UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

V.

CRIMINAL ACTION
NO. 89-221-MA

RICHARD CLARK JOHNSON
PETER EAMON MAGUIRE
MARTIN PETER QUIGLEY
CHRISTINA LEIGH REID
GERALD VINCENT HOY

REPORT AND
RECOMMENDATION ON
(1) DEFENDANT RICHARD
C. JOHNSON'S MOTION TO
SUPPRESS EVIDENCE AND FOR
THE RETURN OF SEIZED PROPERTY (#70);
(2) [DEFENDANT QUIGLEY'S] MOTION TO SUPPRESS
EVIDENCE AND FOR THE RETURN OF SEIZED PROPERTY (#19);
(3) DEFENDANT CHRISTINA LEIGH REID'S MOTION TO SUPPRESS
EVIDENCE AND FOR THE RETURN OF SEIZED PROPERTY (#29);
(4) DEFENDANT CHRISTINA LEIGH REID'S SUBSTITUTE MOTION
TO SUPPRESS EVIDENCE AND FOR THE RETURN OF SEIZED
PROPERTY (#82) AND (5) [DEFENDANT HOY'S] MOTION
TO SUPPRESS EVIDENCE AND FOR THE RETURN OF SEIZED PROPERTY (#98)

COLLINGS, U.S.M.

INTRODUCTION

Each of the defendants' motions seeks to suppress the fruits of foreign intelligence electronic surveillance conducted pursuant to the Foreign Intelligence Surveillance Act, Title 50, United States Code, Section 1801 et seq. (hereinafter, "FISA"). The Government has notified defense counsel of its intention to introduce against the defendants information obtained or derived from FISA electronic surveillance during the trial of this case. Specifically, defense counsel have been advised that Richard Clark

Johnson and Martin Peter Quigley were targets of electronic surveillance authorized by the Court established by FISA. The locations at which the electronic surveillance was conducted have been revealed. The defendants have been provided with copies of all logs and transcripts of the electronic surveillance, together with either copies of or access to the audio tapes of the recorded conversations. Moreover, the particular intercepted conversations that the Government intends to use at trial have been identified. The Government opposes these motions. Since I have determined after an in camera ex parte review of all the documents in the files of the FISA Court that no disclosure of these documents "...is necessary to make an accurate determination of the legality of the surveillance," I have denied motions seeking discovery of the materials. 50 U.S.C. §1806(f).

THE ACT

Enacted in 1978 in response to perceived past abuses, FISA established, for the first time, a statutory "procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes." S. Rep. No. 95-604, 95th Cong., 2d Sess., reprinted in, 4 U.S. Code Cong. & Admin. News, 3904, 3906 (1978). Under the Act, the Chief Justice of the United States was authorized to designate seven district court judges to comprise the Foreign Intelligence Surveillance Court (hereinafter, "FISA Court"), members of which were empowered to hear applications for and grant orders approving electronic surveillance for foreign

intelligence purposes. 50 U.S.C. §1803(a). If an application under the Act is denied, the government is entitled to appeal to a specially created court of review and, thereafter, to the Supreme Court on a petition for a writ of certiorari. 50 U.S.C. §1803(b).

Upon the finding and approval of the Attorney General that a proposed application satisfies specific criteria and requirements, a Federal officer may submit the application for an order approving electronic surveillance to a judge of the FISA Court. 50 U.S.C. §1804(a). The application must include, inter alia, the identity of the target of the proposed surveillance; the facts and circumstances justifying the belief both that the target is a foreign power or an agent thereof and that the locations subject to the proposed surveillance is being used by the foreign power; a detailed description of the information sought together with the type of communication to be intercepted; a statement of the proposed minimization procedures; and a certification that the purpose of the surveillance is to obtain foreign intelligence information as well as that the information sought is deemed to be foreign intelligence information. 50 U.S.C. §1804(a)1-11.

The judge is required to enter an order authorizing the electronic surveillance if the following findings are made: 1) the President has authorized the Attorney General to approve FISA applications; 2) the application has been made by a federal officer and has been approved by the Attorney General; 3) based on the facts submitted by the applicant, there is probable cause to believe that (a) the target of the electronic surveillance is a

foreign power or an agent of a foreign power as defined in the Act, provided that no United States person is to be considered to be a foreign power solely upon the basis of activities protected by the First Amendment and (b) each of the places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or agent; 4) the proposed minimization procedures meet the requirements set forth in the Act; and 5) the application contains all the statements and certifications required by the Act and, if the target is a United States person, that the certifications are not clearly erroneous. 18 U.S.C. §1805(d)(1). In addition, an extension of the order "may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order..." 50 U.S.C. §1805(d)(2).

