IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NIDAL M. HASAN, Defendant.	)	Case No. W-12MC195

ORDER

THIS MATTER is before the Court on Defendant's "Foreign Intelligence Surveillance Act Defense Discovery Request" ("discovery request") and his "Motion to Compel Disclosure of Foreign Intelligence Surveillance Act Evidence and to Suppress Foreign Intelligence Surveillance Act Obtained Evidence" ("motion to suppress") (collectively, "Defendant's motions"). For the reasons set forth below, it is **ORDERED** that the Defendant's motions are **DENIED**, and that the Government's requests are **GRANTED**.

Background

Nidal M. Hasan ("Hasan") is a major in the United States Army and is the defendant in a pending General Court-Martial that has been convened at Fort Hood, Texas, which is located within the Western District of Texas and within the territorial jurisdiction of this Court.

On November 12, 2009, the Government preferred[1] 13 specifications[2] of premeditated murder in violation of 10 U.S.C. § 918(1) against Hasan; on December 2, 2009, the Government preferred an additional 32 specifications of attempted premeditated murder in violation of 10 U.S.C. § 80 against him. Hasan was subsequently referred for trial before a General Court-Martial on all of the preferred specifications. The specifications of premeditated murder and attempted premeditated murder arise from the mass shooting that took place at Fort Hood, Texas, on November 5, 2009.

On July 10, 2012, both Hasan and Colonel Gregory Gross, the presiding military judge, were provided with notice pursuant to 50 U.S.C. § 1806(c) that the United States "intends to offer into evidence or otherwise use or disclose in any proceedings in the above-captioned matter, information obtained and derived from electronic surveillance conducted pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801-1812." On July 17, 2012, Hasan served on the Government a one-page discovery request styled "Foreign Intelligence Surveillance Act Defense Discovery Request."[3] Thereafter, on July 20, 2012, Hasan filed with the military court a

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[1] Pursuant to the Uniform Code of Military Justice ("UCMJ"), Title 10 United States Code §§ 801-946, which governs Courts-Martial, a preferal is the bringing of sworn charges against a member of the military, and it is the first legal step towards trial by a Court-Martial for violations of the punitive articles of the UCMJ. A preferal consists of Charges and Specifications. A charge states the punitive article of the UCMJ alleged to have been violated (in this case, 10 U.S.C. §§ 918(1) and 80), and a specification presents a short, concise factual allegation of how the accused allegedly violated the relevant punitive article.

[2] What would be termed "counts" in a federal criminal indictment are termed "specifications" under the UCMJ.

[3] The defense requested the disclosure not only of all information obtained or derived from FISA surveillance, but also "any and all FISA applications, affidavits, court orders, and extensions, as well as any other documents related to the FISA searches and surveillance . . . regardless of their classification."

"Motion to Compel Disclosure of Foreign Intelligence Surveillance Act Evidence and to Suppress Foreign Intelligence Surveillance Act Obtained Evidence."

Hasan's discovery request and motion to suppress were subsequently transferred by the military judge to this Court for adjudication in accordance with 50 U.S.C. § 1806(f) on July 25, 2012. "[W]here the motion is made before any other authority, the United States district court in the same district as the authority, shall . . . determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). *See United States v. Ott*, 827 F.2d 473, 475 n. 2 (9th Cir. 1987) ("United States district courts have exclusive jurisdiction to entertain motions to suppress evidence obtained through FISA-authorized surveillance. 50 U.S.C. § 1806(f).").

Findings

FISA contains specific and detailed procedures required for obtaining orders to authorize electronic surveillance and physical searches of a foreign power or an agent of a foreign power. To begin the FISA process, an application approved by the Attorney General that contains specific information is filed *ex parte* and under seal with the Foreign Intelligence Surveillance Court ("FISC") (50 U.S.C. §§ 1804(a), 1823(a)). The FISC must make necessary, specific findings after reviewing an application before entering an *ex parte* order (50 U.S.C. §§ 1805(a), 1823(a)). The order must specify and direct certain information and conduct (50 U.S.C. §§ 1805(c)(1)-(2), 1824(c)(1)-(2)). The Court has reviewed the Defendant's motions and the Government's response and the attachments thereto, including applications, orders, and related materials ("the FISA

materials"). After a thorough *in camera, ex parte* review and based on its analysis of all the materials submitted to the Court, and with the above in mind, the Court finds that:

