IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10560

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,
Defendants – Appellants

Consolidated with No. 08-10664

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

SHUKRI ABU BAKER; MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; MUFID ABDULQADER; ABULRAHMAN ODEH,
Defendants – Appellants

Consolidated with No. 08-10774

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

MOHAMMAD EL-MEZAIN,
Defendant – Appellant

Consolidated with No. 10-10590

UNITED STATES OF AMERICA,
Plaintiff – Appellee – Cross-Appellant

v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,

Defendant – Appellant – Cross-Appellee

Consolidated with No. 10-10586

UNITED STATES OF AMERICA,
Plaintiff

v.

SHUKRI ABU BAKER,
Defendant
NANCY HOLLANDER,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
HONORABLE JORGE SOLIS, DISTRICT JUDGE
No. 3:04-CR-240-2

NOTICE OF FILING AND CERTIFICATE OF SERVICE

NANCY HOLLANDER
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ATTORNEYS FOR DEFENDANT-
APPELLANT, SHUKRI ABU BAKER

NOTICE OF FILING AND CERTIFICATE OF SERVICE

Appellant Shukri Abu Baker hereby notifies the Court and counsel that he filed his Classified Opening Brief and Unclassified Record Excerpts on October 19, 2010, by hand-delivering the same to the Court Security Officer for filing and for further delivery to the Court and opposing counsel.

/s/ Theresa M. Duncan
Theresa M. Duncan

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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October 20, 2010

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No. 09-10560 Cons/W 08-10664,et. al. USA v. Shukri Abu Baker
USDC No. 3:04-CR-240-3

Your brief was electronically filed on October 19, 2010.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Nancy F. Dolly, Deputy Clerk
504-310-7683

cc:
Mrs. Marlo Pfister Cadeddu
Mr. John D. Cline
Ms. Susan Cowger
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Ms. Linda Moreno
Mr. Aaron J Mysliwiec
Mr. Ranjana Natarajan
Mr. Joseph Francis Palmer
Mr. Gregory Burke Westfall

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FILED WITH THE COURT SECURITY OFFICER
CSO:
DATE:

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UNITED STATES OF AMERICA,
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v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,

[redacted]

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Consolidated with No. 10-10586

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v.

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NANCY HOLLANDER,
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No. 3:04-CR-240-2

OPENING BRIEF OF DEFENDANT-APPELLANT, SHUKRI ABU BAKER

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CERTIFICATE OF INTERESTED PERSONS

USA v. Mohammad El-Mezain, et al.,
Case No. 09-10560

The undersigned counsel of record for appellant Shukri Abu Baker certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Abdulqader, Mufid

Elashi, Ghassan

Boyd, John W.

Cadeddu, Marlo

Cline, John D.

Cowger, Susan

Dratel, Joshua L.

Duncan, Theresa M.

El-Mezain, Mohammad

Hollander, Nancy

Holy Land Foundation for Relief and Development

Huskey, Kristine

Jacks, James

Jonas, Barry

Junker, Walt

Moreno, Linda

Mysliwiec, Aaron

Natarajan, Ranjana

National Security Clinic, University of Texas School of Law

Odeh, Abdulrahman

Office of United States Attorney, Northern District of Texas

Palmer, Joseph F.

Shapiro, Elizabeth

Solis, Honorable Jorge

Tigar, Michael

Westfall, Gregory B.

DATED: October 19, 2010

Respectfully submitted,

/s/ Nancy Hollander
Nancy Hollander
Attorney of Record for Defendant-Appellant
SHUKRI ABU BAKER

STATEMENT REGARDING ORAL ARGUMENT

Baker requests oral argument. This case comes to the Court after two lengthy trials that have generated a lengthy record and a number of significant issues. Oral argument will assist the Court in addressing the intricacies of the record and the nuances of the controlling law.

TABLE OF CONTENTS

TABLE OF CITATIONS

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Other Authorities

Under Fed. R. App. P. 28(i), Baker adopts the Table of Citations in the Opening Briefs for Elashi and Abdulqader.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The district court entered judgment against appellant Shukri Abu Baker on May 29, 2009. 17R.1539-1546.[1] Baker filed his notice of appeal on May 28, 2009. 17R.1533. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

A first trial produced a hung jury as to the charges against Baker. At a second trial before a different judge, the jury returned guilty verdicts on all counts. The district court sentenced Baker to 65 years in prison and a $12.4 million dollar forfeiture. 15R.187-248; 17R.1539. He presents the following issues on appeal:

1-6. Under Fed. R. App. P. 28(i), Baker adopts the Statement of the Issues in Appellant Elashi's Opening Brief, as to issues I through VI in that brief.

7. Did the district court err in refusing to compel production of Foreign Intelligence Surveillance Act ("FISA") applications and orders?

8. Did the district court err in refusing to suppress the FISA intercepts?

9. Did the district court violate Baker's Fourth Amendment rights by admitting into evidence items seized during a warrantless search of the HLF's

[1] Citations to the record on appeal ("R.") are in the following format: The first number represents the "Holyland" folder number in the electronic record provided to counsel. The second number represents the "USCA5" number in the lower right-hand corner of each page of the electronic record.

offices, where the government admits it did not obtain search warrants but relied solely on its purported authority to block assets under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 et seq., and related Executive Orders?

10. Under Fed. R. App. P. 28(i), Baker adopts the Statement of the Issues in Appellant Abdulqader's Opening Brief, as to Issue number I in that brief.

11. Under Fed. R. App. P. 28(i), Baker adopts the Statement of the Issues in Appellant Abdulqader's Opening Brief, as to Issue number II in that brief.

12. Under Fed. R. App. P. 28(i), Baker adopts the Statement of the Issues in Appellant Elashi's Opening Brief, as to Issue VIII in that brief.

13. Under Fed. R. App. P. 28(i), Baker adopts the Statement of the Issues in Appellant Elashi's Opening Brief, as to issue X in that brief.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW.

Under Fed. R. App. P. 28(i), Baker adopts the Proceedings Below in Appellant Elashi's Opening Brief.

II. STATEMENT OF FACTS.

Under Fed. R. App. P. 28(i), Baker adopts the Statement of Facts in Appellants Elashi's and Abdulqader's Opening Briefs.

We discuss specific facts related to the FISA issues in issues VII and VIII below and the facts related to the suppression issues in issue IX below.

SUMMARY OF THE ARGUMENT

1-6. Under Fed. R. App. P. 28(i), Baker adopts the Summary of the Arguments I through VI in Appellant Elashi's Opening Brief.

7. For almost ten years, the government intercepted appellants' calls, faxes and emails under orders from the Foreign Intelligence Surveillance Court ("FISC"). [redacted] Appellants moved for disclosure of those applications and to suppress the intercepted communications. The district court refused to order disclosure and denied the motion to suppress. The district court erred in refusing to compel production of the FISA applications, orders, and related documents because those materials were necessary to make an accurate determination of the legality of the surveillance.

8. Over objection, the government introduced several intercepted communications. Appellants cannot adequately present their suppression arguments without access to the FISA materials. If this Court affirms the district court's denial of access, it must examine whether the FISA applications contain intentionally or recklessly false statements or material omissions and establish probable cause to believe the targets are agents of a foreign power.

9. The district court erred in denying the defendants' motion to suppress evidence seized during a warrantless entry and search of the HLF offices. First, the court erred in concluding that IEEPA permitted warrantless entries and searches of personal property and was sufficiently certain and regular in its application to provide a constitutionally adequate substitute for a warrant. The court also erred in ruling the government's designation of the HLF as a terrorist organization the day before the search—which was not announced until the day of the search itself—put the HLF and its employees on notice that their property would be subject to periodic inspection. Second, given well-established Supreme Court precedent holding that authority to seize property does not carry with it the authority to enter private premises to search for that property, the court erred in ruling that the government reasonably relied on its authority to block the HLF's property as justification for the warrantless entry and search of its offices. Finally, the court erred in holding that the FBI—which had participated in the initial unlawful search and seizure of HLF's property in December 2001—acted in good faith in April 2002 when it secured a warrant to search the property using information obtained from the earlier unlawful search. The district court's admission of evidence seized during the unlawful entry and search of the HLF's offices violated Baker's Fourth Amendment rights.

10. Baker adopts the Summary of Argument I in Appellant Abdulqader's Opening Brief.

11. Baker adopts the Summary of Argument II in Appellant Abdulqader's Opening Brief.

12. Baker adopts the Summary of Argument VIII in Appellant Elashi's Opening Brief.

13. Baker adopts the Summary of Argument X in Appellant Elashi's Opening Brief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN BARRING THE DEFENSE FROM LEARNING THE NAMES OF A KEY GOVERNMENT EXPERT AND A SECOND GOVERNMENT WITNESS.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number I in Appellant Elashi's Opening Brief.

II. THE DISTRICT COURT ERRED IN PERMITTING THE ADMISSION OF HIGHLY PREJUDICIAL HEARSAY EVIDENCE.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number II in Appellant Elashi's Opening Brief.

III. THE DISTRICT COURT ERRED IN REFUSING TO EXCLUDE EVIDENCE UNDER FED. R. EVID. 403.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number III in Appellant Elashi's Opening Brief.

