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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAZ QADIR KHAN,

Defendant.

Case No. 3:12-cr-659-MO

RESPONSE TO GOVERNMENT LETTER OF OCTOBER 15, 2014, IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL NOTICE OF SEARCHES & SEIZURES (CR-94)

The defendant, Reaz Qadir Khan, through counsel, hereby offers this Response to the Government's Letter of October 15, 2014, offered in support of its request that the Court deny Mr. Khan's Motion to Compel Notice of Searches & Seizures and for Purported Legal Authority for Searches & Seizures (hereafter Motion to Compel Notice) (CR-94).

A. Procedural Posture

On May 6, 2014, the Court issued its Amended Case Litigation Schedule setting forth a series of deadlines. CR-74. Round 2.A of the motions relates to Mr. Khan's Motion to Compel Notice and set a defense motion deadline of July 14, 2014, and a government response deadline of August 11, 2014. *Id.* On September 11, 2014, the Court held a hearing on the Motion to Compel Notice and took the motion under advisement. Exhibit A (Transcript of 9/11/14 Hearing (Excerpt)). 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 (10/15/14 Letter of AUSA Gorder).

As Mr. Khan made clear in his briefing and during argument at the hearing, this motion does not seek disclosure of FISA applications or orders. *See generally*, Memorandum in Support of Motion to Compel Notice (hereafter Memorandum) (CR-94); Ex. A at 29. Instead, his motion asks the Court to compel the government to provide him with adequate notice of the fact of searches and seizures and with the legal authority on which the government relied to justify those searches and seizures, so that his attorneys may knowingly evaluate whether to file a motion to suppress and what issues to raise. That request includes all legal authority, including Executive Order 12333. Memorandum, at 4-5.

B. Argument

This Response addresses four points raised by the government's October 15, 2014, letter. First, the Court should strike the government's letter as both inappropriate and untimely. Second, the Court should find that the government has changed its position regarding its use of FISA subchapters III (pen registers and trap and trace devices, "PR/TT"), IV (business records and

"tangible things"), and FAA § 703 (50 U.S.C. § 1881b, relating to electronic surveillance of United States persons outside the United States). Third, the Court should reject the government's new arguments as unsupported by law and, in light of a public record documenting government interpretation of terms to avoid providing notice, should order the government to provide complete notice as requested by Mr. Khan. Fourth, the Court should reject the government's opposition to notice when it is required under applicable law.

1. The Letter Brief Is Inappropriate And Untimely

The Court went to great pains in holding a scheduling hearing and issuing a litigation schedule under Federal Rule of Criminal Procedure 12(c) to address the multitude of complex issues in this case. The government's October 15, 2014, letter violates the Court's scheduling order.

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. As such, the Court should decline to consider the arguments presented in this unofficial and untimely communication.

2. The Government Has Changed Its Position With The Court As To The Types Of Surveillance Used In Its Investigation Of Mr. Khan

The only questions pending based on the defendant's Motion to Compel Notice relate to search/seizure events and the purported legal authority to justify those events. The government need only answer whether it used a legal authority or not. Government claims of mootness or lack

1 In amendments effective December 1, 2014, Fed. R. Crim. P. 12(e) will be relocated to 12(c)(3).

of standing fail to respond to the pending motion and signify a material change to its previous positions.

Prior to the October 15th letter, the government stated that it had used only FISA subchapters I, II, and VI (§ 702) in its investigation of defendant. The government communicated that position in writing in its Response to the Motion to Compel Notice:

> In conversation with defense counsel in this case, government counsel have emphasized that the defense should, under the procedures outlined in FISA, file appropriate motions to suppress evidence obtained or derived from electronic surveillance and search conducted under FISA Titles I, III, and VII.[2] We have informed them that rulings against the government on the constitutionality of or the government's compliance with those provisions, if upheld on appeal, would be dispositive of this case.

(CR-97 at 5).

