EVEN THE GOVERNMENT CAN'T FIGURE OUT HOW IT USES ITS FISA DRAGNET

Things are getting interesting in the case of Raez Qadir Khan in Oregon, who was charged in 2011 with conspiring to materially support a suicide bombing that took place in Pakistan in 2009.

As I laid out in September, his lawyers asked to know what types of surveillance it used to collect all the data that went into a search warrant on Khan's house.

At a hearing on September 11, the government said that it had provided all the notice Khan needed with its traditional, FAA, and physical search FISA notices.

> JUDGE MOSMAN: Am I reading your brief correctly that in some way the defense has been told which authorities they ought to think about challenging here, maybe informally?
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> MR. GORDER: Well, both formally and informally, Your Honor. The formal way was the notices that we filed with the Court, which indicates that the government intends to use evidence derived from FISA Title I and FISA Title IIand FISA Title VII.

In response, at the hearing, Khan attorney Amy Baggio said she'd hold the government to those 3 FISA authorities.

> MS. BAGGIO: Now, I understand the point that you made earlier, Your Honor, is they've narrowed that somewhat if we're going to hold them to Title 1, 3 and 7,

Just over a month later, the government wrote the judge, Michael Mosman, a letter, changing its mind. It basically said:

- It didn't have to give Khan notice that they used FISA's PRTT authority against him (most likely in the illegal Internet dragnet), because he didn't meet all 5 of the criteria required before the government would have to give notice.
- It didn't have to give notice under FAA 703 because the government doesn't intend to enter that electronic surveillance into evidence.
- It didn't have to give notice it used Section 215 (note, they almost surely used both the phone dragnet and the Western Union dragnet against him), because Khan lacks standing to contest the admission of this evidence. (Predictably, the government made no mention of the language in phone dragnet orders specifically permitting it to be used for discovery purposes.)

The government said nothing about Protect America Act, Section 704 of FISA (at least according to a Snowden document, the government doesn't use 703, they use 704, which if that

remains true Judge Mosman should know as a FISC judge), or EO 12333. The latter of which, in particular, Baggio has raised repeatedly.

In short, after a month of thinking about it, the government realized that its statements at the hearing were not correct, and that these other authorities were used, and maybe it ought to sort of confess to that after all.

Which Baggio pointed out in a letter filed yesterday.

> In the October 15, 2014, letter, the government no longer claims that FISA Titles I, II, and VII (§702) are the only authorities relied on in this case. Instead the government advances, for the first time, arguments about why it is not legally required to provide Mr. Khan with notice that it used FISA subchapters III (PR/TT), IV (§ 215 business records), or FAA § 703. Effectively, the October 15, 2014, letter tacitly admits use of these provisions, but goes on to argue that there are other reasons it need not provide notice.

She also pointed out that, in submitting its letter over a month after the hearing, the government had violated the court's briefing schedule without obtaining permission to do so.

> On October 15, 2014, 65 days after the government's briefing was due and 34 days after the motion was taken under advisement by the Court, the government submitted a letter raising new arguments and taking new positions in support of its request that the Court deny Mr. Khan's Motion to Compel Notice. Exhibit B.
>
> [snip]
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> When the Court sets deadlines in a Rule 12(c) scheduling order, a party who

> fails to raise a "defense, objection, or request" related to a pretrial motion to suppress waives that argument. Fed. R. Crim. P. 12(e).1 A court may grant a party leave to submit a late argument if the party establishes "good cause." *Id*. Here, the government did not seek leave before offering additional arguments over two months after its briefing was due. Moreover, the letter makes no attempt to establish good cause.

She goes on to hammer the government for its tortured definitions of "collect," citing – among other things – James Clapper's lie to Oregon's Senator.

> That is, the DoD definition permits the NSA to obtain communications and store them in a government database without a "collection" occurring. These regulations establish that government takes the position that the communications were "collected" only after an algorithm searches them for key words and analyzes the metadata.
>
> Similarly, Director of National Intelligence (DNI) Clapper explained in Senate testimony in response to a direct question from Senator Wyden in which DNI Clapper denied "collecting" data on millions or hundreds of millions of Americans by stating: "[T]here are honest differences on the semantics when someone says 'collection' to me, that has a specific meaning, which may have a different meaning to him [Senator Wyden]."

While she doesn't say it, we know that the government uses both phone and Internet dragnet data – the Section 215 and PRTT collection the government refuses to notice – as the index to pull up this already collected data. Given that the investigation into Khan likely started only

after his alleged co-conspirator's suicide bombing, much of the evidence was almost certainly stored communication, pulled up using metadata as an index.

Baggio ends by calling on Mosman – a Title III judge but also a FISC judge – to guard his prerogative as the former.

> The government's letter attempts to justify a blanket policy of non-disclosure by coopting this Court's constitutional role to resolve legal questions about whether (1) particular government conduct constitutes a search or seizure, (2) whether the search or seizure violated Mr. Khan's constitutional rights and (3) if so, whether evidence obtained or derived from the search or seizure should be suppressed. The government's argument amounts to an assertion that it need not provide Mr. Khan with notice because, even if it did, Mr. Khan would lose a motion to suppress. Such arguments offend the fundamental principles of the criminal justice system, and the Court should reject them. Without the type of notice requested in Mr. Khan's Motion to Compel Notice,

I originally thought that having Mosman preside over this case would be a bit of a disaster, given FISC judges' apparent willingness to make ridiculous arguments to defend the viability of their secret court. But I think Baggio is giving Mosman an important lesson in how the authorities he approves in secret actually play out in practice.

We'll see whether he's more interested in defending the prerogative of his Title III role or the claimed legitimacy of his secret judge role.