IV. THE DISTRICT COURT ERRED IN ITS RULINGS ON ISSUES INVOLVING OPINION TESTIMONY.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number IV in Appellant Elashi's Opening Brief.

V. THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR LETTER ROGATORY.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number V in Appellant Elashi's Opening Brief.

VI. THE DISTRICT COURT ERRED IN REFUSING TO REQUIRE PRODUCTION TO THE DEFENDANTS OF THEIR OWN STATEMENTS.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number VI in Appellant Elashi's Opening Brief.

VII. THE DISTRICT COURT ERRED IN REFUSING TO COMPEL PRODUCTION OF THE FISA APPLICATIONS AND ORDERS.

Over a period of nine years, from 1994 through 2003, the government intercepted thousands of appellants' telephone calls, faxes, and other communications under orders obtained from the FISC.[2] [redacted]

[redacted]

[2] Appellant El Mezain was the target of FISA surveillance from approximately 1994 through 2003. Appellant Baker was the target of FISA surveillance from approximately 1994 through 2001. Appellant HLF was the target of FISA surveillance from approximately 2000 until 2001. Appellants Abdulqader and Odeh were the targets of FISA surveillance for a relatively brief period. Appellant Elashi was never the target of FISA surveillance, but a number of his conversations were intercepted during the surveillance of the other appellants. *E.g.*, 4R.5021, 5139-40.

[redacted] Appellants accordingly moved before the first trial (1) for disclosure of those applications and the FISC orders authorizing the surveillance, and (2) to suppress the intercepted communications because, among other reasons, (a) the FISA surveillance before October 2001 violated FISA and the Fourth Amendment, because the "primary purpose" of the surveillance was not to obtain foreign intelligence information, *see, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908, 914-15 (4th Cir. 1980); (b) the FISA applications failed to establish probable cause that the targets of the surveillance are "agents of a foreign power"; and (c) [redacted] *see, e.g., Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Duggan*, 743 F.2d 59, 77 n.6 (2d Cir. 1984). 10R.2061-62, 2659; *see* 17R.725, 842, 958 (renewing objections).

The district court refused to order disclosure of the government's applications to the FISC or the FISC orders and denied the motion to suppress. 2R.4920. The defense renewed the FISA motions before the second trial. 29R.6254. Over objection, the government introduced several intercepted communications.[3]

[3] Those communications appear in the following exhibits, admitted at trial over objection: GX Baker Wiretap 1, 2, 4-7, 10, 13, 21-27, 34, 37-38, 40-42; GX El-Mezain Wiretap 1, 2, 4, 7, 9-14; GX HLF Wiretap 2; GX Abdulqader Wiretap 1-2.

As discussed below, this case presents a uniquely powerful argument for disclosure and suppression. [redacted] *See In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 621 (FISC 2002), *rev'd on other grounds, In re Sealed Case*, 310 F.3d 717 (FISCR 2002).

In this Part, we demonstrate that the district court erred in refusing to compel production of the FISA applications, orders, and related documents under 50 U.S.C. §§ 1806(f) and (g) and the Fifth Amendment Due Process Clause,[4] because those materials were "necessary to make an accurate determination of the legality of the surveillance," 50 U.S.C. §1806(f).

A. Standard of Review.

This Court reviews the district court's refusal to order disclosure of the FISA applications and orders for abuse of discretion. *See, e.g., United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *Duggan*, 743 F.2d at 77.

[4] Because the surveillance in this case lasted for many years, and because FISA orders typically have a fixed duration of 90 or 120 days, *see* 50 U.S.C. § 1805(e), this issue covers approximately 50 applications and orders. 10R.1090.

B. The Background and Structure of FISA.

FISA "was enacted to create a framework whereby the Executive could conduct electronic surveillance for foreign intelligence purposes without violating the rights of citizens." *United States v. Hammoud*, 381 F.3d 316, 332 (4th Cir. 2004) (en banc), *vacated on other grounds*, 543 U.S. 1097 (2005), *reinstated in relevant part*, 405 F.3d 1034 (4th Cir. 2005) (en banc). "The Act was intended to strike a sound balance between the need for such surveillance and the protection of civil liberties." *In re Kevork*, 788 F.2d 566, 569 (9th Cir. 1986) (quotation omitted). The importance of such protections is manifest, given the extraordinarily intrusive nature of FISA surveillance and the accompanying potential for abuse. As the FISC has observed, FISA surveillance involves

> exceptionally thorough acquisition and collection through a broad array of contemporaneous electronic surveillance techniques. Thus, in many U.S. person electronic surveillances the FBI will be authorized to conduct, simultaneously, telephone, microphone, cell phone, e-mail and computer surveillance of the U.S. person target's home, workplace and vehicles. Similar breadth is accorded the FBI in physical searches of the target's residence, office, vehicles, computer, safe deposit box and U.S. mails where supported by probable cause.

In re All Matters, 218 F. Supp. 2d at 616-17; *see, e.g., Olmstead v. United States*, 277 U.S. 438, 475-76 (1928) (Brandeis, J., dissenting) ("As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."); *United States v. Smith*, 321 F. Supp. 424, 428 (C.D. Cal. 1971) ("Electronic surveillance is perhaps the most

objectionable of all types of searches in light of the intention of the Fourth Amendment.").

This case highlights the intrusiveness of FISA surveillance; appellant El-Mezain, for example, was subjected to electronic surveillance 24 hours per day, seven days per week for *nine years*, and appellant Baker was subjected to around-the-clock surveillance for *seven years*.

FISA attempts to protect the privacy of potential surveillance targets through a series of procedural provisions, several of which are significant here. First, FISA creates the FISC, to which the government must apply for an order authorizing electronic monitoring. 50 U.S.C. §§ 1803, 1804. "With important exceptions not pertinent here, FISA requires judicial approval before the government engages in an electronic surveillance for foreign intelligence purposes." *United States v. Cavanagh*, 807 F.2d 787, 788 (9th Cir. 1987); *see also Hammoud*, 381 F.3d at 332.

Second, FISA requires the Attorney General to approve any application to the FISC and requires that the application contain certain information and certifications. 50 U.S.C. § 1804. Of significance here, the application to the FISC must include "a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." *Id.* § 1804(a)(4)(A); *see United States v. Posey*, 864 F.2d 1487, 1490 (9th Cir. 1989); *United States v. Cavanagh*,

807 F.2d 787, 789-91 (9th Cir. 1987). FISA defines the term "foreign power," among other ways, as "a group engaged in international terrorism or activities in preparation therefor." 50 U.S.C. § 1801(a)(4); *see, e.g., United States v. Marzook*, 435 F. Supp. 2d 778, 780 (N.D. Ill. 2006) (Hamas is a "foreign power" under FISA).

Third, FISA requires that the application to the FISC set forth certain "certifications" by an appropriate executive branch official. Among other things, the official must certify "that the purpose of the surveillance is to obtain foreign intelligence information"[5] and that "such information cannot reasonably be obtained by normal investigative techniques." *Id.* § 1804(a)(7)(B), (C).

Fourth, the statute specifies findings the FISC must make before it can approve electronic surveillance or a physical search. *Id.* § 1805 (electronic monitoring). The court must find that the procedural requirements of FISA have been satisfied, *e.g.*, *id.* § 1805(a)(1), (2), (4), and it must find (among other things) "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." *Id.* § 1805(a)(3)(A); *see, e.g.*,

[5] Effective October 2001, Congress amended § 1804(a)(7)(B) through the USA PATRIOT Act, Pub. L. 107-56, § 218, to require certification only that "a significant purpose"--rather than "the purpose"--of the surveillance is to obtain foreign intelligence information. *See* 50 U.S.C. § 1804(a)(7)(B). [redacted]

United States v. Dumeisi, 424 F.3d 566, 579 (7th Cir. 2005); *Hammoud*, 381 F.3d at 332-33 (discussing probable cause requirement). When (as here) the target of the surveillance is a "United States person," the FISC must also find that the government's certifications under § 1804 are not "clearly erroneous." *Id.* § 1805(a)(5).

Fifth, FISA authorizes any "aggrieved person" to move to suppress "evidence obtained or derived from" electronic surveillance if "the information was unlawfully acquired" or "the surveillance was not made in conformity with an order of authorization or approval." *Id.* § 1806(e). FISA defines the phrase "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." *Id.* § 1801(k).

