

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

02 CR 395

V.

AHMED ABDEL SATTAR,
MOHAMMED YOUSRY
and LYNNE STEWART,

Defendants.
-----X

**LYNNE STEWART'S MEMORANDUM JOINING
AHMED ABDEL SATTAR'S MOTION TO DISMISS**

Lynne Stewart, by counsel, joins the motion, makes additional arguments, and suggests additional relief.

I. The Right To Counsel

This Court's opinion appointing a special master is law of the case. We submit that the opinion forecloses any argument that the government can fulfill its obligation to respect the attorney-client privilege by erecting a "wall."

Interception of attorney-client communications in this pending criminal case cannot be justified. In *Black v. United States*, 385 U.S. 26 (1966), the Supreme Court vacated the defendant's conviction and remanded for a new trial, so that Black would have the opportunity to challenge the use of evidence obtained from intercepting attorney-client communications. Black was the first of many cases in which the

Solicitor General was compelled to admit illegal electronic surveillance. The case arose before there was any federal statutory authority to conduct electronic searches. The FBI and IRS had nevertheless invaded privacy wholesale.

Black was, however, distinguished in *Hoffa v. United States*, 387 U.S. 231 (1967). *Hoffa* sought a new trial, and the Court declined to order one. It explained that the special circumstance of *Black's* case - and those like it - was the invasion of the attorney-client relationship.

The Court, in its special master opinion, noted that the attorney-client privilege may not be of constitutional dimension. However, the right to consult with an attorney to prepare for trial necessarily requires that the consultations be confidential. That aspect of the right has repeatedly been upheld, beginning with *Powell v. Alabama*, 287 U.S. 45 (1932)[the *Scottsboro* case], where the deprivation of meaningful access to counsel was one key to the decision. Justice Sutherland's discussion of the right to counsel is eloquent testimony to the need for counsel's advice, investigation, and consultation.

The government, in its letters to counsel (see Exhibits A and B), seems to surround itself with the mystique of national security. A defendant's Sixth Amendment rights can never under any circumstances yield to alleged national security concerns. To hold otherwise would be to resurrect the idea of sovereign power rejected by the constitution itself. It would return us to what Madison, in the *Federalist*, called the

then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this Court is bound by the law and the Constitution in all events.

The theme and theory of these principles is most eloquently stated by Learned Hand in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952). There, the FBI and prosecutors sought to hide behind “national security” to deny full adversary inquiry into unlawful surveillance. The security of the Republic is, of course, a primary concern, Judge Hand noted, but when the federal government brings a criminal case it must accord the defendant all that the constitution provides or suffer a dismissal - which is precisely the point of this motion. That “disclose or dismiss” holding was later cited with approval by the United States Supreme Court. *Dennis v. United States*, 384 U.S. 855. 874 n.20 (1965).

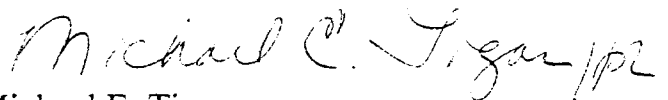
II. Standing and Joint Defense

Exhibits A and B show that the government is unwilling to assure Ms. Stewart that she and her attorneys will have the right to confidential communications. Beyond that, however, in this multi-defendant case, Ms. Stewart needs the assurances that Mr. Sattar has sought for an additional reason.

The government will seek to justify the joinder in this case under Federal Rules of Criminal Procedure 8 and 14. In addition, given the sheer volume of electronic

3. The Court should then turn over this information to the defense so that it can litigate taint issues.
4. The Court should enter an order forbidding the government from any and all interference with the attorney-client relationship.
5. If the government refuses to comply with any of these strictures, or if it is shown to have engaged in past misconduct, the case should be dismissed.

