UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN

RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION TO DISMISS COUNTS ONE THROUGH FOUR OF THE SUPERCEDING INDICTMENT ON ACCOUNT OF A VIOLATION OF THE POSSE COMITATUS ACT

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, submits the following response to Al-Arian's Motion to Dismiss Counts One through Four of the Superceding Indictment for Violations of 18 U.S.C. 1385 (The Posse Comitatus Act). Doc 700.

Noting that a review of the electronic surveillance "tech cut summaries" reveals that military personnel – a Master Sergeant and a Chief Warrant Officer – were apparently involved in translating conversations intercepted under the FISAs, Al-Arian maintains that his indictment on Counts 1 through 4 should be dismissed for a violation of the Posse Comitatus Act, 18 U.S.C. § 1385 (hereafter "PCA"). This remedy, he maintains, is appropriate because the FISA interceptions triggered searches of his home which, in turn, provided evidence resulting in his indictment on those counts. This argument fundamentally misperceives the scope of the PCA; ignores the statutory purpose for electronic interceptions under FISA; and disregards other legislation that manifest Congress' intent to permit passive military support to law enforcement authorities. In any event, the remedy sought by the defendant contravenes repeated

judicial decisions holding that the dismissal of an indictment does not constitute a remedy for either an alleged violation of the PCA or the unlawful seizure of a defendant.

1. The Posse Comitatus Act Does Not Prohibit the Activities At Issue Here.

As presently codified, 18 U.S.C. § 1385 provides:

> Whoever, except in cases and under circumstances authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or both.

Originally enacted in 1878,[1] the PCA was the product of political antagonism on the question of the authority of the President to employ the Army to preserve order at elections and was designed to put an end to the practice of using the Army in the former Confederate States to supervise polling places. See W. Winthrop, Military Law and Precedents 867 (1921 rev.); Chandler v. United States, 171 F.2d 921, 935 (1st Cir. 1949); G. Felicetti & J. Luce, The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done, 174 Mil. L. Rev. 86, 100-113 (2003) (tracing PCA's historical origins as a mechanism to thwart reconstruction). Thus, from the time of its genesis, the PCA was understood to prohibit members of the Army (and now the Air Force), acting in an official capacity, to

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[1] The Posse Comitatus Act was originally enacted as part of the part of the Army Appropriations bill. See Act of June 18, 1878, 20 Stat. 145, 152 (1878). It was amended in 1956, to embrace the Air Force following the creation of the Department of the Air Force from the aviation component of the U.S. Army. See 70A Stat. 626 (1956). It does not embrace the Department of the Navy. See United States v. Mendoza-Ceclia, 963 F.2d 1467, 1477 (11th Cir 1992). However, as we explain (page 6 *infra*), 10 U.S.C. § 375, which requires the Secretary of Defense to issue regulations prohibiting direct participation by members of the of the Army, the Navy, the Air Force and the Marine Corps in a civilian search, seizure, arrest, of other similar activity unless expressly authorized by law, has been construed by some courts to extend the proscriptions of the PCA to the Navy. See United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

use force to prevent a breach of the peace or the commission of a crime in their presence. W. Winthrop, supra, at 877; see also United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986) (PCA was "designed to limit 'the direct active use of federal troops by civil law enforcement officers' to enforce the laws of this nation").[2]

In view of its historical origin, the inquiry adopted by most courts for determining whether the PCA has been violated is whether the activities at issue involved the "direct, active use of federal troops by civil law enforcement officers to enforce the laws of the nation," Hartley, 796 F.2d at 115, (citing United States v. Red Feather, 392 F. Supp. 916, 922 (D.S.D. 1975)), and whether the use of military personnel "subjected the citizens to the exercise of military power which was regulatory, proscriptive or compulsory in nature." Bissonette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985); see United States v. Yunis, 924 F.2d 1086, 1094 (D.C.Cir. 1991); United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976), *aff'g*, United States v. McArthur, 419 F. Supp. 186, 190 (D.N.D. 1975). The first of these two tests proscribes "an active role of direct law enforcement" such as "arrest; search of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities." Red Feather, 392 F. Supp. at 925. The second prohibits activity that "actually regulates, forbids, or compels some conduct on the part of those claiming relief." Bissonette, 776 F.2d at 1390.