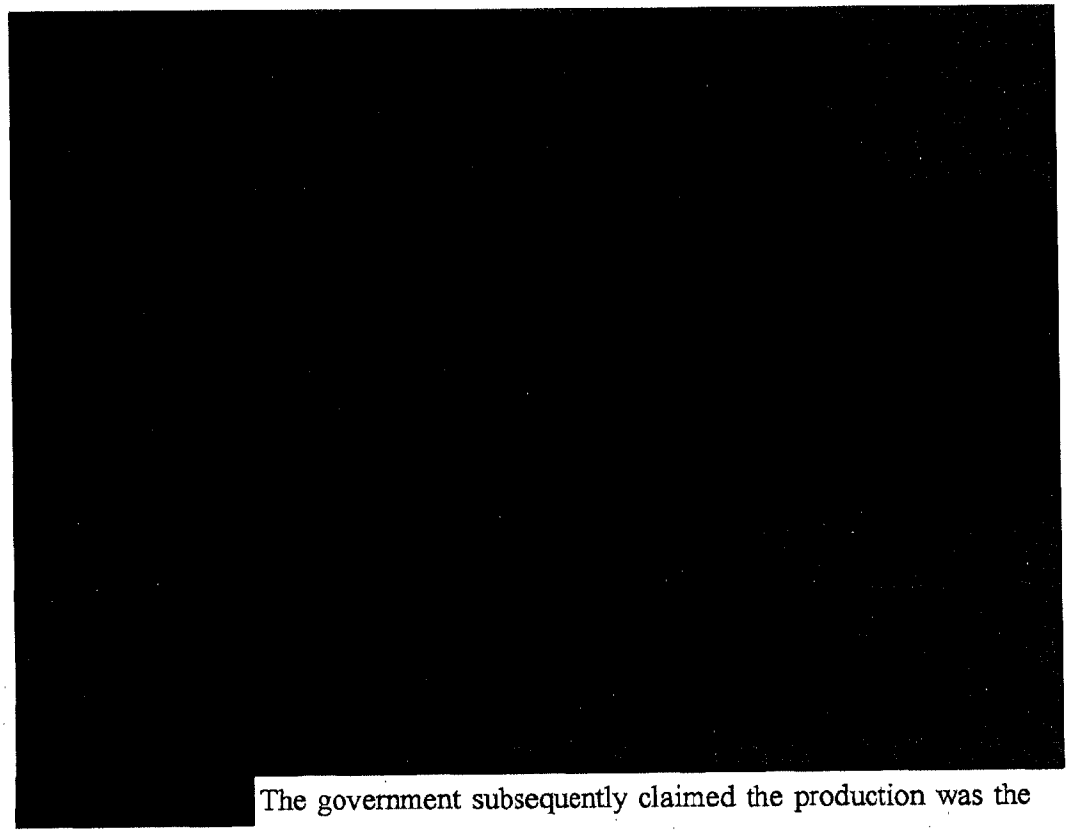
Under these definitions, appellants El-Mezain, Baker, Abdulqader, Odeh, and HLF are "aggrieved persons" as to the electronic surveillance that targeted them, and all appellants are "aggrieved persons" as to the surveillance that intercepted their conversations. *See, e.g., Cavanagh*, 807 F.2d at 789 (person incidentally overheard during FISA surveillance of another target is an "aggrieved person"); *United States v. Belfield*, 692 F.2d 141, 143, 146 n.21 (D.C. Cir. 1982) (same).

Sixth, § 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," a court must consider the application and order for FISA electronic surveillance *in camera* in determining whether the surveillance was lawfully conducted.

The statute adds that "[i]n making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* Section 1806(g), in turn, provides that "if the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person *except to the extent that due process requires discovery or disclosure.*" 50 U.S.C. § 1806(g) (emphasis added).

C. Factual Background.

The FBI intelligence investigation of HLF began in 1994 and ended in 2001. 4R.4182-83. In the course of that investigation (and related intelligence investigations of other appellants), the government applied for, and received, dozens of orders authorizing electronic surveillance of appellants and others.

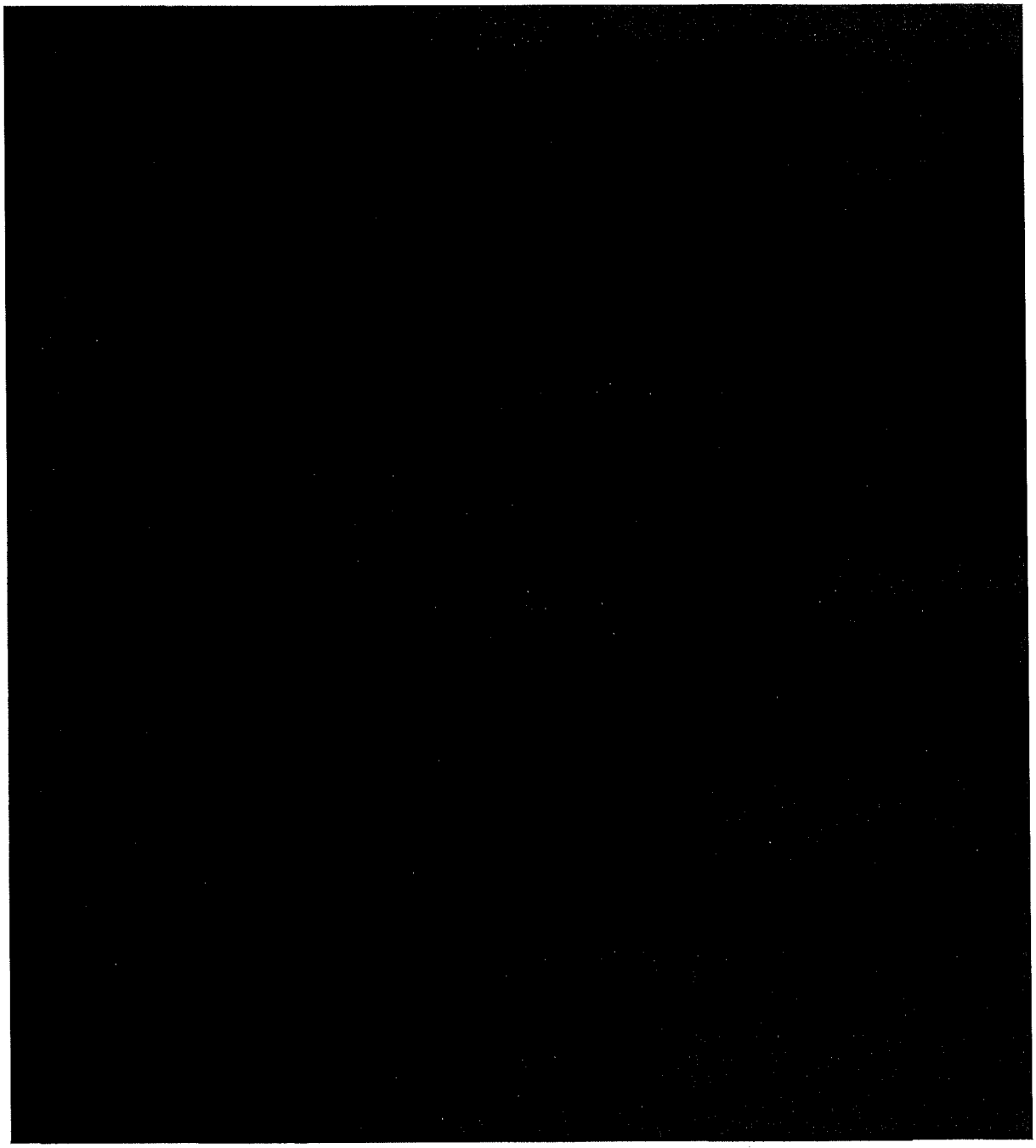


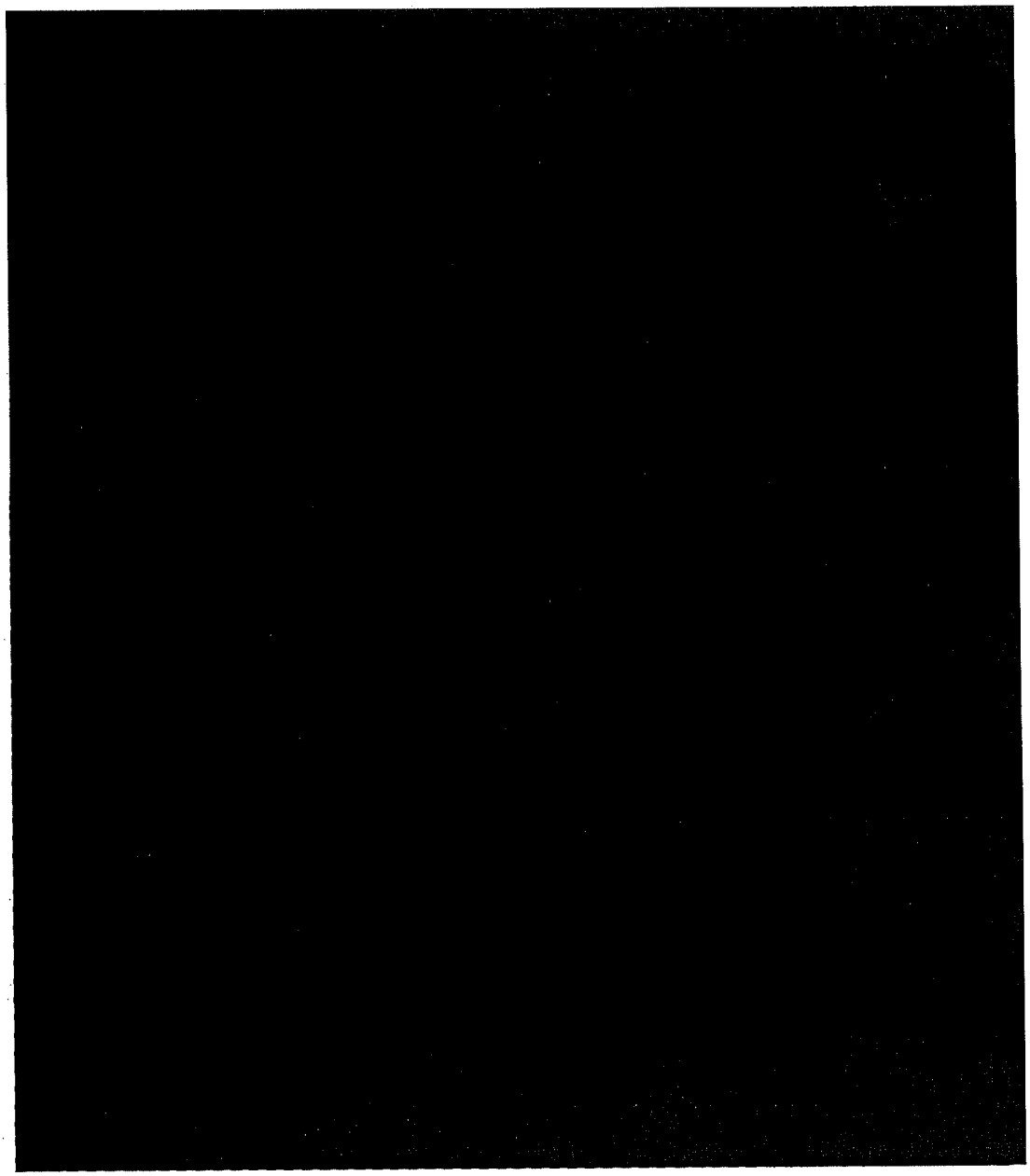
The government subsequently claimed the production was the result of a copying error by FBI personnel. 10R.884 n.8. On August 12, 2005, the government discovered that it had produced the materials and demanded that the defense return them. The defense declined to do so. 10R.381, 384.

