THE GOVERNMENT CONTINUES TO PLAY HIDE AND SEEK WITH SURVEILLANCE AUTHORITIES

Last year, I described the effort by the Reaz Qadir Khan's lawyers to make the government list all the surveillance it had used to catch him (which, significantly, would either be targeted off a dead man or go back to the period during with the government used Stellar Wind). In October the government wrote a letter dodging most notice. Earlier this year, Judge Michael Mosman (who happens to also be a FISA judge) deferred the notice issues until late in the CIPA process. Earlier this month, Khan plead guilty to accessory to material support for terrorism after the fact.

Another defendant accused of material support, Jamshid Muhtorov, replicated that tactic, demanding notice of all the types of surveillance used against him (his co-defendant, Bakhtiyor Jumaev, joined the motion). The government responded to that motion yesterday.

A comparison of the two responses is instructive.

Part of what the government does in both is to rehearse the notice requirements of a particular statute, stating that in this case the evidence hasn't met those terms. It does so, we can be certain, whether or not the surveillance has been used. That's because the government addressed FISA Section 703 notice in the Khan case, and we know the government doesn't use 703 by itself at all.

The responses the government made for both Section 215 request, in which the government said it has no duty to notice Section 215 and a defendant would not have standing nor would have

a suppression remedy,

Khan	Muhtorov
With respect to the use of information obtained from Section 215 business records, FISA does not impose any notice obligation on the use of such information. In an analogous context, the Rules of Criminal Procedure do not require the government to notify the defense of the use of information obtained from grand jury subpoenas. Such records would be collected from third parties, so the defendant would lack standing to contest their admission. Nor is there any suppression remedy available even if the government had committed a statutory violation of Section 215 since the statute provides for none. To the extent that the defense chooses to challenge this provision of FISA, the government's response will be the same as that stated above, namely that the defendant lacks standing to challenge the admission of Section 215-obtained or -derived information and there is no suppression remedy available.	With respect to the use of information obtained from Section 215 business records, FISA does not impose any notice obligation on the use of such information. In an analogous context, the Rules of Criminal Procedure do not require the government to notify the defense of the use of information obtained from grand jury subpoenas. Such records would be collected from third parties, so the defendants would lack standing to contest their admission.2 Nor is there any suppression remedy available even if the government had committed a statutory violation of Section 215 since the statute provides for none. Thus the defendants lack standing to challenge the admission of Section 215-obtained or - derived information and there is no suppression remedy available. 2 See, e.g., United States v. Miller, 425 U.S. 435 (1976).

And PRTT, in which the government listed 5 criteria, all of which must be met to require notice, were virtually identical.

With respect to FISA pen register or trap and trace device authority, Congress enacted criteria in 50 U.S.C. § 1845(c) to define the extent of the government's notice obligations. The government's notice obligations apply only ifthe government (1) "intends to enter into evidence or otherwise use or disclose" (2) "against an aggrieved person 1 " (3) in a "trial, hearing or other proceeding in or before any Court, department, officer, agency, regulatory body, or other authority of the United States" (4) any "information obtained or derived from" (5) "the use of a pen register or trap and trace device pursuant to" FISA. 50 U.S.C. § 1845(c). When all five criteria are met, the government will notify the defense and the Court (or other authority) in which the information is to be used or disclosed that the United States intends to use or disclose such information. The United States would have provided notice to the defense and this Court that the United States intended to use against him in this case information obtained or derived from a FISA pen register or trap and trace device if the statutory criteria for notice identified above were satisfied. No such notice has been provided to the defense because that is not the case. Thus, there is no reason for defendant to brief that issue.	With respect to FISA pen register or trap and trace device authority, Congress enacted criteria in 50 U.S.C. § 1845(c) to define the extent of the government's notice obligations. The government's notice obligations apply only if the government (1) "intends to enter into evidence or otherwise use or disclose" (2) "against an aggrieved person " (3) in a "trial, hearing or other proceeding in or before any Court, department, officer, agency, regulatory body, or other authority of the United States" (4) any "information obtained or derived from" (5) "the use of a pen register or trap and trace device pursuant to" FISA. 50 U.S.C. § 1845(c). When all five criteria are met, the government will notify the defense and the Court (or other authority) in which the information is to be used or disclosed that the United States intends to use or disclose such information. If the statutory criteria for notice identified above were satisfied, the United States would have provided notice to the defendants and this Court that the United States intended to use against either defendant information obtained or derived from a FISA pen register or trap and trace device. No such notice has been provided to the defendants because the statutory requirements have not been satisfied.

Which is why I'm interested that the government's treatment of EO 12333 notice was different (in both cases, there's good reason to believe EO 12333 surveillance was involved, though in the case of Khan, that would likely include the illegal dragnet).

With Khan, the government remained completely silent about the questions of EO 12333 collection.

Whereas with Muhtorov — who was likely included in the Internet metadata dragnet, but probably not in Stellar Wind — the government argues he would only get notice if Muhtorov could claim evidence used against him in a proceeding was obtained via allegedly illegal electronic surveillance.

> Therefore, under circumstances where § 3504 applies, the government would be required to affirm or deny the occurrence of the surveillance only when a defendant makes a colorable claim that evidence is inadmissible because it was "the primary product of" or "obtained by the exploitation of" allegedly unlawful electronic surveillance as to which he is aggrieved.

Then it included a [sealed material redacted] notice.

Which seems tantamount to admission that EO 12333 data was used to identify Muhtorov, but that in some way his prosecution was did not arise from that data as a "primary product."

Muhtorov was IDed in a chat room alleged to have ties to the Islamic Jihad Union, which I presume though don't know is hosted overseas. So that may have been EO 12333 surveillance. But it may be that his communications on it were collected via 702 using the Internet dragnet as an index.

Is the government arguing that using a dragnet the FISC declared to be in violation of FISC orders only as a Dewey Decimal system for other surveillance doesn't really count?