UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Case No. 8:03-CR-77-T-30TBM

v.

SAMI AMIN AL-ARIAN, et al.,

Defendants.
_____/

DEFENDANT SAMI AMIN AL-ARIAN'S MOTION AND MEMORANDUM IN SUPPORT TO COMPEL PRODUCTION OF FOREIGN INTELLIGENCE SURVEILLANCE ACT APPLICATIONS, ORDERS, AND RELATED DOCUMENTS

COMES now the Accused, Sami Amin-Al-Arian, through undersigned counsel, and moves the Court under 50 U.S.C. § 1806 (f) and (g) and the Fifth Amendment Due Process Clause for disclosure of the applications, extensions, Orders, and related documents underlying the FISA surveillance of Dr. Sami Al-Arian.

Under 50 U.S.C. § 1806(f) and (g) and the Fifth Amendment Due Process Clause, the Court should order disclosure of the applications, orders, and related documents underlying the FISA surveillance of Dr. Sami Al-Arian.[1] This motion seeks production

[1] Because the surveillance in this case apparently lasted for years, and because FISA orders typically have a fixed duration of 90 or 120 days, see 50 U.S.C. § 1805(e), we assume that this discovery request covers multiple applications, orders, and related documents.

of the materials necessary to challenge the FISA surveillance of Al-Arian with the requisite specificity.[2]

ARGUMENT

THE COURT SHOULD ORDER DISCLOSURE UNDER 50 U.S.C. § 1806(F).

The Court should order production of the FISA materials because disclosure of those materials is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f).

Section 1806(f) provides that, if the Attorney General files an affidavit that "disclosure or an adversary hearing would harm the national security of the United States," the court deciding the motion must consider the application and order for electronic surveillance in camera to determine whether the surveillance was lawfully conducted. The statue adds that "[i] _ making this determination, the court may make disclosure to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." Id. Although, to our knowledge, the Attorney General has not yet submitted an affidavit in this case under § 1806(f), we assume for purposes of this motion that the government will make such a filing in the future.

According to the legislative history of FISA, disclosure may be "necessary" under § 1806(f) "where the court's initial review of the application, order, and fruits of the

[2] With this motion, Al-Arian files a motion to suppress all evidence obtained or derived from the FISA surveillance. If the Court grants this motion for disclosure of the underlying FISA materials, Dr. Al-Arian will seek leave to supplement his suppression motion.

surveillance indicates that the question of legality may be complicated by factors such as "indications of possible misinterpretation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order." United States v. Belfield, 692 F.2d 141, 147 (D.C. Cir. 1982) (quoting S. Rep. No. 701, 95th Congress).

The Supreme Court in Mathews v. Eldridge identified factors necessary to consider in an analysis of due process with respect to official action. First, the private interest that will be affected by the official action is of initial concern. Mathews. Eldridge, 424 U.S. 319. Al-Arian's private interests at stake here are extremely weighty. He seeks an accurate determination of his claim that the government's secret surveillance violated his privacy rights under FISA and the Fourth and Fifth Amendments. More generally, he seeks through the processes of this Court to avoid deprivation of his liberty. If mere property interest "weigh heavily in the Matthews balance," as the Supreme Court has held, United States v. James Daniel Good Real Property, 510 U.S. 43, 54-55 (1993), Al-Arian's privacy and other liberty interests must have even greater significance.

B. The Risk of Erroneous Deprivation and the Value of Additional Procedures.

Turning to the second Mathews factor, the procedure that the government may ask this Court to adopt—the adjudication of Al-Arian's rights under FISA through ex parte review of materials that Dr. Al-Arian's counsel will have no opportunity to review or challenge—carries a notoriously significant "risk of an erroneous deprivation" of the liberty and property interests at issue, and "additional . . . procedural safeguards"—access to the FISA materials and an opportunity to

address them—carry substantial "probable value." Mathews, 424 U.S. at 335. The Supreme Court has declared that "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." James Daniel Good, 510 U.S. at 55 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)). As the Ninth Circuit observed in a secret evidence case, "'One would be hard pressed to design a procedure more likely to result in erroneous deprivations,' . . . {T}he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error." American-Arab Anti-Decimation Committee, 70 F.3d at 1069 (quoting district court); see, e.g., id. at 1070 (noting "enormous risk of error" in use of secret evidence); Kiareldeen, 71 F. Supp. 2d at 412-14 (same).

In the Fourth Amendment context, the Supreme Court has twice rejected the use of ex parte proceedings on grounds that apply equally here. In Alderman v. United States, 394 U.S. 165 (1969), the Court addressed the procedures to be followed in determining whether government eavesdropping in violation of the Fourth Amendment contributed to its case against the defendants. The Court rejected the government's suggestion that the district court make that determination ex parte and in camera. The Court observed that

> [a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words

> may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.

Id. at 182. In ordering disclosure of improperly recorded conversations, the Court declared:

> Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information continued in and suggested by the materials, will be unable to provide the scrutiny that the Fourth Amendment exclusionary rule demands.