On August 16, 2005, the government persuaded the district court to seal the secure courthouse office pending resolution of the government's request for return of the documents. 10R.366, 369, 371, 373. On January 6, 2006, the district court ordered the documents and all related materials, including defense counsel's notes regarding the documents, to be removed from the sealed courthouse office and

placed in a safe in the court's chambers. 10R.990. [redacted] Accordingly, the factual assertions in this section are based solely on counsel's memory (primarily reflected in district court pleadings submitted at that time).

[redacted]

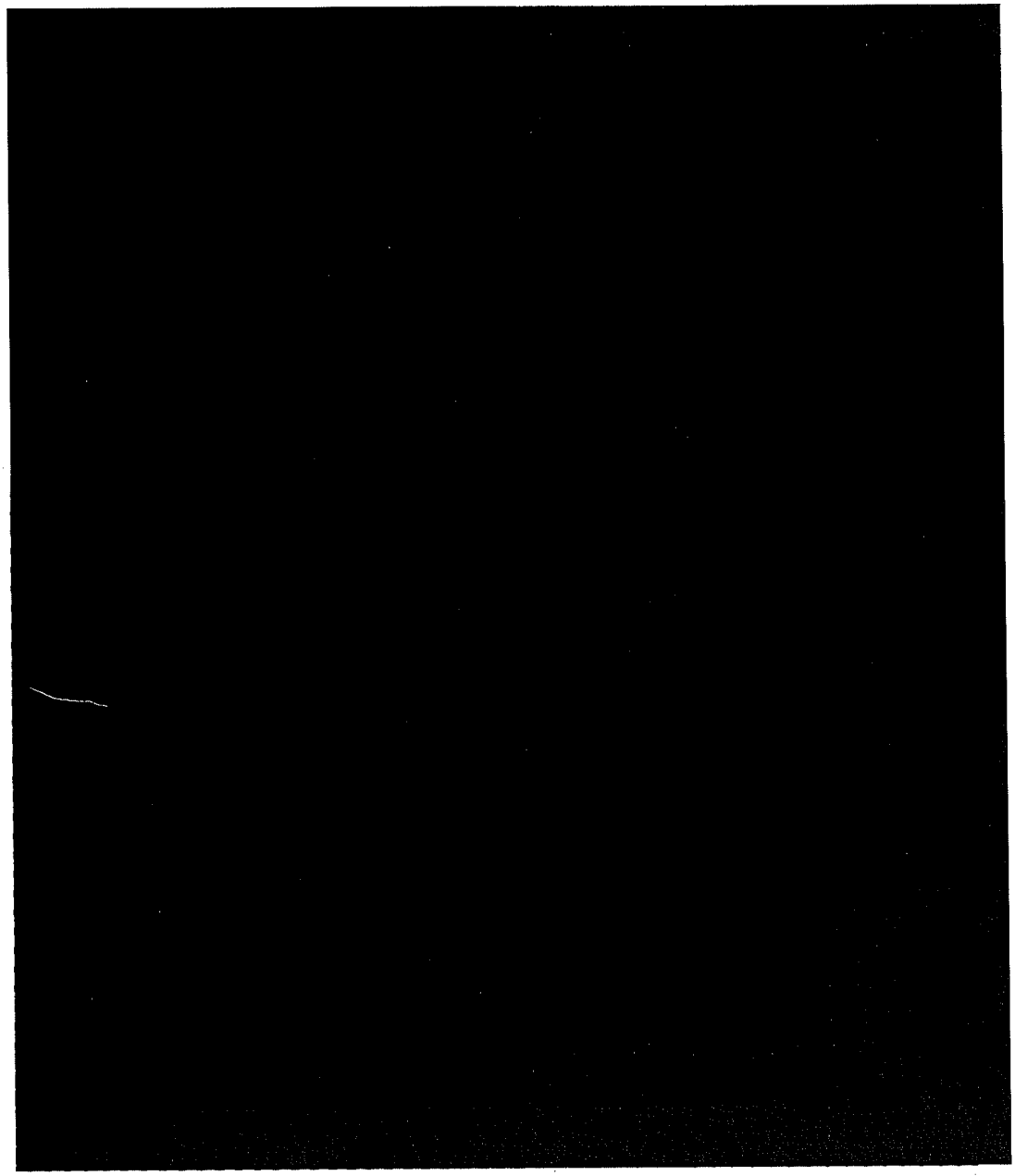




In March of 2001, the government reported . . . misstatements in another series of FISA applications in which there was supposedly a 'wall' between separate intelligence and criminal squads in FBI field offices to screen FISA intercepts, when in fact all of the FBI agents were on the same

> squad and all of the screening was done by the one supervisor overseeing both investigations.

See In re All Matters, 218 F. Supp. 2d at 621.



D. The District Court Erred in Refusing to Order Production.

The district court erred in refusing to order production of the FISA applications and orders to cleared defense counsel for review in their secure room under the well-established procedures set out in the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3. Disclosure of those materials is "necessary to make an accurate determination of the legality of the surveillance," 50 U.S.C. §1806(f), and is required as a matter of due process, *see id.* §1806(g).

1. Section 1806(f).--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.'" *Belfield*, 692 F.2d at 147 (quoting S. Rep. No. 701, 95th Cong., 2d Sess. 64 (1979)); *see also United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987) (same).

[redacted]

[redacted] *See, e.g., Duggan*, 743 F.2d at 79 (disclosure is warranted when there exist "potential irregularities such as possible misrepresentations of fact") (quotations and citation omitted).

Disclosure is "necessary" for counsel to assist the Court in determining whether the applications establish probable cause to believe that the target of the surveillance is an "agent" of Hamas; whether the "primary purpose" of the FISA surveillance was gathering foreign intelligence, and not, impermissibly, for a criminal investigation, *see, e.g., Truong Dinh Hung*, 629 F.2d at 914-15; and whether a *Franks* hearing is necessary. Without access to the discovery in the case, and without the resources to investigate, neither this Court nor the district court can accurately resolve these issues.

2. Section 1806(g) and Due Process.--Defendants also should obtain disclosure of the FISA applications, orders, and related materials under § 1806(g) and the Fifth Amendment Due Process Clause.

To determine whether due process requires the requested disclosure, the Court must consider the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) "the private interest that will be affected by the official action," (2) "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 (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 335; *see also American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1068-71 (9th Cir. 1995) (applying *Mathews* test to determine whether use of secret evidence violates due process); *Rafeedie v. INS*, 880 F.2d 506, 524-25 (D.C. Cir. 1989) (*Mathews* balancing test governs process due alien in exclusion proceeding, including use of secret evidence), *on remand*, 795 F. Supp. 13, 18-20 (D.D.C. 1992) (same); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413-14 (D.N.J. 1999) (same). Application of the *Mathews* test confirms that the district court erred in denying appellants access to the FISA materials.

a. The "Private Interest."--The appellants' "private interests" at stake here are weighty. They seek an accurate determination of their claims that the government's secret surveillance violated their privacy rights under FISA and the Fourth and Fifth Amendments to the Constitution. More generally, they seek through the judicial process to avoid deprivation of their liberty. If mere property interests "weigh heavily in the *Mathews* balance," as the Supreme Court has held, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 54-55 (1993), the appellants' privacy and other liberty interests must possess even greater significance.

b. The Risk of Erroneous Deprivation and the Value of Additional Procedures.--Turning to the second *Mathews* factor, the procedure that the district court adopted--the adjudication of appellants' rights under FISA through *ex parte* review of materials that counsel had no opportunity to review once the court sealed the defense office and ordered the materials returned to the government--carries a notoriously significant "risk of an erroneous deprivation" of the liberty and property interests at issue.

