

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	Crim. No. 3:07-CR-57 (MRK)
v.	:	
	:	December 5, 2007
HASSAN ABU-JIHAAD	:	

**MOTION FOR DISCLOSURE OF FISA APPLICATIONS AND ORDERS
AND FOR ADVERSARY HEARING ON MOTION TO SUPPRESS**

Pursuant to 50 U.S.C. §§ 1806(f) and 1825(g), defendant Hassan Abu-Jihaad hereby moves for disclosure of the application papers submitted by the government and all court orders issued pursuant to the Foreign Intelligence Surveillance Act. Defendant also requests that the Court conduct an adversary hearing to determine the issues raised by defendant's Motion to Suppress FISA Derived Evidence. In support of the instant motion, the undersigned attorney represents the following:

1. Defendant Hassan Abu-Jihaad is accused in a two count Indictment of Providing Material Support to Terrorists in violation of 18 U.S.C. § 2339A and of Communicating National Defense Information to Persons Not Entitled to Receive It in violation of 18 U.S.C. § 793(d).

2. On or about October 29, 2007, the government filed an Amended Notice of Intention To Use Foreign Intelligence Surveillance Act Information Pursuant 50 U.S.C. §§ 1806(c) and 1825(d) ("the Amended Notice"). The Amended Notice indicates that the government intends to use FISA Derived Evidence at pretrial hearings, the trial and other related proceedings in this case.

The Amended Notice does not specify what FISA Derived Evidence the government intends to use, but discovery provided to date suggests that the government intends to use (at a minimum) evidence derived from electronic surveillance (intercepted telephone conversations) and from physical search of the defendant's e-mail accounts.

3. By Motion dated November 12, 2007, the defendant has moved to suppress the FISA derived evidence which the government intends to introduce. Among other arguments, the motion to suppress challenges the probable cause determinations which were made by the Foreign Intelligence Surveillance Court ("FISC") and raises a claim under *Franks v. Delaware*.

4. Defense counsel do not have access to the affidavits and other papers which the government may have submitted to the FISC or any of the orders issued by the FISC authorizing the electronic surveillance and/or physical search(es). As a result, defense counsel are left to guess about what information might have been presented to the FISC and what arguments might appropriately be made in support of the motion to suppress.

5. FISA allows for the disclosure of the government's application papers and FISC orders where "necessary to make an accurate determination of the legality of the [surveillance or search]." 50 U.S.C. §§ 1806(f) and 1825(g). The motion to suppress raises substantial questions about the legality of the government's use of FISA orders in the unique circumstances of this case. Particularly with respect to the probable cause determination that the defendant was acting as an "agent of a foreign power" when the FISA applications were

made in 2006 and the substantial questions raised with respect to the possible *Franks* violation in the FISC application papers, disclosure of the pertinent portions of the application papers and an adversary hearing on the issues raised in the motion to suppress is necessary for the Court to make an accurate determination of the legality of the surveillance. The issues raised by the Motion to Suppress, while substantial, are based largely upon guesswork. As a consequence of the shroud of secrecy surrounding the FISC application papers, the arguments presented in the Motion to Suppress are unrefined. Although the defense respects the Court's ability and the Court's impartiality, very substantial issues have been raised by the Motion to Suppress and there simply is no substitute for more informed input from the defense as an aid to the Court's correct determination of the legality of the government conduct. Disclosure of the application papers and FISC orders and conducting an adversary hearing on the Motion to Suppress will allow the defense to impart its knowledge to the Court and thereby assist the Court in getting the decision right.

6. In response to the instant application, the defense anticipates that the government may file an affidavit certifying that disclosure of the FISA application papers or orders "would harm the national security of the United States." Cf. 50 U.S.C. §§ 1806(f) and 1825(g). The Court should look askance at such an affidavit if it were to be submitted. The only criminal charges filed against the defendant relate to conduct which allegedly occurred in the spring of 2001. The government has been actively investigating the defendant since 2004. Based upon the testimony of Special Agent David Dillon at the court hearing on

November 28th, it is clear that the government has been conducting physical surveillance and electronic surveillance of the defendant since the beginning of 2004 and has enlisted at least one cooperating witness to befriend the defendant in an effort to elicit incriminating statements from him. It is safe to assume that the government has probably utilized every investigative tool available to it in the effort to build a case against the defendant. The end result of the investigation, as shown by the evidence adduced at the recent court hearing on the Motion in Limine, is the same set of e-mail communications which the defendant sent to Azzam Publications in 2001 and which the government has known about since early 2004, and the uncorroborated, hearsay ramblings of Derrick Shareef uttered in 2006 regarding some half-baked notion to attack military installations. There is absolutely no evidence of Mr. Abu-Jihaad's involvement with any "foreign power" beyond the e-mail communications sent to Azzam Publications in 2001, there is no credible evidence of Mr. Abu-Jihaad's involvement in any ongoing conspiracy in 2006 and Mr. Abu-Jihaad himself has been in custody since March of 2007. This is not a situation where the government is conducting an ongoing investigation which is generating "foreign intelligence information" or other evidence of an ongoing plot to harm the national security. In this context, the government cannot make a good faith showing that disclosure of pertinent portions of the FISA application papers and orders would "harm the national security of the United States."

7. If the government files an affidavit opposing disclosure and/or the requested adversary hearing, the Court should consider whether disclosure of

redacted portions of the application papers and orders and conducting a limited adversary hearing would accommodate the government's security concerns.

The relief requested in the instant motion is not intended to be an all or nothing proposition. If the government raises any legitimate security concerns, the Court should review the FISC papers with the issues raised by the Motion to Suppress in mind and fashion an order regarding the scope of disclosure and any adversary hearing which accommodates the competing interests of the parties and the Court's interest in making a fully informed decision.

WHEREFORE, defendant Hassan Abu-Jihaad respectfully requests that the Court issue an order disclosing the FISC application papers and scheduling an adversary hearing on the Motion to Suppress or, in the alternative, granting such other and further relief as the Court deems just and proper.

THE DEFENDANT

By /s/
Dan E. LaBelle of
HALLORAN & SAGE LLP
Fed. Bar #ct 01984
315 Post Road West
Westport, CT 06880
(203) 227-2855
labelle@halloran-sage.com

CERTIFICATION

I hereby certify that on December 5, 2007, a copy of the foregoing Motion For Disclosure was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ _____
Dan E. LaBelle