(1) The President has authorized the United States Attorney General to approve applications for electronic surveillance and for physical searches for foreign intelligence information and purposes;

(2) Each application was made by a federal officer and approved by the Attorney General (50 U.S.C. §§ 1805(a)(1), 1824(a)(1));

(3) Each application contained facts establishing probable cause to believe that the target of the electronic surveillance, physical search, or both, was at the time an agent of a foreign power (50 U.S.C. §§ 1801(b)(2), 1805(a)(2)(A), 1824(a)(2)(A));

(4) No United States person was determined to be an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the United States Constitution (50 U.S.C. §§ 1805(a)(2)(A), 1824(a)(2)(A));

(5) Each application made pursuant to 50 U.S.C. § 1804 contained facts establishing probable cause to believe that each of the facilities or places at which the electronic surveillance was directed was being used, or was about to be used, by a foreign power or an agent of a foreign power (50 U.S.C. § 1805(a)(2)(B)).

(6) Each application made pursuant to 50 U.S.C. § 1823 contained facts establishing probable cause to believe that the premises or property to be searched was or was about to be owned, used, possessed by, or was in transit to or from an agent of a foreign power or a foreign power (50 U.S.C. § 1824(a)(2)(B));

(7) Each application made pursuant to 50 U.S.C. § 1823 contained facts establishing probable cause to believe that the premises or property to be searched contained foreign intelligence information (50 U.S.C. §1824(a)(3)(B)).

(8) The minimization procedures incorporated into the application and orders met the requirements of 50 U.S.C. §§ 1801(h) or 1821(4) (50 U.S.C. §§ 1805(a)(3), 1824(a)(3)) and the Government implemented such minimization procedures accordingly;

(9) Each application contained all of the statements and certifications required by 50 U.S.C. §§ 1804 or 1823 (50 U.S.C. §§ 1805(a)(4), 1824(a)(4));

(10) No certification in an application for a target who was at the time a United States person was clearly erroneous on the basis of the statement made pursuant to 50 U.S.C. §§ 1804(a)(6)(E) or 1823(a)(6)(E) or any other information furnished under 50 U.S.C. §§ 1804(c) or 1823(c) (50 U.S.C. §§ 1805(a)(4), 1824(a)(4));

(11) A "significant purpose" of the Government's collection pursuant to FISA was to collect foreign intelligence information (50 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B)), and the "significant purpose" standard is constitutional under the Fourth Amendment. *See United States v. Duka*, 671 F.3d 329, 343-345 (3d Cir. 2011).

(12) Each order issued by the FISC satisfied the requirements of 50 U.S.C. §§ 1805(c) or 1824(c);

(13) Each order issued by the FISC satisfied the requirements of 50 U.S.C. §§ 1805(d) or 1824(d);

(14) There is no indication of any false statements in the FISA applications; thus, a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), is not warranted in this matter; and

(15) Disclosure to the defense of the FISA materials is not required because the Court was able to make an accurate determination of the legality of the electronic surveillance and physical searches without disclosing the FISA materials or any portions thereof.

Discussion

The Attorney General has filed a sworn declaration in this case stating that disclosure of the FISA materials or an adversary hearing would harm the national security of the United States. Therefore, as mandated by FISA, this Court conducted an *in camera, ex parte* review of the FISA materials to determine whether the information was lawfully acquired and whether the electronic surveillance and physical searches were made in conformity with an order of authorization or approval (*i.e.,* were lawfully conducted). This *in camera, ex parte* review process under FISA satisfies due process under the United States Constitution. *See, e.g., United States v. Spanjol*, 720 F. Supp. 55, 58-59 (E.D. Pa. 1989); *United States v. Butenko*, 494 F.2d 593, 607 (3d Cir.), *cert denied sub nom, Ivanov v. United States*, 419 U.S. 881 (1974); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States v. Warsame*, 547 F. Supp. 2d 982, 988-89 (D. Minn. 2008). In conducting that review, the Court may disclose the FISA materials "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance [or search]." 50 U.S.C. §§ 1806(f), 1825(g).