Conversely, "additional . . . procedural safeguards"--access to the FISA materials and an opportunity to address them--carry substantial "probable value." *Mathews*, 424 U.S. at 335. The Supreme Court has declared that "'[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *James Daniel Good*, 510 U.S. at 55 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

As the Ninth Circuit observed in a secret evidence case, "'One would be hard pressed to design a procedure more likely to result in erroneous deprivations.' . . . [T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error." *American-Arab Anti-Discrimination Committee*, 70 F.3d at 1069 (quoting district

court); *see also id.* at 1070 (noting "enormous risk of error" in use of secret evidence); *Kiareldeen*, 71 F. Supp. 2d at 412-14 (same).

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

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

Id. at 182.

In ordering disclosure of improperly recorded conversations, the Court declared:

> Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information 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, the *Franks* Court held that a defendant must be permitted to attack the veracity of the affidavit underlying a search warrant, upon a preliminary showing of an intentional or reckless material falsehood. The Court rested its decision in significant part on the *ex parte* nature of 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.

438 U.S. at 169; *see also Dennis v. United States*, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."); *United States v. Marzook*, 412 F. Supp. 2d 913, 921 (N.D. Ill. 2006) ("It is a matter of conjecture whether the court performs any real judicial function when it reviews classified documents in camera. Without the illumination provided by adversarial challenge and with no expertness in the field of national

security, the court has no basis on which to test the accuracy of the government's claims.").[6]

The same considerations that the Supreme Court found compelling in *Alderman* and *Franks* militate against *ex parte* procedures in the FISA context. As the FISC itself has acknowledged, without adversarial proceedings, systematic executive branch errors--including submission of FISA applications with "erroneous statements" and "omissions of material facts"--went entirely undetected by the courts until the DOJ elected to reveal it. *See In re All Matters*, 218 F. Supp. 2d at 620-21.

[redacted] But we must rely for our arguments on our five-year-old memories based on only partial review of the documents. Full disclosure to cleared counsel, followed by adversarial proceedings--*in camera* if necessary--will produce far more accurate factfinding than the procedure that the district court used here.

Counsel's earlier review of some of the inadvertently produced documents also puts this case on a unique footing, as the information has already been disclosed to cleared counsel (who have maintained its complete confidentiality

[6] In *Marzook*, the government agreed that the defendant at issue and his co-counsel (as well as counsel for the co-defendant) could be present at the hearing and cross-examine the witnesses. *See* 412 F. Supp. 2d at 917, 923.

since). The only consequence of retrieving the information from counsel in 2005 and withholding it for the past five years is that the district court and now this Court are deprived of counsel's ability to marshal and present that information in a manner that facilitates an accurate and reliable adjudication of the issue.

c. The Government's Interest.--Finally, the Court must consider the government's purported interest in maintaining the secrecy of the FISA materials. The government has asserted its generalized interest in avoiding damage to "national security," without any effort to demonstrate that the previous disclosure of the FISA materials to defense counsel has caused such damage or that further disclosure, under appropriate protections, is likely to do so in the future. Courts have previously rejected such diffuse claims of national security. *See, e.g.*, *American-Arab Anti-Discrimination Committee*, 70 F.3d at 1070 ("We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved."); *Kiareldeen*, 71 F. Supp. 2d at 414 (same); *Rafeedie*, 795 F. Supp. at 19 (same).

The government's asserted national security interest in withholding the FISA materials from the defense is particularly weak here. Defense counsel have security clearances and an obvious "need to know" the information. The district

court put in place an agreed CIPA protective order, which provides elaborate protections for classified information and which permits classified materials to be disclosed to defense counsel but not to the defendants. 2R.194. Defense counsel have complied rigorously with the Protective Order. *See* 2R.4928 (district court "commends counsel on their excellent track record in dealing with classified information"). Moreover, the government can request permission to redact any particularly sensitive "sources and methods" information. *Cf. Al Najjar v. Reno*, 97 F. Supp. 2d 1329, 1358-59 (S.D. Fla. 2000) (proposing procedures for handling classified evidence in deportation context), *vacated as moot*, 273 F.3d 1330 (11th Cir. 2001).

Upon an objective assessment of the government's national security claim, the Court should find that the first and second *Mathews* factors substantially outweigh the government's professed need to withhold the FISA materials, and it should order all the FISA materials again disclosed to defense counsel as a matter of due process. Following that disclosure, appellants should be permitted an opportunity to supplement and renew their motions to suppress the communications intercepted under FISA.

VIII. THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS THE FISA INTERCEPTS.

For the reasons detailed above, appellants cannot adequately present their suppression arguments without access to the FISA applications and orders.

Nonetheless, in case the Court affirms the district court's denial of access, and undertakes review of the FISA materials without the benefit of adversarial proceedings, we sketch those arguments below.

A. Standard of Review.

This Court reviews de novo the district court's denial of a motion to suppress FISA surveillance. *See Dumeisi*, 424 F.3d at 578.

B. Primary Purpose.

The FISA surveillance at issue here--all of which occurred before October 2001--may have violated FISA and the Fourth Amendment because the "primary purpose" of the surveillance was for a criminal investigation, rather than to obtain foreign intelligence information. The Fourth Amendment ordinarily prohibits the government from conducting intrusive electronic surveillance without first demonstrating *criminal* probable cause--probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction for a particular offense." *Dalia v. United States*, 441 U.S. 238, 255 (1979) (quotation omitted); *see* 18 U.S.C. § 2518(1)(b), (3)(a); *United States v. Meling*, 47 F.3d 1546, 1551 (9th Cir. 1995).

FISA, as noted above, does not require a showing of criminal probable cause that a crime has been committed; the government need only show probable cause to believe that the target is a "foreign power or an agent of a foreign power." In

other significant respects as well, FISA offers less protection than the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2521, ordinarily provide.[7]

For example, under Title III and the Fourth Amendment, the target of the surveillance must receive notice that the government has invaded his privacy. *See, e.g., United States v. Donovan*, 429 U.S. 413, 429 n.19 (1977); *Berger v. New York*, 388 U.S. 41, 60 (1967); 18 U.S.C. § 2518(8)(d). Under FISA, however, the government need not ever provide notice to the target of surveillance unless it "intends to enter into evidence or otherwise use or disclose" the FISA evidence in a trial or other official proceeding. 50 U.S.C. § 1806(C).

Similarly, the target of criminal surveillance under Title III ordinarily may obtain copies of the application and order to challenge the lawfulness of the surveillance. 18 U.S.C. § 2518(9). By contrast, no reported decision has *ever* afforded the target of FISA surveillance access to the underlying materials, and--not coincidentally--no court, to our knowledge, has ever suppressed the fruits of FISA surveillance.

Despite the reduced privacy protections that FISA offers, federal courts upheld the constitutionality of the statute before the passage of the PATRIOT Act

[7] *See generally* Daniel J. Solove, *Electronic Surveillance Law*, 72 Geo. Wash. L. Rev. 1264, 1290-91 (2004) (comparing FISA and Title III protections and noting that "FISA's protections against surveillance are much looser than those of [Title III]").

amendments based on the distinction between surveillance conducted for criminal investigative purposes and for foreign intelligence purposes. When the "primary purpose" of electronic surveillance is foreign intelligence gathering, courts have held that surveillance authorized under FISA satisfies the Fourth Amendment, even if it produces evidence that is later used in a criminal prosecution.

On the other hand, when the primary purpose of the surveillance is criminal investigation, courts have required the government to comply with the ordinary warrant, notice, and disclosure requirements of Title III and the Fourth Amendment. *See, e.g., United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) ("Although evidence obtained under FISA subsequently may be used in criminal prosecutions . . . the investigation of criminal activity cannot be the primary purpose of the surveillance. [FISA] is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches."); *Badia*, 827 F.2d at 1464 (FISA application and related documents "establish that the telephone surveillance . . . did not have as its purpose the primary objective of investigating a criminal act"); *Truong Dinh Hung*, 629 F.2d at 915 ("[T]he executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons."), *aff'g United States v. Humphrey*, 456 F. Supp. 51, 57-58 (E.D. Va. 1978) (same; suppressing surveillance conducted without warrant after primary purpose became criminal investigation); *United*

States v. Butenko, 494 F.2d 593, 606 (3d Cir. 1974) (en banc) ("Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental."); *United States v. Brown*, 484 F.2d 418, 424 (5th Cir. 1973) ("There is no indication that defendant's telephone conversations were monitored for the purpose of gaining information to use at his trial, a practice we would immediately proscribe with appropriate remedy."); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 277-78 (S.D.N.Y. 2000) (foreign intelligence exception to warrant requirement for searches abroad where, among other requirements, the search is "conducted 'primarily' for foreign intelligence purposes"); *United States v. Megahey*, 553 F. Supp. 1180, 1188-89 (E.D.N.Y. 1982) (foreign intelligence exception to warrant requirement applies when surveillance is conducted "primarily" for foreign intelligence reasons), *aff'd sub nom. United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). *See generally* Gregory E. Birkenstock, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 Geo. L.J. 843, 863-70 (1992) (noting importance of non-criminal purpose to constitutionality of FISA).

