UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. VIKEN HOVSEPIAN, VIKEN YACOUBIAN, DIKRAN BERBERIAN, KARNIG SARKISSIAN, STEVEN DADAIAN, Defendants.	CASE NO. CR 82-917 MRP FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER RE: FISA MOTION

Defendants filed motions to suppress the fruits of electronic surveillance conducted pursuant to the requirements of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. (FISA), and for discovery and an evidentiary hearing into the purpose of the electronic surveillance. The Court received briefs from the parties and heard oral argument on the motions. In addition, the Court reviewed in camera a sealed ex parte affidavit and exhibit submitted by the Attorney General, pursuant to section 106(f) of FISA, 50 U.S.C. § 1806(f). For the reasons stated below, these motions have heretofore been denied telephonically, and the surveillance held to be

277

valid. The following are the essential findings on which the denial of these motions was based, as required by Rule 12(e), Federal Rules of Criminal Procedure.

FINDINGS OF FACT

1. FISA was enacted into law on October 25, 1978. Pub. L. 95-511, 92 Stat. 1783 (1978). The Act establishes a procedure under which the government can obtain a judicial order authorizing it to conduct electronic surveillance to acquire foreign intelligence information, including information about international terrorism. The Act also authorizes the Chief Justice of the United States to designate seven United States District Judges to be members of the United States Foreign Intelligence Surveillance Court (FISC), which hears the government's applications for electronic surveillance pursuant to the Act. 50 U.S.C. § 1803(a). The Act also provides for appellate review of FISC orders denying government applications for surveillance. 50 U.S.C. § 1803(b).

2. The sealed exhibit submitted by the Attorney General and other materials before the Court demonstrate that the FBI was conducting an ongoing investigation of international terrorism by Armenian terrorist groups operating in this country and abroad. On September 17, 1982, in docket number 82-340, the FISC issued an order authorizing the FBI to conduct electronic surveillance of the telephone installed in the bedroom of the defendant Viken Hovsepian. An order authorizing the continuation of that surveillance was entered by a FISC judge on October 21, 1982 in docket number 82-395. Complete copies of the government's

///

applications for this surveillance and the FISC orders were included in the Attorney General's sealed exhibit.

3. Subsequent to the electronic surveillance conducted pursuant to the FISC orders, the defendants were charged in a three count indictment alleging offenses involving the possession and transportation of explosives. The government contended that certain telephone conversations of the defendants intercepted as a result of its FISA surveillance of Viken Hovsepian's telephone constituted probative evidence of the crimes charged in the indictment. Pursuant to section 106(b) of FISA, 50 U.S.C. § 1806(b), the Attorney General authorized the use of these intercepted conversations as evidence in the defendants' trial. The government also notified this Court and the defendants of this authorization and the intended use of the FISA intercepts, as required by the Act, 50 U.S.C. § 1806(c).

4. FISA requires this Court to review the government's application and the FISC orders authorizing the surveillance to determine "whether the surveillance . . . was lawfully authorized and conducted." 50 U.S.C. § 1806(f). Accordingly, the Court did review the relevant materials in the sealed exhibit and found that the applications for electronic surveillance set forth all the information that the Act requires. See 50 U.S.C. § 1804. The Court also found that the FISC orders contained all the findings as required by the Act. See 50 U.S.C. § 1805.

5. Specifically, the Court found that the President has authorized the Attorney General to approve applications for electronic surveillance, 50 U.S.C. § 1805(a)(1); the instant

