

DID THE GOVERNMENT INVENT TERRORIST THREATS OUT OF ADEL DAOUD'S TERM PAPER?

I'm just now getting around to listening to the Mulligan hearing in Adel Daoud's hearing at the 7th Circuit on Monday which the panel held because the hearing held the previous Wednesday had not been taped.

The hearing (as opposed to Judge Richard Posner's long digression about why they were having the Mulligan) started with Judge Ilana Rovner focusing on whether a defendant caught by FISA could ever take a Franks challenge to a FISA warrant – basically, a claim that the government relied on false information in an affidavit supporting a warrant. Posner, too, seemed focused on this, asking Prosecutor William Ridgway whether a case (this case?) could be sustained even in the face of a Franks challenge. (Ridgway said it could, but of course he would say that, because the Circuit can only sustain a review here if it would be significant enough to exonerate Daoud.)

And all that took place against the background of Posner claiming, at least, that the ex parte hearing last week was held to benefit his client, which suggests (as does the request for more information from the government) that the Circuit may be more skeptical of the warrant than Posner let on last week (or perhaps Posner got more skeptical after the hearing).

Daoud's attorney, Thomas Durkin, tried to bring it back to the larger issues raising questions in this case, including the fact that Dianne Feinstein had suggested Daoud had been caught using Section 702 of FISA.

But ultimately, Posner showed most interest when

Durkin talked about Daoud's mosque school term paper on Osama bin Laden.

Durkin: We do know and we did tell the judge this that this 18 year old kid had to do a term paper for – he went to the mosque school, and he had to do a term paper. He decided to do a term paper on Osama bin Laden. We know he had contacts, therefore, with Inspire magazine and reasons why the NSA may have picked him up. That could be just deliberate First Amendment Activity. Nothing more, nothing less. We don't know that. We don't know whether there's something in that affidavit that says – we've tried to rule out all kinds of First Amendment activity and we can't find anybody. We should be permitted to see that.

Posner: Are you trying to say the government investigated him because of school paper he wrote?

Durkin: I don't know. It could be.

Posner: No, but that's your suspicion, right?

Durkin: That is my suspicion.

As I explained before, the investigation into Daoud started on May 10, 2012 in response to an unsolicited referral that claimed Daoud had said he'd use the instructions in Inspire to launch an attack. But neither that claim nor a subsequent claim based on an undercover officer shows the language Daoud used. The one time the FBI quoted Daoud in its summary, the FBI seemed to overstate the tie between Inspire and Daoud's plans to hurt the US.

Thus, the evidence may well support the claim that the FBI – and whoever referred Daoud in the first place – overstated what Daoud had actually said about Inspire. Which, if that's what they used to get a FISA warrant (and it appears

likely it is), ought to be a good basis to claim they lied to get that FISA warrant.

That may not be enough to sustain Sharon Coleman's decision Daoud should get a review of the warrant (though I suppose it's possible the 7th could just decide to throw out the warrant). Plus, even then you might have to prove that everything that came after – including the alleged threats to a FBI agent – was entrapment.

But it seems like the 7th Circuit may be fairly critical of what they saw in that FISA warrant.