We believe that the FISA applications and an adversarial hearing will establish that in this case the "primary purpose" of the investigation of HLF was

not to obtain foreign intelligence information, but to obtain evidence with which to prosecute HLF and its officers. Because we have had only limited access to the applications, we cannot provide a detailed or comprehensive analysis of their contents in support of this argument. If the Court rules--as argued above--that defense counsel should have been granted access to the applications, then we request an opportunity to submit further briefing on the "primary purpose" issue following that review. If the Court rejects our request for access, then we ask that it undertake an independent review of the applications with the "primary purpose" test in mind.

C. Probable Cause.

As noted above, before issuing any order authorizing FISA surveillance the FISC must find (among other things) "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3)(A). An "agent of a foreign power," as applied to a "United States person,"[8] means (as relevant here) "any person who . . . *knowingly* engages in . . . international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power," and "any person who . . . *knowingly* aids or abets any person in the conduct of activities" described above. *Id.* § 1801(b)(2)(C), (E)

[8] The term "United States person" includes any "citizen of the United States, an alien lawfully admitted for permanent residence . . . or aliens lawfully admitted for permanent residence." 50 U.S.C. § 1801(i).

(emphasis added). "International terrorism," in turn, means certain activities occurring outside the United States that "involve violent acts or acts dangerous to human life" and "appear to be intended--(A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination and kidnapping." *Id.* § 1801(c).

The Supreme Court has held repeatedly that criminal probable cause requires "a reasonable ground for belief of guilt," and "that the belief of guilt must be particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quotation omitted). Under FISA, the probable cause standard is directed not at the target's guilt of a crime, as with a traditional warrant, but at the target's status as "a foreign power or an agent of a foreign power."

Thus, the Court should examine, with respect to every application for surveillance of the appellants, or for surveillance on which appellants were intercepted, whether the application established a reasonable, particularized ground for belief that the target was "a foreign power or an agent of a foreign power" under the definition set out above. 50 U.S.C. §§ 1801(b)(2)(C), (E), 1805(a)(3)(A); *see* Birkenstock, *supra*, 80 Geo. L.J. at 851-53 (discussing the FISA probable cause standard).

D. *Franks v. Delaware.*

Franks v. Delaware, 438 U.S. 154 (1978), establishes the circumstances under which the target of a search may obtain an evidentiary hearing concerning the veracity of the information set forth in a search warrant affidavit. "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-56.

Franks establishes a similar standard for suppression following the hearing:

> In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 156; *see United States v. Brown*, 298 F.3d 392, 395-404 (5th Cir. 2002) (applying *Franks* to Title III wiretap application); *United States v. Blackmon*, 273 F.3d 1204, 1208-10 (9th Cir. 2001) (same); *Duggan*, 743 F.2d at 77 n.6 (suggesting that *Franks* applies to FISA applications under Fourth and Fifth Amendments).

The *Franks* principles apply to omissions as well as false statements. *See, e.g., Brown*, 298 F.3d at 407-08 (Dennis, J., specially concurring); *United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir. 1995) ("Omissions or misrepresentations can constitute improper government behavior."). Omissions will trigger suppression under *Franks* if they are deliberate or reckless and if the affidavit or application, with the omitted material added, would not have established probable cause. *See, e.g., Brown*, 298 F.3d at 407-08 (Dennis, J., specially concurring); *Tomblin* 46 F.3d at 1377 (noting that the required showing of recklessness can in some instances be inferred directly from the omission of material fact itself).

In *Franks*, the Court held that a criminal defendant has a right, under certain circumstances, to challenge the truthfulness of statements made in an affidavit supporting a warrant. 438 U.S. at 155-56; *see also Brown*, 298 F.3d at 407-08 ("Accordingly, a defendant is entitled to a *Franks* hearing upon making a substantial preliminary showing that a governmental official deliberately or recklessly caused facts that preclude a finding of probable cause to be omitted from a warrant affidavit, even if the governmental official at fault is not the affiant.") (Dennis, J., *specially concurring*).

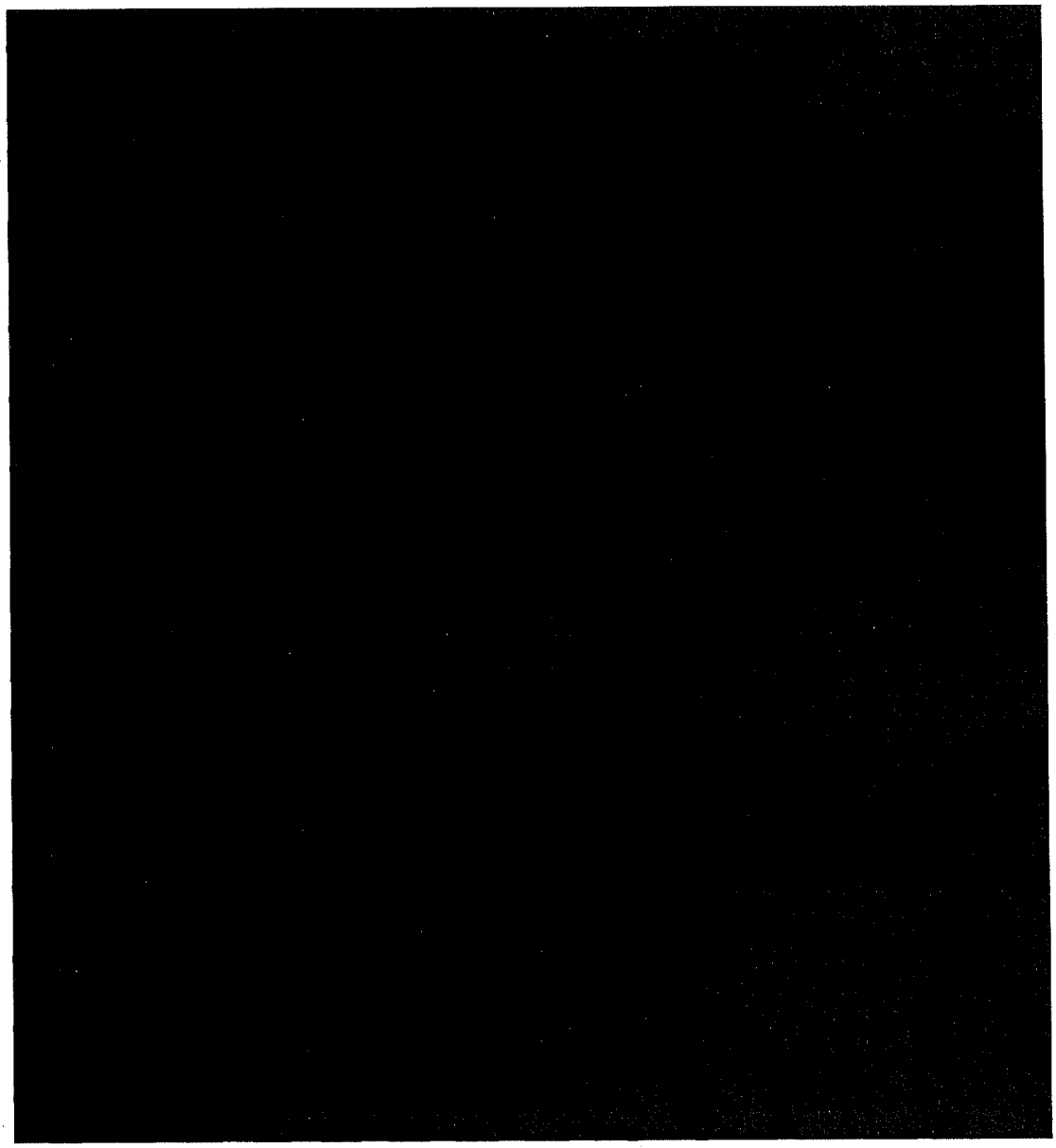
We submit that the record satisfies the standard for an evidentiary hearing under *Franks*. [redacted]

[redacted]

In *United States v. Davis*, 714 F.2d 896 (9th Cir. 1983), the Ninth Circuit held that suppression was required under analogous circumstances. [redacted] The district court denied the *Franks* motion after an evidentiary hearing, and the Ninth Circuit reversed, declaring:

> Thompson's testimony indicated that he did believe the underlying information in the Blue Lagoon affidavit to be true. The district court apparently focused on that aspect of "truth" in concluding that Thompson did not deliberately or recklessly falsify the affidavits. That analysis completely ignored the truth or falsity of the statements which indicated that Thompson had received the information directly from the informants. The record on remand permits no conclusion other than that such statements in the Blue Lagoon affidavit were often false.

Id. at 899 (footnote omitted).



The Court should remand to the district court with instructions to permit cleared counsel to again review the FISA applications and related materials.

Following that disclosure, the district court should be directed to conduct a *Franks* hearing at which appellants will have the opportunity to prove that the affiants before the FISC intentionally or recklessly made materially false statements and omitted material information from the FISA applications. Following the hearing, the district court should suppress all items obtained through any FISA order issued on the basis of any application that the court determines to be materially false, including any evidence derived directly or indirectly from the false applications.