The Act provides that, absent consent of the United States person, information acquired from an electronic surveillance under a FISA order may be used and disclosed only in accordance with the requisite minimization procedures. 50 U.S.C. §1806(a). Moreover, such information may only be used or disclosed for lawful purposes. 50 U.S.C. §1806(a). Further, information so acquired shall be disclosed for law enforcement purposes on condition that the disclosure is accompanied by a statement that the information may only be used in a criminal proceeding if the Attorney General gives advance authorization. 50 U.S.C. §1806(b).

When the government intends to use information obtained or derived from a FISA surveillance as evidence at a trial, both the

aggrieved person, i.e., the target of an electronic surveillance or any other person whose communications or activities were intercepted, and the Court must be notified of the intention to disclose. 18 U.S.C. §1806(c), 50 U.S.C. §1801(k). After notification, an aggrieved person has standing to move to suppress the evidence obtained or derived from the FISA electronic surveillance on either of two grounds: first, that the information was unlawfully acquired or, second, that the surveillance did not conform to the order of authorization or approval. 50 U.S.C. §1806(e).

When a motion to discover applications, orders or other materials related to a FISA surveillance is filed, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm national security, the Court shall review in camera and ex parte the application, order, and other material related to the surveillance to determine if the surveillance was lawfully authorized and conducted. 50 U.S.C. §1806(f). The Court, in making this determination, may disclose to the aggrieved person portions of the materials relating to the surveillance "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. §1806(f). An Affidavit And Claim Of Privilege Of The Attorney General Of The United States (#135) has been filed in opposition to the disclosure of any additional information relating to the FISA electronic surveillances in the interests of national security in the instant case. As indicated supra, I have found that

no disclosure is necessary in this case.

Should the Court determine that the surveillance was not lawfully authorized or conducted, evidence obtained or derived therefrom shall be suppressed. 50 U.S.C. §1806(g). On the other hand, should the Court determine that the surveillance was lawfully authorized and conducted, the aggrieved person's motion shall be denied except to the extent discovery or disclosure is required by due process. 50 U.S.C. §1806(g).

DISCUSSION

In the instant case, as previously noted, the government has fulfilled its obligation under the Act of notifying the Court and the defendants of its intention to introduce as evidence at trial information obtained or derived from FISA electronic surveillance. Each of the defendants is an aggrieved person as defined by the statute and, therefore, has standing to move to suppress the fruits of the FISA surveillances. Given these circumstances, under both statutory and decisional law, it is appropriate for the Court to undertake an in camera, ex parte review of the pertinent documents of the Foreign Intelligence Surveillance Court to determine if the surveillance was lawfully authorized and conducted. 50 U.S.C. §1806(f); See also U.S. v. Sarkissian, 841 F.2d 959, 965 (9 Cir., 1988); U.S. v. Ott, 827 F.2d 473, 476-477 (9 Cir., 1987); U.S. v. Badia, 827 F.2d 1458, 1463-1464 (11 Cir., 1987), cert. denied, 108 S.Ct. 1115 (1988). I have done so.

FINDINGS

1. The President has authorized the Attorney General to

approve applications for electronic surveillance to the FISA Court. 50 U.S.C. §1805(a)(1).

2. Each of the applications was made by a Federal officer and approved by the Attorney General. 50 U.S.C. §1805(a)(2).

3. Each of the applications contained facts establishing probable cause that the target of the electronic surveillance was at the time an agent of a foreign power. 50 U.S.C. §1805(a)(4)(A). In the case of both the defendant Johnson and the defendant Quigley, the facts established probable cause to believe that each was an "agent of a foreign power" as defined in 50 U.S.C. §1801(b)(2)(C)(D). In the case of the defendant Johnson, a "United States person" as defined in 50 U.S.C. § 1801(i), I find that the facts establishing probable cause to believe that he is an agent of a foreign power are not based "solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(3)(A).

4. Each of the applications contained facts establishing probable cause to believe that each of the facilities or places at which the electronic surveillance was, or was about to be used at the time by an agent of a foreign power. 50 U.S.C. §1805(a)(3)(B).

5. The minimization procedures included with the applications and orders of the judge meet the requirements of 50 U.S.C. §1801(h). 50 U.S.C. §1805(a)(4).

6. Each application contained all statements and certifications required by 50 U.S.C. §1804.

7. None of the certifications made in the applications

pursuant to 50 U.S.C. §1804(a)(7) are clearly erroneous on the basis of the facts contained within the certifications and any other facts furnished in the applications pursuant to 50 U.S.C. § 1804(d).