The FISA materials here are well organized and readily understood, and the Court does not require the assistance of the defense to make an accurate determination of the legality of the electronic surveillance and physical searches. Thus, there is no valid, legal reason for disclosure of any of the FISA materials to Hasan. *See United States v. Duggan,*

743 F.2d 59, 78 (2d Cir. 1984) (holding that disclosure should occur only if the court determines such disclosure is necessary to make an accurate determination of the legality of the surveillance). Additionally, as argued by the Government, to disclose the information and materials sought by the Defendant would pose a substantial threat to the national security of the United States by damaging the Government's ability to gather vital intelligence information.

As a result of the Court's thorough *in camera, ex parte* examination of the materials in the Sealed Appendix, the Court finds that the FISC record provides all of the information needed to overcome the concerns and arguments raised by the Hasan. The Court finds that the Government satisfied FISA's requirements to obtain orders for electronic surveillance and physical searches; the information obtained pursuant to FISA was lawfully acquired; and that the electronic surveillance and physical searches were made in conformity with an order of authorization or approval.

Additionally, there is no basis for disclosure of the FISA materials pursuant to 50 U.S.C. § 1806(g). Such disclosure is only permitted if this Court's *ex parte, in camera* review disclosed that due process requires discovery or disclosure. The Court finds that due process does not require any disclosure in this case.

Although federal courts are not in agreement whether the FISC's probable cause determinations should be reviewed *de novo* or accorded deference, the Court finds that the materials that it reviewed *ex parte, in camera* would pass muster under either standard. This Court also finds that the probable cause requirement of FISA comports with the requirements of the Fourth Amendment to the United States Constitution. *See e.g., United States v. Isa*, 923 F.2d 1300, 1304 (8th Cir. 1991).

Furthermore, the certifications submitted in support of a FISA application should be "subjected only to minimal scrutiny by the courts," *United States v. Badia*, 827 F.2d 1458, 1463 (11th Cir. 1987), and are to be "presumed valid." *Duggan*, 743 F.2d at 77 & n.6 (citing *Franks*, 438 U.S. at 171); *United States v. Campa*, 529 F.3d 980, 993 (11th Cir. 2008); *United States v. Sherifi*, 793 F. Supp. 2d 751, 760 (E.D. N.C. 2011) ("a presumption of validity [is] accorded to the certifications"); *United States v. Nicholson*, No. 09-CR-40-BR, 2010 WL 1641167, at *5 (D. Or. Apr. 21, 2010) (quoting *United States v. Rosen,* 447 F. Supp. 2d 538, 545 (E.D.Va. 2006)); *Warsame*, 547 F. Supp. 2d at 990 ("a presumption of validity [is] accorded to the certifications"). If the target is a United States person, then the district court should also ensure that each certification is not "clearly erroneous." *Campa*, 529 F.3d at 994; *Duggan*, 743 F.2d at 77; *United States v. Kashmiri*, 2010 WL 4705159, at *2 (N.D. Ill., Nov. 10, 2010). A certification is clearly erroneous only when "the reviewing court on the [basis of the] entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see United States v. Garcia*, 413 F.3d 201, 222 (2d Cir. 2005); *United States v. Islamic American Relief Agency ("IARA")*, No. 07-00087-CR-W-NKL, 2009 WL 5169536, at *4 (W.D. Mo. Dec. 21, 2009). Applying these standards, this Court finds that the certifications at issue here were made in accordance with FISA's requirements.

Although the Court has determined that the FISA collection was lawfully authorized and lawfully conducted, the FISA-obtained or -derived evidence would have been admissible under the "good faith" exception to the exclusionary rule, as articulated in *United States v. Leon*, 468 U.S. 897 (1984). *See United States v. Ning Wen*, 477 F.3d

896, 897 (7th Cir. 2007) (holding that the *Leon* good-faith exception applies to FISA orders); *United States v. Mubayyid*, 521 F. Supp. 2d 125, 140 n. 12 (D. Mass. 2007) (noting that the Government could proceed in good-faith reliance on FISA orders even if FISA were deemed unconstitutional); *United States v. Ahmed*, No. 1:06-CR-147-WSD-CGB, 2009 U.S. Dist. LEXIS 120007, at *25 n. 8 (N.D. Ga. Mar. 19, 2009); *Nicholson*, No. 09-CR-40-BR, 2010 WL 1641167, at *6.