IX. THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED FROM THE OFFICES OF THE HOLY LAND FOUNDATION

On December 4, 2001, agents of the Department of Treasury ("DOT") and the FBI searched the HLF's offices in Texas, New Jersey, Illinois and California and seized its property as well as personal property of its employees, without search warrants. It is undisputed that the government did not obtain a warrant before entering and searching the offices. Instead, the government relied solely on its purported authority to block assets under IEEPA, and related Executive Orders ("E.O."). 17R.4269. Before trial, the defense moved to suppress evidence seized during these warrantless searches. 10R.1496-1590. The district court denied the motion, ruling that the government's regulation of organizations designated under IEEPA puts those organizations on notice that their property will be subject to periodic inspection so that a warrant is not required before a search may be

conducted. 17R.4268-4276. The court further concluded that, assuming the search did violate the defendant's Fourth Amendment rights, the fruits of the search need not be suppressed because the DOT and FBI reasonably relied on IEEPA as authority to enter and search the HLF's offices without a warrant. *Id.* Finally, the court ruled that even if an FBI search of HLF's property several months after the initial search and seizure were unconstitutional, the fruits of the search were nonetheless admissible because the FBI reasonably relied on a warrant issued by the magistrate court. *Id.*

The district court erred in denying the motion to suppress. First, the court erred in concluding that IEEPA permitted warrantless entries and searches of personal property and in implicitly ruling that the statute included an inspection scheme that was sufficiently certain and regular in its application to provide a constitutionally adequate substitute for a warrant. The court likewise erred in ruling the designation of the HLF the day before the search—which was not announced until the day of the search—put the HLF and its employees on notice that their property would be subject to periodic inspection. Second, given well-established Supreme Court precedent holding that authority to seize property does not carry with it the authority to enter private premises to search for that property, *see G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the court erred in ruling that the government reasonably relied on its authority to block the HLF's

property as justification for the warrantless entry and search of its offices. Finally, the court erred in holding that the FBI—which had participated in the initial unlawful search and seizure of HLF's property in December 2001—acted in good faith in April 2002 when it secured a warrant to search the property without informing the magistrate court of its earlier unlawful activities. The district court's admission of the evidence seized during the unlawful entry and search of the HLF's offices violated Baker's Fourth Amendment rights.

A. Standard of Review.

"When considering the denial of a motion to suppress, this court reviews the district court's factual findings for clear error and its Fourth Amendment conclusions de novo." *United States v. Troop*, 514 F.3d 405, 409 (5th Cir. 2008); *see also United States v. Portillo-Aguirre*, 311 F.3d 647, 651-52 (5th Cir. 2002). Where the relevant facts are undisputed—as they are in this case—the Court may resolve questions of fact as questions of law. *Portillo-Aguirre*, 311 F.3d at 652.

B. Background.

On September 23, 2001, President George W. Bush issued E.O. 13324, pursuant to his authority under IEEPA. E.O. 13224 blocks the assets of certain "foreign persons" and authorizes the DOT to designate others whose assets would be blocked. On October 31, 2001, the government designated Hamas as a Specially Designated Global Terrorist ("SDGT"), thus making Hamas subject to

E.O. 13224. President Bill Clinton had previously designated Hamas as a Specially Designated Terrorist ("SDT") on January 23, 1995, in E.O. 12947. On December 3, 2001, under the purported authority of IEEPA, E.O. 13224, and E.O. 12947, the government designated the HLF as an SDT and SDGT. 29R.6103-6104; 10R.4269. Pursuant to this designation, OFAC issued notices blocking the HLF's assets the following day, December 4, 2001. 10R.1513-20.

On the same day it issued the notice blocking HLF's assets, agents of the DOT and the FBI searched HLF's offices in California, Illinois, New Jersey, and Texas and seized HLF's physical property as well as personal property belonging to its employees. 10R.4269. At that time, Baker was the Executive Director of the HLF and his personal office was located in the HLF's Texas office. 10R.1499. Appellant El-Mezain was HLF's Director of Endowments and his personal office was located in the HLF's California office. *Id.* Appellant Odeh was the HLF's New Jersey representative and his personal office was located in the New Jersey office. *Id.* On the same day the government issued the blocking notice, searched the HLF's offices and seized its and its employees' property, it also held a press conference announcing for the first time that the HLF had been designated an SDT and SDGT. *See* "President Announces Progress on Financial Fight Against Terror," Dec. 4, 2001 (found at http://www.whitehouse.gov/news/releases/2001/12/20011204-8.html).

It is undisputed that the searches of the HLF offices and the seizure of its property occurred solely under the purported authority of the OFAC blocking notices. 10R.4269. The government did not obtain a judicial warrant before seizing HLF's assets, and no court approved the searches and seizures in advance.

In April 2002, over four months after the warrantless searches of the HLF's offices and the seizure of its property, the FBI applied for warrants to search and seize the HLF property then in the custody of OFAC. 10R.1521-87; 17R.4270, 4275. The applications failed to inform the court that the government acted without warrants when it initially searched the HLF offices and seized its property, and that the FBI had participated in those initial searches and seizures. *See N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 466 (S.D. N.Y. 2005), *vacated on other grounds*, 459 F.3d 160 (2d Cir. 2006) (discussing government affidavit acknowledging that FBI agents participated in the searches of the HLF offices on December 4, 2001).

Before the first trial, the defendants filed a motion to suppress the evidence seized during the December 4, 2001, warrantless searches of the HLF offices. 10R.1496-1590. Judge Fish denied the motion without a hearing. 10R.4268-76. While agreeing with the defendants that the government's actions on December 4, 2001, constituted searches and seizures within the protections of the Fourth Amendment, the court ruled that the blocking notice issued the same day the

search was executed put the HLF and its employees on notice "that their property will be subject to periodic inspections so that a warrant is not required before such a search may be conducted." 10R.4270, 4275-76. In the alternative, the court ruled that, even if the December 4 searches and seizures were unconstitutional, the evidence seized need not be excluded from trial because the agents conducting the search reasonably relied on IEEPA in excusing themselves from the Fourth Amendment's warrant requirement. 10R.4273-75. The court also extended the exclusionary rule's good faith exception to the FBI's subsequent April 2002 search of HLF's property. *Id.*

Before the second trial, the defense renewed its motion to suppress. 29R.6248, 6253 (renewing prior motions). Judge Solis adopted Judge Fish's order denying the motion. 32R.155 (adopting prior orders and denying renewed motion). During the second trial, the court admitted the following exhibits, which either were seized on December 4, 2001, or were derived from evidence seized on that date: HLF Search 1-3, 5-12, 14-23, 25, 27-33, 35-45, 47-51, 62, 70-73, 75-77, 81-85, 87-91, 93, 94, 101, 102, 105-115, 117, 119, 124-126, 130, 131, 137, 139, 142-163, 165, 171, 175, 177, 178, 179, and 183-186.

C. The District Court Erred in Refusing to Suppress Evidence Seized During the Unlawful, Warrantless Searches of the HLF Offices.

1. *The district court erred in finding that the administrative inspection exception to the warrant requirement applied to the search of the HLF offices.*

The physical entries into HLF's offices in Texas, New Jersey, Illinois and California constituted searches that implicate the protections of the Fourth Amendment. *See, e.g., G.M. Leasing Corp.*, 429 U.S. at 353-59 (warrantless entry into offices to seize property to satisfy tax debt constituted a search in violation of the Fourth Amendment). Similarly, the removal of HLF's records, computers, and other property constituted a "meaningful interference with [HLF and Baker's] possessory interests in that property" and therefore amounted to "seizures" under the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56, 63 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The search of HLF's offices and the seizures of their contents plainly required either a warrant or an exception to the warrant requirement. *See G.M. Leasing*, 429 U.S. at 353-59. It is undisputed that the government did not have a warrant at the time it entered and searched the HLF's offices and seized its property. 10R.4269. Rather, the government relied solely on the authority of blocking notices issued by OFAC pursuant to IEEPA. The district court erroneously concluded that the warrantless search was justified as an administrative inspection under *Donovan v. Dewey*, 452 U.S. 594 (1981). 10R.4275. Although agreeing that a nonprofit humanitarian

organization is not a "closely regulated" industry, the court apparently concluded that HLF's designation as a SDT was sufficient to bring it within the scope of the administrative inspection exception to the warrant requirement. 10R.4272-73. The court concluded that because IEEPA is a comprehensive regulatory scheme the HLF was on notice that it would be subjected to periodic inspections, despite the fact that IEEPA does not authorize warrantless searches, much less provide any guidance on how such searches should be conducted. 10R.4275. The court's rulings on these points were erroneous.

For the administrative inspection exception to the warrant requirement to apply, several factors must be present: (1) the business to be searched must be "closely regulated," considering the duration and extensive nature of the regulatory scheme, (2) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made," (3) the "warrantless inspections must be 'necessary to further the regulatory scheme,'" and (4) "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 703 (1987) (internal citations omitted). Assuming for the sake of argument that the district court was correct in finding that SDTs and SDGTs are closely regulated and there is a substantial government interest informing IEEPA, the court erred in applying the administrative inspection

exception to this case given that warrantless inspections are not necessary to further the scheme and there is no statutory inspection program much less one that is certain and regular enough to be a constitutionally adequate substitute for a warrant.

