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LEEANN FLYNN HALL
CLERK OF COURT

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE APPLICATION OF THE FEDERAL
BUREAU OF INVESTIGATION FOR AN
ORDER REQUIRING THE PRODUCTION
OF TANGIBLE THINGS FROM
[REDACTED]

Docket Number: BR

13-25

OPINION

On this date, the Court granted the government's application for an order directing [REDACTED] to produce [REDACTED]. This opinion explains the Court's decision to issue the requested production order, with emphasis on the Court's determination that the application demonstrates reasonable grounds to believe that the underlying investigation is "not conducted solely upon the basis of activities protected by the first amendment," as required by 50 U.S.C. § 1861.

A. Statutory Requirements

Section 1861 permits the Federal Bureau of Investigation ("FBI") to make an application to this Court for

an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.¹

50 U.S.C. § 1861(a)(1). "An investigation conducted under [Section 1861] shall . . . be

¹ FISA defines "United States person" in pertinent part as "a citizen of the United States" or "an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act)." 50 U.S.C. § 1801(i).

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conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order),” and shall “not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.” Id. § 1861(a)(2).

An application under Section 1861 must include, in pertinent part, “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation . . . conducted in accordance with subsection (a)(2) . . . to protect against international terrorism or clandestine intelligence activities . . .” Id. § 1861(b)(2)(A). To approve such an application, the Court must find that it meets the foregoing requirements. Id. § 1861(c)(1). Hence, in a case involving the investigation of a United States person, the statute requires the Court to determine whether the application shows reasonable grounds to believe that (1) the tangible things sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and (2) the investigation is not being conducted solely upon the basis of activities protected by the first amendment.

B. Facts

The application in this case was filed in support of the FBI’s investigation of [REDACTED] who is a United States person. App. at 4. The investigation, which is “currently being conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order),” is described as an investigation “to protect against international terrorism.” Id. at 3. The records sought by the government are all tangible things, [REDACTED], including, but not limited to, [REDACTED] s in [REDACTED] possession. Id. at 2-3; see also id. at 6 (setting forth facts identifying [REDACTED]).

According to the application, [REDACTED]

[REDACTED]

The application states that [REDACTED] is also a [REDACTED]

[REDACTED]

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[REDACTED]

The application notes that after [REDACTED]

[REDACTED]

C. Analysis

The Court finds that the application demonstrates reasonable grounds to believe both that the records sought are relevant to the investigation of [REDACTED] and that the investigation is one to

2 [REDACTED]

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protect against international terrorism.³



A more difficult question is whether the application shows reasonable grounds to believe that the investigation of [REDACTED] is not being conducted solely upon the basis of activities protected by the first amendment. None of the conduct or speech that the application attributes to [REDACTED] - appears to fall outside the ambit of the first amendment. Even [REDACTED] - in particular, his statement that [REDACTED]

³ "International terrorism" is defined in 50 U.S.C. § 1801(c) to mean "activities that":

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended-

- (A) to intimidate or coerce a civilian population;
- (B) to influence the policy of a government by intimidation or coercion; or
- (C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

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[REDACTED] -- seems to fall well short of the sort of incitement to imminent violence or "true threat" that would take it outside the protection of the first amendment.⁴ Indeed, the government's own assessment of [REDACTED] points to the conclusion that it is protected speech. See App. at 8 [REDACTED] (emphasis added). Under the circumstances, the Court is doubtful that the facts regarding [REDACTED] own words and conduct alone establish reasonable grounds to believe that the investigation is not being conducted solely on the basis of first amendment.

The Court is satisfied, however, that Section 1861 also permits consideration of the related conduct of [REDACTED] in determining whether the first amendment requirement is satisfied. The text of Section 1861 does not restrict the Court to considering only the activities of the subject of the investigation in determining whether the investigation is "not conducted solely on the basis of activities protected by the first amendment." Rather, the pertinent statutory text focuses on the character (protected by the first amendment or not) of the "activities" that are the "basis" of the investigation.

According to the application, the government is investigating [REDACTED] not only on the basis of his own personal words and conduct (which, as noted, suggest sympathy toward, if not support of, international terrorism), but also on the basis of the admitted or suspected [REDACTED]. And, as discussed above, those activities of [REDACTED] constitute a part of the Court's basis for finding reasonable grounds to believe that the investigation of [REDACTED] is an investigation to protect against international terrorism, as required under Section 1861. Under these circumstances, it is permissible and appropriate under Section 1861 to consider the activities of [REDACTED] in determining whether the investigation of [REDACTED] is conducted solely on the basis of activities protected by the first amendment.

The application establishes that [REDACTED] activities include [REDACTED]. Such activities, of course, would not be protected by the first amendment even if they were carried out by a United States person. Accordingly, the application demonstrates reasonable grounds to believe that the investigation of [REDACTED] is not

⁴ See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reaffirming that the first amendment does not permit the government "to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Virginia v. Black, 538 U.S. 343, 359-60 (2003) (discussing "true threats" falling outside the protection of the first amendment).

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being "conducted solely on the basis of activities protected by the first amendment."⁵ ..

D. Conclusion

For the foregoing reasons, the Court finds that the application in the above-captioned matter shows reasonable grounds to believe that (1) the tangible things sought are relevant to an authorized investigation to protect against international terrorism, and (2) the investigation is not being conducted solely upon the basis of activities protected by the first amendment.

Issued this 19th day of February, 2013.



JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

⁵ The term "solely" in Section 1861 makes clear that the investigation can be based partly on activities protected by the first amendment, provided that there are reasonable grounds to believe that at least one basis for the investigation is not entitled to first amendment protection. Cf. United States v. Rosen, 447 F. Supp.2d 538, 548 (E.D. Va. 2006) (concluding based on the similar "plain language" of 50 U.S.C. § 1805(a) that a finding of probable cause to believe that a target is an agent of a foreign power, which is required to authorize electronic surveillance, "may rely in part on activities protected by the First Amendment provided the determination also relies on activities not protected by the First Amendment").

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