

# Exhibit A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 3:12-cr-659-MO-1
	)	
v.	)	
	)	
REAZ QADIR KHAN,	)	September 11, 2014
	)	
Defendant.	)	Portland, Oregon
_____	)	

**Oral Argument**

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES

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## ( P R O C E E D I N G S )

1  
2 MR. KNIGHT: Good afternoon, Your Honor. We're  
3 present in the matter of United States v. Reaz Khan. This  
4 is Case No. 12-cr-00659. Ethan Knight and Charles Gorder  
5 appearing on behalf of the government. The defendant is  
6 present, out of custody, with counsel Jack Ransom and Amy  
7 Baggio. And we're present today, Your Honor, on two of  
8 defendant's motions: a motion to compel discovery and a  
9 motion to compel notice of search and seizure authority.

10 Your Honor, for the Court's information, I'll be  
11 handling argument related to the motion to compel discovery  
12 and Mr. Gorder will be handling argument relating to the  
13 motion to compel notice.

14 THE COURT: Thank you.

15 Let's start with the latter one. And so it's a  
16 defense motion. I've reviewed what both sides have  
17 submitted. Is there anything you wish to add to what you've  
18 submitted in writing on that motion?

19 MS. BAGGIO: Your Honor, I will be arguing the  
20 motion to compel notice of the search and seizure for the  
21 defense. And I want to make sure I understood that's the  
22 one you wanted to --

23 THE COURT: That's the one we're going to do  
24 first, yes.

25 MS. BAGGIO: Thank you, Your Honor.

1           Just briefly, Your Honor, I believe that it's  
2 important for us to start out with the facts to which -- or  
3 law on which the parties agree. And first and foremost, I  
4 believe that the parties agree that FISA does not change the  
5 Government's discovery obligations. The question then  
6 becomes what are the Government's discovery obligations.  
7 And I believe the parties still agree that the Government's  
8 discovery obligations come down to Rule 12 and Rule 16 in  
9 the Federal Rules of Criminal Procedure, *Brady v. Maryland*,  
10 the Jencks Act, and then whatever is constitutionally  
11 required.

12           And it's that last piece, Your Honor, that I think  
13 that we would have to admit there is some gray area in terms  
14 of what is constitutionally required.

15           THE COURT: Can I interrupt for just a moment and  
16 maybe toss in a couple of the thoughts I have about it and  
17 see where that takes you in your argument.

18           So not only the parties agree, but I agree that  
19 those are the governing standards here. And it seems to me  
20 that part of why there is this agreement about what FISA  
21 does or doesn't require with the ability to challenge the  
22 searches and seizures that led to evidence -- which is  
23 really what we're talking about here -- is that at some  
24 level, FISA has to some degree dropped out of the picture if  
25 you are at that point. At some level the government has

1 declassified something and given it to the defense, and now  
2 the defense wants to challenge the legitimacy of the  
3 acquisition of the evidence. If they don't declassify  
4 something and you don't know about it, then we're not having  
5 that motion to suppress because you don't have it.

6 And so at that point, that's what you're talking  
7 about. You have received a number of materials. You want  
8 to challenge the legitimacy of the searches or seizures that  
9 led to them coming to you, and that is, once the step I've  
10 just described has taken place, that is largely governed by  
11 the best we can do duplicating what's done in a regular  
12 criminal case, with some, you know, caveats in place, I  
13 suppose.

14 So if I understand your position correctly, you  
15 have evidence that you want to -- you want to evaluate, at a  
16 minimum, whether you can move to suppress it, and you  
17 believe that you need to know more than you now know in  
18 order to do that, right?

19 MS. BAGGIO: That's correct.

20 THE COURT: And you have, if I understand this  
21 correctly from your pleadings and from the government's  
22 brief in response here, you have two kinds of evidence: you  
23 have evidence that's been declassified and come to you; and  
24 at least the government seems to suggest that you have  
25 figured out that some of the evidence came just through

1 standard criminal investigative procedures like, say,  
2 physical stakeouts or something like that.