During the September 11th hearing, the following exchange occurred:

> THE COURT: . . . So the idea, at least, that we're left with is that - - without putting words in your opponent's mouth - - I think there's sort of a minimum that is sought by way of identifying the actual authorities relied on in this case, such that just a challenge to the constitutionality of those authorities could be made. So I suppose that could be made today with the disclosures you've made.
>
> Actually, let me back up a little bit. 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?
>
> 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 II and FISA Title VII.
>
> The COURT: All right.
>
> MR. GORDER: And so basically you've got electronic surveillance under FISA, physical search under FISA, and the FISA Amendment Act changes that occurred in 2008.

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2 The government refers to "titles" of FISA. Mr. Khan has referred in his papers to FISA Subchapters rather than Titles because that is the organizational method used in the U.S. Code.

Ex. A at 18-19. *See also* Ex. A at 25 (Mr. Gorder: "I think what we said was they have enough information to make a determination, particularly given the notice we have provided[,] as to what parts of FISA are important to litigate in this case…."). The transcript, including the excerpt cited above, makes plain that the Court understood the government's position to be that only Title I, II, and VII were involved in the investigation of Mr. Khan. This was also defense counsel's understanding as to the government's official position in its papers and during argument. Ex. A at 13 (stating that the government has "narrowed [the applicable portions of FISA] somewhat if we're going to hold them to Title 1, 3 and 7….").

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.[3] Such a material change in position illustrates why the government should not be permitted to control disclosures and exemplifies the need for full notice to be provided to the defense of the search and seizure events, and the purported lawful authority (including sections, subsections and versions) for those events.

3 For example, the government argues that it need not provide notice of its use of the PR/TT provision unless five factors are present. Ex. B at 2. The letter continues by saying that it has not provided Title IV notice because the five statutory criteria in 50 U.S.C. § 1845(c) were not satisfied in Mr. Khan's case. *Id.* That is a materially different position from its previous representation that this Title was not used.

3. The October 15th Letter And Related Public Disclosures Confirm That The Government Has Adopted Narrow Internal Legal Definitions Of Material Terms To Justify Non-Disclosure And Evade Judicial Scrutiny

Based on public disclosures in the media and in other cases, the government should not be empowered as the ultimate arbiter as to when they must provide notice and to what degree.[4] The government's October 15, 2014, letter and information in the public record show that the government has adopted narrow and nonsensical definitions of words in order to avoid disclosure requirements with key FISA terms such as (1) "collected" and "acquired"; (2) "aggrieved", and (3) "used or disclosed"/"obtained or derived."

a. Nonsensical Interpretation Of "Collected" Or "Acquired" Is Inconsistent With Fourth Amendment Jurisprudence And Is Proof Of The Necessity Of Full Notice Of Search/Seizure Events And Purported Legal Authority

The public record shows that the government uses controversial definitions of "collected" or "acquired" to internally justify its decision not to disclose actions that a court could conclude constitute a search or seizure under the Fourth Amendment. *See, e.g*, Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, page 37 (July 2, 2014) (describing "acquired" as the point of "ingest[ion] into government databases"), *available at*

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4 For example, a recent NEW YORK TIMES article described the government's position that "defendants have no right to know" whether investigators derived evidence from activities under EO 12333. Charlie Savage, *Reagan-Era Order on Surveillance Violates Rights, Says Departing Aide*, N.Y. Times, Aug. 13, 2014, *available at* http://www.nytimes.com/2014/08/14/us/politics/reagan-era-order-on-surveillance-violates-rights-says-departing-aide.html?_r=0 (hereafter "Savage E.O. 12333 Article").