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[2] The phrase, "posse comitatus" is literally translated from the Latin as the "power of the country" and was defined at common law to refer to persons over the age of 15 whom a sheriff could call upon for assistance in preventing any type of civil disorder. See United States v. Hartley, 796 F.2d at 114 n. 3.

Here, even if military personnel participated in assisting federal law enforcement authorities in translating recordings of conversations the latter obtained in the execution of a FISA warrant, such activity can neither be characterized as direct active involvement in the execution of the laws, nor as regulatory action against civilians. Most fundamentally, electronic surveillance conducted under the FISA statute is simply not law enforcement activity. Rather, as explained by the FISA Court of Review, the FISA statute authorizes, upon issuance of a warrant by a specially designated federal judge, the electronic collection of "foreign intelligence information," that is information which "'relates to, and if concerning a United States person, is necessary to the ability of the United States to protect against – A) actual or potential attack or other grave hostile acts of a foreign power or agent of a foreign power; B) sabotage or international terrorism by a foreign power or agent of a foreign power . . .'" In Re Sealed Case, 310 F.3d 717, 722 (FISA Ct. Rev. 2002), *quoting* 50 U.S.C. § 1801(e)(1). As that court explained, the foreign clandestine activities revealed by such interception may or may not also constitute evidence of what it termed "foreign intelligence crimes" (id. at 725); indeed, even where the targeted activity may incidentally comprise a criminal offence, "[p]unishment of the terrorist or espionage agent is really a secondary objective" to interdiction of the threat. Id. at 744-45. So understood, it can hardly be argued that military members of the Department of Defense assisting in the translation of FISA intercepts are engaging in law enforcement activities proscribed by the PCA. To the contrary, insofar as the purpose of FISA surveillance is the protection of the United States from threats of attack posed by foreign powers, including terrorist organizations,

such activity is quintessentially a function properly falling within the ambit of the Department of Defense responsibility to protect the security of our nation.

But even if the eventual exploitation of information resulting from a FISA for a criminal prosecution could be viewed as "law enforcement activity," the antecedent translation of the intercepts by military personnel, is, at the most, properly characterized as "passive support" rather than direct, active employment of the military to enforce the laws. The courts of appeals have repeatedly so characterized analogous forms of assistance furnished by the armed forces to civilian law enforcement, and the Coast Guard in the face of claims that the activity contravened the PCA. See United States v. Mendoza-Cecelia, 963 F.2d at 1477-78 (rejecting the claim that assistance provided by the Navy to the Coast Guard in surveilling defendants' vessel; transporting Coast Guard officers to effect its boarding; and, subsequently, providing a place of detention for defendants violated the PCA and the statute applying its prohibitions to the Navy); accord United States v. Khan, 35 F.3d 426, 431-32 (9th Cir. 1994)(action by the Navy in providing the Coast Guard with ships, information concerning suspect vessel's position, aerial reconnaissance and interception of the suspect's vessel was not an exercise of military power in contravention of PCA); Yunis, 924 F. 2d at 1094 (rejecting claim that, by providing medical assistance, lodging and transportation to a terrorist seized by the FBI, the Navy violated the PCA and related statutes). The FISA translation assistance alleged provided by members of the armed forces in this case is even more tangentially related to enforcement of the law than the activities at issue in these cases and, likewise, cannot possibly be characterized as "regulatory, proscriptive or compulsory in nature." Bissonette v. Haig, 776 F.2d at 1390.

