UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

V. Docket No. 02 CR 395 (JGK)

AHMED ABDEL SATTAR,
MOHAMMED YOUSRY
and LYNNE STEWART,

Defendants.

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LYNNE STEWART'S REPLY TO GOVERNMENT MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

I. THE GOVERNMENT FAILS TO UNDERSTAND THE DIFFERENCE BETWEEN THE INVESTIGATIVE AND ADJUDICATIVE PHASES OF A CRIMINAL CASE

The government asserts its right to investigate. In the investigative stage of a case, secrecy is often the watchword. Federal Rule of Criminal Procedure 6(e) shields grand jury proceedings. Electronic surveillance may be done under judicial order. Prosecutors and police do their work behind closed doors.

However, once charges are filed, and the FBI sent out to raid a law office and to handcuff a lawyer and drag her off to jail, the adversary system comes into play. That is the teaching of *Dennis*, cited in our initial motion. The government is no longer entitled to hide its evidence. As Learned Hand said in *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950):

> Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

As the cases hold, the government retains the right to keep its evidence-gathering secret only if it will also forego prosecution of these defendants.

If the government is now intercepting attorney-client communications of the parties and lawyers in this case, the fruits of those interceptions represent (in our view) lawless intrusions. The presence of such fruits in the prosecutor's garden gives us the statutory and constitutional rights to know what has been done and to have a hearing to determine what use the government has made of this material.

Indeed, any ongoing surveillance necessarily intercepts defendants' statements. Fed. R. Crim. Proc. 16(a)(1)(A) has provided in mandatory terms since 1966 that all defendant statements must be disclosed to the defense.

The 1966 rules amendments that brought this mandatory provision into being were accompanied by an advisory committee note (available in the U.S.C.A. and Westlaw versions of the rule) that cited Supreme Court and state court authority for

the near-universality of such a requirement.

II. THE GOVERNMENT'S STATUTORY ARGUMENT FOR NONDISCLOSURE IS WRONG

Both FISA, 50 U.S.C. §1806, and Title III, 18 U.S.C. §2518, provide for judicial supervision of electronic surveillance. (We do not here address the limited statutory authorization for surveillance without a judicial warrant, cited by the government in its footnote 1. Should those provisions become relevant, we will address their unconstitutionality.) Indeed, §1806(c) provides:

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

This language echoes 18 U.S.C. §3504(a), which we cited in our motion. The text of §1806(c) is clear and broad. The statute applies as soon as the government wishes to "otherwise use" surveillance results in any "proceeding." 18 U.S.C. §3504(a) is similarly broad, though couched in different terms.

In *Gelbard v. United States*, 408 U.S. 41, 52-53 (1972), grand jury witnesses claimed that the questions the government wished to ask him were the fruit of unlawful surveillance. The Supreme Court held that the government would have to disclose the surveillance and permit the witnesses to litigate their claims. If so trivial a "use" as this is enough to trigger §3504(a), then surely ongoing surveillance during critical stages of the prosecution, should do the same.

The cases cited by the government in fact support our position or do not address the issue. *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (D.C. Cir. 1992), deals with a civil suit by persons who had not been charged with any crime. Those plaintiffs had no claim under FISA. But the court also held, 952 F.2d at 470:

> This is not to say that the legality of FISA surveillance may not be considered by federal judges other than those on the FISA Court or the FISA court of review. FISA recognizes two private remedies. Both are after-the- fact, rather than prospective: evidence obtained in violation of FISA may be suppressed (50 U.S.C. § 1806(g)) ; and damages may be imposed for surveillance unlawfully conducted (50 U.S.C. § 1810)

United States v. Belfield, 692 F.2d 141, 146 (D.C. Cir. 1982), also supports our position. The court noted:

> [E]ven when the Government has purported not to be offering any evidence obtained or derived from the electronic surveillance, a criminal defendant may claim that he has been the victim of an illegal surveillance and seek discovery of the logs of the overhears to ensure that no fruits thereof are being used against him.

The footnote at that point cites *Alderman v. United States*, 394 U.S. 165 (1969), which is the origin for much of this law on required disclosure. *Alderman* contains, 394 U.S. 183-84, an eloquent (and of course authoritative) paean to adversary proceedings in the context of electronic surveillance litigation. Alderman repeats the lesson of *Coplon* and *Dennis*. If the government wants its hands untied, it need only dismiss this prosecution and free itself of the obligations our adversary system imposes on it.

III. THE GOVERNMENT APPEARS INNOCENT OF KNOWLEDGE ABOUT THE ATTORNEY-CLIENT RELATIONSHIP

The judicial role in protecting attorney-client communications has already been the subject of this Court's earlier ruling. The government fails to acknowledge that ruling, and instead makes reckless allegations about Ms. Stewart. Indeed, at page 22, it again claims that a "wall" not yet built would surely be erected to protect privileged communications. In its special master opinion, the Court found it had some discretion with respect to remedy. In the present context, the statutes and constitution provide only one answer - the one we have sought.

Indeed, the most disgraceful part of the government's reply is its cavalier assertion that present counsel for Ms. Stewart and the other defendants may well need to be surveilled and have their conversations intercepted.

The government's attempt to trivialize the right to counsel is illustrated by citing

United States v. John Doe #1, 272 F.3d 116 (2d Cir. 2001), which deals with a

defendant who threatened his counsel and counsel's family, and has nothing to do with the issues here.

The government's quote, p. 16, from *United States v. Zolin*, 491 U.S. 554 (1989), can only have been collected by someone who has not read that case. Zolin represents a thoughtful balancing of privilege and fairness concerns in the attorney-client context. It erects a barrier to wholesale disclosure of presumptively privileged material, even as to in camera examination by a district judge. By necessary implication, access by the privilege-holder's adversary is even more restricted. On judicial procedures relating to privilege, see generally Paul R. Rice, Attorney-Client Privilege in the United States, §§11.9 - 11.18. (1993 an annual supps.)

IV. THE GOVERNMENT'S DISTURBING CLAIM OF UNREVIEWABLE POWER

The government is claiming the right to investigate people in secret forever with respect to the most sensitive matters. By its nature, electronic surveillance is covert. So broad a claim as the government now makes calls to mind the words of Justice Robert Jackson, who had come back to the Court from being Nuremberg prosecutor, and who had been Attorney General of the United States. Perhaps today's prosecutors, however exalted they believe their position to be, should pay attention:

> Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and

> most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949)(dissenting opinion).

V. RELIEF

Until we know the extent of invasion, we cannot fashion a claim for relief. If the government remains obdurate in the face of a disclosure order, or if it discloses and the invasion is substantial, the remedy will be plain enough at that time. We also request that the Court set oral argument on this motion and the issues it raises.

Dated: Washington, DC
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Michael E. Tigar
Attorney for Lynne Stewart
1025 Connecticut Ave., N.W.
Suite 1012
Washington, D.C. 20036
(202) 467-8583