

# WHAT DOES THE GOVERNMENT CONSIDER “PROTECTED” FIRST AMENDMENT ACTIVITIES?

[youtube]GDFIVVmXE-g[/youtube]

The other day, AP’s Matt Lee called out State Department spokesperson Jen Psaki’s suggestion that Edward Snowden is not entitled to free speech.

QUESTION: Okay. Then I just don’t understand. I think this is an incredibly slippery slope that you’re going down here, that the U.S. Government is going down here, if you are coming up and saying to us that you’re trying to prevent an American citizen – albeit one who has been accused of serious crimes – from exercising his right to free speech. You don’t agree with that?

MS. PSAKI: I believe that what I’ve conveyed most proactively here is our concern about those who helped facilitate this event –

QUESTION: Yes.

MS. PSAKI: – and make it into a propaganda platform.

QUESTION: Right. And –

QUESTION: Or a public asylum –

QUESTION: – the propaganda platform aside, free speech covers propaganda. Last time I checked, it covers a lot of things. And I don’t see, unless he’s somehow violated U.S. law by speaking at this – at the Russian – the transit line

at the Russian airport, I don't see why you would be disappointed in the Russians for, one, facilitating it, but also, apparently from what it sounds like, tried to discourage them from – tried to discourage this – them from allowing this event to take place in the – to take place at all.

MS. PSAKI: Well, Matt, this isn't happening, clearly, because we wouldn't be talking about it, in a vacuum. And this is an individual, as we all know, who has been accused of felony crimes in the United States. We have expressed strongly our desire to have him returned –

QUESTION: I understand.

MS. PSAKI: – to face those charges. This is all applicable context to these circumstances.

QUESTION: But as you have also said, he is a U.S. citizen.

MS. PSAKI: He is, yes.

QUESTION: He remains a U.S. citizen, and he enjoys certain rights as a U.S. citizen. One of those rights, from your point of view, is that he has the right to come back and face trial for the crimes he's committed. But the rights that you're not talking about are his right to free speech, his right to talk with whoever he wants to, freedom to assemble. I don't understand why those rights are – why you ignore those and simply say that he has – that he's welcome to come back to the United States to exercise his right to be tried by a jury of his peers. Why is that the only right that he gets, according to this Administration? [my emphasis]

As it happens, I read it about the same time i

read this passage, from the government's opposition to Basaaly Saeed Moalin's challenge to the FISA-derived evidence against him (see this post for more background).

Moalin claims he was targeted for FISC-authorized surveillance in violation of FISA's stipulation that no United States person may be considered a foreign power or an agent of a foreign power solely on the basis of activities protected by the First Amendment. Docket No 92 at 18-19 (citing 50 U.S.C. §§ 1805(a)(2)(A), 1824(a)(2)(A)). Although *protected* First Amendment activities cannot form the sole basis for FISC-authorized electronic surveillance or physical search, not all speech-related activities fall within the protection of the First Amendment. See *infra* at 70.

That is, when faced with limitations on surveillance based on First Amendment activities, the government claimed that not all speech is protected.

(Note, I'm not certain because the page numbers listed in this unclassified motion are to the pagination of the classified motion, but I believe that reference to speech that is not protected is redacted.)

That's important because of the narrative the government presented in this motion (which is different from what Sean Joyce presented to the House Intelligence Committee – I believe both narratives are in fact badly misleading).

In the materials presented in this case, the government suggests FISA-authorized surveillance on Moalin's calls with al-Shabaab warlord Aden Ayrow started, out of the blue, in December 2007, several months before al-Shabaab was listed as a Foreign Terrorist Organization. I'm not aware of any evidence it presents that precedes these calls. Yet these early calls show no evidence of criminal behavior.

Thus, the evidence suggests that merely calling someone considered a terrorist but whose group was not yet officially designated as such by the government makes one an agent of a foreign power.

