UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 05-20943-Cr-Moore

UNITED STATES OF AMERICA,

Plaintiff

v.

CARLOS ALVAREZ and ELSA ALVAREZ,

Defendants

_____/

DEFENDANTS' MOTION FOR DISCLOSURE OF FOREIGN INTELLIGENCE SURVEILLANCE ACT APPLICATIONS, ORDERS, AND RELATED DOCUMENTS AND INCORPORATED MEMORANDUM OF LAW

Defendants, Carlos Alvarez and Elsa Alvarez, by counsel, move, pursuant to 50 U.S.C. § 1806 (f) and (g) and the Due Process Clause of the Fifth Amendment, for disclosure of the applications, extensions, Orders and related documents underlying electronic surveillance and recording of them under the Foreign Intelligence Surveillance Act, 50 USC § 1801 *et seq.* ("FISA"). The requested material is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806 (f).

MEMORANDUM OF LAW

On February 21, 2006, the defendants were first informed that they had been targets of FISA surveillance. Their telephone calls were recorded, and the government planted a bug in their bedroom to record their private conversations. On March 6, 2006, the government produced summaries of allegedly "pertinent" recorded conversations produced by that surveillance starting in December 2001 and ending July 4, 2005, although the government states

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that the eavesdropping began earlier and continued until the Defendants' arrest on January 6, 2006. Upon learning of the wiretaps, the defendants immediately requested, in writing, the production of the documents filed with the FISA Court in order to be able to prepare their motions to suppress. The government, in a letter dated March 7, 2006, responded that

> The government will not be producing FISA applications , material submitted in support of such applications, and FISA court orders. These materials remain classified and are not discoverable. Moreover, assuming that a formal motion to order production of such material is made to the United States District Court, the government will file appropriate materials in support of this position, including the [required] Attorney General affidavit. . . ."

Letter to counsel from Brian Frazier, dated March 7, 2006.

The statutory FISA scheme, as it appears to apply to defendants, who are not alleged to be foreign powers or terrorists or saboteurs, requires the Government to apply to the FISA Court to obtain a warrant before conducting clandestine foreign intelligence surveillance.

Each application to the FISA court must first be personally approved by the Attorney General. *See* 50 U.S.C. § 1804(a). The application must contain, among other things, a statement of reasons to believe that the target of the surveillance is a foreign power or agent of a foreign power, specified information on the implementation of the surveillance, and a "certification" from a high-ranking executive branch official stating that the official "deems the information sought to be foreign intelligence information," and that the information sought cannot "reasonably be obtained by normal investigative techniques." 50 U.S.C. §1804(a)(7). Where, as here, the targets of the surveillance are "United States persons," the FISA court may issue an order authorizing the surveillance only if the FISA judge concludes that there is "probable cause to believe that the target of the surveillance is a foreign power or agent of a

foreign power, that proposed 'minimization procedures' are sufficient under the terms of the statute, that the certifications required by § 1804 have been made, and ... that the certifications are not 'clearly erroneous.'" *United States v. Pelton,* 835 F.2d 1067, 1075 (4th Cir. 1987) (*citing* 50 U.S.C. § 1805(a) (findings necessary to support the issuance of an order authorizing surveillance)).

An "agent of a foreign power" includes any person who knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States. 50 U.S.C. § 1801(b)(2). However, **no United States citizen "may be considered an agent of a foreign power solely upon the basis of activities that are protected by the first amendment to the Constitution of the United States . . . ."** 50 U.S.C. § 1805(a)(3)(A). (emphasis supplied)

The government must specify the minimization procedures that it will follow in conducting the surveillance 50 U.S.C. § 1804(a)(5) to protect the privacy of those overheard and must specify those procedures for every device that will be used for the surveillance. 50 U.S.C. § 1804(a)(11).

An application for surveillance targeted against an alleged foreign agent authorizes monitoring for 120 days or until the purpose of the eavesdropping is fulfilled, whichever is less. 50 U.S.C. § 1805(e). Extensions may be granted for up to one year upon application "in the same manner as" the original application. 50 U.S.C. § 1805(e)(2). Thus, there must be a number of applications in this case, each with the same requirements.

The statutory scheme permits defendants to move to suppress FISA wiretaps on grounds that "(1) the information was unlawfully acquired; or (2) the surveillance was not made in

conformity with an order of authorization or approval." 50 U.S.C.A.§ 1806(e).

In order to effectively litigate their suppression motions, defendants seek disclosure of the materials which will reveal whether the government complied with its procedural and substantive requirements. FISA contemplates such requests. Thus, while Section 1806(f) provides that, if the Attorney General files an affidavit that "disclosure or an adversary hearing would harm the national security of the United States," the court deciding the motion is to consider the application and order for electronic surveillance *in camera* to determine whether the surveillance was lawfully conducted, the statute adds, that the court "may make disclosure to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other material relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* Section 1806(g) states that "due process" may require "discovery or disclosure."

According to the legislative history of FISA, disclosure may be "necessary" under § 1806(f), "where the court's initial review of the application, order, and fruits of the surveillance indicates that the question of legality may be complicated by factors such as 'indications of possible misinterpretation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order.'" *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) (*quoting* S. Rep. No. 95-701, 95th Cong., 2d Sess. 64 (1978)).

