2000 WL 1858492

UNITED STATES of America,
v.
Usama BIN LADEN

United States District Court, S.D. New York.
Dec. 19, 2000.

SAND, District J.

The Defendants are charged with numerous offenses arising out of their alleged participation in an international terrorist organization led by Defendant Usama Bin Laden and that organization's alleged involvement in the August 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Presently before the Court are Defendant El-Hage's motions which seek the following: suppression of evidence seized from the search of his residence in Nairobi, Kenya in August 1997 and suppression of evidence obtained from electronic surveillance, conducted from August 1996 to August 1997, of four telephone lines in Nairobi, Kenya.

BACKGROUND . . .

The charges currently pending against each of the Defendants in this case arise from their alleged involvement with an international terrorist organization known as "al Qaeda" or "the Base." Since its emergence in 1989, al Qaeda is alleged to have planned and financed (both independently and in association with other terrorist groups) numerous violent attacks against United States personnel and property abroad. The United States Attorney's Office in the Southern District of New York has been investigating al Qaeda since at least 1996. In the spring of 1996, Bin Laden, the founder and leader of al Qaeda was identified by the United States Government as "a serious threat to national security.". . .

Among other things, the Government alleges that al Qaeda coordinates the activities of its global membership, sends its members to camps for military and intelligence training, obtains and transports weapons and explosives, and explicitly provides Muslims with religious authority for acts of terrorism against American citizens. In August 1996, Bin Laden "effectively declared a war of terrorism against all members of the United States military worldwide." In February of 1998, this declaration was expanded to include attacks on American civilians. Al Qaeda, which has at different points in its history been headquartered in Afghanistan, Pakistan and the Sudan, has maintained an international presence through "cells" (and al Qaeda personnel) located in a number of countries including Kenya, Tanzania, the United Kingdom, Canada and the United States.

By the late spring of 1996, the United States intelligence community ("Intelligence Community") became aware that persons associated with Bin Laden's organization had established an al Qaeda

presence in Kenya. In addition, the Intelligence Community had isolated and identified five telephone numbers which were being used by persons associated with al Qaeda. All five of these phone lines were monitored by the Intelligence Community from August 1996 through August 1997. One of these phone lines was located in an office in the same building where the Defendant, El-Hage, and his family resided. (El-Hage, an American citizen, and his family lived in Nairobi from 1994 to 1997.) Another of the phone lines, was a cellular phone used by El-Hage and others.

On April 4, 1997, the Attorney General authorized the collection of intelligence specifically targeting El-Hage. This authorization was renewed on July 3, 1997. On August 21, 1997, American and Kenyan officials conducted a search of the Defendant's residence. The Defendant's wife (the Defendant was not present during the search) was shown a document which was identified as a Kenyan warrant authorizing a search for "stolen property." The American officials who participated in the search did not, however, "rely upon the Kenyan warrant as the legal authority for the search." At the end of the search, the Defendant's wife was given an inventory by one of the Kenyan officers present which enumerated the items which had been seized during the search.

ANALYSIS

The Defendant seeks suppression of the evidence which was seized during the warrantless search of his home in Kenya and the fruits thereof. In addition, he seeks the suppression of evidence derived from electronic surveillance of several telephone lines over which his conversations were recorded, including the telephone for his Nairobi residence and his cellular phone. The Defendant also asks that the Court hold a hearing with respect to the validity of the surveillance and the search.

El-Hage bases his challenge to the evidence on the Fourth Amendment and asserts that the search and the electronic surveillance were unlawful because they were not conducted pursuant to a valid warrant. If the Court accepts the Government's argument that no warrant was required, El-Hage argues, in the alternative, that the searches were unreasonable. In its response to the Defendant's motion, the Government asserts that the searches were primarily conducted for the purpose of foreign intelligence collection and are, therefore, not subject to the Warrant Clause of the Fourth Amendment. As a result, it is the Government's position that the aforementioned evidence should not be suppressed. In addition, the Government claims that no hearing is necessary.

El-Hage's suppression motion raises significant issues of first impression concerning the applicability of the full panoply of the Fourth Amendment to searches conducted abroad by the United States for foreign intelligence purposes and which are directed at an American citizen believed to be an agent of a foreign power. Although numerous courts and Congress have dealt with searches in the United States for foreign intelligence purposes and other courts have dealt with searches of foreigners abroad, we believe this to be the first case to raise the question whether an American citizen acting abroad on behalf of a foreign power may invoke the Fourth Amendment, and especially its warrant provision, to suppress evidence obtained by the United States in connection with intelligence gathering operations.

