UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-60298-CR-SCOLA/O'SULLIVAN

UNITED STATES OF AMERICA

v.

RAEES ALAM QAZI
and SHEHERYAR ALAM QAZI,

Defendants.
_____/

GOVERNMENT'S MOTION FOR RECONSIDERATION
OF THE COURT'S MARCH 28, 2014, ORDER

The United States of America, by and through the undersigned Assistant United States Attorneys and Department of Justice Trial Attorney, hereby moves for reconsideration of the court's March 28, 2014, Order, requiring the government to file a substantive memorandum of law addressing the constitutionality of the FISA Amendments Act of 2008 (hereafter referred to as "FAA").[1] In support of its Motion, the United States respectfully states the following:

[1] This Motion for Reconsideration is submitted in response to defendant Sheheryar Alam Qazi's effort to challenge the constitutionality of FAA. The government will file on or before May 12, 2014 its substantive memorandum addressing the issues raised by Raees Alam Qazi in recently joining Sheheryar's challenge.

The court has the authority to reconsider its March 28th interlocutory Order. *See, e.g., Toole v. Baxter Healthcare Corp.,* 235 F.3d 1307, 1315 (11th Cir.2000) ("In this case, the court's order for a new trial was an interlocutory order, and therefore the trial court had the power to revoke it and reinstate the judgment."); *Hardin v. Hayes,* 52 F.3d 934, 938 (11th Cir.1995) (district court may reconsider and amend interlocutory orders at any time before final judgment). And if this decision were reviewed on appeal, the appellate court would review a district court's reversal of its own interlocutory order for abuse of discretion. *See, e.g., Lanier Const., Inc. v. Carbone Props. of Mobile, LLC,* 253 Fed.Appx. 861, 863 (11th Cir.2007) ("[T]the district court's denial of [the plaintiff's] motion for leave to amend the complaint was simply an interlocutory

On May 28, 2013, defendant Sheheryar Alam Qazi (hereinafter "Movant") filed a motion challenging the constitutionality of the FAA as a violation of the First and Fourth Amendments as well as Article III of the Constitution. (DE 96). On July 30, 2013, the government filed its Opposition to the Motion, advising the Court that the government does not intend to use any information obtained or derived from FAA-authorized surveillance as to which defendant Movant is an aggrieved person. (DE 130). The government argued that any decision by this Court regarding the constitutionality of the FAA would not affect any substantive right of Movant in this case, and would therefore constitute an impermissible advisory opinion. (Government's Opposition at 2).

Section 1806 of Title 50, United States Code, provides the sole statutory mechanism for suppression of FAA-collected evidence at a subsequent trial.[2] That statute provides, in relevant part, that "[a]ny person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person[3] is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing or other proceeding . . . may move to suppress..." 50 U.S.C. §§ 1806(e) and 1881e(a); see also 50 U.S.C. § 1825(f) (identical provision regarding evidence obtained or derived from FISA physical search). Thus, in order for a defendant to move

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decision ... which the district court had ample discretion to reconsider."); *Sanchez v. Triple–S Mgmt., Corp.*, 492 F.3d 1, 12 n. 12 (1st Cir.2007) ("[A]bsent a particularly egregious abuse of discretion, district courts are free to reconsider their interlocutory orders.") (internal quotation omitted).

[2] 50 U.S.C. § 1881e(a) provides that information collected under Section 702 of the FAA "shall be deemed to be information acquired from an electronic surveillance pursuant to" Section 1806.

[3] Congress defined an aggrieved person as "a person who is the target of electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

to suppress FISA or FAA-obtained or derived evidence, the defendant must be: (1) "a person against whom evidence obtained or derived from" (2) "an electronic surveillance" [or physical search] (3) "to which he is an aggrieved person" (4) "is to be, or has been, introduced or otherwise used or disclosed" (5) in a "trial, hearing or other proceeding." 50 U.S.C. §§ 1806(c), 1881e(a); see also 50 U.S.C. § 1825(d). Because the government has not and does not intend to use or disclose against the Movant in this case any evidence obtained or derived from FAA-authorized surveillance as to which Movant is an aggrieved person, Movant cannot seek suppression of any such evidence under 50 U.S.C. § 1806(c); thus, he cannot challenge the constitutionality of the FAA.[4]