In this case, all three of these factors appear to come into play based upon the limited information the defendants currently have. First, throughout the pleadings in this case, the two

defendants have been treated as a unit. But for each of them to be a target of this surveillance there must have been probable cause for each of them in his or her own right. The applications must be evaluated to determine whether probable cause for each defendant is set out.

Second, there is an overabundance of nonforeign intelligence information. The government has informed defendants that there are "thousands" of non-pertinent conversations. They have produced about 200 supposedly pertinent conversations. A review of these supposedly pertinent conversations shows that the majority deal only with mundane activities of daily life. There are several conversations about what the family will have for dinner. A number deal with the tenting of the house for termites. Many deal with meetings at the church. There is certainly reason to question compliance with minimization standards.

And, third, there is a firm foundation for a belief that there are more than just "indications of possible misinterpretation of facts." The material that has been turned over to the defendants in this case, when it has dealt with issues relating to Cuba, has been solely material from the heartland of the First Amendment: issues of cultural and political beliefs. The conversations consist of Dr. Alvarez's opinions and beliefs on a variety of political and social issues confronting the Cuban American community, of which he was a part, and communications relating to his professional involvement and associations with programs dealing with Cuba.[1]

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[1] This section focuses on Dr. Carlos Alvarez and not on Elsa Alvarez because the first amendment issues are so clear given both his field of study and the contents of the summaries of conversations that have been produced. Elsa Alvarez participates minimally in the recordings. Of course, she has her own first amendment rights and privileges.

As noted above, as the Alvarezes are U.S. citizens, probable cause for the FISA surveillance may not be based upon first amendment activities. 50 U.S.C. § 1805(a)(3)(A). Given Dr. Alvarez's academic fields of interest and summaries of conversations that have been produced to date, this is a serious concern in this case.

Doctor Carlos Alvarez was born in Cuba. He has been an American citizen since 1970. He holds a doctorate in psychology and is a tenured Associate Professor at FIU, where he has been teaching for over 30 years. His academic career has centered on two areas: conflict resolution and cultural identity focusing on the Cuban and Cuban American experience. He has published a book, authored articles, lectured frequently, and taught numerous courses on these topics. As a result, in 1978, Dr. Alvarez was one of the first Cuban Americans allowed to travel to Cuba to participate in the second of two historic exchanges referred to as "The Dialogue." As a consequence of these meetings, numerous Cuban political prisoners were released and travel restrictions for family members were significantly eased.

As a result of his work and experience in this area, Dr. Alvarez became a well known advocate for dialogue between Cuba and the United States. Indeed, in light of the intransigence of both governments, he believed further that for dialogue to occur among the governments, it must first occur between the people of both countries. Consequently, Dr. Alvarez was frequently invited to participate and did participate as a facilitator in numerous workshops in which Cuban professionals would engage in a dialogue with their Cuban American counterparts about their respective experiences. These workshops occurred in academic environments in Cuba and the United States under the full auspices of both governments. Frequently, and not surprisingly, these workshops were sponsored by academic groups or organizations promoting and advocating

for increased dialogue and interaction between the people and governments of the United States and Cuba.

All of the evidence of communications produced so far by the government between Dr. Alvarez and alleged members of the Cuban government represented his personal opinions, beliefs and observations of well known and public matters and were in furtherance of his well-known advocacy on behalf of increased dialogue and interaction between the people of both countries. None of the information involved classified, confidential or secret data. It appears that his professional activities and expressions of opinion protected by the first amendment were misinterpreted.

Moreover, without the benefit of context, it may be impossible for the Court to know when references in the FISA applications are actually protected first amendment activities. A review of the summaries of the recorded conversations that have been provided shows the need for the defendants to be able to illuminate the full context of communications in the first amendment realm. As an example, over forty of the "pertinent" recordings are telephone conversations between Dr. Alvarez and a colleague with whom he worked on sanctioned legal licensed cultural exchange programs between the United States and Cuba. In these conversations, they plan the workshops and, along the way, discuss the politics of both Cuba and the United States. In two recordings, Dr. Alvarez orders books from Barnes & Noble. In several, he discusses U. S. politics. If so many of these conversations deal with first amendment protected conduct, it is likely that probable cause was founded on the same sort of protected discussions and based on a misunderstanding of the activities he was undertaking.

The difficulty for the Court in determining what in this case is protected first amendment

activity is highlighted by the discussions about the cultural exchange workshops. Without knowing that these workshops were wholly legal activities, the Court might believe that those discussions dealt with some illegality not deserving of first amendment protection. Similarly, there may be wholly innocent events used to found probable cause for the FISA taps that could be explained if the defendants had access to them.

This, of course, is why we have an adversary system. The Court will be handicapped in its evaluation of the first amendment implications in this matter, to the detriment of the Alvarezes, if it must proceed without the benefit of their review and response to the underlying allegations of illegal conduct presumably articulated in the applications and other materials. The mere fact that the Attorney General files an affidavit should not automatically foreclose disclosure of the FISA materials. In deciding whether or not to continue to conceal these materials from the Alvarezes and their counsel, great deference must be given to the universal and fundamental reluctance of the courts to proceed ex parte in any matter where significant individual rights are at stake.