To defendant's knowledge, the government has never provided a criminal defendant with notice that it relied on E.O. 12333 in its investigation even though the government claims that it conducts most of its signals intelligence under E.O. 12333. NSA Legal Fact Sheet: Executive Order 12333, Jun. 19, 2013, at 1, http://bit.ly/1CG9EtT.

http://www.pclob.gov/All%20Documents/Report%20on%20the%20Section%20702%20Program/PCLOB-Section-702-Report.pdf. The government consistently uses terms like "collection" and "acquired" in its public discussions not as ordinary people use those terms, but very specifically to mean a point after the government has actual custody or control over communications. For instance, Department of Defense (DoD) regulations provide that information is considered to be collected only after it has been "received for use by an employee of a DoD intelligence component," and that "[d]ata acquired by electronic means is 'collected' only when it has been processed into intelligible form," without regard to when the information was initially acquired by a surveillance device. DOD 5240 1-R, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons § C.2.2.1 at 15 (Dec. 1982).[5] 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.

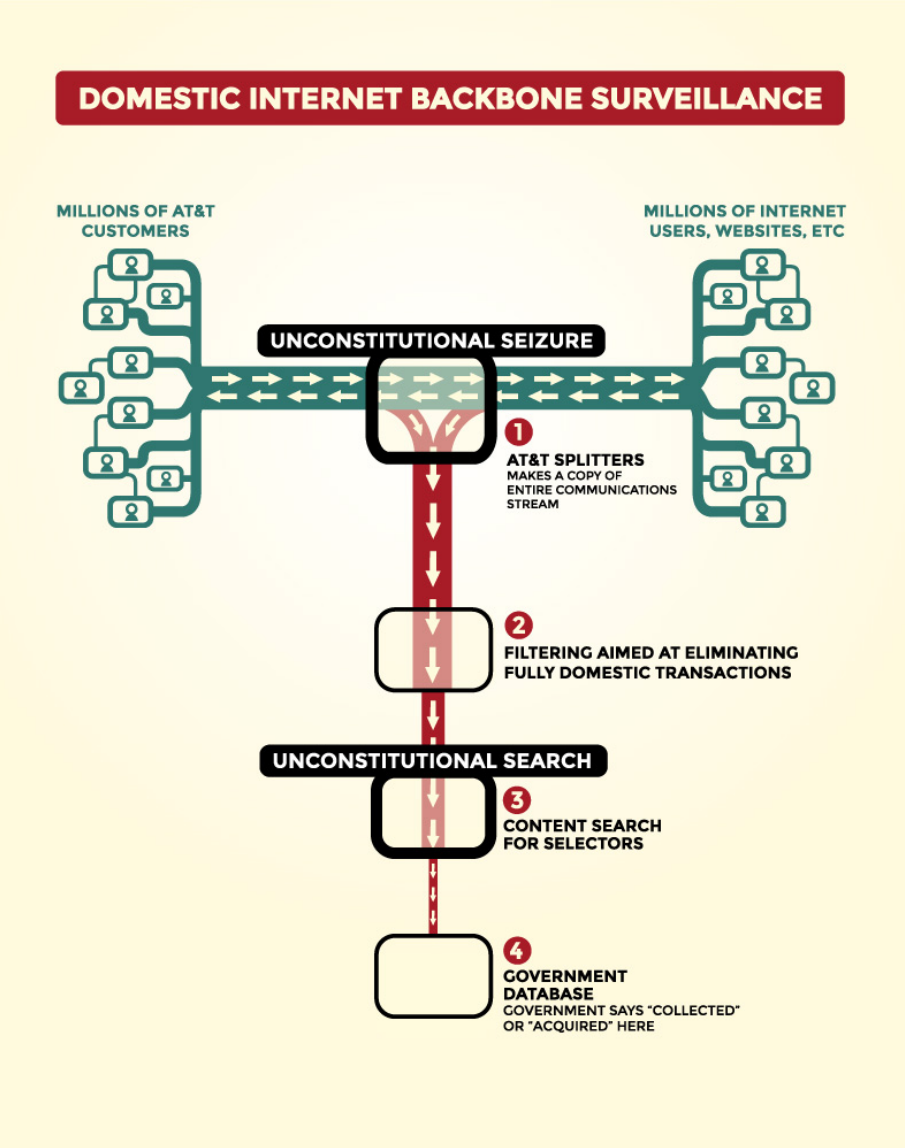
Similarly, Director of National Intelligence (DNI) Clapper explained in Senate testimony in response to a direct question from Senator Wyden in which DNI Clapper denied "collecting" data on millions or hundreds of millions of Americans by stating: "[T]here are honest differences on the semantics when someone says 'collection' to me, that has a specific meaning, which may have a different meaning to him [Senator Wyden]." Interview by Andrea Mitchell with DNI James R.Clapper (June 8, 2013).[6]