3 Is that a fair description of what's gone on so  
4 far for you?

5 MS. BAGGIO: Yes, Your Honor, except I would add  
6 to the last point, we may know that a Rule 41 search warrant  
7 was used to obtain certain evidence but we might not know  
8 all of the evidence, the source of all the evidence on which  
9 the search warrant application was based. So, in that  
10 sense, while we may have some definitive answers as to some  
11 of the evidence, we still may not know where it originally  
12 came from.

13 THE COURT: Right. So the crux of your issue is  
14 that you have a pile of evidence that maybe is in two  
15 stacks, the two I've just described, and you may have some  
16 rough ideas, but you certainly aren't sure if you can  
17 identify by what authority any particular piece of evidence  
18 was acquired?

19 MS. BAGGIO: That's correct, Your Honor.

20 THE COURT: And your contention is that there's  
21 nothing about FISA or related national security law that  
22 changes the fundamental equation that as to evidence that  
23 you assume is going to be used against you because it's been  
24 produced, you should have whatever -- you should have enough  
25 to file a meaningful motion to suppress.

1 MS. BAGGIO: That's correct, Your Honor.

2 THE COURT: And the Government suggests, I think,  
3 two things about that. One is that you -- well, maybe  
4 three. One is that you sort of have a rough idea about this  
5 dividing line between what you've received that's been  
6 declassified and what you've received that just came through  
7 nonclassified channels originally. And I think I have your  
8 answer on that. Maybe a rough idea, but nothing very  
9 specific.

10 MS. BAGGIO: Correct.

11 THE COURT: So that's one thought.

12 The other I'm not sure I totally understand, and  
13 I'll ask the government more about this in a minute, but I  
14 want to see if it is accurate as far as you know.

15 The government suggests that in conversations with  
16 you -- and I'm now looking at page 5 of the government's  
17 response to your motion. I'm not sure I get this. I'm  
18 starting with you because you're the moving party and maybe  
19 you can help me here.

20 The government suggests that in conversations with  
21 you, something about those conversations has informed you  
22 that if you're going to challenge the authorities by which  
23 the declassified evidence came -- came to be seized, if we  
24 will, that that's going to be FISA Titles 1, 3 and 7.

25 Tell me more about that from your perspective.

1 MS. BAGGIO: Your Honor, from my perspective,  
2 informing us that they used Titles 1, 3 and 7 of FISA is  
3 insufficiently specific.

4 THE COURT: Let me just start with that. Is that  
5 what's happened? Is that what's happened, first of all?  
6 Have you been informed that the sources you ought to be  
7 thinking about challenging are 1, 3 and 7?

8 MS. BAGGIO: By reading this memo, Your Honor. I  
9 don't recall specific other conversations, other than after  
10 this was filed, in talking with the government about what we  
11 wanted. But I have no more specific information than what  
12 appears here.

13 THE COURT: Let's assume that means what it says,  
14 and that that's the road you ought to take. Once again,  
15 just help me if this is where you are. It seems like you  
16 are in a position to challenge the overarching  
17 constitutionality of those authorities, right? You spoke  
18 last time we were together about how you might have to  
19 challenge the constitutionality of every possible  
20 acquisition authority there might be, and if this is a  
21 limitation that's meaningful, then as to just what I'll  
22 think of as systemic challenges to authorities, you can  
23 limit yourself and you can raise broad Constitution-based  
24 challenges to the legitimacy of those authorities. Is that  
25 fair?

1 MS. BAGGIO: We could raise facial challenges --

2 THE COURT: That's the word I was thinking of.

3 MS. BAGGIO: -- to those three titles.

4 However, the problem is that even within those  
5 titles, there are so many different ways of doing so many  
6 different things that it's our position that that's not  
7 sufficiently specific.

8 And the second problem that we have, Your Honor,  
9 is because of -- based on the discovery provided, it  
10 suggests that this investigation went on for years and  
11 years. We're not certain which versions of these titles  
12 were used.

13 THE COURT: All right.

14 MS. BAGGIO: And --

15 THE COURT: So you have some problems even making  
16 a facial challenge to those authorities.

17 And then the second thing the government says here  
18 is that -- I guess a suggestion that these are the relevant  
19 authorities, and that if you prevailed as to those  
20 authorities, it would be dispositive of the case. I guess  
21 that's a way of saying that these are the authorities that  
22 matter in this case.

