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

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

MOTION FOR DISCOVERY IN SUPPORT OF DEFENDANT'S PREVIOUSLY FILED MOTION FOR NOTICE OF FISA AMENDMENTS ACT EVIDENCE PURSUANT TO 50 U.S.C. §§ 1881e(a), 1806(c) (Dkt. #42)

Defendant, **ADEL DAOUD**, by and through his attorneys, **THOMAS ANTHONY DURKIN**, **JANIS D. ROBERTS**, and **JOSHUA G. HERMAN**, pursuant to 50 U.S.C. §§ 1881e(a) and 1806(c), Rule 16(a)(1)(E)(i) & (ii), the Search and Seizure, Due Process, and Effective Assistance of Counsel provisions of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States, as well as the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), respectfully moves this Court to order the government to disclose any and all information supplied by Executive Branch law enforcement or intelligence agencies to the United States Senate Select Committee on Intelligence ("SSCI") regarding the use or results of any and all electronic surveillance, eavesdropping, recording, storage, or other means of gathering or collecting Defendant's oral, written, or electronic communications.

In support of this motion, Defendant, through counsel, shows to the Court the following:

1. On May 22, 2013, counsel filed a pleading captioned, "Defendant's Motion for Notice of FISA Amendments Act Evidence Pursuant to 50 U.S.C. §§ 1881e(a), 1806(c)." (Dkt. #42). The motion requested that the government provide notice of: "(1) whether the electronic surveillance described in its FISA Notice was conducted pursuant to the pre-2008 provisions of

the Foreign Intelligence Surveillance Act ("FISA") or, instead, the FISA Amendments Act ("FAA"); and, (2) whether the affidavit and other evidence offered in support of any FISA order relied on information obtained or derived from an FAA surveillance order." The motion was premised in part on Senate floor comments by Senator Diane Feinstein (D-CA) on December 27, 2012, which specifically referenced this case and suggested that the FAA was instrumental in foiling the alleged terrorist plot. (Dkt. #42, ¶4).

2. In its August 8, 2013, Sur-Reply to Defendant's Motion, the prosecutors acknowledged that they would have to provide notice to the defense and the Court if, as they wrote, they "intended to use in this case any information obtained or derived from surveillance authorized under [the FAA] as to which the defendant is an aggrieved person." (Dkt. #49, pp. 1-2). The prosecutors further asserted that no notice was provided in this case because the government "does not intend to use any such evidence obtained or derived from FAA-authorized surveillance in the course of this prosecution." (*Id*., p. 2).

3. In light of the obvious tension between Senator Feinstein's public comments regarding the use of the FAA and the prosecutors' position in their pleading that no notice of the use of the FAA was required, undersigned counsel wrote a letter to Eric Losick and Jack Livingston, Counsel for the SSCI, Majority and Minority, respectively, on August 20, 2013, and requested "any and all 'assessments, reports, and other information obtained by the Intelligence Committee' to which Senator Feinstein referred in sharing her comments with the Senate, insofar as these documents pertain to the implementation of the FAA surveillance with respect to Mr. Daoud's case." A copy of this letter is attached hereto as Exhibit A.

4. On September 16, 2013, Morgan J. Frankel, Counsel for the Office of Senate Legal Counsel, responded on behalf of the SSCI to counsel's letter. A copy of Senate Legal

Counsel's letter is attached hereto as Exhibit B. In this letter, Senate Legal Counsel declines to comply with counsel's request for production based primarily on the invocation of the legislative privilege under the Speech or Debate Clause, Article I, section 6, clause 1, of the United States Constitution.[1]

5. After invoking this legislative privilege, Senate Legal Counsel proceeds to state, nevertheless, that: "[w]ithout waiving Senator Feinstein's or the Intelligence Committee's legislative privilege, [he] would like to provide some clarification that may help explain a misunderstanding of the Chairman's remarks on which your documentary request is predicated." (Ex. B, p. 2) Senate Legal Counsel then goes on to relate—curiously one might add—that "*[n]otwithstanding that she was speaking in support of reauthorization of Title VII of the Foreign Intelligence Surveillance Act, Senator Feinstein did not state, and did not mean to state, that FAA surveillance was used in any or all of the nine cases she enumerated, including Mr. Daoud's case, in which terrorist plots had been stopped.*" (*Id.*) (emphasis added).

6. Rather, Senate Legal Counsel adds, "the nine cases the Chairman summarized were drawn from a list of 100 arrests arising out of foiled terrorism plots in the United States between 2009 and 2012 compiled by committee staff *from FBI press releases and other public sources.*" (Ex. B, p. 2). Senate Legal Counsel identifies the list compiled by the Committee staff was entitled, "Terrorist Arrests and Plots Stopped in the United States 2009-2012," and indicates that a slightly earlier version of this document is available on the SSCI's website. (*Id.*, pp. 2-3,

[1] The filing of this motion for discovery, as counsel for the SSCI suggests, is done out of courtesy and respect for the SSCI, and should not be construed as a concession or agreement with its counsel's legislative privilege analysis, and undersigned counsel would expressly reserve the right to challenge the SSCI's position, if necessary. Indeed, and notwithstanding the SSCI's disclaimer regarding the preservation of Senator Feinstein or the Committee's privileges, counsel's gratuitous attempts at explaining or clarifying the Chairman's remarks in question, could very well be construed as a waiver of the privilege should it later become necessary to litigate a subpoena for documents and/or testimony.

footnote 1) (emphasis in original). Senate Legal Counsel further notes that, in contrast to this public source information, "any information that the Committee may have received about use of FAA authorities would be classified and would have been provided to the Committee by the Executive Branch, from which it can be sought directly." (*Id.*, p. 3, footnote 3).