8. Each of the Orders issued by the FISA Court satisfied the requirements of 50 U.S.C. §1805(b).

DISCUSSION OF SPECIFIC ARGUMENTS MADE BY DEFENDANTS

The defendants advance several arguments in support of the claimed necessity for disclosure of the FISA documentation and materials. The first contention is that based on the circumstances of this case the FISA warrants issued on or about November 15, 1988 appear to be facially deficient under 50 U.S.C. Sections 1804 and 1805. This argument must be placed in perspective by a brief recital of the background facts.

The initial surveillance at issue was commenced on August 23, 1988 on defendant Johnson's telephone at his home in Nashua, New Hampshire and on his parents' home telephone in Harwich, Massachusetts. These wiretaps were terminated on October 23, 1988. Having reviewed the log entries of the telephone conversations that transpired during this period, the defendants maintain that there was no foreign intelligence information obtained from these surveillances. Nevertheless, the FISA application was renewed and authorized surveillance was reinstated on November 15, 1988.

Because the initial surveillances bore no fruit with respect to foreign intelligence information, the defendants argue that the basis for the November 1988 FISA orders are patently questionable.

In the defendants' view, it is doubtful that the requirements of 50 U.S.C. §§1805 and 1806 have been met. They infer from the circumstances that there may have been a misrepresentation of fact to the FISA judge regarding the initial surveillance in order to obtain the second warrants. In other words, they question the facts presented to establish probable cause for the November orders when the earlier wiretaps proved to be unsuccessful. Due to these "irregularities", it is urged that, at a minimum, partial disclosure of the applications, orders and other materials relating to the surveillance is required.

The defendants' position is unavailing for two reasons. First, there quite simply is no requirement in the Act that the facts upon which the probable cause necessary to support the renewal application is based must be derived from the information obtained as a consequence of the initial electronic surveillance. Rather, the statute provides that

> Extensions of an order issued under this chapter may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order.

50 U.S.C. §1805(d)(2).

It is not reasonable to construe this statutory language as constraining the government strictly to the use of information gleaned from a prior surveillance in satisfying the criteria and requirements needed to support a reapplication for a FISA warrant. Put another way, the government is not limited to information obtained from a prior FISA surveillance as the source of facts upon

which reapplication may be made.

Second, having reviewed the FISA applications, warrants and related materials, the Court finds that the defendants' inferred irregularities are unsupported as a matter of fact.

The defendants next challenge the FISA surveillance and urge the need for an adversary hearing on the grounds that the true purpose for the wiretaps is dubious. It is argued that after April 11, 1989, the date on which the Government obtained a search warrant in order to open a letter sent to defendant Johnson, the purpose of the FISA surveillance was in fact to further a criminal investigation, not to gather foreign intelligence information.

Gathering of foreign intelligence information and obtaining information which is evidence of a crime are not mutually exclusive activities. As was recognized in the FISA legislative history

> Intelligence and criminal law enforcement tend to merge in (the area of foreign counter-intelligence investigations).
>
> ...
>
> ...[S]urveillances conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate.

4 U.S. Code Cong. & Admin. News at pp. 3979-3980.

The statute itself anticipates and makes provision for the use of information obtained or derived from FISA authorized surveillances at a trial or other judicial proceeding. See, 50 U.S.C. §1806.

Courts addressing this issue have uniformly rejected the defendants' argument. Indeed, it is often reiterated

> ...that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by §1806(b), as evidence in a criminal trial.

U.S. v. Duggan, 743 F.2d 59, 78 (2 Cir., 1984); See also, U.S. v. Badia, 827 F.2d 1458, 1464 (11 Cir., 1987), cert. denied, 108 S.Ct. 1115 (1988); U.S. v. Pelton, 835 F.2d 1067, 1076 (4 Cir., 1987).

The Court is convinced after reviewing the FISA materials that the purpose of the surveillances was to obtain foreign intelligence information not, as the defendants would have it, "to ferret out criminal activity." U.S. v. Cavanagh, 807 F.2d 787, 791 (9 Cir., 1987); U.S. v. Sarkissian, 841 F.2d, 959, 964-965 (9 Cir., 1988).

Included within the FISA documents are the requisite certifications that the electronic surveillances were sought "for the purpose of obtaining foreign intelligence information." 50 U.S.C. §1804(a)(7)(B). The defendants have made no proffer which would contradict these certificates. See U.S. v. Duggan, supra, 743 F.2d at 77. Moreover, the certifications were not clearly erroneous. 50 U.S.C. §1805(a)(5). In short, the Court is satisfied that the purpose of the FISA surveillances both before and after April 11, 1989 was to obtain foreign intelligence information, even though the Government might reasonably anticipate that the surveillances would yield evidence of criminal activity.