23 And then, second, the suggestion that this --  
24 well, it's not even a suggestion, I guess. There's the idea  
25 that this allows you to seek rulings against the government

1 on the constitutionality of or the government's compliance  
2 with those provisions.

3 So I guess my first take was maybe yes as to the  
4 constitutionality of it, but my impression is that you don't  
5 think or don't have what you would need to challenge the  
6 government's compliance with any specific authority. Is  
7 that fair?

8 MS. BAGGIO: That is fair, both as to as-applied  
9 constitutional challenges, as well as any statutory  
10 violations that might have taken place.

11 THE COURT: So whether the government sort of  
12 followed the protocol set out in those authorities for  
13 obtaining the evidence it got, you just don't know?

14 MS. BAGGIO: That's correct.

15 THE COURT: And you think the authorities you  
16 cited to me in your briefing entitle you to know?

17 MS. BAGGIO: That's correct.

18 THE COURT: And that's kind of the crux of this  
19 issue, isn't it?

20 MS. BAGGIO: And may I add one other?

21 THE COURT: Absolutely. I didn't mean to -- I'm  
22 just telling you what I thought your argument was, and now  
23 you can help me with what I missed.

24 MS. BAGGIO: Thank you, Your Honor.

25 One other point that really came out to me in the

1 government's briefing is footnote 2 on page 4, in which they  
2 are saying they don't intend to rely on the authority of the  
3 Terrorist Surveillance Program authorization of use of  
4 military force or president's Article II power.

5 I understand from a driveby perspective it kind of  
6 supports what the Court just referred to on page 5 if we're  
7 just dealing with these three subchapters of FISA -- or  
8 titles of FISA. But one of the problems that I'm having  
9 with this, Your Honor, is it's unclear to me how the  
10 government is interpreting seizures and constitutionally  
11 significant events, because based on some of the publicly  
12 disclosed government surveillance practices, in combination  
13 with some of the government's statements, for instance,  
14 before the Privacy and Civil Liberties Oversight Board, we  
15 have -- we're getting this information that the government  
16 may take the position that it could conduct a bulk  
17 surveillance of telephone metadata or Internet metadata or  
18 perhaps even Internet communications under EO 12333 or under  
19 the FISA Amendments Act, but in some of the different places  
20 in which the government has made statements about this,  
21 they've taken the position that, well, that initial seizure  
22 isn't really a seizure, and in fact it's only when it's  
23 later sorted and certain information is pulled out that  
24 that's a seizure.

25 In another context, the government has taken the

1 position that later searches of a collected vat of  
2 information, later searches of that even years later don't  
3 constitute constitutionally significant events.

4 So my concern with the government's representation  
5 is I'm not sure how they are reading search and seizure law  
6 to say the only thing at issue here are Titles 1, 3 and 7 of  
7 FISA. So that is an additional concern, again based on both  
8 the publicly available information and the discovery in this  
9 case, which although the orders -- the orders seem to have  
10 come about around 2009, based on the seized communications,  
11 the email communications go back to 2005. And so there  
12 becomes a question in our minds under what authority were  
13 those seized back in 2005.

14 Does that concern make sense, Your Honor?

15 THE COURT: Yes.

16 MS. BAGGIO: And I think one of the other things  
17 that I -- that we agree -- and this seems like we're all  
18 consistent on this. On page 3 of its response, the  
19 government cites a Federal Rules Decision case to say that  
20 the government's obligations are satisfied when it has made  
21 disclosures that sufficiently allow defendants to make  
22 informed decisions whether to file one or more motions to  
23 suppress.

24 This is what we're struggling with, Your Honor.  
25 And if we take away the FISA overlay for a moment and

1 consider this a regular criminal case -- and Mr. Khan is  
2 charged not with material support but with a complex  
3 financial fraud -- and imagine that the government gives me  
4 40,000 pages of information and they say, okay, here's our  
5 evidence, here's your charge, and we use Title 18, Chapters  
6 119 and 121. And I know by reading those chapters that that  
7 could have been a wiretap, that could have been ordered  
8 under the Stored Communications Act, that could have been  
9 the Congress's Assistance to Law Enforcement Act. There's  
10 all these different legal mechanisms within that larger  
11 umbrella.

