IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

IN THE MATTER OF THE SEARCH OF:	)	
	)	
750 A Miller Drive	)	
Leesburg, VA	)	
	)	
1101 and 1105 Safa Street	)	Case No. 02-MG-122
Herndon, VA	)	
	)	
1514 Church Hill Place	)	
Reston, VA	)	
	)	
12528 and 12607 Rock Ridge Road	)	
Herndon, VA	)	
	)	
12541 Brown's Ferry Road	)	
Herndon, VA	)	
	)	
9034 Swift Creek Road	)	
Fairfax Station, VA	)	
	)	
305 Marjorie Lane	)	
Herndon, VA	)	
	)	
	)	
	)	

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF MOTION FOR RETURN OF PROPERTY AND TO UNSEAL THE SEARCH WARRANT AFFIDAVIT

The American Civil Liberties Union of Virginia, Inc., *amicus curiae*, hereby files this brief in support of the movants' Motion for Return of Property and to Unseal the Search Warrant Affidavit.

INTEREST OF *AMICUS*

The American Civil Liberties Union of Virginia, Inc. ("ACLU of Virginia"), the Virginia affiliate of the American Civil Liberties Union, has approximately 5,000 members in the

Commonwealth of Virginia. Its mission is to safeguard and advance the individual rights of Virginia residents under the federal and state constitutions and civil rights statutes. Since its founding, the ACLU of Virginia has been a forceful advocate for the protection of the Fourth Amendment right to be free from unreasonable search and seizure and the First Amendment right to freedom of expression. The ACLU of Virginia has frequently appeared before this Court and the United States Court of Appeals for the Fourth Circuit both as *amicus curiae* and as direct representative for plaintiffs in civil rights and constitutional cases.

The ACLU of Virginia endorses wholeheartedly the movants' contention that the searches at issue violated their rights under the Fourth Amendment. In this brief, *amicus* focuses on one especially egregious aspect of this unconstitutional search: the wholesale seizure of books, pamphlets, scholarly works and other materials protected by the First Amendment.

FACTS

The movants' memorandum of law fully sets forth the facts. Of those facts, the following are most relevant to the First Amendment arguments herein:

1. In March 2002, federal agents searched three Islamic entities and ten Muslim homes pursuant to a warrant supported by a sealed affidavit.

2. Two of the entities that were searched have as their primary purpose activities protected by the First Amendment, i.e., the Graduate School of Islamic Thought and Social Sciences (GSISS), an institution of higher education, and the International Institute of Islamic Thought (IIIT), a non-profit academic and cultural institution concerned with general issues of Islamic thought.

3. The warrants authorized the seizure of, among other things:

- Any and all information referencing in any way [various individuals and organizations] and any other individual or entity designated as a terrorist by the President of the Untied States, the United States Department of Treasury, or Secretary of State;
- Any and all correspondence referencing in any way [various individuals and organizations] and any other individual or entity designated as a terrorist by the President of the Untied States, the United States Department of Treasury, or Secretary of State;
- Pamphlets, leaflets, booklets, video and audio tapes related to [various individuals and organizations] and any other individual or entity designated as a terrorist by the President of the Untied States, the United States Department of Treasury, or Secretary of State; and
- All computers and network equipment and peripherals, the software to operate them, and related instruction manuals.

4. The warrants did not specify which particular books, pamphlets, computer files, tapes or other written or recorded material were to be seized.

5. The agents executing the searches seized thousands of documents and other items presumptively protected by the First Amendment, including books, binders, computer disks, scholarly manuscripts, audio and videotapes, and mail delivered during the execution of the warrants.

6. Many of the seized items were written or recorded in Arabic. As far as the movants know, none of the agents participating in the search spoke or read Arabic.