///

applications were made by Federal officers and approved by the Attorney General, 50 U.S.C. § 1805(a)(2); there was probable cause to believe that the target of the surveillance, Viken Hovsepian, was acting as an agent of a foreign power as that term is defined in sectin 101(b)(2)(C) of the Act, and the facilities against which the electronic surveillance was directed were being used by Viken Hovsepian, 50 U.S.C. § 1805(a)(3); the minimization procedures included with the government's application and ordered by the FISC judge met the requirements of section 101(h) of the Act, 50 U.S.C. § 1805(a)(4); and the certifications filed pursuant to section 104(a)(7) of the Act were not clearly erroneous, 50 U.S.C. § 1805(a)(5). The Court also found that in making its showing that Viken Hovsepian was an agent of a foreign power, the government placed no reliance on activities protected by the First Amendment. See 50 U.S.C. § 1805(a)(3)(A). Finally, the Court found that the FISC judges who issued the orders involving Viken Hovsepian were duly designated by the Chief Justice pursuant to section 103(a) of the Act, 50 U.S.C. § 1803(a), and the orders issued by those judges fully satisfied the requirements of section 105(b) of the Act, 50 U.S.C. § 1805(b).

CONCLUSIONS OF LAW

1. FISA is constitutional both on its face and in its application to this case. FISA's procedure for judicial authorization of the government's electronic surveillance for foreign intelligence purposes interposes a neutral and detached judicial officer between the government and the target of the

///

surveillance. As such, it satisfies the warrant requirements of the Fourth Amendment. See United States v. Megahey, 553 F. Supp. 1180, 1190 (E.D.N.Y. 1982); United States v. Falvey, 540 F. Supp. 1306, 1312 (E.D.N.Y. 1982).

2. The Court does not accept the defendants' contention that the Act does not satisfy the Fourth Amendment's requirement that no warrants shall issue except upon a finding of probable cause. Probable cause is a concept whose definition depends on the circumstances of each case. See Camera v. Municipal Court, 387 U.S. 523, 534-39 (1967). FISA requires the FISA judges to make those determinations which they are accustomed to make as members of the judiciary. See Note, The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance, 78 Mich. L. Rev. 1116, 1149-50 (1980) (hereinafter Note). While the standards for the issuance of a FISA warrant differ from those governing the issuance of a warrant to gather evidence for law enforcement purposes, those differences are "reasonably adapted to the peculiarities of foreign intelligence gathering." Megahey, supra, at 1192. The Act requires information of sufficient particularity to satisfy the requirements of the Fourth Amendment, and the FISC authorizations are valid warrants under that amendment.

3. The definitions included in the Act are not overbroad or vague. They involve sufficient detail and require a sufficient showing of information to satisfy these requirements of statutory construction.

///

///

4. The Court was satisfied that the FISC judges are properly appointed under the Act and exercise fully the powers of Article III judges. The Court found no merit in the defendants' contention that the Act violates Article III of the Constitution. See Megahey, supra, at 1196-98. The Act also does not require that the judiciary make foreign policy or other determinations reserved to the executive by the Constitution. See Note, supra, at 1144-51. Accordingly, the Act does not violate the doctrines of political questions or separation of powers. Megahey, supra, at 1195-96.

5. The Court rejected the defendants' contention that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., embodies the minimum constitutional standards for electronic surveillance. In United States v. United States District Court, 407 U.S. 297 (1972) (known as Keith), the Supreme Court expressly stated that Title III "does not attempt to define or delineate the powers of the President to meet domestic threats to the national security." Id. at 322. The Court went on the state:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. Id. at 322-23.

The standards and procedures of Title III are inapplicable to foreign intelligence gathering, including international terrorism investigations, because those investigations differ from criminal investigations. See Select Committee on Intelligence, Foreign Intelligence Surveillance Act of 1978,

S. Rep. No. 95-701, 95th Cong., 2d Sess. 11-16 (1978). Thus, the Court concluded that the differences between FISA and Title III do not cause FISA to be constitutionally infirm. Accord. Falvey, supra, at 1312.

6. The Court reviewed the documents submitted by the government, including the sealed exhibit, and concluded that the surveillance conducted by the FBI was wholly consistent with the orders issued by the FISC judges. The Court also found that the FBI was seeking foreign intelligence information, and instituted its electronic surveillance as part of an international terrorism investigation.