12 Now, I understand the point that you made earlier,  
13 Your Honor, is they've narrowed that somewhat if we're going  
14 to hold them to Title 1, 3 and 7, but even within the Title  
15 1, 3 and 7, there's so many different ways to do things that  
16 I submit I can't be effective and I can't evaluate whether  
17 or not -- make an informed choice about whether I should  
18 file a motion to suppress evidence when I'm not sure which  
19 mechanisms were used.

20 And then if we add the FISA overlay, Your Honor,  
21 back into it, another point I just wanted to highlight --

22 THE COURT: Let me pause you there for a moment.  
23 I take seriously your argument that you don't feel that you  
24 had adequate information to know whether, or if the answer  
25 is yes, then how to file a facial challenge to the

1 authorities.

2 I guess I thought your more fundamental argument  
3 was -- Let me back up. So that's an argument that you've  
4 been given some information towards what you need but not  
5 enough.

6 I thought your more fundamental argument was the  
7 second one, which is I was under the impression you have  
8 essentially no information that would tell you whether the  
9 government complied with the methods set out for obtaining  
10 it or not. Am I wrong about that?

11 MS. BAGGIO: No, you are correct. That is  
12 correct.

13 THE COURT: The first argument is you've been  
14 given something but not enough; but isn't the second  
15 argument that you have, in terms of deciding whether to  
16 challenge evidence based on the government's compliance with  
17 the authorities, you wouldn't know the first thing about  
18 whether to file or when to file, would you?

19 MS. BAGGIO: That is true, but I also recognize  
20 that, as outlined in the government's response, there are  
21 mechanisms for that to happen in a special way in a FISA  
22 case, but I don't even know which sets of statutes or which  
23 subsections or which definitions to look at so that I can  
24 draw a road map for Your Honor to go through and look at  
25 them. That's the kind of narrowing that we're hoping for.

1 THE COURT: And then you said -- your analogy was  
2 to a complex financial fraud case, and then you said if you  
3 add the FISA overlay, then what?

4 MS. BAGGIO: Thank you, Your Honor.

5 If you add the FISA overlay, you have not only  
6 Rules 12, 16 and the federal constitutional requirements and  
7 considerations, but we also have the express statutory right  
8 for this defendant to challenge in this proceeding the  
9 lawfulness of the seizure and whether the seizure occurred  
10 in conformance with the application and order.

11 And, Your Honor, my position is that that  
12 statutory right to say that this is an unlawful seizure is  
13 more than us being able to do a driveby "the FISA statute is  
14 unconstitutional on its face." To interpret that statutory  
15 right under -- it's under 1806(e) for the electronic motions  
16 to suppress and 1825(f) for the physical searches. For that  
17 statutory right to have any meaning, then we need to be  
18 given sufficient information to be able to challenge it.

19 And it's our position, Your Honor, that only with  
20 more detailed disclosures, at a minimum, of the statutes,  
21 subsections and versions used, but also that it needs to be  
22 tied back to at least classes of evidence, because that way  
23 we can more fully understand the picture. I can make an  
24 informed decision about whether to file a motion to suppress  
25 and so that we can understand the exploitation analysis,

1 because so many of these investigative methods allow  
2 retroactive information to be produced that I can't even  
3 possibly know when things happened, whether an order was  
4 issued in 2005 to get email or whether that happened in 2012  
5 and was able to retroactively get email.

6 And therefore, Your Honor, it's our position that  
7 not only does a regular criminal case require the type of  
8 notice requested in other pleadings, but FISA further  
9 recognizes the necessity of us being able to exercise that  
10 statutory right to move to suppress evidence.

11 THE COURT: Did you just say that you needed  
12 further identification of the authorities in order to do the  
13 exploitation analysis?

14 MS. BAGGIO: And tie it back to individual pieces  
15 of evidence.

16 THE COURT: I didn't know what you mean by those  
17 two words.

18 MS. BAGGIO: Yes, Your Honor.

19 Well, if, for instance, if we're looking at, for  
20 example, a search warrant application, and the search  
21 warrant application describes an investigation that took  
22 place in 2005, either to a certain investigative process in  
23 2006 and 2007, and then I can know that if a bad search  
24 happened in 2006, that that would then have a domino effect,  
25 and I can make a *Wong Sun* fruit-of-the-poisonous-tree

1 argument as to the government exploited that illegality.