I. Application of the Fourth Amendment Overseas

Before proceeding to that Fourth Amendment analysis, it is necessary to ascertain whether the Amendment applies in this situation. El-Hage is an American citizen and the searches at issue were conducted in Kenya. The Defendant argues that the protection of the Fourth Amendment "does not dissolve once a United States citizen leaves the borders of the United States." The Government seems to concede the general applicability of the Fourth Amendment to American citizens abroad, but asserts that the particular searches contested in this case (which were conducted overseas to collect foreign intelligence) call for a more limited application of the Amendment.

The Supreme Court cases on point suggest that the Fourth Amendment applies to United States citizens abroad. See Reid v. Covert, 354 U.S. 1, 5-6 (1957). . . . Thus, this Court finds that even though the searches at issue in this case occurred in Kenya, El-Hage can bring a Fourth Amendment challenge. However, the extent of the Fourth Amendment protection, in particular the applicability of the Warrant Clause, is unclear.

II. An Exception to the Warrant Requirement for Foreign Intelligence Searches

The Government urges that the searches at issue in this case fall within an established exception to the warrant requirement. According to the Government, searches conducted for the purpose of foreign intelligence collection which target persons who are agents of a foreign power do not require a warrant. The Defendant asserts that such an exception does not exist and should not be recognized by this Court.

The Supreme Court has acknowledged but has not resolved this issue. See United States v. United States District Court (Keith), 407 U.S. 297, 321- 22 (1972). Circuit courts applying Keith to the foreign intelligence context have affirmed the existence of a foreign intelligence exception to the warrant requirement for searches conducted within the United States which target foreign powers or their agents. See United States v. Clay, 430 F.2d 165, 171 (5th Cir.1970); United States v. Brown, 484 F.2d 418, 426 (5th Cir.1973); United States v. Butenko, 494 F.2d 593, 605 (3d Cir.1974); United States v. Buck, 548 F.2d 871, 875 (9th Cir.1977); United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir.1980). . . . No court has considered the contours of such an exception when the searches at issue targeted an American citizen overseas. The question, for this Court, is twofold. First, it is necessary to evaluate whether there is an exception to the warrant requirement for searches conducted abroad for purposes of foreign intelligence collection. Second, if such an exception exists, the Court must evaluate whether the searches conducted in this case properly fall within the parameters of that exception.

A. The Constitutional and Practical Bases for the Exception

Because the Second Circuit has not confirmed the existence of a foreign intelligence exception to the warrant requirement and because no other court has considered the applicability of such an exception overseas, the factors which call for the adoption of the exception are reviewed here.

1. The President's Power Over Foreign Affairs

In all of the cases finding an exception to the warrant requirement for foreign intelligence collection, a determinative basis for the decision was the constitutional grant to the Executive Branch of power over foreign affairs. On numerous occasions, the Supreme Court has addressed the constitutional competence of the President in the field of foreign affairs. . . .

. . . Warrantless foreign intelligence collection has been an established practice of the Executive Branch for decades. . . . Congress has legislated with respect to domestic incidents of foreign intelligence collection, see FISA, 50 U.S.C. ' ' 1801 et seq. (1978), but has not addressed the issue of foreign intelligence collection which occurs abroad. The Supreme Court has remained, in the three decades since Keith, essentially, silent on both aspects of the issue. . . . While the fact of this silence is not dispositive of the question before this Court, it is by no means insignificant. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'Executive Power' vested in the President by ' 1 of Art. II.").

2. The Costs of Imposing a Warrant Requirement

It is generally the case that imposition of a warrant requirement better safeguards the Fourth Amendment rights of citizens in the Defendant's position. But several cases direct that when the imposition of a warrant requirement proves to be a disproportionate and perhaps even disabling burden on the Executive, a warrant should not be required. See Truong, 629 F.2d at 913 (finding that a requirement that officials secure a warrant before these types of searches "would 'unduly frustrate' the President in carrying out his foreign affairs responsibilities"); Keith, 407 U.S. at 315 ("We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it."). . . . For several reasons, it is clear that imposition of a warrant requirement in the context of foreign intelligence searches conducted abroad would be a significant and undue burden on the Executive.