The graphic below illustrates how the government's conduct—in this example the NSA's upstream collection of internet communications—infringes on a United States person's Fourth

5 DoD Procedures are available at http://fas.org/irp/doddir/dod/d5240_1_r.pdf.

6 The full text of the interview is available at http://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews-2013/874-director-james-r-clapper-interview-with-andrea-mitchell.

Amendment rights in multiple ways.[7] It also provides a visual representation of the importance of granting Mr. Khan's Motion to Compel Notice because it shows how the government attempts to circumvent judicial review through semantics.



The government's position in *Jewel* is that a Fourth Amendment search occurs only at the fourth stage where it admits that it "collected" or "acquired" the information. That is a questionable

7 Mr. Khan uses the graphic with the permission of the Electronic Frontier Foundation (EFF). The EFF created and filed the graphic in *Jewel v. NSA*, case no. 08-cv-04373 (N.D. Cal.).

legal position that needs to be litigated in an adversarial proceeding. This graphic illustrates the complexities involving just one of the types of government surveillance likely used in this case.

In sum, the government's interpretations of "collected" and "acquired" directly conflict with the ordinary meaning of "collected" and with Fourth Amendment jurisprudence. *See Florida v. Jardines,* 133 S. Ct. 1409, 1414 (2013) (describing the "simple baseline" Fourth Amendment rule that "[w]hen the government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred" (internal quotations omitted)); *United States v. Luong*, 471 F.3d 1107, 1109 (9th Cir. 2006) (interception under 18 U.S.C. § 2510(4) occurs under when the tapped phone is located and the officers overhear a call); *United States v. Choate*, 576 F.2d 165, 201 (9th Cir. 1978) (information derived from mail cover operation "was doubtless 'seized' in that the Government made a permanent record of what was written on the surface of the mail."); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1991) ("[W]hen the contents of a wire communication are captured *or redirected in any way*, an interception occurs at that time." (emphasis added)). The government's interpretations are contrary to law and illustrate the need for full disclosure so that these legal interpretations may be subjected to a full and fair adversarial proceeding and review by the independent judiciary.

b. The Government's Untenable Definition Of Standing Or "Aggrieved" Proves The Necessity Of Full Notice Of Search/Seizure Events And Purported Legal Authority

The government's argument in the October 15, 2014, letter regarding the FISA §215 "Tangible Things" provision establishes that the government unilaterally and internally resolves controversial legal issues to justify non-disclosure. The government claims that (1) it need not provide notice of its use of §215; and (2) Mr. Khan lacks standing to challenge any information

obtained using §215. Exhibit B at 2 The government has advanced the untenable position that Mr. Khan lacks standing *per se* to challenge seizures based on §215 in order to avoid providing notice of its use of this provision.

Section 215 permits seizure of "any tangible things." Consistent with the law of this circuit, standing involves a mixed question of fact and law related to whether Mr. Khan has a reasonable expectation of privacy in whatever "thing" was invaded by the search or seizure. *United States v. Lopez-Cruz*, 730 F.3d 803, 807-08 (9th Cir. 2013) (noting determination of standing may include factors such as if the defendant has a property or possessory interest in the thing seized and whether he has a subjective expectation of privacy that the item would remain free from governmental intrusion); *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116-17 (9th Cir. 2005) (standing is a mixed question of fact and law).