2 THE COURT: Seems to me that the derivative use  
3 would be by exploitation.

4 MS. BAGGIO: Yes, Your Honor. I'm sorry.

5 THE COURT: It's a perfectly good word, I just  
6 didn't know what you meant by it. I guess that makes it not  
7 a perfectly good word.

8 One last question, then. You -- let me just ask  
9 what position would you be in if there were no further or --  
10 no more linkage of authorities to pieces of evidence but a  
11 more specific identification of authorities with regard to  
12 your facial challenge? Why would you be able to make a  
13 facial challenge if you knew exactly what authorities had  
14 been used without knowing precisely what pieces of evidence  
15 came from the use of those authorities?

16 MS. BAGGIO: So long as that disclosure included  
17 specific enough reference to a section or subsection, and  
18 the version, Your Honor, I think based on having that  
19 information, I could do a facial challenge. I may still be  
20 unable to conduct an as-applied challenge or to examine  
21 whether they complied with the statute.

22 THE COURT: I was just sticking with the facial  
23 challenge.

24 You could get there probably, and you might even  
25 have, depending on the nature of the disclosed specific

1 authority, you might even have a pretty good idea what  
2 evidence came from it?

3 MS. BAGGIO: That is correct, Your Honor.

4 THE COURT: All right. Thank you.

5 Mr. Gorder, let's start with this concept of  
6 what's needed to make an adequate facial challenge, and then  
7 we'll talk about what's needed to make an adequate specific  
8 or as-applied challenge to the government's compliance.

9 MR. GORDER: Very well, Your Honor.

10 You know, we are cognizant and understand the  
11 dilemma that defense counsel is in in cases like this. To  
12 use her analogy, if this was a fraud case and we gave them  
13 records that said it came from criminal wiretaps and search  
14 warrants, she would get the affidavits in support of the  
15 wiretap orders, the copies of the orders, and be able to,  
16 you know, basically figure out her probable cause argument,  
17 if she desired to make that.

18 That's not the situation that Congress set up with  
19 regard to FISA. The situation is kind of in the reverse.  
20 So we have gone about as far as we can go with regard to  
21 classified techniques of acquiring foreign intelligence.

22 THE COURT: That's, I think, a little -- relevant  
23 to both points I'm interested in, runs more towards the  
24 as-applied challenge. So the idea, at least, that we're  
25 left with is that -- without putting words in your

1 opponent's mouth -- I think there's a sort of a minimum that  
2 is sought by way of identifying the actual authorities  
3 relied on in this case, such that just a challenge to the  
4 constitutionality of those authorities could be made. So I  
5 suppose that could be made today with the disclosures you've  
6 made.

7           Actually, let me back up a little bit. Am I  
8 reading your brief correctly that in some way the defense  
9 has been told which authorities they ought to think about  
10 challenging here, maybe informally?

11           MR. GORDER: Well, both formally and informally,  
12 Your Honor. The formal way was the notices that we filed  
13 with the Court, which indicates that the government intends  
14 to use evidence derived from FISA Title I and FISA Title II  
15 and FISA Title VII.

16           THE COURT: All right.

17           MR. GORDER: And so basically you've got  
18 electronic surveillance under FISA, physical search under  
19 FISA, and the FISA Amendment Act changes that occurred in  
20 2008.

21           And I think to make a general facial challenge to  
22 those statutes, they have what the FISA statute says -- or  
23 what Congress says is required to make those kinds of facial  
24 challenges. I mean --

25           THE COURT: There would have to be -- I mean,

1 there might be truly overarching arguments made to the FISA  
2 and the FISA Amendments Act in their entirety, but to  
3 challenge the specific methodologies authorized by either of  
4 those acts today, if Ms. Baggio wanted to do that, she'd  
5 have to challenge all of them contained in those three  
6 chapters or subsections, right?

7 MR. GORDER: Yes. But --

8 THE COURT: Why is that better than the only way  
9 permitted under law, more detailed identification of what  
10 was relied on here?