It has been asserted that the judicial branch is ill-suited to the task of overseeing foreign intelligence collection. Foreign affairs decisions, it has been said, are often particularly complex. See Chicago & Southern Air Lines, 333 U.S. at 111 (explaining that foreign affairs decisions are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility"). These arguments have, to some extent, been undercut by both the Supreme Court, in Keith, and Congress, in FISA. On the other hand, neither Keith nor FISA addresses the particular difficulties attendant to overseas foreign intelligence collection. In fact, as mentioned previously, it was precisely these peculiarities which caused Congress to restrain the reach of FISA to domestic searches. The Government makes several persuasive points about the intricacies of foreign intelligence collection conducted abroad. First, the Government cautions that a court would have greater difficulty (than in the domestic context) predicting

"the international consequences flowing from a decision on the merits' regarding Executive Branch foreign policy decisions." Often these decisions have significant impacts on the essential cooperative relationships between United States officials and foreign intelligence services. In addition, when some members of the government of the country in which the searches are sought to be conducted are perceived as hostile to the United States or sympathetic to the targets of the search, a procedure requiring notification to that government could be self-defeating. The Government also explains that too much involvement could place American courts in an "institutionally untenable position" when the operations which are authorized are violative of foreign law.

These concerns about the complexity of foreign intelligence decisions should not be taken to mean that the judiciary is not capable of making these judgments. Judges will, of course, be called on to assess the constitutionality of these searches ex post. Requiring judicial approval in advance, however, would inevitably mean costly increases in the response time of the Executive Branch. Although the Defendant asserts that such concerns are accommodated by existing allowances for exigent circumstances, the Court is not persuaded that the exigent circumstances doctrine provides enough protection for the interests at stake. See Truong, 629 F.2d at 913 ("[A] warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives [and] in some cases delay executive response to foreign intelligence threats."); Butenko, 494 F.2d at 605 (concluding that imposition of a warrant requirement would interfere with the "continuous flow of [foreign intelligence] information" thus making the "Executive's foreign policy-making apparatus" less efficient).

In addition to concerns about the impact of a warrant requirement on the speed of the executive response, there is an increased possibility of breaches of security when the Executive is required to take the Judiciary into its confidence. The Government emphasizes the detrimental impact that the existence of a warrant requirement for foreign intelligence searches might have on the cooperative relationships which are integral to overseas foreign intelligence collection efforts. . . .

3. The Absence of a Warrant Procedure

The final consideration which persuades the Court of the need for an exception to the warrant requirement for foreign intelligence collection conducted overseas is that there is presently no statutory basis for the issuance of a warrant to conduct searches abroad. In addition, existing warrant procedures and standards are simply not suitable for foreign intelligence searches. . . . See also Verdugo, 494 U.S. at 278 (Kennedy, J., concurring) (explaining that several factors counsel against overseas application of the warrant requirement including: "the absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials") . . . .

. . . Thus, although this Court does not accept as settled the Government's proposition that it is impossible to secure a warrant for overseas searches or surveillance, it is clear that the acquisition would certainly have been impracticable given the absence of any statutory provisions empowering a magistrate to issue a warrant and the unsuitability of traditional warrant procedures to foreign intelligence

collection. . . .

B. Adoption of the Foreign Intelligence Exception to the Warrant Requirement

In light of the concerns outlined here, the Court finds that the power of the Executive to conduct foreign intelligence collection would be significantly frustrated by the imposition of a warrant requirement in this context. Therefore, this Court adopts the foreign intelligence exception to the warrant requirement for searches targeting foreign powers (or their agents) which are conducted abroad. As has been outlined, no court, prior to FISA, that was faced with the choice, imposed a warrant requirement for foreign intelligence searches undertaken within the United States. With those precedents as guidance, it certainly does not appear to be unreasonable for this Court to refuse to apply a warrant requirement for foreign intelligence searches conducted abroad.

At the same time, the Court is mindful of the importance of the Fourth Amendment interests at stake. In keeping with the precedents reviewed above, the warrant exception adopted by this Court is narrowly drawn to include only those overseas searches, authorized by the President (or his delegate, the Attorney General), which are conducted primarily for foreign intelligence purposes and which target foreign powers or their agents. See Truong, 629 F.2d at 915-17. The protection of individual rights in this context is not a significant departure from that which is envisioned by the Fourth Amendment. All warrantless searches are still governed by the reasonableness requirement and can be challenged in ex post criminal or civil proceedings.