Notably, this surveillance took place before SCOTUS in *Holder v. Humanitarian Law Foundation* expanded material support to include First Amendment protected activities. But Moalin's own brief claims (not entirely convincingly, but the claim is defensible for the beginning of the surveillance period) that his independent support for Ayrow was clear First Amendment activity.

The statute includes an additional restriction for electronic surveillance of a "United States person," as it prohibits finding probable cause for such a target based solely upon First Amendment activities. In making that probable cause determination, the statute directs "[t]hat no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment . . ."

§1805(a)(2)(A).

Accordingly, if the target participated in First Amendment activities such as expressing support, urging others to express support, gathering information, distributing information, raising money for political causes, or donating money for political causes, these activities cannot serve as a basis for probable cause for a FISA warrant.

And, Moalin's brief goes on, even a 2009 FBI report on Moalin (written after the end of the surveillance described in case documents) described his activities with respect to Somalia in terms of that kind of political, even tribal, support.

Here, that limitation on FISA surveillance is relevant because of the information provided in the FIG Assessment. For example, the FIG Assessment notes that Mr. Moalin had “previously expressed support for al-Shabaab[.]” See Exhibit 1, at 1. See also ante, at 5. Such “expression” clearly implicates protected First Amendment conduct. Also, the FIG Assessment adds that Mr. Moalin “likely supported now deceased senior al-Shabaab leader Aden Hashi Ayrow due to Ayrow’s tribal affiliation with the Hawiye tribe/Habr Gedir clan/Ayr subclan rather than his position in al-Shabaab.” Id.

Again, that evaluation does not include an allegation of material support, and the “support” mentioned could very well be limited – especially since the FIG Assessment describes it in benign terms – to protected First Amendment activity. See *Humanitarian Law Project v. Holder*, \_\_\_U.S. \_\_\_, 130 S. Ct. 2705, 2710 (2010) (material support does not include independent advocacy, or even mere membership in a proscribed organization).

Ultimately, the government presents no evidence in unredacted court documents about what evidence justified surveilling Moalin before such time as his activities amounted to material support.

Indeed, the Indictment does not allege any material support – in the form of a house and/or financial contributions by Mr. Moalin – to al Shabaab until January 2008 (Count 5) and February 2008 (see Count 3, Overt Act 5, at p. 5), respectively. That, of course, begs the question whether there was any basis, other than protected First Amendment activity, for commencing FISA surveillance on Mr. Moalin. Should the

answer be in the negative, the FISA surveillance would be invalid under §1805(a)(2)(A).

Mind you, the entire section after the government discusses speech that is not protected – a section that clearly addresses the FIG conclusions – is redacted. And I think it highly likely that the government accessed already-collected contacts between Moalin and Ayrow sometime months later, using the Section 215 call record database as an index to locate those earlier calls. It's quite possible, in other words, that the surveillance actually "started" at a time after Moalin had begun giving Ayrow money and after al-Shabaab got listed, making such support illegal material support. It's quite likely (and other government claims in its brief back this up) that the government used future events to authorize surveillance encompassing communications before those events.

The government, I suspect, retroactively labeled clearly protected speech unprotected speech because that speech would subsequently lead to unprotected speech.

It's funny how these secret designations work.

But that's not the claim the government makes in its unclassified case. On its face, it argues that Moalin's calls two months prior to al-Shabaab's terrorist designation, which effectively express support for Ayrow's efforts to defend their tribal lands, constitute probable cause to designate Moalin an agent of a foreign power.

And in any case, the claim is rather interesting, given the Administration's insinuation that Edward Snowden should be stripped of his right to free speech, whether propaganda or no.

Update: Or I could be wrong. FBI's Stephanie Douglas just said the investigation started when NSA passed on a San Diego phone number in

October 2007 (two months before the wiretap started). And that based on that they started the investigation.

Incidentally, Douglas also dated the earlier investigation of Moalin to a 2003 anonymous tip, with the investigation closed in 2004.