The defendant's motions refer to three Amendments to the United States Constitution without further elaboration; *namely,* the Fifth, Sixth, and Eighth Amendments. In effect, Hasan contends that FISA's *ex parte, in camera* process violates his rights under the Fifth and Sixth Amendments of the United States Constitution. The constitutionality of FISA's *in camera, ex parte* review provisions has been affirmed by every Federal court that has considered the matter. See, e.g., *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2nd Cir. 2010) (*in camera, ex parte* review does not violate due process); *Spanjol*, 720 F.Supp. at 58; *Damrah*, 412 F.3d at 624 (due process); *Ott*, 827 F.2d at 476-77 (due process); *United States v. Gowadia*, No. 05-00486, 2009 WL 1649714, at *2 (D. Hawaii June 8, 2009); *United States v. Jayyousi*, No. 04-60001-CR, 2007 WL 851278, at *7 (S.D. Fla. 2007); *Benkahla*, 437 F. Supp. 2d at 554; *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991); *United States v. Falvey*, 540 F. Supp. 1306, 1315 (E.D. N.Y. 1982).

Hasan's argument that his Sixth Amendment rights were violated is without merit. The right of confrontation is "not absolute" and may bow to accommodate legitimate interests in the criminal trial process. Given the substantial interests at stake here (as reflected in the sworn declaration of the Attorney General) and the protections provided

by FISA, Hasan's Sixth Amendment rights of the appellant were not violated. *United States v. Isa*, 923 F.2d 1300, 1306-07 (8th Cir. 1991). *See Warsame*. 547 F. Supp. 2d at 988 n.4; *United States v. Nicholson*, 955 F. Supp. 588, 592 & n.11 (E.D. Va. 1997); *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982); *United States v. Megahey*, 553 F. Supp. 1180, 1193 (E.D. N.Y. 1982); *United States v. Benkhala*, 437 F. Supp. 2d 541, 554 (E.D. Va. 2006); *Falvey*, 540 F. Supp. at 1315-16 (rejecting challenges under the First, Fifth, and Sixth Amendments, and noting that a "massive body of pre-FISA case law of the Supreme Court, [the Second] Circuit and others" supported the conclusion that the legality of electronic surveillance should be determined on an *in camera, ex parte* basis).

The defendant contends that his rights have been violated under the Eighth Amendment; however, the defendant does not cite to any authority in support of his position that FISA is unconstitutional under the Eighth Amendment, and the Court can find no portion of that Amendment that has any relevance to the issue before the Court.

Hasan also alleged ten legal infirmities in the FISA process. The Court has reviewed each of those allegations, and finds that each is without merit.

Finally, Hasan sought an adversarial hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The Court notes that Hasan would have been entitled to such a hearing only if he had made a substantial preliminary showing that established two elements: (1) that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included in the FISA materials; (2) and that such allegedly false statement had been necessary to the FISC's approval of the application. *Id.* at 155-56. Hasan has made no such preliminary showing and has failed to carry either burden. However, this Court is

aware that Hasan has not reviewed the FISA materials, and has therefore made an independent review of all of the FISA materials. Based upon that review, the Court finds that there is no indication that any false statements were included in the FISA materials, and as a result, there is no occasion for the Court to assess the materiality of alleged falsehoods that do not in fact exist.

