In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 14-1284

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ADEL DAOUD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 12-CR-723 — Sharon Johnson Coleman, *Judge*.

BRIEF OF THE UNITED STATES AND SHORT APPENDIX

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JURISDICTIONAL STATEMENT

Defendant-Appellee Adel Daoud was charged with violations of 18 U.S.C. § 2332a(a)(2)(D), and 18 U.S.C. § 844(i). R. 16; App. 4-5.[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

On January 29, 2014, the district court entered an order requiring the United States to disclose to defense counsel classified applications and related materials filed with the Foreign Intelligence Surveillance Court pursuant to the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, in connection with defendant's motion to suppress evidence obtained from FISA collection. R. 92; SA 1-5. On February 10, 2014, the United States timely filed a notice of appeal from this order. R. 97.

This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because, pursuant to FISA, the district court's ruling constitutes a final order subject to immediate appeal. The district court ordered disclosure of classified FISA application materials based on Section 106 of FISA, 50 U.S.C. § 1806. That section provides that "decisions under [50 U.S.C. § 1806] . . . granting disclosure of applications, orders, or other materials relating to a surveillance

[1] Citations to the Original Electronic Record and Supplemental Record on appeal are designated as "R." followed by the district court document number. The government's Short Appendix and Appendix are cited as "SA" and "App." followed by the page number. The relevant Classified Record consists of the government's classified brief in response to the motion to suppress (cited as "G.Br.") and the "Sealed Appendix" to that brief, comprising an index and several exhibits. Citations to the exhibits from the Sealed Appendix are designated "Ex." followed by the pertinent exhibit number and relevant page number.

shall be final orders." 50 U.S.C. § 1806(h).[2] As a final order, the district court's ruling is appealable under 28 U.S.C. § 1291, which provides that courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts." *Cf. Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (noting that § 1291 "encompasses not only judgments that terminate an action, but also a small class of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final'").

Alternatively, the district court's order is also appealable as an interlocutory appeal pursuant to the Classified Information Procedures Act, 18 U.S.C. app. III § 7(a), which provides that the government may take an interlocutory appeal "from a decision or order of a district court in a criminal case authorizing the disclosure of classified information."[3]

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[2] The House of Representatives Report that accompanied FISA confirms that the term "final orders" in 50 U.S.C. § 1806 is meant to authorize "immediate appeal." H.R. Rep. No. 95-1283, Pt. I, 95th Cong., 2d Sess. 94 (1978) ("House Report") (discussing H.R. 7308 Section 106(i), which ultimately was enacted (with changes not material here) as 50 U.S.C. 1806(h)); *see also* 2 David S. Kris & J. Douglas Wilson, *National Security Investigations & Prosecutions* § 33:2 (2d ed. 2012) ("FISA allows an immediate appeal of an order granting discovery of FISA applications and orders."); *United States v. Hamide*, 914 F.2d 1147, 1150-51 (9th Cir. 1990). Although the House version of the bill would have made any FISA determination final and appealable immediately, the Conference agreement narrowed this approach and provided: "All orders regarding legality and disclosure shall be final and binding only where the rulings are against the Government." H.R. Conf. Rep. No. 95-1720, 32, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4048, 4061.

[3] An appeal filed pursuant to this section must be filed within 14 days, as the United States has done here, and shall be expedited. *Id.* § 7(b).

If these two statutory bases for appellate jurisdiction were not available, this Court would still have jurisdiction to issue a writ of mandamus to reverse the district court's order pursuant to 28 U.S.C. § 1651. This Court may issue a writ of mandamus so long as the following conditions are met: "First, the party seeking the writ must demonstrate that the challenged order is not effectively reviewable at the end of the case, that is, without the writ the party will suffer irreparable harm. Second, the party seeking the writ must demonstrate a clear right to the writ. Last, the issuing court must be satisfied that issuing the writ is otherwise appropriate." *Abelesz v. OTP Bank*, 692 F.3d 638, 652 (7th Cir. 2012).

Each of those conditions exists here. First, the district court's order compels the United States to disclose to defense counsel highly sensitive classified information, which would harm the national security of the United States, as explained below. Once this information is disclosed, the harm from disclosure cannot be undone, and thus the order is not effectively reviewable at the end of the trial. *Cf. In re U.S.*, 878 F.2d 153, 158-59 (5th Cir. 1989) (reviewing pretrial discovery order in part because the government had "no other means of redress" and the challenged order was "entirely unprecedented"); *In re U.S.*, 985 F.2d 510, 513 (11th Cir. 1993). Second, as demonstrated below, there exists a clear right to relief. Third, if the Court were to find that it lacked appellate jurisdiction under the statutory

provisions discussed above, granting a writ of mandamus would be "otherwise appropriate" given the important national security interests at stake. *See, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

ISSUE PRESENTED FOR REVIEW

Whether the district court abused its discretion by ordering the United States to disclose classified FISA applications and orders to defense counsel, despite failing to find that disclosure is "necessary" to determine the legality of the challenged FISA collection, as required by FISA.

STATEMENT OF THE CASE

[CLASSIFIED MATERIAL REDACTED][4]

The FBI's Undercover Investigation

In mid-May 2012, the FBI's undercover investigation began with two FBI employees who work online. R. 1 at 11-12; App. 16-17. They separately e-mailed Daoud in response to material he posted online, posing as individuals who had an interest in violent jihad. *Id.* Daoud eventually confided in them that he planned to engage in violent jihad, either in the United States or overseas, and mentioned that he had discussed plans for a terrorist attack with "trusted brothers." *Id.* Daoud sent one of the FBI covert employees jihadist propaganda, including links to *Inspire* magazine, and mentioned that

[4] As a result of the redactions, the pagination and footnote numbering of the classified brief and the unclassified brief are different.

he may use the magazine's bomb-making instructions to carry out an attack. *Id.* at 13; App. 18.

From late May to mid-June 2012, Daoud sought guidance regarding whether to carry out a terrorist attack in the United States or overseas, relying principally on internet resources. *Id.* at 13-15; App. 18-20. For example, operating under a pseudonym, Daoud posted a question to a members-only extremist internet forum, which Daoud had characterized as a "terrorist website" (*Id.* at 13-14; App. 18-19):

> . . . I have also been reading the english Inspire magazine. Masha'Allah is the best magazine I have read ...
>
> The point is in this magazine they encourage Muslims in the West especially in the USA to attack IN America. By all means this is something i would consider. But in know that if i started attacking in America i would probably not be able to go to Yemen or anywhere else for Jihad in the Cause of Allah.
>
> Is there a way i could do both, or what's your opinion on that? i personally think it's easier and more rewarding to go to Yemen but at the same time i hate the oppression of the USA and i would love to do something that would hurt it from the inside.

In a follow-up posting to the same forum, on June 2, 2012, Daoud wrote that he recognized "9/11" was "halal," meaning acceptable under Islamic law, but requested advice about other circumstances in which Americans may be killed in accordance with the Quran. *Id.* at 14; App. 19. Meanwhile, Daoud

viewed a number of related videos, such as one by Anwar Al-Awlaki[5] explaining why a martyrdom operation is not considered suicide in Islam but rather is an appropriate method of waging jihad. *Id.* at 15; App. 20. That topic was also the subject of Daoud's internet searches, which included "is it halal to blow up a train," "are attacking planes and trains halal," and "killing americans in islam." *Id.*

Based on this research, Daoud, as he reported to one of the covert FBI employees, confirmed that it was appropriate to kill Americans in a terrorist attack, citing his belief that Americans "pay their taxes which fund the government's war on Islam" and "vote for the leaders who kill us everyday." *Id.* at 16; App. 21. Daoud then began seeking online resources regarding how to carry out an attack, performing searches such as "how to make TNT," "how to make explosives," "The Preparatory Manual of Explosives," and "Organic Chemistry of Explosives." *Id.* at 16-17; App. 21-22.

In June 2012, one of the covert FBI employees told Daoud about a "cousin" who had access to resources for a terrorist attack. Daoud said he wanted to meet the cousin, who, unbeknownst to Daoud, was an FBI

[5] On July 16, 2010, pursuant to an Executive Order, Anwar Al-Awlaki was designated by the United States a "Specially Designated Global Terrorist" because of his position as a leader of AQAP, a Yemen-based terrorist group that has claimed responsibility for several terrorist acts against the United States. R. 1 at 4; App. 9. On September 30, 2011, President Barack Obama announced that Awlaki had been killed in Yemen. *Id.*

undercover agent. *Id.* at 17; App. 22. Between July 2012 and September 2012, Daoud met with the undercover six times, during the course of which Daoud selected, researched, and surveilled a target for a terrorist attack to be carried out in Chicago with a bomb supplied by the undercover. *Id.* at 17-35; App. 22-40.

As part of his plans, Daoud attempted to recruit two like-minded friends to assist in the terrorist attack, though they eventually opted out after a confrontation with religious leaders at their mosque, who tried to convince them that violent jihad was wrong. *Id.* at 28-29: App. 33-34. According to Daoud, following this intervention, his friends harbored reservations about killing "random americans," rather than those involved with the United States military. *Id.* at 29; App. 34.

Daoud, however, continued on with his plans. *Id.* at 29-30; App. 34-35. As his target, Daoud decided on a particular bar in downtown Chicago, asserting that it would be filled with "the evilest people . . . all the kuffars."[6] *Id.* at 30; App. 35. When Daoud asked the undercover about the blast radius, the undercover stressed that it would destroy the building and kill "hundreds" of people, to which Daoud remarked that killing people was "the point" of the operation. *Id.* at 33; App. 38. He told the undercover that he

[6] "Kuffar" is an Arabic term meaning unbeliever, referring to an individual who is not a Muslim. R. 1 at 15 n.19; SA 20.

would pray that they would "get away with it," that they would "kill a lot of enemies," and that the attack would "make[] international news." *Id.*

On September 13, 2012, Daoud met with the undercover to look at the purported explosive, which was inside a Jeep Cherokee. *Id.* at 34; App. 39. The next day, at around 7:00 pm, Daoud and the undercover met and the two drove to downtown Chicago. *Id.* at 35; App. 40. During the drive, Daoud led the undercover in a prayer that they succeed in their attack and kill many people. *Id.*

After arriving downtown, Daoud and the undercover first drove around their target and then headed to a nearby parking lot where the Jeep was located. *Id.* Daoud drove the Jeep and parked it in front of the target. *Id.* He then walked to an alley about one block away, where, in the presence of the undercover, he attempted to detonate the device by pressing the triggering mechanism, after which he was taken into custody by the FBI. *Id.* Daoud was charged with attempting to use a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(2)(D), and attempting to damage and destroy a building by means of an explosive, in violation of 18 U.S.C. § 844(i). R. 16; App. 4-5.