2. Federal Legislation Governing the Armed Forces Permits the Type of Activity At Issue Here.

In 1981, as part of the 1982 DOD Authorization Act, Congress enacted legislation[3] specifically intended to "clarif[y] existing practices of cooperation between the military and civilian law enforcement authority." *See* H.R. 97-71, Part II, 97th Cong 1st Sess. at 7 (1981), reprinted in 1981 U.S.C.C.A.N. 1785, 1790. In particular, Section 375 of that legislation authorizes the Secretary of Defense to prescribe regulations governing such support "as may be necessary to ensure that any activity (including the ... detail of any personnel) does not include or permit direct participation by a member of the Army, Navy, Air Force or Marine Corps *in a search, seizure, or arrest, or any similar activity*, unless participation in such activity by such member is otherwise authorized by law." (italics added). Thus, by enacting such legislation, Congress has manifested its intent that the military may provide "indirect" or "passive" assistance to civilian law enforcement as long as the assistance does not constitute one of the specifically enumerated law enforcement activities. See Yunis, 924 F.2d at 1094. Consistently with that purpose, Section 373 expressly authorizes the Secretary of Defense to "make Department of Defense personnel available – (2) to provide . . . law enforcement officials with expert advice relevant to this chapter." Thus, not only does the provision of translating skills to civilian law enforcement fall outside the ambit of proscribed law enforcement activities enumerated in Section 375, it is reasonably embraced by the Congressional authorization to furnish "expert advice" to law enforcement.

[3] Pub. L. No. 97-86, 19 Stat. 1099 (now codified and amended as 10 U.S.C. §§ 371-378).

3. Suppression Does Not Constitute A Remedy For a Violation of the PCA.

Even if, contrary to the foregoing arguments, the assistance Al-Arian maintains that military personnel furnished to federal law enforcement authorities violated the PCA, he would be entitled to no relief. The PCA is, by its explicit terms, a criminal statute. See Yunis, 924 F.2d at 1093 (noting that the PCA provides for "criminal penalties" for a violation). The exclusive remedy for a violation is therefore a criminal prosecution of the violator.

The courts that have addressed motions similar to the defendant's are therefore in accord that "the Posse Comitatus Act [or subsequent proscriptions against military involvement in civil law enforcement] provides no basis for the . . . remedy of dismissal of . . . the charges" (Mendoza-Ceclia, 963 F.2d at 1478), or suppression of evidence. See Yunis, 924 F.2d at 1093-94 (collecting cases); Hartley, 796 F.2d at 115; United States v. Roberts, 779 F.2d 565, 567-68 (9th Cir. 1986) (refusing to apply exclusionary rule to evidence resulting from unauthorized law enforcement activity by the Navy); Cotten, 471 F.2d at 749.[4]

More fundamentally, however, as the court recognized in Yunis, 924 F.2d at 1094, the proposed remedy of dismissal for a violation of the PCA would contravene the "Ker-Frisbie" doctrine, *i.e.,* that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Frisbie v. Collins, 342 U.S. 509, 511 (1952), *quoting* Ker v.

[4] Although these cases repeatedly assert that the PCA does not authorize dismissal or suppression as a remedy for a violation, many actually involve alleged violations of 10 U.S.C. § 375, which embraces a similar proscription against law enforcement activity by the Navy. See, e.g., Yunis, 924 F.2d at 1094; Roberts, 779 F.2d at 567.

Illinois, 119 U.S. 436 (1886). As a corollary to that doctrine, "[a defendant] cannot claim his own immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest." United States v. Crews, 445 U.S. 463, 473 (1980), citing, Frisbie and Ker. Thus, although "exclusionary principles, delimit[ ] what proof the government may offer against the accused at trial . . . [the defendant] is not himself a suppressible 'fruit' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by police misconduct." Id. at 474. See United States v. Noriega, 117 F.3d 1206, 1214 (11th Cir. 1997), where the court of appeals, applying the Ker-Frisbie doctrine, rejected the defendant's argument that his indictment should be dismissed because his arrest was effected by a United States military invasion. Here, likewise, the defendant's argument that military involvement in the development of evidence resulting in his eventual indictment requires its dismissal, "falls squarely within the Ker-Frisbie doctrine." Id..

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2004, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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