7. The government inventories of the searches do not provide sufficient information to determine whether the things seized were within the scope of the search warrant, describing most items in general terms such as "cassette tapes," "photographs," "documents in Arabic," "video tapes," "folder with memos," "faxes, emails, memos, letters," "binders with information written in arabic," "folder of documents," "miscellaneous file folders," "contents of filing cabinets," "documents" "miscellaneous books and binders," "desk items."

8. The government inventories refer to some constitutionally protected material that is manifestly outside the scope of the warrants, e.g., "Sunday school emergency forms," and "one box of correspondences, *some* referring to Hamas" [implying correspondence not referring to Hamas was also seized].

7. Almost none of the seized items have been returned to the movants.

8. The affidavits supporting the search warrants remain sealed, and none of the movants has seen the affidavits or has any idea as to their contents.

ARGUMENT

The Supreme Court has long recognized that the inherent restraint on liberty imposed by any search or seizure is magnified when the items to be seized are written materials protected by the First Amendment. This principle reflects the historical fact that "the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus v. Search Warrants*, 367 U.S. 717, 724 (1961). In *Marcus*, the Court traced this history in some detail, beginning with the incorporation of the Stationers' Company in 1557, which was authorized to enter any building and seize all printed material that was "contrary to the form of any statute, act, or proclamation, made or to be made." 367 U.S. at 725 (quoting 1

Arber, Transcript of the Registers of the Company of Stationers of London, 1554-1640 A.D., p. xxxi). Broad search and seizure powers to suppress dissident writings were repeatedly reaffirmed by the Star Chamber and later during Oliver Cromwell's rule. *Id.* at 725-26.

After the Restoration, a new licensing act was enacted, under which government officials issued warrants for the seizure of persons and paper. "These warrants, while sometimes specific in content, often gave the most general discretionary authority," for example, "to search any house, shop, printing room, chamber, warehouse, etc. for seditious, scandalous or unlicensed pictures, books, or papers, to bring away or deface the same . . . " *Id.* at 726.

The use of such "general warrants" in England was finally overturned by Lord Camden in *Entick v. Carrington*, 19 How.St.Tr. 1029 (1765). Entick, a publisher of an opposition paper, was charged with seditious libel, and a warrant was issued for the seizure of all of his papers. Camden condemned the general warrant:

> This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.

Marcus, 367 U.S. at 728, quoting *Entick v. Carrington*. In another warrant case, Lord Camden noted that a general warrant "is a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Wilkes v. Wood*, 19 How.St.Tr. 1153 (1765), quoted in *Marcus*, 367 U.S. at 728-29. In a similar vein, a London pamphlet published in 1764 decried such warrants: "[W]here there is even a charge against one particular

paper, to seize all, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in practice." 367 U.S. at 729 n. 22.

The Court concluded that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.* at 729.

After presenting the historical background, the Court in *Marcus* turned to the facts of the case, which involved a warrant authorizing police to seize all "obscene publications" from a bookstore. The search resulted in the seizure, and removal from the market, of hundreds of titles, two-thirds of which were ultimately held not to be obscene. *Id.* at 732. The Court faulted the warrant's broad grant of discretion, which left "to the individual judgment of each of the many police officers involved in the selection of such magazines as in his view constituted 'obscene . . . publications.'" *Id.* at 732. Search warrants pertaining to expressive writings are different from other search warrants, and "a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Id.* at 731.

These principles were reaffirmed in *Stanford v. Texas*, 379 U.S. 476 (1965), a case that strikingly resembles the case at bar. There, the Supreme Court struck down a search warrant that authorized the seizure of "any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments concerning the Communist Party of Texas and the operations of the Communist Part in Texas." 379 U.S. at 486. Government officials searched the petitioner's home, from which he operated a mail order book business, and seized material sold by the business as well as the petitioner's personal books and pamphlets. *Id.* at 479. As in this case, they also seized "many of the petitioner's private documents and papers,

including his marriage certificate, his insurance policies, his household bills and receipts and the files of his personal correspondence." *Id.* at 480.