About one month after Daoud's arrest, while in custody, Daoud solicited the murder of the FBI undercover agent in retaliation for his involvement in the investigation and to prevent him from testifying against Daoud, resulting in additional charges for soliciting a crime of violence, in violation of 18

U.S.C. § 373(a), murder-for-hire, in violation of 18 U.S.C. § 1958(a), and obstruction of justice, in violation of 18 U.S.C. § 1512(a)(1)(A). R. 79, Ex. A. That indictment has since been consolidated with Daoud's original case. R. 81.

The FISA Collection

[**CLASSIFIED MATERIAL REDACTED**]

On September 18, 2012, as required by FISA, 50 U.S.C. §§ 1806(c) and 1825(d), the United States provided notice to Daoud that it "intends to offer into evidence, or otherwise use or disclose in any proceedings," information obtained or derived from surveillance conducted pursuant to FISA, citing the electronic surveillance and physical search provisions of that statute. R. 9.

On August 9, 2013, Daoud filed a motion and corresponding brief, seeking discovery of certain "FISA-related materials" and suppression of all evidence obtained or derived from "electronic surveillance [or] any other means of collection conducted pursuant to FISA or any other foreign intelligence gathering of any intelligence agencies of the United States." R. 51, 52.

On October 25, 2013, the United States filed a response to Daoud's motion, consisting of a classified brief and Sealed Appendix, which was submitted *ex parte* to the district court through the designated Classified

Information Security Officer.[7] R. 73. The United States also filed electronically and served on the defense a redacted, unclassified version of its brief. *Id.* As part of its filing, the United States submitted an unclassified declaration from Attorney General Eric H. Holder, Jr. stating that the FISA applications "contain sensitive and classified information concerning United States intelligence sources and methods and other information related to efforts of the United States to conduct counterterrorism investigations." *Id.* Att. 1 at 3; App. 1-3. As a result, Attorney General Holder certified that "the unauthorized disclosure of that information" or "hold[ing] an adversarial hearing with respect to the FISA materials" "could harm the national security interests of the United States." *Id.* at 2-3; App. 2-3. Those harms were detailed in a classified declaration of the FBI's Acting Assistant Director for Counterterrorism. *Id.* Att. 1 at 2; App. 2.

On January 3, 2014, the court heard oral argument regarding the unclassified aspects of Daoud's FISA motion, among other pretrial motions. R. 86; SA 6-43.

The District Court's Order

On January 29, 2014, the district court granted Daoud's request for disclosure to cleared defense counsel of the "classified FISA application materials," provided defense counsel possessed or obtained the appropriate

[7] [**CLASSIFIED MATERIAL REDACTED**]

security clearances. R. 92; SA 1-5. The district court noted that Daoud's motion "seeks disclosure of classified documents that are not ordinarily subject to discovery" and recognized that "no court has ever allowed disclosure of FISA materials to the defense." *Id.* at 1 n.1, 5; SA 1, 5.

The district court noted that the Attorney General's declaration "triggers an *in camera*, *ex parte* procedure to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." *Id.* at 3; SA 3. The district court also noted that a reviewing court may order disclosure of FISA materials "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* at 3-4; SA 3-4 (citing 50 U.S.C. §§ 1806(f), 1825(g)).

Based on the district court's "thorough and careful review of the FISA application and related materials," the court affirmed it was "capable of making . . . a determination" of the legality of the surveillance. *Id.* at 5; SA 5. Nevertheless, the district court found that the disclosure of FISA materials to defense counsel "may be necessary" because "an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding." *Id.* The court emphasized that "the adversarial process is integral to safeguarding the rights of all citizens" and quoted the Supreme Court's statement in *United States v. Cronic*, 466 U.S. 648, 656 (1984), that the Sixth Amendment "right to the effective assistance of counsel

is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.*

In the district court's view, defense counsel's security clearances "would allow him to examine the classified FISA application material." The court asserted that the "government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances" and concluded that "the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel." *Id.* at 4; SA 4.

SUMMARY OF ARGUMENT

The district court committed legal error, and thereby abused its discretion, in ordering the United States to disclose classified FISA applications and orders to defense counsel in order to adjudicate the suppression motion. Its ruling disregarded the high threshold of necessity required to justify the disclosure of FISA applications and orders, and provided no case-specific basis for compelling disclosure for the first time since FISA was enacted.

The district court's stated reason for its order—that an adversarial process is "best"—defies Congress's judgment, embodied in the statutory text, that, if the Attorney General files a claim of privilege as was done in this case, courts are to evaluate FISA applications and orders *ex parte* and *in*

camera. A court may deviate from that procedure and compel disclosure to defense counsel only when *necessary* to determine accurately the legality of the surveillance. That high standard, which this Court has recognized, may be met only in unusual circumstances. The district court's disregard of that standard contravenes a practice that has been uniformly followed and successfully implemented by courts for decades.

The district court also misjudged the damage to national security that could result from disclosing the FISA applications and orders, even to cleared defense counsel under a protective order, as substantiated by declarations from the Attorney General of the United States and the Acting Assistant Director of the FBI for Counterterrorism. A "need-to-know" must exist before classified information may be disclosed, even to those who possess a security clearance, and that essential prerequisite is present only where disclosure to defense counsel is "necessary" for a court to adjudicate the legality of the FISA collection.

When viewed under the correct "necessity" standard, nothing about the challenged FISA collection justifies the district court's outlier decision. As the classified record makes clear, the *ex parte* process that the statute provides readily permits an accurate determination that the FISA collection was lawful, and the defendant's allegations to the contrary are unfounded. A court reviewing the applications would have no difficulty determining that they

established probable cause to believe that the target was an agent of a foreign power and that a significant purpose of the collection was to obtain foreign intelligence information. As such, the legality of the FISA activity may be accurately determined without the need to compel disclosure of the FISA materials to defense counsel. The district court's order should therefore be reversed.

ARGUMENT

I. The District Court Erred in Ordering the Disclosure of Classified FISA Materials to Defense Counsel

A. Standard of Review

Courts review for abuse of discretion a district court's decision whether to order disclosure of FISA materials. *United States v. El-Mezain*, 664 F.3d 467, 567 (5th Cir. 2011); *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984). Under this standard, a "decision that rests on an error of law is always an abuse of discretion." *United States v. Simon*, 727 F.3d 682, 696 (7th Cir. 2013).

B. Analysis

1. Overview of FISA

Congress enacted FISA in 1978 to regulate certain government surveillance conducted for foreign intelligence purposes. The statute created the Foreign Intelligence Surveillance Court ("FISC") and empowered it to grant or deny government applications for surveillance or searches targeting

a foreign power or an agent of a foreign power for the purpose of obtaining foreign-intelligence information. *See* 50 U.S.C. § 1801 *et seq.*

To obtain such an order, the government must establish, *inter alia*, probable cause to believe that the target of the electronic surveillance or physical search is a foreign power or an agent thereof and that "each of the facilities or places" at which the surveillance or search is directed is being used or is about to be used by the target. 50 U.S.C. §§ 1804(a)(3), 1823(a)(3).[8] The government must also establish that the "minimization procedures" that it will employ are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublic information concerning "United States persons," consistent with the government's need to obtain, produce and disseminate foreign-intelligence information. 50 U.S.C. §§ 1801(h), 1805(c)(2)(A), 1824(c)(2)(A), 1821(4).[9]

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[8] The provisions of FISA that address electronic surveillance are found at 50 U.S.C. §§ 1801-1812; those that address physical searches are found at 50 U.S.C. §§ 1821-1829. These regimes are in most relevant respects parallel and almost identical; thus this brief cites to the provisions in parallel, with the first referring to the electronic surveillance provision and the second referring to the physical search provision.

[9] FISA also provides that the Attorney General, or the Assistant Attorney General for National Security as a designee, 50 U.S.C. §1801(g), may authorize emergency FISA collection if the Attorney General "reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance [or physical search] to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained" and makes a full application "as soon as practicable, but not later than seven days after" the emergency authorization. 50 U.S.C. §§ 1805(e)(1), 1824(e)(1).

FISA requires that the government include in its application a written certification from a high-ranking executive branch official regarding the nature of the information sought by the order. 50 U.S.C. §§ 1804(a)(6), 1823(a)(6). That certification must state that the electronic surveillance or physical search seeks "foreign intelligence information," that a "significant purpose" of the surveillance or search is to obtain foreign intelligence information," and that the information cannot be reasonably obtained by normal investigative techniques. *Id.*

If satisfied that a FISA application has met the statutory requirements, and if the reviewing FISC judge makes the necessary findings, the judge may issue an order authorizing the surveillance or search. 50 U.S.C. §§ 1805(a), 1824(a). The order identifies the target of the search, the location of the facility at which the surveillance will be directed or the nature and location of each of the premises or property to be searched, the type of information, material or property to be sought, the means or manner of conducting the surveillance or search, the duration of the surveillance operations, the time period during which the surveillance or searches are approved, and the applicable minimization procedures.[10] *Id.* §§ 1805(c), 1824(c).

[10] When the target of collection is a United States person, the United States must minimize the acquisition and retention of non-publicly available information and prohibit its dissemination, consistent with the need to obtain, produce, and disseminate foreign intelligence information. 50 U.S.C. §§ 1801(h), 1805(c)(2)(A).

FISA permits the government to use in a criminal prosecution information obtained or derived from a FISA order, provided that advance authorization is obtained from the Attorney General, 50 U.S.C. §§ 1806(b), 1825(c), and that notice is given to the court and to each "aggrieved person"[11] against whom the information is to be used. 50 U.S.C. §§ 1806(c)-(d), 1825(d)-(e). The aggrieved person, upon receiving notice, may seek discovery of the "applications or orders or other materials relating to" the electronic surveillance or physical search and may also seek to suppress evidence obtained from the surveillance or search if "the information was unlawfully acquired" or if the surveillance or search "was not made in conformity with an order of authorization or approval." *Id.* §§ 1806(e), 1825(f).

2. The District Court Misapplied FISA's Rules Governing the Disclosure of FISA Materials

When a defendant moves to suppress FISA information or for disclosure of the FISA applications and orders that produced the information, the government may respond by filing a declaration from the Attorney General stating that "disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. §§ 1806(f), 1825(g). If the

[11] For purposes of electronic surveillance, "aggrieved person" is defined as "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k). For purposes of physical search, "aggrieved person" is defined as "a person whose premises, property, information, or material is the target of physical search or any other person whose premises, property, information, or material was subject to physical search." 50 U.S.C. § 1821(2).