7. Remarkably, Senate Legal Counsel then goes on to make further representations on Senator Feinstein's behalf in an ostensible attempt to summarize. Only a complete quote will do justice to the purported summary or explanation:

> To summarize, nothing in Senator Feinstein's remarks was intended to convey any view that FAA authorities were used or were not used in Mr. Daoud's case or in any of the other cases specifically named. *Rather, her purpose in reviewing several recent terrorism arrests was to refute the "view by some that this country no longer needs to fear attack."* *Id*. Thus, because Senator Feinstein was neither relying on, nor attempting to convey, any information about the use or non-use of FAA authorities in any of the nine cases, there are no "assessments, reports, and other information" in the Committee's possession to which Senator Feinstein referred in her comments, pertaining to FAA surveillance with respect to Mr. Daoud's case. *Id.*[2] (emphasis added).

8. Senate Legal Counsel concludes the letter by asserting that the SSCI is "not prepared to initiate a general search of its oversight files to ascertain whether or not any documents exist in its files that may shed light on the type of surveillance authorized in Mr. Daoud's case." (*Id*., p. 4). Instead, Senate Legal Counsel suggests that Mr. Daoud should seek production from the Executive Branch. This too is worth quoting in full: "Any such evidence that may be within the possession of the Committee would derive entirely from information

[2] This representation is rather remarkable on several levels. First, it is hard to believe that Chairman Feinstein, one of the most experienced and respected Senators in Congress, would advocate for the reauthorization of the FAA without actually "relying on" or "attempting to convey" information about the use or non-use of the FAA itself which was then under consideration. Equally remarkable, if Mr. Frankel is correct on this point, is that the mere use of nine random "ripped from the headlines" (or more precisely, "ripped from FBI press releases") terrorism arrests to justify the reauthorization of a statute that Edward Snowden's disclosures have revealed to the world as massive, overreaching, and often abused surveillance programs is a poignant illustration of the use politics of fear.

supplied by the Executive Branch, from which Mr. Daoud can directly seek production to the extent provided by federal law and the rules of criminal procedure." (Ex. B, p. 4).

9. Counsel for Mr. Daoud, therefore, do just that. Rather than engage the Court at this time in the complex legislative privilege issues raised by Senate Legal Counsel, undersigned counsel would formally request that the prosecutors seek authorization from whomever they must to obtain approval from the Executive Branch and its intelligence agencies to produce the materials that Senate Legal Counsel states are in its possession. Counsel defer to the Court to fashion a means by which the prosecutors can produce these materials should some or all of the materials be classified. In that undersigned counsel all possess security clearances, this should not be a significant hurdle in light of the constitutional issues involved.

10. As counsel have previously noted, these materials "are essential to a full and fair exposition and resolution of the significant statutory and constitutional issues of first impression presented by this motion." (Dkt. #65, ¶ 4). (Motion to Vacate The Denial of His Motion for Notice of FISA Amendments Act (FAA) Evidence Pursuant to 50 U.S.C. §§1881e(a), 1806(c); and For Leave to File a Response to the Government's Sur-Reply to Defendant's Motion for Notice of FAA Evidence). As such, it is likewise submitted that these documents are discoverable under Rule 16(a)(1)(E)(i) & (ii), as well as *Brady*, *supra*.[3]

11. At the risk of stating the obvious, had the FAA not been used whatsoever in the investigation of Defendant, one would think that the Office of Senate Legal Counsel, the SSCI, Senator Feinstein, the NSA, the FBI, the Justice Department, or the U.S. Attorney's Office could just simply say so. That "clarification" would have been far more helpful than any provided by Senate Legal Counsel or the opaque responses by the prosecutors to date. Again, undersigned

[3] In addition to providing a basis for suppression of the fruits of the poisonous tree, the existence of FAA surveillance and its fruits most certainly could lead to the discovery of potentially exculpatory material.

counsel would suggest that the semantic and procedural battle being waged here only further demonstrates the lengths by which the Executive Branch, or more correctly its intelligence agencies, wish to avoid constitutional review of the FAA.

Respectfully submitted,

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/s/Janis D. Roberts
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CERTIFICATE OF SERVICE

Thomas Anthony Durkin, Attorney at Law, hereby certifies that the foregoing Motion for Discovery in Support of Defendant's Previously Filed Motion for Notice of FISA Amendments Act Evidence Pursuant to 50 U.S.C. §§ 1881e(a), 1806(c) (Dkt. #42), was served on September 18, 2013, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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