At oral argument, the defendants argued that the results of FISA surveillances after April 11, 1989 should be suppressed because on that date, results of certain FISA interceptions were included in an affidavit presented to me in support of a search warrant in this case. See Magistrate's Docket No. 89-0838RC. The

defendants argue that this was in violation of the provisions of 50 U.S.C. §1806(c), which provides:

> No information acquired pursuant to this chapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

I suppose the argument is that the disclosure to me for "for law enforcement purposes" in the application for the search warrant was not "accompanied by the statement" required by the statute, and since the request for a search warrant is a "criminal proceeding," I should have refused to read the application for the warrant until "advance authorization" was received from the Attorney General.

I have grave doubts that this section was meant to apply at all to the situation in which FISA information is incorporated into an Affidavit to be presented to a judicial officer for purposes of obtaining a search warrant. The statute seems designed to insure that "law enforcement" personnel who receive FISA information realize that they cannot use the information in a "criminal proceeding" without the Attorney General's advance authorization. I doubt that disclosure to a federal judicial officer is disclosure "for law enforcement purposes" in the sense that it is disclosure to someone who will use it to enforce the law.

But leaving aside these doubts, the simple answer to defendants' argument is that even if the Government did violate §1806(b) by submitting the affidavit for the search warrant to me, this violation is simply not a basis for suppression of the

information obtained from the FISA surveillances. Suppression can be obtained pursuant to §1806(e) only if it is shown that the information obtained from the FISA surveillances was "unlawfully acquired" or the "surveillance was not made in conformity with [the] order of authorization or approval." The alleged error in disclosure does not affect either of those criteria.

The defendants' remaining arguments may be addressed in summary fashion. First it is argued that because Ms. Reid was not a target of the FISA surveillance, the probable cause requirement of the Fourth Amendment mandates the suppression of her intercepted conversations. The Court finds no merit in this contention. Rather, as stated by Judge William Matthew Byrne of the Central District of California:

> The identification requirement imposed by FISA is that an application for surveillance identify the "target of the electronic surveillance." 50 U.S.C. §1804(a)(3). Once the proper prerequisites are established with respect to a particular target, there is no requirement in FISA that all those likely to be overheard in foreign intelligence conversations be named. United States v. Donovan, 429 U.S. 413, 416 (1977).

United States v. Cavanagh, unpublished opinion (C.D. Calif., June 27, 1985), affirmed, 807 (F.2d 787 (9 Cir., 1987); See, Government's Supplemental Response, Etc., #199 attachment.

The Court finds no basis in law for suppressing the statement of defendant Reid merely because she was not a named target of the FISA surveillances.

The second argument advanced by Defendant Reid is that, in making the required findings of probable cause, the FISA Court

judge is adjudicating political questions in violation of Article III of the Constitution. The short answer to this concern is that:

> The Act merely directs judges to make findings regarding the time, persons, and places at which the surveillance is directed and regarding governmental compliance with the procedure of the Act, in accordance with objective definitions provided within the Act itself. The determinations to be made are not unlike determinations of fact and law made throughout the judicial process in a wide variety of other contexts. (citations omitted)

U.S. v. Megahey, 553 F.Supp. 1180, 1198 (E.D.N.Y., 1982), affirmed, sub nom, United States v. Duggan, 743 F.2d 59 (2 Cir., 1984).

The Court completely concurs with this analysis and, therefore, finds the defendant Reid's position to be without merit.

## RECOMMENDATION

For all of these reasons, I RECOMMEND that Defendant Richard C. Johnson's Motion To Suppress Evidence And For The Return Of Seized Property (#70); [Defendant Quigley's] Motion To Suppress Evidence And For The Return Of Seized Property (#19); Defendant Christina Leigh Reid's Motion To Suppress Evidence And For The Return Of Seized Property (#29); Defendant Christina Leigh Reid's Substituted Motion To Suppress Evidence And For The Return Of Seized Property (#82); and [Defendant Hoy's] Motion To Suppress Evidence And For The Return Of Seized Property (#98) be DENIED.

## REVIEW BY THE DISTRICT COURT

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to this report and recommendation must file a written

objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1 Cir., 1980); United States v. Vega, 678 F.2d 376, 378-379 (1 Cir., 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1 Cir., 1983). See, also Thomas v. Arn, 474 U.S. 140 (1985).

ROBERT B. COLLINGS
United States Magistrate

April 13, 1990.