Attorney General files such a declaration, as he did here, the district court must review the FISA materials *ex parte* and *in camera* and may order disclosure of "portions" of the FISA materials "only where such disclosure is *necessary* to make an accurate determination of the legality of the surveillance [or search]." *Id.* (emphasis added).

By its terms, FISA thus requires the court to examine the applications, orders, and related materials *ex parte* and *in camera* to determine the lawfulness of the FISA collection. *Id.* If the court is able to assess the legality of the FISA collection, it must deny a request for disclosure to the defense. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 565 (5th Cir. 2011); *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982). A court may order disclosure of portions of the FISA materials to the defense only if it finds that it is incapable of accurately resolving the lawfulness of the FISA activity without such disclosure. *El-Mezain*, 664 F.3d at 567; *Abu-Jihaad*, 630 F.3d at 129.

In light of these procedures, "[d]isclosure of FISA materials is the exception and *ex parte*, *in camera* determination is the rule." *El-Mezain*, 664 F.3d at 567 (citing *Abu-Jihaad*, 630 F.3d at 129); *Duggan*, 743 F.2d at 78

(same); *United States v. Rosen*, 447 F. Supp. 2d 538, 546 (E.D. Va. 2006); *see also Belfield*, 692 F.2d at 147 ("The language of section 1806(f) clearly anticipates that an ex *parte*, *in camera* determination is to be the rule. Disclosure and an adversary hearing are the exception, occurring *only* when necessary."); *United States v. Isa*, 923 F.2d 1300, 1306 (8th Cir. 1991). As this Court observed, a case in which "disclosure is necessary" is "one-in-a-million." *In re Grand Jury Proceedings of Special April 2002 Grand Jury*, 347 F.3d 197, 203 (7th Cir. 2003) (affirming district court's decision not to disclose FISA applications and orders based on the court's own review of the record); *see also* Kris & Wilson, *National Security Investigations* § 29:3 n.1 (2d ed. 2012) ("Necessary means 'essential' or 'required,' and therefore the plain language of that provision makes clear that a court may not disclose . . . unless it cannot determine whether the surveillance was unlawful without the assistance of defense counsel and an adversary hearing.").

Indeed, apart from the district court in this case, every court to have addressed a motion to disclose FISA applications and orders or to suppress FISA information has been able to reach a conclusion about the legality of the challenged FISA collection based on its own *in camera*, *ex parte* review. *See, e.g.*, *El-Mezain*, 664 F.3d at 566 (quoting district court's statement that no court has ever held an adversarial hearing to assist the court); *United States. v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *In re Grand Jury Proceedings*, 347

F.3d at 203 (noting that, at that time, "every FISA wiretap review had been conducted *in camera* and *ex parte*"). Even where defendants have alleged specific errors or misrepresentations in the FISA applications, based on their analysis of the evidence in the case, courts have deemed disclosure unnecessary because they were able to rule on the legality of the surveillance, even in light of the alleged errors, through *in camera*, *ex parte* review. *See, e.g.*, *Abu-Jihaad*, 630 F.3d at 130; *Rosen*, 447 F. Supp. 2d at 552 (denying disclosure despite minimization errors that were inadvertent, disclosed to the FISC, and promptly rectified).

The district court, however, disregarded the heavy burden imposed by FISA to justify disclosure. It offered no case-specific reason to support its decision and made no finding that disclosure was "necessary" to determine accurately the lawfulness of the surveillance. Instead, the district court acknowledged, after having made a "thorough and careful review of the FISA application and related materials," that it was "capable" of making "an accurate determination of the legality of the surveillance." R. 92 at 5; SA 5. That finding alone precludes disclosure under FISA.

Rather than address the specific facts of this case, the district court ordered disclosure because it believed that resolving the legality of the FISA collection is "best made in this case as part of an adversarial proceeding." *Id.* at 5; SA 5. The court noted that "the adversarial process is integral to

safeguarding the rights of all citizens" and quoted the Supreme Court's language that the Sixth Amendment "right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.*

But a court's preference for the adversarial process—a circumstance that exists in all litigation—cannot serve as a basis for declaring that disclosure of FISA materials is "necessary to make an accurate determination of the legality of the surveillance" under the statute. Congress envisioned that FISA litigation be handled *ex parte*, *in camera*, with disclosure the rare exception. *E.g.*, *In re Grand Jury Proceedings*, 347 F.3d at 203; *El-Mezain*, 664 F.3d at 567; *Abu-Jihaad*, 630 F.3d at 129; *Duggan*, 743 F.2d at 78. Yet the district court's reasoning would turn that regime on its head. A court could always say that an adversarial proceeding would be the "best" way to determine the legality of the FISA collection. To compel disclosure on that basis would trivialize FISA's necessity standard and work a sea change in FISA litigation.

For FISA and its procedures to have meaning, the need for disclosure must stem from unique, case-specific facts, and not a general preference that would apply to all FISA litigation. After all, the statute mandates that courts review the FISA applications and orders *in camera* and *ex parte* before even contemplating disclosure. Thus, a court cannot order disclosure of FISA

materials unless it concludes, based on facts specific to the FISA applications in that case, that it cannot accurately resolve the legality of the collection without such disclosure.

The legislative history of FISA reinforces the conclusion that disclosure cannot be "necessary" absent a case-specific reason that would justify a departure from the default *ex parte* process. Among the factors bearing on the possibility of disclosure include "indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information." S. Rep. No. 95-701, 95th Cong., 2d Sess. 64 (1978) ("Senate Report"); *see also Belfield,* 692 F.2d at 147; House Report at 47 (discussing the term "necessary" as used in the definition of "foreign intelligence information" and emphasizing that it meant "important and required" and not simply "useful and convenient").[12] Nothing in FISA's legislative history lends credence to the district court's disregard for FISA's "necessary" language.

[12] A prior version of the bill that became FISA would have allowed disclosure of the applications and orders "if there is a reasonable question as [to] the legality of the surveillance and if disclosure would likely promote a more accurate determination of such legality or if such disclosure would not harm the national security." House Report at 10. That version, however, was not enacted by Congress. *See* H.R. Conf. Rep. No. 95-1720, 31-32. Congress's decision to reject this standard, opting instead for a stricter one, supports the inference that the "necessary" requirement sets a high bar.

The district court's order also runs counter to the policy judgment Congress made in devising FISA's suppression procedures. The advantages of the adversary process were well known to Congress, but those benefits were weighed against the exceptional costs of revealing "sensitive foreign intelligence information." Senate Report at 57; *see also Belfield*, 692 F.2d at 148 (noting that Congress was "aware" of the difficulties of *ex parte* procedures, but that Congress made a "thoroughly reasonable attempt to balance the competing concerns of individual privacy and foreign intelligence."). The district court's gloss on the statute, if embraced by other courts, would make disclosure the norm, circumventing Congress's intentions and upsetting decades of case law. *See Belfield*, 692 F.2d at 146-48 (noting that Congress "was adamant" that the "carefully drawn procedures" of § 1806(f) were not to be "bypassed by the inventive litigant using a new . . . judicial construction") (citing Senate Report at 63).

An attempt to compel disclosure on similar grounds was roundly rejected by the D.C. Circuit in *Belfield*. 692 F.2d at 146-47. There the defendants asserted that "[q]uestions as to the legality of surveillance conducted under FISA are far too complex to be determined without disclosure and adversary proceedings." *Id.* at 147. The *Belfield* court recognized that this theory proved too much—that "*in every case* 'such disclosure is necessary to make an accurate determination of the legality of

the surveillance.'" *Id.* (emphasis in original). That view, the court declared, "cannot be correct" "as a matter of statutory interpretation" because "[t]he language of section 1806(f) clearly anticipates that an *ex parte*, *in camera* determination is to be the rule. Disclosure and an adversary hearing are the exception, occurring *only* when necessary." *Id.* (emphasis in original). *Belfield*'s conclusion applies with equal force to the district court's invocation of the adversarial process, for that too stands at odds with the language and structure of FISA.

To the extent the district court thought its ruling found support in cases applying the Sixth Amendment right to effective assistance of counsel (*see* R. 92 at 5), that too was wrong. There is no Sixth Amendment right to have counsel present for a classified, pretrial determination. *See United States v. Abu Ali*, 528 F.3d 210, 254 (4th Cir. 2008). And FISA's *ex parte* review procedure has withstood numerous constitutional challenges. *See, e.g.*, *El-Mezain*, 664 F.3d at 567-69; *Damrah*, 412 F.3d at 624-25; *Isa*, 923 F.2d at 1306-07; *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987); *Belfield*, 692 F.2d at 148.

The claim that the Sixth Amendment requires an adversary hearing also founders on the large body of non-FISA law allowing courts to hold *ex parte*, *in camera* hearings when needed to protect an informant's safety, the integrity of an ongoing investigation, or some other legitimate governmental

interest. *See Isa*, 923 F.2d at 1307; *United States v. Falvey*, 540 F. Supp. 1306, 1315 (E.D.N.Y. 1982). Indeed, even before FISA came into existence, the Supreme Court authorized the adjudication of electronic surveillance issues *ex parte* and *in camera*. *See Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (*per curiam*) ("Nothing [in the Supreme Court previous decisions] requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance"); *Giordano v. United States*, 394 U.S. 310, 314 (1969) ("Of course, a finding by the District Court that surveillance was lawful would make disclosure and further proceedings unnecessary."). In accordance with those principles, the government's compelling interest in protecting ongoing national security investigations and intelligence sources and methods, coupled with the protections found in other parts of FISA, justifies limiting the defendant's right to review the FISA applications and orders, especially given the relatively straightforward task of assessing probable cause, which district courts do on a regular basis when approving or evaluating criminal search warrants. *Isa*, 923 F.2d at 1307; *see generally Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014) ("This Court has repeatedly declined to require the use of adversarial procedures to make probable cause determinations.").

Not only did the district court misapprehend FISA's necessity standard, the court appeared to replace it altogether with a novel balancing test. The

court stated that the government "has no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary clearances" and that, without some greater showing of national security harm, "this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel." R. 52 at 4.[13]

Such a balancing test has no moorings in the statute. FISA does not call for district courts to estimate the "potential danger of disclosure," scrutinizing the executive branch's judgment that disclosure to the defense would harm national security. Those judgments, appropriately entrusted to the executive branch, "are decisions for which the judiciary has neither aptitude, facilities, nor responsibility." *Chicago & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). A district court judge has "little or no background in the delicate business of intelligence gathering," and should thus give appropriate deference to the executive branch's assessments about the significance of disclosing sensitive information and the

[13] The district court stated that the "government's only response at oral argument was that [ordering disclosure of FISA materials to defense counsel] has never been done." R. 92 at 4; SA 4. The government provided classified briefing to the district court regarding the damage that could be expected to occur from such an order (*see* G.Br. and Ex. 2), but was not able to discuss that information in open court due to its classification.

repercussions for intelligence gathering and United States foreign policy. *CIA v. Sims*, 471 U.S. 159, 176 (1985); *see also id.* at 180 ("It is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process"); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) ("Things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods."). In light of these concerns, FISA envisions an inquiry more limited and suitable for a non-specialist court: an *ex parte*, *in camera* review to determine whether the applications for FISA collection established probable cause, as well as compliance with the other statutory requirements.

