from Yahoo and Hotmail, precisely the kind of content the government obtains under PRISM using Section 702 authority.

While I can't know whether the government obtained warrants for content originally obtained under FAA, O'Sullivan permitted a constitutional challenge to FAA even without notice from the government that it had been used against the brothers (though last July the government did submit a response to Sheheryar's challenge to FISA that discussed 3 different authorities; see section IB).

You do the math.

As I said, this challenge goes back some time, to April 2013, in the wake of both Dianne Feinstein's naming of the brothers in a speech defending the reauthorization of the FAA and the *Amnesty v. Clapper* decision ruling that judged the plaintiffs didn't have standing, but that defendants who did would be accorded the opportunity to challenge the constitutionality of the law.

Of particular interest, after the government originally refused to give notice to the brothers on whether it had used FAA to get them, Sheheryar asked specifically whether the government used 702 information in the affidavit to obtain the content and physical search FISA warrants used against the brothers (probably targeted, as I said, at Raees). The government reacted particularly aggressively to that affidavit request, as if Sheheryar struck close to the bone.

Which brings us to the argument the government is now making to Sheheryar's constitutional challenge. The government says that Sheheryar Qazi should not be able challenge the constitutionality of the FISA Amendments Act because it will not introduce any FAA-derived information against him at trial.

Thus, in order for a defendant to move to suppress FISA or FAA-obtained or derived evidence, the defendant must be: (1) "a person against whom evidence obtained or derived from" (2) "an electronic surveillance" [or physical search] (3) "to which he is an aggrieved person" (4) "is to be, or has been, introduced or otherwise used or disclosed" (5) in a "trial, hearing or other proceeding."

[snip]

Because the government has not and does not intend to use or disclose in trial any evidence obtained or derived from

FAA-authorized surveillance as to which Movant is an aggrieved person, Movant cannot demonstrate any sort of concrete, particularized and actual or imminent injury, much less an injury “fairly traceable” to the FAA. Movant also cannot possibly demonstrate that any resolution of the constitutionality of the FAA would redress any injury.

It says this even as it is working on a separate theory why Sheheryar’s brother, Raees, against whom the primary traditional FISA warrant was almost certainly targeted, cannot challenge FAA’s constitutionality, either. The government appears to be less sure that they can argue with a straight face that none of the evidence they’ll submit at trial against Raees derived from FAA.

But that motion is due after a May 9 hearing in which the judge will consider whether Sheheryar’s counsel, Ronald Chapman, must withdraw as counsel because he witnessed an alleged altercation between the brothers are two Marshals in a SCIF on April 8 (Chapman just submitted a statement that he has no conflict under FL Bar rules). That same day, April 8, Raees joined in his brother’s demand on the constitutionality of FAA, and I wouldn’t be surprised if the government argued Raees improperly joined his brother’s request because of that meeting.

The government suggests it may file additional charges against the brothers for the alleged altercation. At which point they’ll probably drop these flimsy terrorism charges, bust the brothers for assault, and avoid having to reveal the shell game by which they came to arrest the brothers in the first place.

Timeline

2010: Raees identified by security guard at

Miami airport

2011: Raees returns home; FISA-authorized surveillance begins

November 29, 2012: Raees arrested upon return from NYC

November 30, 2012: Raees indicted along with his older brother, Sheheryar

December 6, 2012: Both brothers given identical notice of intent to use FISA-derived evidence

December 27, 2012: Dianne Feinstein names the brothers in speech supporting renewal of FISA Amendments Act

February 26, 2013: Ruling in *Amnesty v. Clapper*

April 7, 2013: Sheheryar moves for review of FISA

April 8, 2013: Robert Scola refers FISA motion to magistrate John O'Sullivan

April 15, 2013: Government asks for extension on FISA response

April 18, 2013: Raees files unopposed motion to join on FISA challenge

April 22, 2013: Sheheryar moves motion for advance notice of FAA

April 23, 2013: Raees files unopposed motion to join on FAA notice

April 25, 2013: Government files motion claiming FAA notice is moot because of prior FISA notice

May 2, 2013: In reply to government opposition, Sheheryar restates the question, asks whether FISA affidavits relied on FAA

May 6, 2013: Judge grants motion

May 9, 2013: Government moves for reconsideration

May 14, 2013: Sheheryar responds citing *Clapper*

May 21, 2013: Government response; Raees moves

to suppress FISA; referred to O'Sullivan

May 25, 2013: Sheheryar response

May 28, 2013: Sheheryar moves to suppress ;
moves to declare FAA unconstitutional

June 5, 2013: First Snowden documents;
O'Sullivan stays order on notice on FAA pursuant
to government filings on FISA

July 8, 2013: Raees calls to reconsider stay

July 16, 2013: Government moves for extension on
FISA

July 17, 2013: Judge grants extension

July 30, 2013: Government opposition to
Sheheryar motion for disclosure; opposition to
reconsideration; opposition on FISA

August 21, 2013: Government obtains warrants for
Yahoo, Hotmail

September 10, 2013: Sheheryar responses to FISA
related motions

October 23, 2013: Sheheryar notices Savage
article on DOJ debates over FAA notice

March 14, 2014: Scola refers FAA
unconstitutional motion to O'Sullivan

March 28, 2014: O'Sullivan orders government to
provide substantive memo of law on FAA
constitutionality

April 8, 2014: Raees moves to adopt
constitutional challenge; Raees and Sheheryar
allegedly assault 2 deputy Marshals in a SCIF,
with Sheheryar lawyer present

April 10, 2014: Government asks for extension,
in part because of assault

April 28, 2014: Government submits motion to
reconsider, along with sealed motion

April 30, 2014: Scola calls May 9 hearing on
whether Chapman can continue to represent
Sheheryar