7. The defendants contended that the government was obtaining evidence of a criminal investigation and should have sought a warrant under Title III. Congress clearly contemplated that in some circumstances, a FISA surveillance would uncover evidence of criminality. See Permanent Select Committee on Intelligence, Foreign Intelligence Surveillance Act of 1978, H.R. Rep. 95-1283, Pt. I, 95th Cong., 2nd Sess. 49 (1978) (hereinafter House Report). FISA expressly permits the government to retain and use such information, see 50 U.S.C. § 1801(h)(3), and clearly contemplates that evidence of criminality may be used in criminal proceedings. See 50 U.S.C. § 1806. Accord. Falvey, supra, at 1314. The Court found that the government was not obligated to seek a Title III warrant when a FISA surveillance uncovers evidence of criminal activity.

8. The defendants contended that the government may conduct an international terrorism investigation only when there

///

is an indication that terrorist acts will be directed against the United States itself. However, protection of foreign officials in the United States from terrorist violence is directly related to the nation's foreign affairs and national security. The government is obligated to combat international terrorism under treaty obligations it has assumed. See e.g., OAS Convention on Terrorism, done at Washington, Feb. 2, 1971, entered into force for the U.S. October 20, 1976, 27 U.S.T. 3949, T.I.A.S. 8413; Convention on the prevention and punishment of crimes against internationally protected persons including diplomatic agents, done at New York, December 14, 1973, entered into force for the U.S. February 20, 1977, 82 U.S.T. 1975, T.I.A.S. 8532. Congress was fully aware of these obligations when it enacted FISA. See S. Rep. No. 95-604, 95th Cong., 2d Sess. (1978), reprinted in 4 U.S. Code Cong. & Adm. News 3904, 3983. It is clear that FISA may be used to investigate international terrorist activities, even though such activities may not be targeted directly against the United States.

9. The defendants argued that the government failed to adhere to the minimization procedures ordered by the FISA court. In particular, the defendants argued that the government's use of automatic tape recording machines was improper. However, the use of automatic taping was proper because of the likelihood that the defendants would speak in Armenian, a relatively rare foreign language, and because of the defendants' propensity to speak in code or guarded language. The collection of all the conversations on the targeted telephone was not improper. See Scott v. United States, 436 U.S. 128, 139-43 (1978). The Court reviewed

the logs of the taped conversations that the FBI prepared for its investigative use. These logs, not the transcripts of the taped conversations prepared at this Court's order, are the proper material for determining compliance with minimization requirements. The logs demonstrate that the FBI properly minimized the intercepted conversations. The minimization the FBI performed is fully consistent with the minimization procedures ordered by the FISC judges and is also consistent with Congress' concerns about minimization. See House Report, supra at 55.

10. The Court's ex parte, in camera review of the sealed exhibit submitted by the Attorney General was not improper. It is well established that the legality of foreign intelligence surveillance should be determined on an in camera, ex parte basis. See, e.g., United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977); United States v. Ajlouny, 629 F.2d 830, 839 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981). In Taglianetti v. United States, 394 U.S. 316, 317 (1968), the Supreme Court held that adversary proceedings and full disclosure were not necessarily required "for resolution of every issue raised by an electronic surveillance." See Alderman v. United States, 394 U.S. 165, 184 n.15 (1969). FISA explicitly mandates in camera, ex parte review when the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security. 50 U.S.C. § 1806(f). The Attorney General filed such an affidavit. The Act permits disclosure in these circumstances "only where such disclosure is necessary to make an

///

accurate determination of the legality of the surveillance." Id.

11. Based on review of the contents of the sealed exhibit, the Court found that no basis exists for disclosure of the materials reviewed to the defendants or their counsel. The government's sealed exhibit is very detailed and all parts are fully consistent with the requirements of FISA. The orders authorizing electronic surveillance were based on applications by the government that stated ample facts to support a finding of probable cause that Viken Hovsepian was acting as an agent of a foreign power and engaged in international terrorist activities.

IT IS HEREBY ORDERED that the telephonic denial of the defendants' motions to suppress is hereby restated and made a part of the record.

DATED: January 24, 1985

Mariana R. Pfaelzer

Mariana R. Pfaelzer
United States District Judge