The problems with the balancing test fashioned by the district court are exemplified by its application here, for the court misjudged the real risks of disclosure. The court incorrectly assumed that defense counsel's security clearance[14] would simply "allow him to examine the classified FISA

[14] According to the Classified Information Security Officer, defense counsel currently holds a Secret level security clearance granted in connection with an unrelated matter and his background investigations would make him eligible for a

application material." R. 52 at 4; SA 4. Possession of a security clearance alone does not entitle counsel to see documents with that classification; a "need-to-know" must exist before classified information may be disclosed. *See* Executive Order 13526, § 4.1(a); *El–Mezain*, 664 F.3d at 568 (approving denial of discovery to cleared defense counsel because of the government's substantial interest in maintaining secrecy); *United States v. Sedaghaty*, 728 F.3d 885, 909 (9th Cir. 2013); *United States v. Libby*, 429 F. Supp. 2d 18, 24 & n.8 (D.D.C. 2006) (security clearance alone does not justify disclosure because access to classified information is permitted only upon a showing that there is a "need to know"); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 287 n. 27 (S.D.N.Y 2000); *Baldrawi v. Department of Homeland Security*, 596 F. Supp. 2d 389, 400 (D. Conn. 2009); *see generally Ott*, 827 F.2d at 477 ("Congress has a legitimate interest in authorizing the Attorney General to invoke procedures designed to ensure that sensitive security information is not unnecessarily disseminated to *anyone* not involved in the surveillance operation in question.") (emphasis added).[15]

Top Secret clearance and access to sensitive compartmented information ("SCI"). R. 102.

[15] Disclosure to defense counsel raises particular issues because the obligation to safeguard national security information stands in tension with counsel's duty to zealously represent his or her client. As such, a defense counsel's "sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy." *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *see also Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (*en banc*) (holding that counsel's

The "need-to-know" prerequisite matters all the more here because, as persuasively articulated in the sworn declarations from the Attorney General of the United States and the FBI's Acting Assistant Director for Counterterrorism, these FISA applications deal with exceptionally sensitive issues with profound national security implications.

[**CLASSIFIED MATERIAL REDACTED**]

The district court's order ignored these declarations and brushed aside the considered judgment of two senior executive branch officials who carefully concluded—based on the particular facts of this case—that disclosure may lead to an unacceptable risk of compromising the intelligence-gathering process and undercut the FBI's ongoing ability to pursue national security investigations. If permitted to stand, the district court's order would impose upon the government a lose-lose dilemma: disclose sensitive classified information to defense counsel—an option unlikely to be sanctioned by the owners of that information—or forfeit all FISA-derived evidence against the defendant, which in many cases may be critical evidence for the government.

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duty of undivided loyalty to his client gives him "every incentive to probe as close to the core secrets as the trial judge would permit"). Absent a finding that disclosure to defense counsel is necessary for the court to determine the legality of the challenged surveillance, the government should "not [be] required to play with fire and chance further disclosure – inadvertent, mistaken, or even intentional." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) ("It is not to slight judges, lawyers, or anyone else to suggest that any disclosure [of classified information] carries with it serious risk that highly sensitive information may be compromised.").

A ruling that bears such significant consequences should not proceed from a misreading of the law.

This case amply illustrates why Congress created FISA's procedures. Classified information is too sensitive to be shared with individuals who lack a "need-to-know," regardless of their possession of a security clearance, thus FISA directs courts to assess the legality of the collection *ex parte* and *in camera*. A court may deviate from this procedure only in the rare case in which the legality of the FISA collection cannot be adjudicated without disclosing portions of the FISA materials to the defense. This is not that case. The district court found that it was "capable" of assessing the legality of the FISA collection *ex parte* and *in camera*, and that is what the court should have done.

3. The Legality of the FISA Collection May Be Accurately Assessed *Ex Parte* and *In Camera*

As the classified exhibits in the Sealed Appendix demonstrate, a court should have no trouble finding FISA's requirements met in this case. That is, a court is fully capable of determining here that the applications established probable cause, the executive branch certifications were proper, and the collection was appropriately minimized. *See Abu-Jihaad,* 630 F.3d at 130-31; *Belfield*, 692 F.2d at 147 ("[t]he determination of legality in this case is not complex"); *United States v. Warsame*, 547 F. Supp. 2d 982, 987 (D. Minn.

2008) ("issues presented by the FISA applications are straightforward and uncontroversial").

The FISA applications further refute the host of legal and factual challenges the defendant presented to the district court.[16] These allegations may be considered, and rejected, based on an examination of the classified record. The applications present none of the issues that may warrant disclosure, such as "indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information." *Belfield*, 692 F.2d at 147 (quoting Senate Report at 64).

[CLASSIFIED MATERIAL REDACTED]

a. The FISA Applications Established Probable Cause

[CLASSIFIED MATERIAL REDACTED][17]

[16] That the defendant managed to present over fifty pages of briefing in support of suppression (*see* R. 52, 74) without having seen the FISA applications aptly illustrates how FISA's *ex parte* regime does not prevent a defendant from articulating challenges to the surveillance. *See United States v. Megahey*, 553 F. Supp. 1180, 1193-94 (E.D.N.Y 1982).

[17] Even if the FISA collection were not lawfully authorized, the "good faith" rule of *United States v. Leon*, 468 U.S. 897, 914-15 (1984) would prevent exclusion of the evidence unless the affidavit supporting the warrant was false or misleading, or probable cause was so transparently missing that "no reasonably well trained officer [would] rely on the warrant." *See United States v. Ning Wen*, 477 F.3d 896, 897 (7th Cir. 2007) (applying *Leon* to FISA warrant). There is no basis to find that any of the applications at issue contained false or misleading statements or that probable cause was lacking.

b. The Certifications Complied With FISA

[CLASSIFIED MATERIAL REDACTED]

c. The FISA Information Was Appropriately Minimized

[CLASSIFIED MATERIAL REDACTED]

* * *

In sum, the FISA applications presented the FISC with probable cause; they included a proper executive branch certification; and the resulting collection was properly minimized. The applications, orders, and related materials present nothing extraordinary that would justify this case becoming the first in which FISA applications are ordered disclosed. The district court, as it acknowledged, was fully capable of deciding these issues *ex parte* and *in camera*, as confirmed by the classified record.

Against this backdrop, the district court legally erred (and thus abused its discretion) in ordering the disclosure of FISA applications and orders, despite the sworn declarations from executive branch officials that doing so would harm national security. The reason for the court's order—that an adversarial process is "best"—falls well short of the high threshold of necessity required to justify disclosure under FISA. Were it otherwise, *ex parte* and *in camera* adjudication of FISA collection would no longer be "the rule"—contrary to the balance struck by Congress and decades of case law—and the government in national security cases would be forced either to

disclose highly-sensitive information or forgo valuable evidence, the very predicament FISA was designed to avert.

Relying on the correct "necessity" standard, no grounds for disclosure may be found in the classified record. A reviewing court may readily make an accurate determination of the legality of the FISA collection, based on an *ex parte* and *in camera* review of the classified record in this case, and decide that the FISA collection was lawful. The district court's order should therefore be reversed.

CONCLUSION

For the reasons discussed above, the United States respectfully asks this Court to reverse the district court's order compelling disclosure to defense counsel of classified FISA applications, orders, and related materials.

Respectfully submitted.

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United States Attorney

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Chief of Appeals, Criminal Division

/s/ *William E. Ridgway*
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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), I, William E. Ridgway, counsel for Plaintiff-Appellant, UNITED STATES OF AMERICA, state that the appendix included with this brief on appeal incorporates the materials required under Circuit Rule 30(a) and (b).

Respectfully submitted,

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RULE 32 CERTIFICATION

I hereby certify that:

1. This redacted brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 7,992 words.

2. This redacted brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the Microsoft Office Word proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

Respectfully submitted.

ZACHARY T. FARDON
United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2014, I electronically filed the foregoing Brief and Short Appendix of the United States with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted.

By: */s/ William E. Ridgway*

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SHORT APPENDIX

SHORT APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. 12 cr 723
v.	)	
	)	Judge Sharon Johnson Coleman
ADEL DAOUD,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Defendant Adel Daoud is charged with attempting to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(D) and attempting to destroy a building by means of explosive in violation of 18 U.S.C. § 844(i). Daoud filed a motion for disclosure of Foreign Intelligence Surveillance Act of 1978 ("FISA") related material and to suppress the fruits or derivatives of electronic surveillance and any other means of collection conducted pursuant to FISA or other foreign intelligence gathering [51]. This Court heard oral argument on this, and other motions, on 1/3/2014.[1] For the reasons discussed below, the motion is granted in part and denied in part.

FISA Procedures

The Foreign Intelligence Surveillance Act of 1978, established detailed procedures governing the Executive Branch's ability to collect foreign intelligence information. To obtain an order authorizing electronic surveillance or physical searches of an agent of a foreign power, FISA requires the government to file under seal an *ex parte* application with the United States Foreign Intelligence Surveillance Court (the "FISC"). 50 U.S.C. §§ 1804, 1823. The application

[1] Unlike the Court's recent denial of discovery [87], which did not seek the discovery of classified information, the instant motion seeks disclosure of classified documents that are ordinarily not subject to discovery.

must be approved by the Attorney General and must include certain specified information. *See* 50 U.S.C. §§ 1804(a), 1823(a).

After review of the application, a single judge of the FISC will enter an *ex parte* order granting the government's application for electronic surveillance or a physical search of an agent of a foreign power, provided the judge makes certain specific findings. 50 U.S.C. §§ 1805(a), 1824(a). The FISA order must describe the target, the nature and location of the facilities or places to be searched, the information sought, and the means of acquiring such information. *See* 50 U.S.C. §§ 1805(c)(1), 1824(c)(1). The order must also set forth the period of time during which the electronic surveillance or physical searches are approved, which is generally ninety days or until the objective of the electronic surveillance or physical search has been achieved. *See* 50 U.S.C. §§ 1805(e)(1), 1824(d)(1). Applications for a renewal of the order must generally be made upon the same basis as the original application and require the same findings by the FISC. 50 U.S.C. §§ 1805(e)(2), 1824(d)(2).