11 MR. GORDER: Well, I'm not sure I understand what  
12 more detail the defense would need to make the facial  
13 argument. I mean, the electronic --

14 THE COURT: They know there was an electronic  
15 surveillance but they don't know what kind of electronic  
16 surveillance.

17 MR. GORDER: Right. But the statute that  
18 authorizes it, all electronic surveillance is the same. If  
19 you want to make a constitutional challenge to the  
20 government's ability to do FISA electronic surveillance, you  
21 look at Title 1 of FISA. I mean, the statute doesn't make a  
22 difference between different kinds of electronic  
23 surveillance.

24 THE COURT: I suppose the idea is that some  
25 methods of engaging in electronic surveillance are on weaker

1 constitutional footing than others. Maybe going after  
2 stored emails is weaker in some way -- I haven't thought  
3 about this, but weaker in some way than going after  
4 something else, so the idea being you might not have just  
5 one generic constitutional argument. You might have better  
6 ones for some methods and weaker ones for other.

7 MR. GORDER: Well, I think, Your Honor -- and  
8 again, I don't intend to say that this is an easy task, but  
9 that is what FISA requires.

10 THE COURT: Well, that's your position, is that  
11 more detailed identification than what you've done so far is  
12 beyond what Congress contemplated by way of notice?

13 MR. GORDER: Correct.

14 THE COURT: And what's your authority for that,  
15 the authority that would say that identifying not just the  
16 overarching authority but the specific methodologies used is  
17 not permitted here?

18 MR. GORDER: Well, I think, Your Honor, the  
19 authority that we have are the cases that upheld the  
20 in-camera ex parte process that is used to challenge FISA  
21 and to get into the as-applied analysis in any particular  
22 case.

23 Second, as we mentioned in our brief, I mean,  
24 Congress did require more specific notices in certain cases  
25 but not in the overall just general electronic surveillance

1 area or physical search area, but they did make an exception  
2 for certain kinds of notice in certain circumstances. So --

3 THE COURT: All right. Let's turn, then, to the  
4 idea that -- I guess only -- again, I'm not trying to make  
5 you say something you didn't say, but sort of hinted at in  
6 your brief is the idea that a person ought to be able to  
7 challenge not only the constitutionality of searches but the  
8 government's compliance with the authorities that allow for  
9 those searches.

10 Sitting here today, does Ms. Baggio have what she  
11 needs to challenge the government's compliance? Your  
12 analogy to financial fraud was she would be able to know  
13 whether there was PC to challenge it.

14 MR. GORDER: The answer to that question is no,  
15 she does not. The applications that went to the FISA board  
16 are classified, she does not have access to those, and the  
17 process that Congress has set up and that the courts have  
18 upheld as constitutional is should she file a motion to  
19 suppress, which she undoubtedly will next Monday, Your  
20 Honor, we will be preparing an ex parte in-camera classified  
21 brief for you to examine that establishes, in our position,  
22 that the applications were proper, that the court orders  
23 were authorized by law, and that the government complied  
24 with the requirements of the various orders.

25 The procedure that Congress has set up and that

1 the Courts have upheld is that you will examine those  
2 yourself in camera, and only if you find it necessary to  
3 bring Ms. Baggio into the equation to make a decision, which  
4 you -- you know, we don't think you will need in this case,  
5 as hasn't happened in any other FISA case to date.

6 But that is the way that the as-applied and  
7 compliance mechanism is examined by the courts in this case,  
8 because the details of FISA surveillance -- physical search,  
9 et cetera -- are classified. We're not allowed to publicly  
10 discuss what the target of a FISA is, the details of the  
11 time period, court orders and that sort of thing. So that's  
12 just the way Congress has set it up, and the courts to date  
13 have upheld it as an appropriate way to balance the national  
14 security issues that are contained in FISA applications and  
15 orders and the criminal process that, you know, we're  
16 engaged in today.

17 THE COURT: So if I agreed with you, then going  
18 forward, what would happen is that for facial challenges,  
19 Ms. Baggio would be able to make a very sort of programmatic  
20 or overarching challenge to the constitutionality of FISA  
21 and the FAA, at a minimum, and to the degree that she  
22 thought she had particular arguments that got at some but  
23 not all of the methodologies used, she'd have to just make  
24 all of those arguments, not being sure that those  
25 methodologies were used in this case, challenge the

1 constitutional of them.