There is no evidence in the record that warrantless searches are necessary to further IEEPA's regulatory scheme. Nothing prohibited the government from obtaining a warrant before entering the HLF's offices or from sealing those offices until it could obtain a warrant. *See, e.g., Segura v. United States*, 468 U.S. 796, 810 (1986) ("We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents."). In finding no difference between a warrantless entry and search and the sealing of premises (10R.4275), the district court ignored the different interests protected by the Fourth Amendment's regulation of searches and seizures. *See Jacobsen*, 466 U.S. at 113 ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."). Assuming IEEPA authorized the government to seize HLF's assets on December 4, 2001 (in other words, to interfere with its possessory interests), the government needed no further authorization to seal the HLF offices

while it obtained a warrant. Such an action would have done nothing to further interfere with HLF possessory interests. However, by entering the offices without a warrant, the government not only interfered with the HLF's possessory interests, it infringed the privacy of HLF and its employees without a warrant. This is a difference of constitutional proportions.

More importantly, however, IEEPA does not satisfy *Burger*'s requirement that a statute's inspection program be certain and regular enough in application that it provides a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 703. Neither IEEPA nor the relevant executive orders authorize OFAC or any other governmental agency to conduct a warrantless search of private property. E.O. 12947 and 13224 declare national emergencies, as required to trigger the Presidential authorities granted by IEEPA. *See* 50 U.S.C. § 1701(b) (President may exercise authorities granted by IEEPA only "to deal with unusual and extraordinary threat with respect to which a national emergency has been declared").

IEEPA authorizes the President or his delegates to:

> ...
> (A) investigate, regulate, or prohibit—
> (i) any transactions in foreign exchange,
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

> (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and ... [remainder not relevant].

50 U.S.C. § 1702(a)(1).

Nothing in IEEPA authorizes a search of private property. As the Supreme Court has made clear, the authority to levy or block property does not carry with it the authority to make a warrantless intrusion onto private property. *See G.M. Leasing Corp.*, 429 U.S. at 354 ("It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.").

Further, as the District Court of the District of Columbia stated in rejecting the government's reliance on the relaxed standards of administrative inspections in the civil case arising from the search of HLF's offices:

> [E]ven if the administrative search exception for commercial entities was analogous to the present factual context, which it is not, a fundamental component of the exception cannot be met in this case. In

> upholding the warrantless searches, the Supreme Court specifically concluded that the regulatory inspection statutes in question provide a "sufficiently comprehensive and predictable inspection scheme ···· that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." [*United States v. Donovan*, 452 U.S. 594, 600 (1981)]. In this case, neither the IEEPA nor the two Executive Orders provides these essential safeguards of predictability and implicit notice that satisfy the requirements of the Fourth Amendment.

See Holy Land Foundation v. Ashcroft, 219 F. Supp. 2d 57, 78-80 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

In the instant case, the district court misapprehended *Burger*'s requirement of a comprehensive and predictable inspection scheme, asserting that regulation of SDTs and SDGTs need only be "sufficiently comprehensive that the regulatory scheme ... is adequate to put such organizations on notice that their property will be subject to periodic inspections so that a warrant is not required before such a search may be conducted." 10R.4275. In other words, the court ignored the requirements that *Burger* placed specifically on the inspection component of a regulatory scheme—requiring that the program be sufficiently certain and regular in its application to provide a constitutionally adequate substitute for a warrant—ruling instead that so long as a regulatory scheme is "sufficiently comprehensive" entities subject to the scheme are on notice that they may be subjected to random inspections. This is patently erroneous. But even

assuming the possibility that designation of an organization as a SDT or SDGT might put the organization on notice that it could be subject to future periodic inspections (despite the lack of any language in IEEPA authorizing such an inspection), because the government failed to notify the HLF of its designation until it executed the searches of the HLF offices, the district court erred in concluding that HLF received constitutionally sufficient notice.

2. ***The district court erred in finding that the good faith exception to the exclusionary rule applied to the government's violation of the appellants' Fourth Amendment rights.***

Given that IEEPA does not authorize a warrantless entry and search of private property and well-established Supreme Court precedent holding that the authority to seize property does not carry with it the authority to enter private premises to search for that property, *see G.M. Leasing Corp.*, 429 U.S. 338, the court erred in ruling that the government reasonably relied on its authority to block the HLF's property as justification for the warrantless entry and search of the HLF's offices. 10R.4273-75. The government had several options for lawfully entering HLF's offices and searching for assets subject to the blocking order. It simply chose to act pursuant to the unfettered discretion of the Executive. As the

Supreme Court has repeatedly noted, such unfettered discretion is anathema to the Fourth Amendment:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

United States. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297, 317 (1972) (citations omitted).

The court also erred in holding that the FBI—which participated with OFAC in the initial unlawful search and seizure of HLF's property in December 2001—acted in good faith in April 2002 when it secured a warrant to search the property without informing the magistrate court of its earlier unlawful activities. 10R.4275-76. The property seized from the HLF's offices remained within the government's exclusive control from the time of its seizure until the date on which the FBI submitted its application for a warrant to search it. In its affidavit in support of the warrant, the government expressly relied on information obtained from the December 2001 searches and seizures to establish probable cause to believe the

seized material contained information relevant to its investigation. The government affiant wrote:

> 87. I have reviewed OFAC Blocked Property Inventories for the Four HLF locations referenced herein. Those inventories indicate that OFAC seized various materials from the four HLF locations, to include the following: desks, filed, books, binders, computers, telephones, fax machines, miscellaneous documents, and various other items that the HLF used to facilitate its activities.

10R.1583. The good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search. *See United States v. Mowatt*, 513 F.3d 395, 405 (4th Cir. 2008) ("The [*United States v.*] *Leon*[, 468 U.S. 897 (1984)] exception does not apply here because *Leon* only prohibits penalizing officers for their good-faith reliance on magistrates' probable cause determinations. Here, the exclusionary rule operates to penalize the officers for their violation of Mowatt's rights that preceded the magistrate's involvement."); *United States v. McGough*, 412 F.3d 1232, 1239-40 (11th Cir. 2005) (good faith exception does not apply to search of defendant's apartment, where the search warrant was issued based on an affidavit tainted with evidence obtained as a result of a previous unlawful entry into the apartment); *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987) (good faith exception did not apply when warrant was based on information obtained in illegal warrantless search because "[t]he constitutional error was made by the officer ..., not by the magistrate").

D. The Government Cannot Prove the Error Harmless Beyond a Reasonable Doubt.

Because the admission of evidence seized during the illegal searches of the HLF offices implicates Baker's Fourth Amendment rights, this Court must decide whether the district court's error is harmless beyond a reasonable doubt. *See United States v. Edwards*, 303 F.3d 606, 621-22 (5th Cir. 2002) ("To the extent that the error implicates [the defendant's] Fourth Amendment rights, we ask whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.') (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)).

Given the volume of exhibits obtained during the unlawful search and seizure, and the central role those exhibits played in the trial, the government cannot establish that the district court's error in admitting those exhibits is harmless beyond a reasonable doubt. The exhibits seized from the HLF's office included some of the most inflammatory and irrelevant evidence introduced at trial, including evidence of Hamas violence unrelated to any act by the HLF or any individual HLF defendant (e.g., GX HLF Search 47, 50, 51). The government also relied heavily on thousands of pages of evidence seized from the HLF offices to show the transfers of funds to the zakat committees listed in the indictment to numerous zakat committees and charity societies not contained in the indictment. *See e.g.*, GX HLF Search 35-45.

X. THE DISTRICT COURT ERRED IN GIVING A FIRST AMENDMENT INSTRUCTION THAT MISSTATED THE LAW AS APPLIED TO THE FACTS OF THE CASE.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number I in Appellant Abdulqader's Opening Brief.

XI. THE DISTRICT COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number II in Appellant Abdulqader's Opening Brief.

XII. THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number VIII in Appellant Elashi's Opening Brief.

XIII. THE DISTRICT COURT ERRED IN SENTENCING BAKER.

Under Fed. R. App. P. 28(i), Baker adopts this Argument, which is number X in Appellant Elashi's Opening Brief. Here, too the U.S.S.G. § 3A1.4 adjustment does not apply. At Baker's sentencing the court failed to give individual consideration to Baker's intent, instead attributing to him the intent of Hamas. 15R.203. The court also erroneously attributed to Baker—solely because "Mr. Baker was there" (15R.241)—the anti-Jewish statements in videos found in the searches.

CONCLUSION

For the foregoing reasons, the Court should reverse Shukri Abu Baker's conviction. If the Court does not reverse Baker's conviction, it should vacate his sentence and remand for resentencing.

DATED: October 19, 2010

Respectfully submitted,

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SHUKRI ABU BAKER

~~SECRET~~

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 12,499 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

/s/ Nancy Hollander
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th of October, 2010, a copy of the foregoing was hand-delivered to the Court Security Officer for further delivery to the Court and opposing counsel.

/s/ Nancy Hollander
Nancy Hollander