The current version of FISA requires that "a significant purpose" of the surveillance or search is to obtain foreign intelligence information. 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2006). However, FISA allows the use of evidence derived from FISA surveillance and searches in criminal prosecutions. 50 U.S.C. §§ 1806(a), 1825(a). Here, the government provided notice, as required by FISA, of its intent to use evidence obtained and derived from electronic surveillance and physical searches pursuant to FISA orders.

FISA authorizes an "aggrieved person" to seek suppression of any evidence derived from FISA surveillance or searches either because (1) the evidence was unlawfully acquired, or (2) the electronic surveillance or physical search was not conducted in conformity with the order of authorization or approval. 50 U.S.C. §§ 1806(e), 1825(f). An "aggrieved person" for purposes of

electronic surveillance is "a person who is the target of an electronic surveillance." 50 U.S.C. § 1801(k). For physical searches, FISA defines "aggrieved person" as "a person whose premises, property, information, or material is the target of physical search or any other person whose premises, property, information, or material was subject to physical search." 50 U.S.C. § 1821.

Discussion

Daoud moves for disclosure of the FISA application and materials and also moves to suppress the fruits of electronic surveillance pursuant to FISA or any other foreign intelligence information gathering. Daoud requests that this Court review all applications for electronic surveillance of the defendant pursuant to FISA; to order the disclosure of the applications for the FISA warrants to defendants' counsel pursuant to an appropriate protective order; conduct an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978); suppress all FISA intercepts and seizures, and fruits thereof, derived from illegally authorized or implemented FISA electronic surveillance; and consider the constitutionality of FISA both facially and as applied to defendant under the First and Fourth Amendment of the United States Constitution. For the reasons stated below, the motion is granted in part and denied in part.

Attorney General Eric H. Holder, Jr., filed an affidavit stating under oath that disclosure of such materials would harm national security. *See* 50 U.S.C. §§ 1806(f), 1825(g). Attorney General Holder's claim of privilege is supported by a classified declaration from an FBI official. Pursuant to FISA, the filing of an Attorney General affidavit triggers an *in camera, ex parte* procedure to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. 50 U.S.C. §§ 1806(f), 1825(g).

Once the *in camera, ex parte* procedure is triggered, the reviewing court may disclose such materials "only where such disclosure is necessary to make an accurate determination of the

legality of the surveillance." 50 U.S.C. § 1806(f); *see also* 50 U.S.C. § 1825(g). The Seventh Circuit has previously reviewed *de novo* the probable cause determination of the FISC, *United States v. Dumeisi*, 424 F.3d 526, 578 (7th Cir. 2005), and therefore this Court rejects the government's request for deferential review. The factual averments and certifications used to support the government's FISA warrant application are reviewed for clear error. *United States v. Rosen*, 447 F.Supp.2d 538, 546 (D.Va. 2006).

Here, counsel for defendant Daoud has stated on the record that he has top secret SCI (sensitive compartmented information) clearance. Assuming that counsel's clearances are still valid and have not expired, top secret SCI clearance would allow him to examine the classified FISA application material, if he were in the position of the Court or the prosecution. Furthermore, the government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances. The government's only response at oral argument was that it has never been done. That response is unpersuasive where it is the government's claim of privilege to preserve national security that triggered this proceeding. Without a more adequate response to the question of how disclosure of materials to cleared defense counsel pursuant to protective order jeopardizes national security, this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel. Upon a showing by counsel, that his clearance is still valid, this Court will allow disclosure of the FISA application materials subject to a protective order consistent with procedures already in place to review classified materials by the court and cleared government counsel.

While this Court is mindful of the fact that no court has ever allowed disclosure of FISA materials to the defense, in this case, the Court finds that the disclosure may be necessary. This finding is not made lightly, and follows a thorough and careful review of the FISA application and related materials. The Court finds however that an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding. The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 743 (1967). Indeed, though this Court is capable of making such a determination, the adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

In sum, this Court grants disclosure to cleared defense counsel of the FISA application materials and such disclosure will be made under an appropriate protective order. By this Order, this Court does not express any opinion with respect to the constitutionality of FISA or its procedures. Nor has this Court lost sight of the potential Classified Information Procedures Act ("CIPA") issues that may be implicated by this disclosure, and resolution of those issues may result in the redaction of certain portions of the material. Lastly, this Court denies Daoud's request to suppress all fruits of FISA surveillance without prejudice. Counsel for Daoud must present to the Court documentation of current valid security clearances at or before the next status hearing on February 6, 2014.

IT IS SO ORDERED.

Date: January 29, 2014

Entered: _____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 12 CR 723-1
Plaintiff,	)	
v.	)	Chicago, Illinois
	)	January 3, 2014
ADEL DAOUD,	)	1:35 p.m.
Defendant.	)	Motion Hearing

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SHARON JOHNSON COLEMAN

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THE CLERK: 12 CR 723, USA versus Adel Daoud.

THE COURT: Good morning, Mr. Daoud. How are you.

DEFENDANT DAOUD: I'm all right. How are you?

THE COURT: Well, actually we're afternoon now. All right.

MR. RIDGWAY: Good afternoon, Your Honor. William Ridgway and Bolling Haxall on behalf of the United States.

MR. DURKIN: Good afternoon, Judge. Tom Durkin and Joshua Herman on behalf of the defendant, who's obviously present and in custody.

THE COURT: Yes, and in custody. And we've spoken.

MR. DURKIN: Last I checked.

THE COURT: Okay. A couple of things today. First of all, the Court did get your most recent submission of an article, is that correct?

MR. DURKIN: Yes.

THE COURT: And your position?

MR. RIDGWAY: We received it as well, Your Honor. And we have no, I guess no objection to it being part of the record.

THE COURT: All right. For whatever it's worth. The Court can always use some additional reading. Not in this case, but I'll take it.

MR. DURKIN: I wanted to mention it today, and I didn't want to mention it without having given everybody a copy

of it.

THE COURT: All right.

MR. DURKIN: That's all.

THE COURT: The Court does acknowledge that the Court has a copy. The Court also would like to point out before we get started on the motions that are germane to the proceedings today, that there were some CIPA motions pending. And unless this Court somehow has overlooked it, the Court didn't receive a response. There was going to be an ex parte presentation from the defense.

MR. HERMAN: That's correct. We had asked -- there had been a deadline for the filing of a defense --

THE COURT: There was a September deadline.

MR. HERMAN: A defense, a defense position paper I guess you would say as to what our defenses would be for the Court to consider. That was -- we never noticed that up.

THE COURT: You filed a motion for I think a three-week extension and --

MR. HERMAN: A second extension, and I think that was when motions were flying back and forth and there was the issue of the consolidation of the cases, which obviously had some bearing on what positions we would set forth in --

THE COURT: And so, in other words, there hasn't been one filed yet.

MR. HERMAN: There hasn't been one.

THE COURT: And you still would like to reserve the right to file something.

MR. HERMAN: I think so.

THE COURT: Just to make clear, we're not dealing with CIPA today.

MR. DURKIN: No.

THE COURT: All right.

MR. DURKIN: Other than the portion of our motion that seeks permission to attend the ex parte proceeding.

MR. HERMAN: Correct.

MR. DURKIN: That portion we can argue in public I believe.

THE COURT: Well, the Court isn't going to hear any argument on that at all today. We'll deal with the motions -- the only motions the Court's going to deal with are 51, 54, and 70. Those are the ones that deal with the FISA related materials and surveillance materials. Those are the ones the Court's going to deal with today.

MR. RIDGWAY: That was our understanding as well, Your Honor.

MR. DURKIN: Right.

THE COURT: All right. And we can set another date, a future date soon after for your response or your written response on the CIPA materials. And if there's something else you wish to file, to have some sort of hearing, which I don't

think you'll be able to have. But you can do some filing on that. That's separate from the proceedings today.

MR. RIDGWAY: And just --

MR. DURKIN: The argument that I had intended to discuss, which I think is part of the first motion is for us to be part of the FISA proceeding, which our argument is you can extrapolate the CIPA provisions which permit counsel to be there even though it never happens, to be part of the FISA proceeding regarding the other surveillance. That's I believe part of what we're -- at least that's what I prepared to argue today.

MR. RIDGWAY: Your Honor, I understood that we would be arguing about whether they would be present for any FISA suppression related hearings.

MR. DURKIN: Yes.

MR. RIDGWAY: And that's fine. I didn't understand there to be anything about the CIPA at this hearing.

THE COURT: All right.

MR. DURKIN: And I'm the one that misspoke. That's correct.

THE COURT: It's FISA.

MR. DURKIN: FISA, yes.

THE COURT: Not CIPA. All right. As long as we're all on the same page with that.

MR. DURKIN: Yes.

MR. RIDGWAY: And if I could inject one point on the CIPA. I do -- defense counsel has been very generous with us in terms of getting us extensions and so, but I will say the CIPA filing's been on file for -- since March of last year. It is something that we would like to have dealt with. And so in particular because we don't want to have any reason to delay the trial date in this case. I just ask that we can expeditiously handle that.

MR. DURKIN: We can do that.

THE COURT: The Court agrees. That was one of the reasons I brought it up today. Just to make sure it's on the radar, but not being dealt with.

MR. DURKIN: I appreciate that. I assume you can understand, though, that our submission will be different now that the cases are consolidated.

THE COURT: And I'm not going to presume what you will be submitting, but --

MR. DURKIN: Oh, no, but I mean I -- we didn't intentionally delay because we were not interested. It was -- we just thought it would be difficult to present in one pleading if we still didn't know what was happening with the consolidation.

THE COURT: If the Court hadn't thought that you were still interested, the Court would have ruled as the Court had stated in its motion that I would rule without your

submissions.

MR. DURKIN: I kind of figured that.

THE COURT: So the Court understands that you still have a desire to --

MR. DURKIN: Thank you.

THE COURT: -- make a presentation, and we'll set a time period at the close of this proceeding today.

MR. DURKIN: That's fine. Thank you.

THE COURT: All right. And so since it's your motion, if defense wants to either stand to the side or whichever. You can be seated. However you want to do it.

MR. DURKIN: What I was hoping to do is I'd like to argue -- Mr. Herman would like to argue the discovery related motion.

MR. HERMAN: Right. The non-FISA discovery motion that fits into the surveillance and investigation. And as I think you'll see that there will be overlap. That is just a natural outcome of the way the arguments and the issues are framed. And Mr. Durkin will argue the FISA and the FAA related motions.

THE COURT: All right. All right. That will be fine. What the Court will suggest is that why doesn't everybody including Mr. Daoud have a seat at the table. And that way we can be a little bit more organized in how we go about this.

MR. DURKIN: That's fine.