The Court found that "the warrant was of a kind which it was the purpose of the Fourth Amendment to forbid -- a general warrant." *Id.* The Court once again explained the Fourth Amendment's roots in the "history of conflict between the Crown and the press," concluding that

> what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. No less a standard could be faithful to First Amendment freedoms.

Id. at 485 (citations omitted). Since *Marcus* and *Stanford*, the courts have repeatedly affirmed the need for the "most scrupulous exactitude" when warrants or subpoenas are issued for constitutionally protected materials. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319 (1979); *In re Grand Jury Subpoena*, 829 F.2d 1291 (4th Cir. 1987).

The present case parallels *Stanford* in that large numbers of books, pamphlets, tapes, and other items protected by the First Amendment were seized based on a suspicion of "subversiveness." As in *Stanford*, the warrants executed in this case were "general warrants." Indeed, the warrants' inclusion of all items "referencing in any way" the proscribed organizations here is virtually identical to the *Stanford* warrants.[1] The broad sweep of the warrants encompasses constitutionally protected materials that are irrelevant to any type of criminal activity, e.g.:

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[1] The *Stanford* warrants: "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments concerning the Communist Party of Texas and the operations of the Communist Part in Texas."
The warrants at issue here: "Pamphlets, leaflets, booklets, video and audio tapes related to" ; "Any and all correspondence referencing in any way"; and "Any and all information referencing in any way" various individuals and organizations.

- scholarly works about terrorist organizations,
- a biography of Osama bin Laden,
- books or pamphlets dealing with the history of the Islamic world for the last thirty years,
- books, letters, or pamphlets *condemning* terrorist activity,
- pamphlets describing religious discrimination against Muslims in America post-9/11.

Given the magnitude of the September 11 attacks and their effect on the Muslim-American community, it would be surprising *not* to find documents "referring in any way" to terrorist organizations at any American entity engaged in the study of Islam or advocacy on behalf of Muslim-Americans. Such documents not only are not evidence of any crime, but are entitled to the highest First Amendment protection.

As in *Stanford*, "[t]he constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." 379 U.S. at 485. The agents here made no attempt to limit the scope of their search to potential evidence of a crime or to respect the boundaries of the First Amendment. Instead, they went so far as to seize large numbers of documents, books and pamphlets in Arabic, without any way of knowing whether they were within the scope of the warrant.[2]

The danger posed to the United States from terrorism is a serious matter of legitimate concern to law enforcement agencies. However, the particular dangers of the times does not justify the abandonment of fundamental First and Fourth Amendment freedoms, as the Supreme Court has repeatedly made clear. For example, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Court forcefully rejected the Government's contention that they were

[2] The breadth of the search is aggravated by the fact that the affidavits supporting the warrants were, and still are, sealed. "An affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant." *U.S. v. Washington*, 852 F.2d 803, 805 (4th Cir. 1988), quoting *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987).

not required to obtain warrants for electronic surveillance in domestic security matters. The Court noted that "[n]ational security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech." 407 U.S. at 313. Justice Douglas, concurring, made the point by invoking the same historical background cited in *Marcus* and *Stanford*:

> That 'domestic security' is said to be involved here does nto draw this case outside the mainstream of Fourth Amendment la. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition. For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment.

Id. at 327 (Douglas, J., concurring). His concluding sentence rings true today as it did thirty years ago: "We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent . . . Government as we do from the likelihood that fomenters of domestic upheaval will modify or form of governing." *Id.* at 333.

CONCLUSION

As the movants have persuasively argued, the search warrants at issue here lack sufficient particularity as to all of the items to be seized. Even were this not the case, however, the warrants most certainly fail to provide the "most scrupulous exactitude" required for the seizure of things protected by the First Amendment.

For the foregoing reasons, *amicus* respectfully urges this Court to grant the Motion to Return Property and to unseal the search warrant affidavit.

Respectfully submitted,

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