An analysis of Movant's Article III standing to challenge the constitutionality of the FAA compels the same conclusion. As the government stated in its initial Response to the Motion to Declare the FAA Unconstitutional, a judicial ruling that purports to resolve a legal question that would not "impact [the movant's] substantive rights" and, therefore, constitutes an "impermissible advisory opinion" is prohibited by Article III. *Jacksonville Prop. Rights Ass'n. v. City of Jacksonville*, 635 F.3d 1266, 1276 (11th Cir. 2011). In the words of the Supreme Court:

> Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101-02 (1998). As standing is the

[4] We are also filing a Classified Ex Parte Supplemental Brief contemporaneously with the Motion for Reconsideration in order to provide the Court with additional information.

sine qua non for justiciability, *see Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), a "plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp., v. Cuno*, 547 U.S. 332, 352, *rehearing denied,* 548 U.S. 920 (2006); *see also American Civil Liberties Union v. Nat'l Sec'y Agency*, 493 F.3d 644, 652 (6th Cir. 2007). In order to satisfy the standing requirement, a plaintiff must demonstrate that he or she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,. . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) (citations omitted). As for the first requirement, "actual or threatened injury," a plaintiff must assert an "injury in fact -- a harm suffered by the plaintiff that is" both "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical'." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. at 103. Should the plaintiff specifically allege an injury, the plaintiff must next allege causation, which is "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* (citation omitted). Finally, the plaintiff must show that the injury caused by the conduct is redressable, defined as "a likelihood that the requested relief will redress the alleged injury." *Id.* (citations omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Id.* at 107. If the plaintiff is unable to allege these three elements, then the plaintiff has no standing, and the court has no jurisdiction to entertain the matter.

In *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), the Supreme Court addressed the threshold question of whether the plaintiffs had standing to challenge the constitutionality of the FAA. Noting that the "standing inquiry has been especially rigorous

when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," the Court reiterated the long-held three-prong test for standing: "[T]o establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 [internal citations omitted]. The Court found that the plaintiffs failed to demonstrate a future injury was certainly impending and failed to establish that any sort of future injury was fairly traceable to the FAA, and held that the plaintiffs did not have standing to challenge the FAA's constitutionality. *Id.* at 1150. Without a showing of standing, the Court had no jurisdiction over the matter under Article III, and did not address the challenge to the statute on the merits.

The same result is compelled here. As reaching the merits of the dispute would force this Court to decide the constitutionality of the FAA, this Court must first make an "especially rigorous" inquiry into the movant's standing to challenge the FAA. *See Amnesty Int'l.* at 1147. Because the government has not and does not intend to use or disclose in trial any evidence obtained or derived from FAA-authorized surveillance as to which Movant is an aggrieved person, Movant cannot demonstrate any sort of concrete, particularized and actual or imminent injury, much less an injury "fairly traceable" to the FAA. Movant also cannot possibly demonstrate that any resolution of the constitutionality of the FAA would redress any injury.

As stated previously, the government intends to file, on or before May 12, 2014, a response explaining why Raees Qazi also has no standing to challenge the constitutionality of the FAA. The government respectfully urges this Court to quash or hold in abeyance its requirement

in its March 28, 2014, Order and April 11, 2014, Order that the government submit a substantive memorandum of law on the merits of the constitutional argument until after the Court can review the response relating to Raees Qazi's lack of standing. The government would urge the Court to issue such a ruling before the May 12, 2014, deadline imposed by the Court for filing the substantive memorandum of law on the merits of the constitutional argument. If, after reviewing the government's response relating to Raees Qazi and the instant submission, the Court still requires briefing on the merits of the constitutionality argument, the government respectfully requests that the Court set a new response date for the filing of that brief.

Pursuant to Local Rule 88.9, the undersigned have consulted with counsel for Movant, Ronald Chapman, Esq., who has advised that he has an objection to the government's request for reconsideration.

CONCLUSION

WHEREFORE, the United States respectfully requests that the Court grant the Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. Pursuant to operation of the CM/ECF system.

/s/ *Karen E. Gilbert*
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