THE COURT: And defense may proceed when they're ready, and then the government may respond. Understanding by all that this Court has reviewed all of the submissions, and this Court will also note that although, and that you have presented an article and there may be some references to other proceedings, that this Court is focused on what's going on in this case and what's relevant to this case and not an overall view of the surveillance system and all the news that surrounds it that may have nothing whatsoever to do with this case. Keeping that in mind in your arguments, proceed.

MR. DURKIN: Well, thank you, Judge. And thanks, first of all, for giving us the opportunity to argue, because I think this is a significant motion at a significant time in our history involving this growth of the national security state. And I understand that things may or may not be relevant to the bigger picture from the Snowden matter, but that goes to the heart of the problem. We don't know that. And that's one of the biggest problems here.

I would respectfully submit that the opinions of -- and I'm assuming you were talking when you just mentioned other cases, the two opinions that have been widely publicized by both -- regarding the 215 issue by Judge Leon in Washington and Judge Pauley in New York. Those opinions I think are germane to the bigger picture that I think is at stake here. I think

what is at stake here is a genuine issue of transparency and the effectiveness of the adversary system, which is at the heart of this, and I think going to our fundamental premise. And I don't think I'm to a point where I can jump and argue the unconstitutionality as Judge Leon has set out, or conversely the lawfulness of the 215 regarding -- that Judge Pauley found.

But nevertheless I think that issue is there, and I think it could be relevant in this case depending on what we discover and depending on what is presented to you in the FISA proceedings. And that's why I think that this is the case, if there was ever a case where the adversary system should be permitted to have access to the FISA proceeding. We've set it out -- I mean, I think our reply brief is probably the most comprehensive response that I could make to the entire issue. But we set our argument out there.

We are both cleared counsel. I believe, you know, and if it's not part of the record, I'd make it part of the record. If you need a submission, I would do it, but I was part of the Military Commissions in Guantanamo Bay. I was counsel originally in the 911 conspiracy case. And in the course of that proceeding and the Military Commissions I was granted a top secret SCI clearance, which I believe is the highest clearance you can possibly get. I was privy to all kinds of classified, confidential evidence in that case. I think there is no question that there's adequate protection

involved simply under the procedures and the protective orders.

And I think where we're at is that I believe that there are questions about the viability of the adversarial system in this country at least insofar as terrorism related cases are concerned. And with all due respect, I think you can kind of take your side of where you want to come out in history on this, because I don't think I'm overstating it to say we are at a crossroads here. The Snowden leaks have created an enormous controversy in this country over what's going on, and the consequences of a nontransparent intelligence agency operating in the dark.

And I'm not going to get into whether *The New York Times* is right in praising Snowden or calling for whatever. But the fact remains is that there is a tremendously serious debate going on in this country over I believe what happened in this case. I believe that that program was used in some fashion in this case. I can't prove it. I don't have any access to be able to prove it, but -- and Mr. Herman will address it in more detail with respect to the discovery side of it, but the timing all fits as well. And he, he will address that later.

THE COURT: All right. Can you -- now that the Court has given you a lot of latitude in your prefacing remarks, can you be more specific to the case here as to what you are asking for in this case here.

MR. DURKIN: What I'm asking for right now and what I want to argue about right now is simply the ability to participate in the FISA hearing. I'm asking very seriously for you to consider permitting cleared counsel to be part of this process, because I think the lack of transparency and the suspicion surrounding this program and the controversy that's going on demands it. And in this case -- and that's the reason I gave you the Mearsheimer article. And I'm not trying to belabor it. But the reason I found that article interesting is that that's an article that's written by a political scientist of significant repute. It is -- and he is not a flaming liberal by any stretch of the imagination. And some --

THE COURT: Whatever that means.

MR. DURKIN: Well, people accuse me of that at times. He is a very serious political scientist. And I think that some of the comments he makes here are relevant to what we're talking about today. He's talking about, you know, core principles of a liberal society trampling on the rule of law. And he's talking about secrecy. He's talking about, you know, the exaggerated fear of foreign threats that permeates the American national security establishment. It is unsurprising that Presidents Bush and Obama have pursued policies that endanger liberal democracy at home.

Now, I'm not trying to be dramatic. But this -- I genuinely believe that he's right. And I genuinely believe

what we've put in our pleading here is accurate. I don't believe that the U.S. Attorney's office gets the straight information from the intelligence agencies. I simply don't believe it because I know how other cases operate. I know what happens in the normal give and take with prosecutors. It doesn't happen in these types of cases. We don't get the kinds of responses that we get in this case in any other type of cases.

And I said in our pleading I think it really calls out for an independent judiciary to get involved. Judge Pauley, with all due respect to him, starts out his opinion --

THE COURT: And the Court really doesn't want to get into discussion, Mr. Durkin, on the recent decisions on either side of what the judges say.

MR. DURKIN: But here's -- what I'm getting at is what Mearsheimer is talking about, what Pauley talks about, what everybody is talking about, which is the use of fear to quiet any criticism of what's going on. And the use of fear to back off the judiciary. And that I think is what's going on. I understand that you have to follow precedent. I understand that the law is a certain way. But I don't believe that you can rely simply on the representations of the U.S. Attorney's office. Not because they're hiding anything, but because things are being hidden from them.

I do not understand, for example, why we can't get a

simple answer of what happened here. Is that because it's too secret to know? What possibly could have happened here in this case that would be too secret for us to know about? And if it is, why can't we then be told in secret as part of the -- as cleared counsel and as part of the protective order? There's no reason not to be. And that's what's at stake here. And I understand you don't want -- I won't -- some other time I'll give you my argument on Pauley versus Leon. But what we're talking about is this case and what happened.

And I'll defer to Mr. Herman to give you more of the timeline as to why we suspect that there is something there. But what I'm saying bluntly is if it's there and we're right, then we should get to challenge the constitutionality of the FAA, because he is a criminal defendant entitled to that. And we shouldn't have to play semantics about whether the evidence was used or derived from or whatever way they want to parse it. It's a simple proposition. Was something used or not? We believe it was.

THE COURT: All right. Thank you, Mr. Durkin. I'm going to allow -- before you step up, Mr. Herman, I'm going to allow the government if they wish to respond at this point to the request to participate in the FISA hearing.

MR. RIDGWAY: Thank you, Judge. Respectfully regarding some of the information that we've seen and the responses, much of that I believe is not really applicable to

the facts of this case. And so I want to focus on the facts in this case here.

This is an individual we provided notice to that information was collected through a traditional FISA. That means that a federal judge made a decision that there was probable cause the defendant was acting as an agent of a foreign power. Now, I understand the defense has moved to suppress that FISA, and that's, and that's its right. But it's important to keep in mind, though, that Your Honor is going have the opportunity to assess whether the judge was correct in making that assessment in terms of probable cause.

And Your Honor will also have the opportunity to assess the allegations that we've heard surrounding this case from the defense. And there's a procedure for that review that's critical here, and that procedure is laid out in the statute. If the Attorney General submits a declaration saying that permitting the defense access to the hearing would harm national security, as Attorney General Holder has done here, if that's the case, then the default is that the proceedings are held in camera and ex parte. And that is the default that has been followed for over 35 years now in FISA litigation.

And, Your Honor, I don't believe that the filings we received from the defense that -- what the defense has offered you has given you a reason to deviate from what really is decades of precedent. There are articles related to

disclosures obviously. And, of course, there is a lot of media associated generally with surveillance and the NSA and things like that.

THE COURT: Well, it's not just the media, is it, Mr. Ridgway? I mean, hasn't there have been some facts that have come out to --

MR. RIDGWAY: There certainly have, Your Honor, and I'm certainly not an expert in that area, and I won't be able to weigh in on that. But I -- so there has been a great deal of information.

THE COURT: Some things have changed since the last 30 years. That's what the Court is saying. I'm sure that that's what Mr. Durkin is also saying.

MR. RIDGWAY: Yes, Your Honor. But it's important to keep in mind that those reports don't, they don't change the case law. The case law still is what it is. And more importantly, it relates to information that's really not at issue here. So to be specific, FISA Amendments Act, we've heard a lot about that. That's part of the statute that's related to many of these disclosures. And the government has represented in its previous filing, and I can do so again, that if in this case the government was intending to use any information obtained or derived from the FISA Amendments Act in the case against Adel Daoud in which he is aggrieved party, then we would provide notice. And no notice has been provided

in this case because those aren't the facts -- that's not the facts of this case. And so --

THE COURT: And is it correct that you have on at least two occasions before this Court stated on the record that this is traditional FISA material, not FAA related, is that correct?

MR. RIDGWAY: That's correct, Your Honor, that we provided notice for a traditional FISA, not for FAA related acquisition. So the information that has been -- that has -- that the defense has talked about really doesn't have bearing on the issues in this case. And so I don't think it gives reason for you to deviate from the precedents that we laid out in our filing. Case after case of judges finding that it was appropriate to review a FISA, review its legality ex parte and in camera.

THE COURT: Thank you very much. Mr. Durkin, very brief reply if there is one or no.

MR. DURKIN: Well, I think --

THE COURT: Not a new speech. Just a brief reply.

MR. DURKIN: I think we addressed it in our reply. The government's history of ex parte proceedings has not shown to be very reliable based on the opinions that have come out of the FISA court. So I think that knocks that argument down completely, and I'll defer to what we wrote in the reply.

THE COURT: Great. Thank you, Mr. Durkin. All

right. Mr. Herman.

MR. HERMAN: Judge, I want to thank you as well. And as we said before, I'm going to focus on document No. 54 which was filed, which was our motion for additional discovery regarding the government's surveillance and investigation of Adel Daoud. There will be some overlap because, as I said before, I think the overlap's natural.

One of the things that you had said before Mr. Durkin got up and possibly as a preemptive strike is that you had read everything. Well, the fact of the matter is is that we haven't.

THE COURT: Well, let me say this: Read everything that you have submitted to me.

MR. HERMAN: Well, we haven't read everything that's out there. One of the government's most substantial pleadings was the response to one of the motions that Mr. Durkin addressed, which was our motion to participate in the FISA hearing. That document, as you know, and as the public knows and as we are limited to knowing is substantially redacted. We can only guess what's in there, in that document. And that arrives at one of the themes to our motion for discovery, which is targeted at non-FISA related information but information that is very significant to the case and some defenses that we anticipate raising, specifically that of entrapment, which is the issue of transparency.

And we think that there's some spill over and bleed over from this intelligence agency mentality of secrecy and in the investigation of Adel Daoud into what is more of a traditional discovery request here into material that is both relevant and we believe material to this case, specifically as to issues of entrapment and Mr. Daoud's predisposition or lack thereof, and the steps, the extraordinary steps that the government took in inducing Mr. Daoud.