C. Application of the Exception

Before the Court can find that the exception applies to this case, it is necessary to show, first, that Mr. El-Hage was an agent of a foreign power; second, that the searches in question were conducted "primarily" for foreign intelligence purposes; and finally, that the searches were authorized by the President or the Attorney General.

1. Agent of a Foreign Power

It is clear from the Court's review of the evidence contained in the classified DCI declaration and in the materials considered by the Attorney General in issuing authorization for the post-April 4, 1997 surveillance and the August 21, 1997 search of El-Hage's residence that there was probable cause to suspect that El-Hage was an agent of a foreign power. The Court is also persuaded that al Qaeda was properly considered a foreign power. In reaching this conclusion, the Court relies on the definitions of "foreign power" and "agent of a foreign power" which were incorporated by Congress into FISA. See 50 U.S.C. ' 1801(a)-(b).

2. Primarily for Foreign Intelligence Purposes

This exception to the warrant requirement applies until and unless the primary purpose of the searches stops being foreign intelligence collection. See Truong, 629 F.2d at 915. If foreign intelligence

collection is merely a purpose and not the primary purpose of a search, the exception does not apply. See id. Similarly, if a reviewing judge finds that the Government officials were "looking for evidence of criminal conduct unrelated to the foreign affairs needs of a President, then he would undoubtedly hold the surveillances to be illegal and take appropriate measures." Butenko, 494 F.2d at 606.

A foreign intelligence collection effort that targets the acts of terrorists is likely to uncover evidence of crime. See United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir.1988) ("'International terrorism,' by definition, requires the investigation of activities that constitute crimes."); Truong, 629 F.2d at 915-16 ("[A]lmost all foreign intelligence investigations are in part criminal investigations."). Recognizing this, courts have explicitly rejected a standard which would require that the Executive action be "solely" for foreign intelligence purposes and have allowed for the "accumulation of evidence of criminal activity" if it is "incidental" to foreign intelligence collection. Butenko, 494 F.2d at 606. . . .

The Government's submissions establish persuasively that the purpose, throughout the entire electronic surveillance of El-Hage and during the physical search of his Nairobi residence, was primarily the collection of foreign intelligence information about the activities of Usama Bin Laden and al Qaeda. There was no FBI participation in the electronic surveillance that took place. Although there was an FBI agent present during the search of El-Hage's residence, the Court does not find that foreign intelligence collection ceased to be the primary purpose of that search. The Court's determination about the purpose of the residential search is, in part, dependent upon the Government's classified submissions. For that reason, further analysis of this question is included in Classified Appendix A. The Court hereby directs the Government to institute proceedings to declassify Appendix A.

In particular, the Government explained that the purpose of its efforts was "to gather intelligence about al Qaeda, including the status of the Kenyan cell, the points of contact for other al Qaeda cells around the world, as well as any indications of the future terrorist plans of al Qaeda." The searches yielded important foreign intelligence information. The electronic surveillance that was conducted revealed that Al Qaeda persons in Kenya "were heavily involved in: providing passports and other false documentation to various al Qaeda associates . . .; passing messages to al Qaeda members and associates . . .; passing coded telephone numbers to and from al Qaeda headquarters; . . . and passing warnings when al Qaeda members and associates were compromised by authorities." Similarly, the Government asserts that the physical search "recovered documents of great intelligence value from el Hage's computer, including a report in which el Hage's close associate Harun made an explicit admission that the Kenyan cell of Bin Laden's group were responsible for the American military personnel killed in Somalia in 1993." The Court is satisfied that the facts presented here, while perhaps suggestive of an investigation that was driven by multiple motives, clearly establish that the primary purpose of the searches at issue was, from start to finish, foreign intelligence collection.

3. Authorization from the President or the Attorney General

Finally, to apply the exception to the warrant requirement for foreign intelligence searches conducted abroad against an agent of a foreign power, the Court must find that the searches in question were directly authorized by the President or the Attorney General. On April 4, 1997 (and again on July

3, 1997), the Attorney General gave her express authorization for the foreign intelligence collection techniques (including the post-April 4, 1997 electronic surveillance and the August 21, 1997 physical search) that were employed. . . . For these searches, then, the exception to the warrant requirement for foreign intelligence surveillance is applicable and the government officials were not required to secure a warrant. . . .