In an adversary system, the parties provide information to the Court that the court does not otherwise have access to. The use of *ex parte* procedures to decide the merits of FISA issues represents an extraordinary departure from the normal judicial process in this country. The Supreme Court in the seminal case of *Jencks v. United States*, 353 U.S. 657, 669 (1957), disapproved the practice of providing government documents to the trial judge for his determination of relevancy and materiality without input from defense counsel, stating,

> The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense without hearing defense argument, **after inspection**, as to its bearing upon the case.

(emphasis supplied). The District of Columbia Circuit has declared that "[o]nly in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd* by an equally divided Court, 484 U.S. 1 (1987). Courts enforce this principle because "[i]t is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions." *Id.* at 1060-61 (citation omitted). *See also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) ("Democracies die behind closed doors.").

Courts generally bar the use of secret evidence and ex parte proceedings outside the FISA context because of the grave risk of error that such procedures entail. The Supreme Court has declared that "'[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)). As the Ninth Circuit observed in a secret evidence case, "'[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations.'. . . [T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because

of the risk of error." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (quoting district court). *See also id.* at 1070 (noting the "enormous risk of error" in the use of secret evidence).

Two Fourth Amendment decisions from the Supreme Court highlight the importance of adversarial proceedings. In *Alderman v. United States*, 394 U.S. 165 (1969), the Court addressed the procedures to be followed in determining whether government eavesdropping in violation of the Fourth Amendment contributed to its case against the defendants. The Court rejected the government's suggestion that the district court make that determination *ex parte* and *in camera*. The Court observed that

> [a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.

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

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

Id. at 184. Similarly, in *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held that a defendant must be permitted to attack the veracity of the affidavit underlying a search warrant, upon a preliminary showing of an intentional or reckless material falsehood. The Court rested its decision in significant part on the *ex parte* nature of the procedure for issuing a search warrant and the value of adversarial proceedings:

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

Id. at 169.

Depriving these defendants of the opportunity to litigate fully their challenge to the legality of the FISA warrants issued against them, denying them access to the applications and other materials, and, thus, denying them the opportunity to obtain an individualized determination of the lawfulness of the surveillance conducted of their telephone conversations and in their bedroom is a violation of the Due Process clause of the Fifth Amendment.

Procedural due process requires a balancing of the individual's interest, the state's interest, and the probability that further procedural safeguards will reduce the risk of error in judicial decision making. *Mathews v. Eldridge,* 424 U.S. 329, 334-35 (1976) (addressing the termination of social security disability benefits).

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (citations omitted). *See also Zavala v. Ridge,* 310 F. Supp. 2d 1071 (N.D. Cal. 2004)

(reasoning that automatic stays, which override an Immigration Judge's decision to release an alien on bond, are unconstitutional because the liberty interest "is of the highest constitutional import," the Government has not shown "an identified and articulable threat," and overruling an Immigration Judge's decision "poses a serious risk of error"); *Ashley v. Ridge,* 288 F. Supp. 2d 662, 669-71 (D.N.J. 2003) (finding detention of aliens during immigration proceedings without an individualized determination of flight risk or dangerousness violates procedural due process because the alien's interest in being free from detention is "without question, a weighty one," the government has proven no interest in keeping each particular alien detained, and the risk of error in unilateral determinations is great).

Thus, due process in this context requires sufficient disclosure to the defendants to permit them to litigate effectively. A blanket prohibition of disclosure of these materials is a violation of the principles and factors set out in *Matthews v. Eldridge.* The determination by the Supreme Court that *ex parte* proceedings result in a high risk of error is set forth above. There can be no doubt that the courts have found a substantial weighty constitutional interest in making sure that electronic surveillance is appropriately authorized.[2] The government can protect its interest by tailored redactions of the material to be shared with defense counsel and by appropriate protective orders.

Finally, in addition to the factors discussed above, the Alvarezes object to the usurpation of judicial authority that will occur if the Attorney General can foreclose review of FISA

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[2] "By its very nature eavesdropping involves an intrusion on privacy that is broad in scope," and its "indiscriminate use . . . in law enforcement raises grave constitutional questions." *Berger v. New York,* 388 U.S. 41, 56 (1967) (quotation and citation omitted). "Few threats to liberty exist which are greater than those posed by the use of eavesdropping devices." *Id.* at 63.

applications, orders, and other materials by invoking the broad banner of "national security," especially in a case where it is conceded that there was no threat to national security.

As the Supreme Court has explained:

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65 (1963) (footnote and citations omitted). FISA cannot provide the government the authority to deny an individual due process by merely invoking national security concerns, where, as here, there is no basis. That would certainly elevate form over substance.

For all the above reasons, the defendants move for the production of the FISA application(s) and related materials so that they can fully litigate this case.

DATED: March 22, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 22nd day of March, 2006 on:

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s/ Jane W. Moscowitz