Id. at 184

Similarly, the Franks Court held that a defendant must be permitted to attack the veracity of the affidavit underlying a search warrant, upon a preliminary showing of an intentional or reckless material falsehood. The Court rested its decision in significant part on the ex parte nature of adversarial proceedings:

> [T]he hearing before the magistrate [when the warrant is issued] not always will suffice to discourage lawless or reckless misconduct. The pre-search proceeding is necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceeding itself should be an indication that an ex parte inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an independent examination of the affiant or other witnesses.

438 U.S. at 169

The same considerations that the Supreme Court found compelling in Alderman and Franks militate against ex parte procedures in the FISA context. As the FISA itself has acknowledged, for example, without adversarial proceedings, systematic executive branch misconduct—including submissions of FISA applications with "erroneous statements" and "omissions of material facts"—went entirely undetected by the courts until the DOJ chose to reveal it. See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620-21 (Foreign Intelligence Surveillance Court), rev d, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002).[3] We do not know—and cannot determine without disclosure—whether any of the FISA applications to which the FISC referred related to the Al-Arian surveillance. In light of the almost complete exclusion of criminal defendants and their counsel from the FISA review process, and the correspondingly low risk that misconduct will be detected, it is understandable, if inexcusable, that law enforcement officials "engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), may have come to believe that FISA offers a convenient means of circumventing the traditional Title III and search warrant processes.

[3] The FISC was sufficiently alarmed by these erroneous applications that "decided not to accept inaccurate affidavits from FBI agents whether or not intentionally false," and "[o]ne FBI agent was barred from appearing before the Court as a FISA affiant." In re All Matter, 281 F. Supp. 2d at 621. We do not know whether the barred agent was an affiant on any of the Al-Arian FISA applications.

The protection afforded FISA targets is particularly weak in light of the limited scope of the review performed by the FISC and (if the target is charged with a crime) by the district court. The FISC's ex parte review of FISA application is highly deferential to the executive branch. In particular, the executive's certification concerning the purpose of the surveillance or search—which has critical constitutional significance—"is, under FISA, subjected to only minimal scrutiny by the courts. . . . The FISA Judge, in reviewing the application, is not to second-guess the executive branch official's certification that the objective of the surveillance is foreign intelligence information." Duggar, 743 F.2d at 88; see, e.g., In re Grand Jury Proceedings, 347 F. 3d. 197, 204-05 (7th Cir. 2003). And the subsequent ex parte review by the district court (assuming a criminal prosecution is brought and the defendant challenges the legality of the surveillance) adds little additional protection. According to Duggan, "when a person affected by a FISA surveillance challenges the FISA Court's order, a review in court is to have no greater authority to second-guess the executive branch's certifications than has a FISA Judge." 743 F.2d at 77; see, e.g., In re Grand Jury Proceedings, 347 F.3d at 204-05.

Not only is judicial review of FISA surveillance and searches invariably in camera and ex parte, therefore, without the benefit of adversarial testing; the review provides "only minimal scrutiny." Given the one-sided proceedings under FISA and the highly deferential standard of review, it is hardly surprising that, according to the Attorney General's annual reports form 1979 to 2002 (available at http://fas.or/irp/agency/doj/fisa), the FISC approved 15,264 applications or

extensions authorizing FISA surveillance or searches during that period; it modified only four applications before granting approval; and on one occasion, in 1997, it did not approve the application but granted the DOJ leave to amend and resubmit it. In other words, between 1979 and 2002, the FISC approved without modification 15,259 out of 15,264 applications, or more than 99.9% of the total. Not once did the court reject outright a FISA application. Nor has subsequent review by district courts presiding over criminal prosecutions proven effective. To our knowledge, no district court has ever suppressed the results of FISA surveillance or FISA search, and no court of appeals has ever reversed a district court's denial of a motion to suppress FISA information.

As these statistics suggest, ex parte review under the "minimal scrutiny" standard that FISA contemplates does not adequately protect the surveillance target's constitutional and statutory rights. The "additional . . . . procedural safeguards" that Al-Arian requests—access to the FISA materials and an opportunity to address them—thus carry substantial "probable value." Mathews, 424 U.S. at 335.

C. The Government's Interest.

Finally, the Court must consider the government's purported interest in maintaining the secrecy of the FISA materials. We expect the government to assert its generalized interest in avoiding damage to "national security," without any effort to demonstrate that disclosure of the FISA materials to defense counsel under the circumstances of this case would cause such damage. Courts have previously rejected such diffuse claims of national security. See e.g., Arab-

American Anti-Discrimination Committee, 70 F.3d at 1070 ("We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.") Kaireldenn, 71 F. Sup. 2d at 414 (same); Rafeedie, 795 F. Supp. at 19 (same).

Upon an objective assessment of the government's anticipated national security claim, the Court should find that the first and second Mathews factors substantially outweigh the government's professed need to withhold the FISA materials, and it should order the Al-Arian FISA materials disclosed to defense counsel as a matter of due process.

CONCLUSION

For the foregoing reasons, the Court should order the government to produce the FISA applications, orders, and related documents associated with the Al-Arian surveillance at issue here.

Dated: 22 November 2004

Respectfully submitted,

/s/Linda Moreno

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
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