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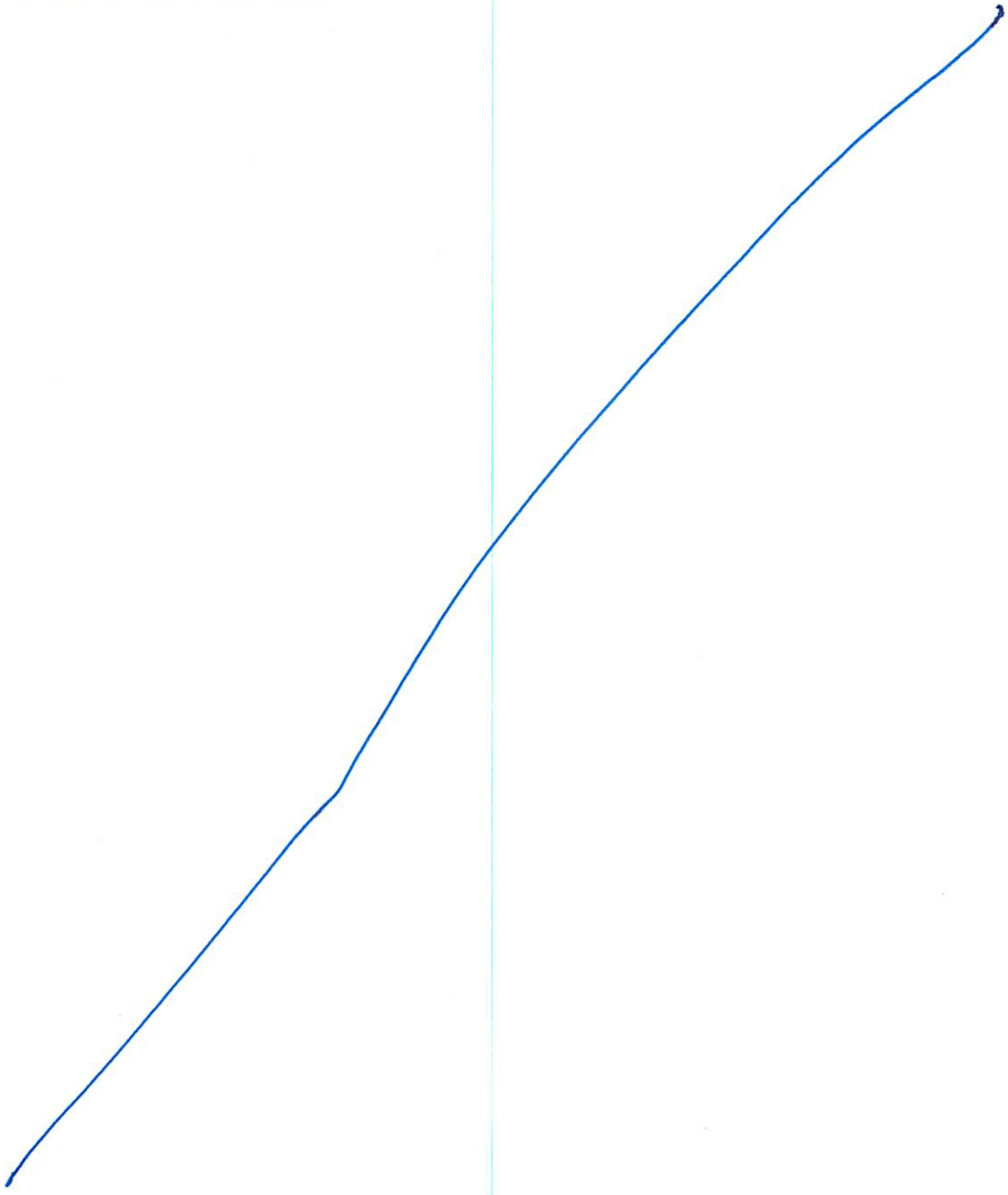

Conclusion

With the above findings and analysis, the Court determines that:

(1) The electronic surveillance and physical searches conducted pursuant to FISA were lawfully authorized and lawfully conducted in compliance with the Fourth Amendment.

(2) The electronic surveillance and physical searches at issue were both lawfully authorized and lawfully conducted in compliance with FISA.

IT IS HERBY ORDERED that the Defendant's motions are **DENIED** and that the Government's requests are **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the Government's FISA applications, orders and other related materials and its classified submissions for this matter are **SEALED** and shall be retained in accordance with established security procedures by the Classified Information Security Officer or his/her designee.

SO ORDERED,

This 14th day of August, 2012

Walter S. Smith, Jr.

WALTER S. SMITH, JR
United States District Judge