As Mr. Durkin said, there's some facts here. And I want to -- as high as he was, I want to get down into the weeds just a little bit to frame the importance of our discovery requests here. In the indictment -- excuse me, in the criminal complaint that was filed in this case one of the first dates we see is October 2011, which is significantly just after Mr. Daoud turned 18. In the discovery, and the government may say they've turned over voluminous discovery, and that's absolutely correct. And I will say that the government has been -- the prosecutors here have been very cooperative in working out disputes and issues so we wouldn't have to bring them to the Court. So I'd like to commend them for that.

But at the same time to echo a theme that Mr. Durkin said, we just don't know that they know everything. In fact, we believe that they don't know everything that's out there, and certain materials have been held up in the declassification channel. So just not -- simply not provided. So we're making

these --

THE COURT: And what again are you basing that on?

MR. HERMAN: We're basing it on --

THE COURT: Your not knowing what they might not know that you think they know but you don't know.

MR. HERMAN: It's common sense based on everything that Mr. Durkin said in the terms of the lack of candor that the intelligence agencies had even before the FISC, the Foreign Intelligence Surveillance Court. How many times they've been -- the intelligence agencies and the government have been chided for not being honest. How many times they've had to come and correct themselves. Judge Bates' opinion, Judge Walton's opinion. Judge Bates' opinion, and this will -- I want to segue back into this timeline here -- is significant we believe. And I'm not trying to go afield into the FAA arguments, but like I said, there is an overlap.

That opinion was dated I believe October 3rd, 2011. Again, it's significant. And this is just not tin foil hat paranoia here. We believe that there's a basis. October 2011 is also significant because it's a date where Mr. Daoud and his family traveled to Saudi Arabia for a Hajj, for a traditional Muslim pilgrimage. Around that time we're also seeing communications and e-mail traffic regarding the downloading of certain speeches from Anwar al-Awlaki, who was droned and killed by the government in September of 2011. Judge Bates'

opinion discussed what I believe what's known as the upstream collection of data, which was the snaring of international communications through undersea cables.

We believe based on that, and that's where we assert our good faith basis for the strong possibility which we believe is true that Mr. Daoud's communications were not simply as the document that we submitted. And I believe our final pleading under seal we report this was not an investigation that simply happened to be opened from an unsolicited source providing information to the FBI in May of 2012. The complaint talks about communications in October of 2011. We have in discovery communications and e-mails long before then. Perhaps the government knows how that information was then collected through various databases of Google or YouTube because it's very strangely organized in a manner that we who have been practicing and receiving discovery in a lot of cases are not used to seeing the way that has been organized.

There is also a significant concern of -- and this ties directly into materiality and relevance because of this entrapment defense. We think it's very telling if the government is watching and monitoring Mr. Daoud for several months in order to, in order to make a determination of whether he is, for lack of a better word or phrase, a fitting candidate for yet another government sting operation. We know, and I know you don't want to hear about other cases, but young Muslim

males are often prime candidates for government sting operations.

Probably the most similar case is the case of -- in Portland of -- against Mohamed Osman Mohamud, who was known as the Christmas tree bomber. What's the analogy and the fact that I want to impress about that case is the defendant also in that case represented by Steve Wade -- Steve Sady and Steve Wax I believe, who are very experienced attorneys, I believe one is the Federal Defender from the district if I'm not mistaken, made requests to the government for the surveillance authorities that were used.

The case went to trial. There was nothing about Section 215 or the FAA disclosed. In fact, there was just a traditional FISA notice. And I'm responding to something that Mr. Ridgway said about providing the notice and to your question about them not knowing -- we not knowing what they don't know or et cetera, et cetera. After conviction after a jury trial Mr. Mohamud was provided notice that I believe it was Section 215 was, in fact, used in that case. And we spelled this out in our briefs.

In the case in Colorado that's pending right now, Muratov, again there was a traditional FISA notice. Mr. Muratov and his counsel were just -- were recently provided with information that the FAA was, in fact, used. And the link to Mr. Daoud's case is that both Mr. Daoud and Mr. Muratov were

mentioned by Senator Feinstein on December 27th, 2012 in her Senate floor speech. And I'm bringing that up because I don't want docket No. 70 to not go mentioned, which is when we posed the question that Senate legal counsel Frankel essentially said all the information they're receiving is from the Executive Branch.

We're quite frankly being whipsawed here. And we think that our -- just all of our discovery requests, both FISA and our traditional FISA -- or traditional discovery requests, and I'm calling it traditional, but it's a little -- even though within the confines of Rule 16 and Brady we believe it's not what you see every day. We're being forced to make these requests, and we believe transparency compels the answering to them.

I want to make one final point about the specific request we made regarding Exhibit A to our docket 54, which is the 2002 FBI manual regarding the operation of undercover guidelines, which I found on Google just looking around for some stuff. And so it's out there. It's not a secret. The government does not deny that it's not applicable authority in this case. This is an incredibly important document to look over closely with respect to the issues of entrapment, which are spelled out on pages 16 and 17.

On page 17 there's an issue -- there's a sentence when an undercover employee learns that persons under

investigation intend to commit a violent crime, he or she shall try to discourage the violence. In this case, Your Honor, we had two online undercover employees, and this is spelled out in the complaint, who in mid-May 2012 reached out to Adel Daoud online and started conversations, purporting to be totally independent of each other, but essentially creating an echo chamber of extremism that Adel Daoud began to -- Mr. Daoud began to engage them in conversations. They're working for the FBI. They're operating --

THE COURT: You said they started it, but then you just said that --

MR. HERMAN: They were communicating --

THE COURT: -- that he engaged them in conversation.

MR. HERMAN: They were communicating with each other. Mr. Daoud didn't send an e-mail to one of these fellas, whoever they were. If they were actually two people or if it was just one person posing as two people. They contacted him. And I believe that's again spelled out in the complaint. One of these OCEs then invited -- said, hey, I have a flesh and blood person that you can meet, a real terrorist.

What's interesting here and we -- Mr. Durkin said this on I believe day one when we were on the case that if you look in the indictment -- or at the complaint, excuse me, pages 40 -- paragraphs 41 through 43, there's an incredibly important moment in the case when Mr. Daoud is confronted by his sheikh

during Itikaf, which is a period of prayer and contemplation during the Ramadan period. After this confrontation, another individual said he wasn't interested in participating in any type of activity. Mr. Daoud spoke with the UCE, the flesh and blood agent, who said he was going to get the real fatwa. This was in mid-August 2012.

The next meeting that the -- that Mr. Daoud had with the UCE was on August 23rd, 2012, when the UCE assured Mr. Daoud that this jihad had to be in his heart after Mr. Daoud was expressing doubts. On August 22nd, 2012, one day before this meeting, we understand from discovery that the FBI constructed the fake bomb that Mr. Daoud subsequently tried to detonate. That is hardly compliance with the FBI guidelines. It's directly material to the issue of predisposition, to the issue of inducement.

And before I take up any more time, we pose questions on page 4 of our reply and also -- on docket No. 69, and also on docket No. 70 at the bottom of page 4 to page 5, which is the question in response to Senate legal counsel Frankel. We submit that answering those questions go a long way in resolving these discovery issues. And submitting documents for in camera review or to cleared counsel may also be solutions that could balance the interests in this case.

THE COURT: Thank you, Mr. Herman. Response by the government. Mr. Ridgway.

MR. RIDGWAY: Thank you, Judge. I just have a few points I wanted to address. First, comments about the e-mails that were collected and provided to the defense in this case and the date range regarding those e-mails. Those were collected via a traditional FISA. And I've said that before, but that's worth saying again. And in terms of -- and this is not even limited to FISA context or search warrant context. When someone does a court order to collect information from an account, information that is stored in the e-mail account will also be retrieved pursuant to that search warrant.

So associating the timing of a particular e-mail that was collected and provided to the defense, it doesn't necessarily have any correlation with, for example, when the investigation actually commenced, if that makes sense. When there's stored -- when someone has e-mails stored in their account and there's a search warrant executed, the stored e-mail communications are also provided pursuant to that search warrant.

With regard -- there is some discussion in terms of classified materials. And, Your Honor, we had briefed the CIPA issue, and so I don't want to go too much into that except to say that there is a vehicle for handling classified information. There is classified information in this case, and we have used the CIPA in order to apprise Your Honor of that information. And so I think that's the appropriate vehicle for

handling any classified information in this case. That's the same, the same procedure that's used in any case involving classified information.

Finally, with respect to the communications with the online undercover employees and the communications with the undercover agent, obviously the defense has a different interpretation of how those communications transpired. If I could cite some points at which I would submit that the government was trying to discourage Mr. Daoud from carrying out the attack, I'm sure there would be -- there's going to be argument about that. The important point, though, is for discovery. They have all of those communications.

The online undercover employees preserved, and we disclosed all of those communications. They have all the electronic communications with the undercover agent. They have recordings of all the meetings with the undercover agent. And I'm certain that they're going to have very -- have arguments associated with that information. But for purposes of discovery it's important to keep in mind that they have those materials for them to review and to make argument. If you have no further questions, I'll just rest on my filing.

THE COURT: And furthermore, maybe you did already address it, but if you can address it again where they're speaking of the procedures. You want to save that for the CIPA, or do you want to at least make a few more comments.

MR. RIDGWAY: You mean in terms of the ex parte in camera?

THE COURT: Right.

MR. RIDGWAY: Well, they certainly will be very similar to the ones, my remarks regarding the FISA in the sense that there is a statutory regime that provides for ex parte submissions. And in this case as in any other circumstance those are what we have requested and that we have submitted information justifying that in this particular case. Apart from that in terms of the particular cases, I think those are outlined in our brief. And I believe they've actually already responded to that aspect of the CIPA issue.

THE COURT: Thank you.

MR. HERMAN: Just one brief point. Mr. Ridgway said we have all the e-mails. We have all the information. That may be true as to the communications. And we don't know if it is, but we'll take his word for it I guess. But what we're asking for in our discovery motion is -- and particularly as it pertains to these guidelines, is what information led the UCE in the meeting to say -- to talk about the sheikh. You know, to use the religious card, the iman card. How that plays into issues of predisposition.

And the government in their brief raised the Rule 16 (a) 2 issue in terms of nondisclosure of investigatory memos and reports and what not. I think we've addressed that in our

reply, but it goes without saying that Brady trumps Rule 16 (a) 2, Brady's constitutional provisions. And Brady is also important for the issue of impeachment. And if a government witness will testify as to an individual, Mr. Daoud's predisposition, it would be material to the cross-examination of that witness as to the government's calculated efforts to get around the issue of predisposition vis-a-vis ratcheting up the inducement, and in this specific factual instance playing the religious card. Thanks.