The electronic surveillance conducted from August 1996 until April 4, 1997 is, however, not embraced by the foreign intelligence exception to the warrant requirement. The Government does not rely on the foreign intelligence exception and seeks, instead, to distinguish the pre-authorization surveillance by emphasizing that it was directed at the activities of al Qaeda, generally, and not at El-Hage. In the Government's words, although "incidental" interception of El-Hage was "anticipated," he was not the "target" of the collection. For that reason, the Government believed that its only constitutional obligation was to "minimize interception of el-Hage." It is on this basis that the Government suggests that no Fourth Amendment violation occurred. . . .

The Government properly asserts that in the Title III context, incidental interception of a person's conversations during an otherwise lawful surveillance is not violative of the Fourth Amendment. See United States v. Figueroa, 757 F.2d 466 (2d. Cir.1985); United States v. Tortorello, 480 F.2d 764 (2d Cir.1973). . . .

. . . It is the Court's view that, given the Government's suspicions about El-Hage's connection to al Qaeda, to say that al Qaeda was the target is merely to say that El-Hage was one of many targets of the surveillance.

Ultimately, the Court holds that with respect to the electronic surveillance of the home and cellular phones, El-Hage was not intercepted "incidentally" because he was not an unanticipated user of those telephones and because he was believed to be a participant in the activities being investigated. The Court finds that El-Hage had a reasonable expectation of privacy in his home and cellular phones and the Government should have obtained approval from either the President or the Attorney General before undertaking the electronic surveillance on those phone lines in August 1996.

III. The Exclusionary Rule

Despite the fact that this electronic surveillance was unlawful, the Court finds that exclusion of this evidence would be inappropriate because it would not have the deterrent effect which the exclusionary rule requires and because the surveillance was undertaken in good faith. Many of the facts upon which the Court's conclusions are based involve presently classified material. Those classified facts and the conclusions drawn therefrom are reviewed in Classified Appendix B. The Court hereby directs the Government to institute proceedings to declassify Appendix B. . . .

A. Deterrence . . .

The Court is satisfied that the goal of the intelligence collection, "to neutralize the Bin Laden

threat to national security," overwhelmingly dominated the electronic surveillance conducted prior to April 4, 1997. There was no FBI participation in that surveillance and the Court believes that the surveillance would have been conducted even if there had been an awareness that the material recorded would be inadmissible at a future criminal trial of El-Hage. . . .

B. Good Faith

One offshoot of the deterrence analysis has been the development of an exception to the exclusionary rule that is derived from the "good faith" of the officials involved in a particular search. . . .

For reasons which are largely outlined in Classified Appendix B, the Court does not accept the Defendant's assertion that the Government's claim that the interception was incidental is a "transparent contrivance designed [to] deflect attention from the fact that Mr. El-Hage was a target of the wiretap, and to avoid the consequences of not having appropriate authorization to conduct that electronic surveillance." At the time the surveillance in this case was undertaken, there was no clear precedent in this area to guide the actions of government officials. See Ajlouny, 629 F.2d at 841. The Court is persuaded that the officials who conducted the electronic surveillance operated under an actual and reasonable belief that Attorney General approval was not required prior to April 4, 1997, when El-Hage was specifically identified by the Government as a target of foreign intelligence collection. . . . The surveillance was also conducted in a good faith attempt to conform to the Government's perception of what the law allowed. The Court finds that the officials' interpretation of the caselaw which informs this analysis was reasonable even if in the end it was incorrect. Therefore, the exclusionary rule should not be applied.

IV. The Reasonableness Requirement

Even if the Government was not required to secure a warrant in advance of the searches, the Fourth Amendment still requires that the searches be reasonable. El-Hage argues that the search of his home was unreasonable because of the "paramount Fourth Amendment interests in the sanctity of the home." In addition, he asserts that the electronic surveillance was unreasonable because it was conducted "continuously and without interruption" for a full year. These allegations are considered in turn.