Unsurprisingly, the government cites no authority for its argument that Mr. Khan lacks standing to challenge evidence collected under §215. Standing is not determined by the government; standing is a question for the Court. *See, e.g., Lopez-Cruz*, 730 F.3d at 808 (rejecting two different arguments raised by the government that the defendant lacked standing to file a motion to suppress); *Gonzalez, Inc.*, 412 F.3d at 1116-17 (rejecting government argument that defendant lacked standing to move to suppress evidence). One district court considering standing *vis-a-via* §215 concluded that a person has a reasonable expectation of privacy in the records collected using §215. *Klayman v. Obama,* 957 F. Supp. 2d (D.D.C. 2013) (appeal pending). The government almost certainly believes that *Klayman* was wrongly decided. But the government does not get to make that decision unilaterally and in secret. The Constitution establishes an adversarial system of justice that grants a criminal defendant the right to notice of whether the government used § 215, and upon such notice, he is empowered to exercise his rights to move to suppress any

evidence obtained, or derived from, the statute. At the suppression stage, Mr. Khan would have the opportunity to present this Court with reasons why he does have standing, similar to the plaintiff in *Klayman*, and why evidence obtained from § 215 or derived from that § 215 evidence should be suppressed.

The same reasoning applies to every authority on which the government relied to obtain any evidence in its investigation of Mr. Khan. The government may not rely on its own interpretations to justify non-disclosure. If that were the case, then wide swaths of Fourth Amendment jurisprudence would never change. For example, a court would never be able to consider whether the third-party doctrine from *Smith v. Maryland*, 442 U.S. 735 (1979), should be reconsidered in light of technological changes and evolving expectations of privacy. *See United States v. Jones*, 32 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (so suggesting); *see also*, *Klayman*, 957 F. Supp. 2d 1 (D.D.C. 2013) (distinguishing *Smith*). The government's position ignores that changes in technology and government surveillance have previously caused the Supreme Court to revisit Fourth Amendment case law or expand constitutional protections, oftentimes over the government's rigorous objections. *E.g. Riley v. California*, 134 S. Ct. 2473, 2489-91 (2014) (describing how technological advancements in cell phone technology and use justified requiring a warrant before police may search an arrestee's cell phone); *United States v. Jones*, 132 S Ct 945, 951-52 (2012) (distinguishing GPS tracking from prior two cases that held that tracking via a beeper did not did not infringe on a person's privacy).

The government's positions in the October 15th letter imply that it is relying on *Smith* (and possibly other as-yet-undisclosed theories) to justify non-disclosure. Doing so would violate fundamental principles of fairness by preventing defendant from litigating these crucial issues about the government's novel investigatory techniques. Mr. Khan's standing, or other related issues to a

motion to suppress evidence obtained or derived from § 215, are questions for the Court to decide after notice and after proper briefing by both sides.

c. The Government's Definitions Of "Used Or Disclosed" And "Obtained Or Derived" Provide Even More Proof Of The Necessity Of Full Notice Of Search/Seizure Events And Purported Legal Authority

The government interprets the phrases "used[d] or disclose[d]" or "obtained or derived from" in ways that allow it to create an argument within the minds of the government attorneys that information "obtained or derived" from authority of questionable legality, like the FISA PR/TT program, in no way advanced the government's case.

A case in this District, *United States v. Mohamud*, demonstrates why the Court should not defer to the government's representations that evidence was not obtained or derived from other legal authorities it used in its investigation. Mr. Mohamud learned that he had been surveilled by the NSA under the FISA Amendments Act ("FAA") on November 19, 2013—five years after the FAA was enacted and nine months after the jury had found Mr. Mohamud guilty. *United States v. Mohamud*, No. 10-cr-00475 (CR-486). To date, five defendants, including Mr. Khan, have received FAA notices. In three cases, the government provided notice after they had already been tried or convicted.[8]

As illustrated in *Mohamud*, from the enactment of the FAA in 2008 until the fall of 2013, the government avoided court review of its FAA surveillance activities by relying on an undisclosed and "narrow understanding" of its notice obligations.[9] The government altered course last year, but only

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8 Those cases are: *United States v. Hasbajrami*, No. 11 Cr. 623 (E.D.N.Y.) (post- conviction notice); *United States v. Mihalik*, No. CR 11-833(A) (C.D. Cal.) (post- conviction notice); *United States v. Mohamud*, No. 10-cr-475 (D. Or.) (post-trial notice); *United States v. Muhtorov*, No. 12-CR-00033 (D. Co.).