THE COURT: Thank you. Mr. Ridgway, does anyone want to -- you want to respond to the last argument --

MR. RIDGWAY: Sure, Your Honor.

THE COURT: -- versus Brady trumping --

MR. RIDGWAY: So long as I'm -- I think I understand it. And to the extent, you know, materials related to I guess playing the religious card and things --

THE COURT: The predisposition issue for purposes of their entrapment defense.

MR. RIDGWAY: And so I guess what I don't understand its discoverability under any rule in terms of -- what matters is what -- the ultimate issue is whether law enforcement persuaded or induced the defendant in this case. And what's relevant to that is what they did and said to the defendant, and that's all been disclosed.

To the extent there is Giglio information about any

of the individuals who will be testifying, we haven't yet provided all those materials. And to the extent those exist, and we obviously will do so before trial as we do in any of our cases. So if there -- if particular impeaching material, we would either bring it to Your Honor or disclose it. But there's nothing that I can think of at this point that would be responsive to that.

THE COURT: Well, the slight difference as you said as you do in any of the cases is that this wouldn't be just possibly any old Giglio material. This is material that might have another door closed because his last name isn't Smith.

MR. RIDGWAY: Well, certainly it is different in the sense that there are classified materials in this case. And because of that there could be different procedures and maybe something that has to be filed via CIPA. That said, the underlying rules still all apply in terms of Brady, Giglio, Rule 16. Our obligations are the same. The procedures for, for those -- for carrying out those obligations are a little bit different in a case involving classified material. But the underlying rights are the same for a defendant.

THE COURT: Thank you.

MR. RIDGWAY: Thank you.

THE COURT: Anything further? Have we covered all the motions that the Court is going to address? I believe I've heard argument that I need. Mr. Durkin, you want to wind up.

MR. DURKIN: Well, only in the sense that I don't understand what would be so terrible to let us participate in this. And just that little discussion right there would solve so many problems if we knew that. And that's what's wrong here. Okay. Typically I trust what a guy like Ridgway tells me. We have conversations lawyer to lawyer. And I say what really went on here. This goes on every day in every kind of case that's in front of you here. For the 40 years I've been practicing law I've relied on the integrity of the U.S. Attorney's office to tell me what really happened. And if I'm satisfied, I shut up. Sometimes I don't shut up.

But that usually -- that normal give and take doesn't exist anymore. And I can't make that point any stronger to you. It doesn't exist because I don't think they're getting the full story. It's not because they're lying to us. But what kind of answer is it to say if we decide we're going to use something, we're going to give notice? Does that mean implicit in that then that they did -- they obviously must have gotten something, but they're just not going to use it?

THE COURT: Well, also the other side is just because you're not satisfied, does that mean that there's something there?

MR. DURKIN: No, but vice versa why can't they tell us that then? What's the problem with telling us that? If they can't tell it to us lawyer to lawyer, then why can't

cleared counsel be permitted to know that?

THE COURT: Well, isn't it true, Counsel, you just said, we've told you everything. We told you what we have and what is going to be FA -- what isn't FAA and what is FISA traditional. We've given them what we have, but you say but you know what, I might believe him, but he doesn't know everything. And, therefore, we can't believe him.

MR. DURKIN: But I don't hear them saying that. What I hear them saying is we're not going to use it. And if we use it, we'll let them know. That's what I hear them saying. They're not saying it was never used. They're not saying 215 never came into play here or FAA never came into play. Senator Feinstein says it does. And then her counsel says, well, if she said that, she didn't mean to say it. Or maybe she meant to say something else.

THE COURT: And the Court's going to put Senator Feinstein's comments on the other side over here.

MR. DURKIN: But that's -- I understand. But my point is is that I don't hear them saying it wasn't used. If it wasn't used, we could all go home. There's nothing else to talk about other than the typical stuff. But that's what's happening, because we aren't part of the process. I don't know what they've told you. I don't know why cleared counsel can't see what they tell you. I don't know why we have to have a different system for the prosecution of terrorism cases in this

country. And that's what's happening.

And if it continues, if they just get to say the rules are the rules and there's nothing extraordinary about this case, if there's nothing extraordinary about this case, then there won't be anything extraordinary about very many other cases. And we can just go by the rules, the rules that the intelligence agencies have created, which keeps the adversarial process out of it.

And I don't mean to belabor it. But how could it be said that any harm could come if we were permitted to do that? And that's what I'm asking you to do. Because it would -- I'll tell you what it would do an enormously good thing for. It would give some faith to people who are losing faith in the ability of the judiciary to even control their own courtrooms in criminal prosecutions. And I don't think you want to end up with two different kinds of prosecutions going on. We're going to have secret courts and then we're going have the regular courts. And I guess we'll have everything -- everything will be fair in a mail fraud case or a bank robbery case or, you know, a postal theft case. But when it comes to terrorism, that's just too frightening.

And that's what's happening. Maybe that's too big a picture and maybe I'm Chicken Little, the sky is falling, but I don't think so.

THE COURT: Well, I think the terminology you used

earlier, fear can work both ways. When you talk about the fear of the courts, it can work both ways. It can work from your end saying that the sky is falling, or it can work from the other end.

MR. DURKIN: I understand that. But what I'm saying is is that if people lose faith in an independent judiciary to be able to provide transparency to the proceedings, then we've lost everything. And that's what's happening. Maybe it's not just this case. But it's the snowball of this case and that case. And now we're saying -- now, it's 35 years of these rules working well. Working well for the intelligence agencies maybe, but not necessarily working well for the Portland bomber.

And why should we permit that? That's all I'm asking. I'm not asking you to rule anything unconstitutional. I'm simply saying step up and simply say the time has come. This case, it would be appropriate for the adversarial process to be permitted and for cleared counsel to have access to this. That might solve everything. It might not. But it would go a long way to restoring a lot of lost faith in this country. Thank you.

THE COURT: Well, this Court doesn't know if its ruling will be that grandiose, Mr. Durkin, but the Court keeps in mind your argument. Thank you.

MR. DURKIN: I'm suggesting it is.

THE COURT: The Court will take a look at it and see first in the context of this particular defendant and his rights. All right. Thank you.

The Court -- before we conclude here, there is in addition to the -- setting a date for the CIPA motions or response from the defendant, on docket No. 70, which has been addressed here somewhat, the government never filed a response to defendant's motion. Do you want to stand on your -- unless I'm mistaken.

MR. RIDGWAY: Your Honor, I believe that's in reference to the FAA if I'm correct.

THE COURT: Yes.

MR. RIDGWAY: In which case we would ask to rest on our -- the surreply we've submitted. I think we've submitted enough on the FAA.

THE COURT: The Court thought so. But since I wanted to make sure the record was clear. And do you wish to stand on that as being your response, is that correct?

MR. RIDGWAY: Correct.

THE COURT: All right. And as to CIPA, how long did you want to respond? Two weeks, three weeks.

MR. DURKIN: I'm sorry?

THE COURT: How long do you want to respond?

MR. DURKIN: I heard numbers --

THE COURT: Two weeks, three weeks.

MR. DURKIN: Could I beg you for four only because Mr. Herman and I are starting a trial in that NATO 3 case on Monday in the state court. And as you know --

THE COURT: Sure. I can give you four. I'm just looking at also our time on the other end.

MR. DURKIN: Will that screw things up if we took four?

MR. RIDGWAY: I don't believe so. I don't know that a reply would be necessary. So I think with that we would be able to -- and I guess we could -- I'll look at the response before I think a reply is necessary. But I'd like to try to expedite that.

THE COURT: Well, since we're not -- since we aren't sure whether or not you'll need a reply and the arguments are pretty well known here, why don't we do the four weeks that you need.

MR. DURKIN: Thank you.

THE COURT: But then we'll have -- just put in a built-in seven days for the reply.

MR. DURKIN: And the other problem, are you aware that Miss Roberts broke her hip and --

THE COURT: Yes. And how is she?

MR. DURKIN: She's okay. She had blood clots in her lungs which have been --

THE COURT: That's what you were dealing with?

MR. DURKIN: -- naturally complicated. Yes, so we're -- our three man firm is somewhat handicapped.

THE COURT: I was going to say I trust you're playing appropriate nurse maid.

MR. DURKIN: You know, believe it or not I'm better than I thought.

THE COURT: Yes. All right. Well, good.

MR. DURKIN: But I don't like it, I'll tell you that.

THE COURT: I'm sure she doesn't either.

MR. DURKIN: Thank you.

THE COURT: All right. Thank you very much. And we will set -- do we have a status date set, Mrs. Hunt?

MR. RIDGWAY: I don't believe we do, Your Honor.

THE COURT: We do not.

MR. RIDGWAY: It may make sense to have one.

THE COURT: All right. So we have four weeks from today will be the date for the response to the CIPA motions.

MR. DURKIN: Right.

THE CLERK: That's January 31st.

THE COURT: Seven days thereafter for the reply.

THE CLERK: February 11th.

THE COURT: And so --

MR. RIDGWAY: And just so I'm clear, actually just -- sorry. In terms of the CIPA I understand that their responses, in fact, will be ex parte. So I don't think there will be a

need for a reply.

THE COURT: There won't be a reply.

MR. RIDGWAY: There will not be a reply.

THE COURT: Right.

MR. RIDGWAY: It will just be --

THE COURT: So why don't we just do this, I'm looking at -- I'll be on trial. How about Thursday, February 6th status date.

MR. DURKIN: That should be fine.

MR. RIDGWAY: That's fine, Your Honor.

THE COURT: Or we can set it on -- how is February 5th? That's our normal --

MR. DURKIN: Either one works, Judge.

THE COURT: That's our normal status date. Mrs. Hunt, does that look fine?

THE CLERK: Yes.

MR. DURKIN: Judge.

THE COURT: Yes.

MR. DURKIN: The 6th would be better only because of this, it's possible I could be on trial in Indiana in the Northern District, but I don't think so. But Mr. Herman has a problem on the 5th. He could be here on the 6th if I can't.

THE COURT: All right. Then we'll do 9:45 on the 6th for status.

MR. DURKIN: Thank you, Judge.

THE COURT: All right. Is there anything else, government, that I need to address today that you can think of?

MR. RIDGWAY: I don't believe so, Your Honor.

THE COURT: All right. And what about you, Mr. Durkin, for Mr. Daoud? All right. Everything okay, Mr. Daoud?

MR. DURKIN: He says he's okay.

THE COURT: All right. Good. All right. Thank you very much for your submissions, Counsel.

MR. DURKIN: Thanks, Judge.

MR. RIDGWAY: Thank you, Judge.

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/TRACEY D. McCULLOUGH *February 10, 2014*

Official Court Reporter Date
United States District Court
Northern District of Illinois
Eastern Division