2           And then as to the idea that the government failed  
3 to follow or failed to comply with the requirements for  
4 using those authorities without knowing one way or the other  
5 whether that was the case or not, or even if she had a good  
6 argument or not, she'd just have to move to suppress for  
7 failure, for example, failure of the government to show PC  
8 to the FISC, and you'd respond ex parte in camera?

9           MR. GORDER: That's correct, Your Honor.

10           And she could certainly use whatever discovery she  
11 has to date to supplement those arguments. I mean, I have  
12 seen in my own cases defense counsel take the discovery, and  
13 based on discovery make an argument that their client  
14 couldn't have been found to be an agent of a foreign power,  
15 for example, or somebody else couldn't have been found to be  
16 an agent of a foreign power.

17           But, again, we're cognizant of the difficulty that  
18 she is in in trying to make those arguments because she  
19 doesn't have the supporting documents, but that's just the  
20 process that's been set up by Congress and has been found  
21 constitutional.

22           THE COURT: And then if I could refer to page 4  
23 for just a moment of your brief, I think you're asserting or  
24 at least suggesting that enough discovery has been given  
25 that the defense either can or has figured out which pieces

1 of evidence it's received have just come from non-FISA  
2 means. Is that right?

3 MR. GORDER: Well --

4 THE COURT: I'm not sure I understood what you  
5 were saying there.

6 MR. GORDER: I think what we had said was they  
7 have enough information to make a determination,  
8 particularly given the notice that we have provided as to  
9 what parts of FISA are important to litigate in this case,  
10 and in a general sense can figure out most of the time, for  
11 example, an audio call that was recorded, where it came  
12 from.

13 THE COURT: What do you mean by saying that they  
14 have -- leaving FISA aside, they have successfully divined  
15 from discovery that evidence may also have been collected  
16 pursuant to grand jury, physical surveillance, witness  
17 interviews, border searches?

18 MR. GORDER: Right. I was referencing the chart  
19 that Ms. Baggio has in her pleading where she goes through a  
20 number of those items.

21 And then obviously, you know, an FBI 302, for  
22 example --

23 THE COURT: Of a witness interview?

24 MR. GORDER: -- of a witness interview makes it  
25 clear that it was a witness interview.

1 THE COURT: So FISA just wouldn't apply and she  
2 could challenge it by any of the standard methods that were  
3 available?

4 MR. GORDER: Correct.

5 THE COURT: All right. Thank you.

6 Ms. Baggio.

7 MS. BAGGIO: Thank you, Your Honor.

8 Three quick points in rebuttal. First of all, the  
9 government has said that we can challenge the statute's  
10 constitutionality by just looking at the statute, and if  
11 it's an electronic seizure, we challenge the FISA statute  
12 for electronic seizure.

13 I'm trying, and it's really, really difficult,  
14 Your Honor. If we start with a good definitional section --  
15 for example, Mr. Gorder raised the example of, well, some  
16 attorney tried to argue whether or not his client could have  
17 been an agent of a foreign power. I think there are about  
18 ten different definitions of how somebody can be an agent of  
19 a foreign power. There are seven different definitions of  
20 how a person can actually be a foreign power directly. And  
21 I'm not even sure where we fit into any of these pieces. So  
22 even when I was preparing for argument, I was trying to do a  
23 visual of how all these ways could fit together, one piece  
24 of evidence, all the different ways by which the government  
25 might have obtained it, and I couldn't do it, it was just so

1 complicated.

2           So if we look at just, for example, the chapter on  
3 electronic surveillance, there is a whole statutory scheme  
4 if the electronic surveillance is seized without an order.  
5 There's a whole different statutory scheme if the electronic  
6 surveillance is obtained pursuant to an order. So even just  
7 narrowing by half, it would be of great assistance to the  
8 defense, but we still have the problem of so many  
9 definitions that come into play, and again, the problem of  
10 different versions being in effect at different times.

11           The same thing applies to the physical searches  
12 chapter, where they have a whole section that explains how  
13 physical searches can be done by presidential authorization  
14 and all the complicated processes associated with that  
15 versus how it can happen pursuant to a court order.