9 Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 16, 2013, http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-s

after the Solicitor General had inaccurately described the government's FAA notice policy to the Supreme Court. Following public outcry, the Solicitor General apparently concluded that the Justice Department's FAA notice policy "could not be legally justified." Savage FAA Article. The government's history of avoiding disclosure for strategic reasons provides a basis for this Court to conclude, first and foremost, that adequate notice of the seizures and purported authority for those seizures must be given to allow the defendant to exercise his constitutional and statutory rights.

d. The Government's Positions May Be Based On The Questionable Practice Of Parallel Construction To Mask The True Source Of Evidence, Another Reason To Require Full Disclosure

The government also avoids its notice obligations by engaging in parallel construction. Parallel construction describes the practice of laundering the source of evidence by recreating access to the evidence. *See* J. Shiffman & K. Cooke, *Exclusive: U.S. directs agents to cover up program used to investigate Americans*, Reuters.com (Aug. 5, 2013) (describing release of internal training materials for the Special Operations Division, which includes the FBI, that teach agents how to conceal true investigation and recreate an investigative trail), *available at* http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R2013080.[10] The practice, apart from the fundamental problem of its inherent disregard for the truth, hides the government's conduct of questionable legality. Although the government may, in some cases, have a colorable argument that a parallel construction constitutes a truly "independent source" of evidence, the Constitution does not permit the government to decide that issue unilaterally. *See United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989) (describing independent source

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ecret-wiretaps.html?from=us.politics&_r=0 (hereafter, Savage FAA Article).

[10] In the same article, former federal judge Nancy Gertner described "parallel construction" as "phonying up investigations." Shiffman & Cooke, *supra*.

doctrine). The government must provide defendant with notice so that the parties may litigate the lawfulness of the true source of the government's evidence.

4. The Fourth, Fifth and Sixth Amendments Entitle Defendant To Notice

The Constitution does not permit the government to withhold notice of the sources of its evidence against a criminal defendant. *Berger v. New York*, 388 U.S. 41, 60 (1967). Mr. Khan is entitled to notice of the authority relied on by the government in its investigation so he may challenge the legality of the government's investigatory techniques and the admissibility of any resulting evidence. *Wong Sun v. United States*, 371 U.S. 471, 486-88 (1963); *Murray v. United States*, 487 U.S. 533, 536-37 (1988). The Fourth and Fifth Amendments entitle Mr. Khan to notice so that he may evaluate whether to challenge the admission of evidence that, he believes, the government obtained or derived from illegal action. *E.g. United States v. Unites States District Court (Keith)*, 407 U.S. 297 (1972); *Alderman v. United States*, 394 U.S. 165 (1969); *United State v. Gamez-Orduno*, 235 F3d 453, 461 (9th Cir. 2000). Moreover, the Sixth Amendment entitles Mr. Khan to effective assistance of counsel in the consideration and filling of meritorious motions to suppress. *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

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,

Mr. Khan could be convicted of a crime carrying a maximum of life in prison based on evidence obtained or derived from wide-scale programmatic surveillance implemented using novel legal theories that have not been tested in an adversarial judicial proceeding.

C. Conclusion

Mr. Khan asks the Court to strike the government's letter of October 15, 2014, as too late and not well taken. Mr. Khan's Motion to Compel Notice seeks to enforce his most basic rights to due process, a fair trial, and to enjoy the effective assistance of counsel to raise motions challenging the lawfulness of the government's conduct. The government's resistance to provide this most basic information is troubling. Its late submission of additional arguments unsupported by case law highlights the weakness of the government's position and the need for disclosure in this important case. Mr. Khan's Motion to Compel Notice should be granted.

Respectfully submitted on November 5, 2014.

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