

Exhibit 10

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No NSA Poster Child: The Real Story of 9/11 Hijacker Khalid al-Mihdhar

By Michael German

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Since whistleblower Edward Snowden exposed the incredible scope of the government's domestic spying programs, two different narratives are moving forward in Congress.

One, expressed most recently by Sen. Dianne Feinstein, D-Calif., in the *Wall Street Journal*, argues that the government's collection of all Americans' calling data "is necessary and must be preserved if we are to prevent terrorist attacks."

The other, offered by Sen. Ron Wyden, D-Ore., Rep. James Sensenbrenner, R-Ohio, and others is that the Justice Department, National Security Agency and FBI have repeatedly misled members of Congress and the public about the nature of their spying programs, as well as their effectiveness, and they need to be reined in to protect Americans' rights.

Unfortunately for Feinstein, a simple review of the facts she marshals to support her position reveals a total reliance on dubious intelligence community statements that have already been widely debunked. The actual facts make clear that the NSA doesn't need an enormous database of everyone's phone records to track a discrete number of terrorists -- the NSA just needs to use the traditional tools it has to investigate its targets.

Feinstein's first claim, based on recent testimony from FBI Director Robert Mueller and the NSA's director, Gen. Keith Alexander, is that the domestic telephone data collection program would have enabled the intelligence community to prevent the 9/11 attacks by revealing that al-Qaeda operative and future 9/11 hijacker Khalid al Mihdhar was inside the United States. On June 12, 2013, Alexander told the Senate Appropriations Committee:

"We all had this concern coming out of 9/11: How are we going to protect the nation? Because we did get intercepts on Mihdhar, but we didn't know where he was. We didn't have the data collected to know that he was a bad person. And because he was in the United States, the way we treat it is he's a U.S. person. So we had no information on that."

Mueller made a similar statement the following day in testimony to the House Judiciary Committee:

"[Khalid al-Mihdhar] was being tracked by the intelligence agencies in the Far East. They lost track of him. At the same time, the intelligence agencies had identified an al Qaeda safe house in Yemen. They understood that the al-Qaeda safe house had a telephone, but they could not know who was calling into that particular safe

house. We came to find out afterwards that the person who had called into that safe house was al-Mihdhar, who was in the United States in San Diego. If we had this program in place at the time, we would have been able to identify that particular telephone number in San Diego.”

The Justice Department previously made this claim in classified talking points provided to the Senate and House Intelligence Committees in 2009, and again in 2011, as Congress was locked in a debate over reauthorizing the Patriot Act.

There are a few problems with using Mihdhar as the poster child for new domestic spying programs, however. The intelligence agencies, which normally benefit from being able to keep secret any facts that might undermine their arguments, seem to have forgotten that the 9/11 Commission, the Justice Department Inspector General and the intelligence committees in Congress published in detail what the government knew about Mihdhar before the attacks. It turns out that the NSA was intercepting calls to the al Qaeda safe house in Yemen as early as 1999, and both the FBI and CIA knew Mihdhar was an al Qaeda operative long before the 9/11 attacks.

The safe house was discovered during the FBI’s investigation into the 1998 bombings of two U.S. embassies in East Africa, and had been monitored by the NSA and CIA ever since. The inspector general’s report couldn’t be clearer that the intercepts were being broadly shared:

“The NSA’s reporting about these communications was sent, among other places, to FBI Headquarters, the FBI’s Washington and New York Field Offices, and the CIA’s CTC. At the FBI, this information appeared in the daily threat update to the Director on January 4, 2000.”

Intercepted communications from this location allowed the CIA to follow Mihdhar to an al Qaeda meeting in Kuala Lumpur in January 2000. Though they lost him in Thailand, as Mueller suggested, the CIA knew he had a visa to enter the United States and that his travel companion and fellow hijacker, Nawaf al Hazmi, had a plane ticket to fly to Los Angeles.

The CIA, however, failed to place Mihdhar on a watch list or “notify the FBI when it learned Mihdhar possessed a valid U.S. visa,” according to the 9/11 Commission report. The inspector general’s report revealed that five FBI officials assigned to the CIA Counterterrorism Center viewed CIA cables indicating Mihdhar had a U.S. visa. A week after the Kuala Lumpur meeting, Mihdhar and Hazmi flew into Los Angeles International Airport and entered the United States without a problem. After their entrance, the NSA would intercept at least six calls from the al Qaida safe house in Yemen to the United States, according to the Los Angeles Times.

By all accounts FBI officials knew Mihdhar had a visa to enter the United States by July 2001, and knew he was in the United States by August 22, 2001. As the Joint Intelligence Committee investigation found:

“A review was launched at CIA of all cables regarding the Malaysia meeting. The task fell largely to an FBI analyst assigned to CTC. On August 21, 2001, the analyst put together two key pieces of information: the intelligence the CIA received in January 2000 that al-Mihdhar had a multiple entry visa to the United States, and the information it received in March 2000 that al Hazmi had traveled to the United States. Working with an INS representative assigned to CTC, the analyst learned that al-Mihdhar had entered the United States on January 15, 2000, had departed on June 10, and had re-entered the United States on July 4, 2001.”

Yet neither the FBI nor NSA apparently attempted to trace the calls coming into the al Qaeda safe house until after 9/11, when telephone toll records obtained by the FBI confirmed Mihdhar made the calls.

In other words, the problem was not that the government lacked the right tools to do its job (it had ample authority to trace Mihdhar's calls). The problem was that the government apparently failed to use them.

It's pretty cynical for the intelligence community to use its repeated failures to properly assess information it collected prior to 9/11 as justification for wholesale spying on Americans. But Feinstein's continuing reliance on the Mihdhar canard is even more inexplicable given that ProPublica published [an article thoroughly rebutting these claims](#) shortly after Alexander's and Mueller's June 2013 testimony. It's troubling when the Senate Intelligence Committee Chairwoman ignores more accurate information from public sources in deference to U.S. intelligence agencies, which have not only misled members of Congress but the Foreign Intelligence Surveillance Court, as well.

But Feinstein doesn't only peddle falsehoods from the past. She then points to the NSA's claim that dozens of terrorist events were disrupted through these domestic spying programs, though this too was publicly debunked. During a Senate Judiciary Committee hearing on Oct. 2, 2013, Sen. Patrick Leahy, D-Vt., questioned Alexander directly on the NSA's claims that these programs prevented 54 terrorist plots. Leahy called them "plainly wrong" and pointed out that the listed incidents "weren't all plots and they weren't all thwarted." Only 13 had any nexus to the U.S. and only one case relied on the bulk call records' program in a significant way. And even that case didn't involve any plot on the US -- it involved a material support prosecution relating to someone who allegedly sent \$8500 to al Shabaab in Somalia.

Alexander sheepishly agreed with Sen. Leahy's analysis, leading the senator to tell the NSA director that the government's use of inaccurate statistics undermined its credibility with Congress and the American people. Feinstein was on hand when Alexander admitted to Leahy that these statistics were misleading.

These repeated efforts to mislead Congress and the American people only make the case more strongly that the government's surveillance authorities need to be sharply curbed with strong legislation that ends the bulk collection programs, protects Americans' private communications and adds more transparency and public accountability to these activities. Americans have the right to truthful information about their government's intelligence activities, and the current oversight system, which depends on whistleblowers willing to risk jail, certainly isn't working.

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<http://www.defenseone.com/ideas/2013/10/no-nsa-poster-child-real-story-911-hijacker-khalid-al-mihdhar/72047/>