16           So that is what we're struggling with here, Your  
17 Honor, and I believe therefore that simple references to  
18 Title 1, 3 and 7 is insufficient.

19           The government also mentioned, well, there is an  
20 audio call, so clearly it's obtained by FISA. Well, we  
21 don't know if it's FISA or if it's the FISA Amendments Act.

22           And so those types of pieces of information will  
23 allow me to do my job but also to be able to focus the  
24 Court's attention on the different pieces of FISA that are  
25 relevant and not waste anybody's time on what's not

1 relevant.

2           The last point that I just wanted to mention, Your  
3 Honor, is the government does make the argument that other  
4 parts of FISA require more specific disclosures. And I  
5 would like to just respond to that by saying if we look at  
6 each of those other FISA provisions that require more  
7 specific notice of an application, of a date of an order or  
8 of the information obtained I think are some of the things  
9 that those more specific notice provisions require, all of  
10 those involve people who aren't charged with anything. And  
11 I think that is absolutely the difference here, that  
12 Congress looked at someone who is charged in a criminal  
13 case, and when they're charged in a criminal case, the  
14 notice provisions come into play, the statutory right to  
15 move to suppress moves into play, as do the Rules of  
16 Criminal Procedure and the constitutional protections. None  
17 of that applies in the examples cited by the government.

18           THE COURT: One of Mr. Gorder's arguments is that  
19 we're not writing on a blank slate here; that the Ninth  
20 Circuit, at a minimum, and other courts have spoken on  
21 what's allowed and not allowed. To what degree do you view  
22 what you're asking for as either open or foreclosed by Ninth  
23 Circuit authority? In other words, is there any theory  
24 under which your argument is simply suggesting that existing  
25 authorities have it wrong and I ought to reconsider versus

1 just open field where no authority prohibits what you're  
2 asking for?

3 MS. BAGGIO: I believe we're in the latter  
4 category, Your Honor, not the former. I'm aware of no one  
5 in any other case that has made this type of request, not  
6 for access to the applications and orders or challenging  
7 that process set out in FISA. This is different, Your  
8 Honor. We're asking just for more specific notice of the  
9 authorities that were used and the versions. We are also  
10 asking for it to be tied to at least classes of evidence.  
11 I'm not asking to read the application, I'm not asking to  
12 look at the order. I just want the universe of  
13 possibilities to be reduced dramatically to just the ones  
14 that are relevant to this case.

15 THE COURT: All right. And so I think I  
16 understand your position on challenging compliance, that you  
17 can do a better job of it if you -- if the field is narrowed  
18 somewhat for the authorities that had to be complied with.  
19 But you're not asking today for the underlying documents in  
20 order to see whether the affiant stated probable cause to  
21 the FISC?

22 MS. BAGGIO: Precisely, Your Honor. And if we  
23 know that we're in the section that allows recording of a  
24 phone call without a court order, then I would be setting  
25 out for the Court these are the processes, now that I know

1 we're in this one and not the court-ordered section of FISA.

2 THE COURT: Thank you.

3 MS. BAGGIO: Thank you.

4 THE COURT: Let's turn to the other motion. And I  
5 guess, then, Mr. Knight and Mr. Ransom, you're handling  
6 those; is that right?

7 MR. RANSOM: That's correct, Your Honor.

8 THE COURT: So once again I've reviewed what you  
9 submitted and you've had a chance now to review the  
10 government's response. Anything you wish to add to what you  
11 said in writing?

12 MR. RANSOM: Yes.

13 In regard to the statements of the defendant, Your  
14 Honor, the government's position is it has provided all  
15 statements that are relevant and material. It is our  
16 position that the government has not.

17 I'd like to reference the emails themselves which  
18 have been obtained through either FISA or the FISA  
19 amendment. We assume there are a significant cache of  
20 documents that are held, the metadata, and that these are  
21 reviewed pursuant to keywords that are provided. Let's say  
22 in this case the keywords are "Reaz Khan," and of those, a  
23 thousand documents appear.

24 And then there is a filter, and in the first  
25 filter -- and this is all supposition based on what I have