A. The Physical Search of the Residence

All of the cases which have established the existence of a foreign intelligence exception to the warrant requirement (and which are relied upon by the Government) arose in the context of electronic surveillance. El-Hage also notes, correctly, that "[n]one of the other 'foreign intelligence- gathering' cases involved a residential search." It is therefore necessary to assess whether the precedents reviewed apply with equal force to a physical search of the home.

The proposition that searches of the home have always merited rigorous Fourth Amendment scrutiny is unassailable. At the same time, numerous cases have emphasized the highly intrusive nature

of electronic surveillance. . . . These cases, considering the relative intrusiveness of residential searches and electronic surveillance, generally seem to conclude that neither automatically merits greater protection from the Fourth Amendment. . . .

. . . For these reasons, the Court finds that the foreign intelligence exception to the warrant requirement applies with equal force to residential searches. El-Hage's argument that the search of his residence was per se unreasonable is therefore rejected. . . .

CONCLUSION

For the foregoing reasons, El-Hage's motion to suppress evidence from the physical search of his Kenya residence and electronic surveillance is denied without a hearing.

SO ORDERED

Declassified Appendix A

As outlined in the opinion, the Court finds that the search of El-Hage's residence was undertaken primarily for the purpose of foreign intelligence collection. The mere fact that FBI Agent Coleman [redacted] was present during the residential search does not mean that law enforcement displaced foreign intelligence collection as the primary purpose of the search. Coleman's presence was intended to ensure that "if anything of evidentiary value for law enforcement was found, [he] could testify to a chain of custody without involving covert [redacted] employees." Although [redacted] has, at times, "attempted to accommodate law enforcement . . . the primary focus has been collection, disruption, and dissemination of intelligence" on Bin Laden and his organization. The intelligence objective, [redacted] was at all times overriding, It was also believed that evidence gleaned from El-Hage's computer would provide [redacted] "insight into the Bin Laden infrastructure." The Government's assertion that [redacted] actions were primarily for the purpose of foreign intelligence collection is reinforced by the fact that foreign intelligence collection against Bin Laden and al Qaeda "continues today." As is clear from the [name redacted] Declaration, the search of El-Hage's residence yielded important intelligence information about Bin Laden's organization. Finally, in disseminating the information discovered during the search, [redacted] followed minimization procedures.

Declassified Appendix B

The foregoing analysis, see supra Section III, concludes that although the electronic surveillance conducted prior to obtaining the Attorney General's authorization (April 4, 1997) was violative of the Fourth Amendment, exclusion would not be the appropriate remedy for such a violation. In addition to the facts outlined in the opinion as the basis for the determination, the Court has also relied on the following facts drawn from the Government's classified submissions of October 2, 2000 and November 21, 2000. . . .

Nevertheless, as explained in the opinion, the Court finds that exclusion of the evidence derived

from these surveillances would not be appropriate both because of the limited deterrent effect of such an exclusion and because of the Court's belief that the agents conducting the surveillance acted in good faith. The basis for the deterrence argument is wholly incorporated into the main text. The basis for the good faith argument, however, relies in part on the contents of some of the government's classified submissions.

Perusal of the contemporaneous communications among the Government agents [redacted] and their superiors [redacted] discloses the following:

1) There was an awareness that El-Hage, who was believed to be an important agent of Bin Laden, was an American citizen and that he could not be targeted for surveillance absent authorization form the Attorney General. [Redacted]. Advice was sought from [redacted] General Counsel regarding whether electronic surveillance could be conducted on telephones which were registered in El- Hage's name but were believed to be used by a number of Bin Laden associates who used El-Hage's residence as a guesthouse.

2) The General Counsel advised that any interception of El-Hage as a result of general surveillance of al Qaeda for intelligence purposes would be 'incidental' and permissible absent Attorney General authorization. . . .

. . . What emerges from the foregoing is the fact that the Government proceeded with caution in the belief, fortified by the opinion of counsel, that its actions were entirely lawful. Obviously, reliance on the opinion of [redacted] counsel does not immunize clearly illegal action. General counsel's advice is not equivalent to the views of a disinterested magistrate. But the fact that counsel, removed from those in the field, sanctioned the actions taken is a relevant consideration. . . .

The Court is persuaded that the surveillance was undertaken in good faith reliance on a mistaken interpretation of the law. For that reason, as outlined in the opinion, the evidence from the pre-April 4, 1997 electronic surveillance is not suppressed.