Respectfully submitted,



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NY Bar 307643

EXHIBIT A

SUSAN V. TIPOGRAPH
Attorney-at-Law
351 Broadway, 3rd fl.
New York, NY 10013
(212) 431-5360
fax (212) 625-3939

April 25, 2002

Christopher J. Morville
Joseph P. Bianco
Assistant United States Attorneys
One St. Andrew's Plaza
New York, NY 10007

Re: United States v. Sattar, et al.,
02 Cr. 395 (JGK)

Dear Gentlemen:

I am writing to follow-up, on behalf of Ms. Stewart and myself, on the conversation that occurred in Court yesterday concerning the privacy of Kenneth Faul's communications with Mr. Sattar at the M.C.C. It raised concerns for us about the confidentiality of Ms. Stewart's communications with any attorneys connected with her legal defense, as well as with her own clients. We would like an assurance, therefore, as to the following:

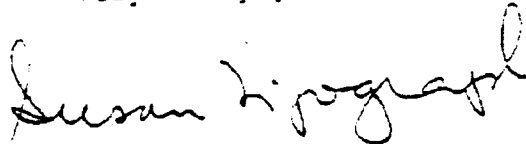
1. Whether there is an monitoring, whether under FISA, Title 3 or any other legal or extra-legal basis of the telephones in Ms. Stewart's office;
2. Similarly, whether there is any such monitoring on the telephone in my office;
3. Whether there is any audio, video or any other recording, videotaping or other monitoring of the offices located at 351 Broadway, 3rd floor, New York, NY 10013. As you are aware, both Ms. Stewart and myself our offices in that suite, along with three other attorneys;

Christopher J. Morvillo
Joseph P. Bianco
April 25, 2002
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4. Whether Ms. Stewart's visits with any of her own clients who are incarcerated in federal or state custody are being recorded, videotaped or monitored in any way.

I would appreciate you addressing the concerns raised herein as we want to guarantee the sanctity of Ms. Stewart's constitutionally privileged communications with her legal team, as well as with her own clients. I thank you in advance for your prompt attention to this matter.

Very truly yours,



Susan V. Tipograpa

cc: Honorable John G. Koeltl
David Stern
Kenneth A. Paul

EXHIBIT B

U.S. Department of Justice

United States Attorney
Southern District of New YorkThe Silvio J. Mello Building
One Saint Andrew's Place
New York, New York 10001

May 2, 2002

By FaxSusan V. Tipograph, Esq.
351 Broadway
3rd Floor
New York, NY 10013Re: United States v. Ahmad Abdel Sattar, et al.
02 Cr. 395 (JGR)

Dear Ms. Tipograph:

We are writing in response to your letter, dated April 25, 2002, requesting certain assurances relating to Government monitoring of you and your client, Lynne Stewart ("Stewart"). Specifically, you have asked us to represent to you that the Government is not currently monitoring or recording, in any manner, any of the following: (1) the suite in which you and Stewart maintain offices; (2) your office telephone; (3) Stewart's office telephone; and (4) Stewart's visits with any of her incarcerated clients.

As noted in the attached letter to Kenneth Paul, Esq., responding to his similar - yet far more narrowly tailored - request, the Government cannot provide you with the assurances you seek. Your request essentially asks the Government to disclose whether you or Stewart (or any of Stewart's incarcerated clients) are the targets of electronic surveillance in connection with any ongoing criminal investigation - state or federal - or for any foreign intelligence purpose. Disclosure of such investigative techniques to the targets of an investigation would obviously thwart any such investigation and, therefore, would be utterly inappropriate.

May 2, 2002

Susan V. Tiopgraph, Esq.

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The Government can assure you, however, that any such interceptions would be obtained pursuant to court order and would be conducted in accordance with applicable minimization requirements. Moreover, the Government would be taking proper precautions to prevent the dissemination of any privileged information to the agents and prosecutors involved in the prosecution and investigation of this case.

The Government is aware of no authority in any jurisdiction supporting the proposition that the Government has an obligation to disclose the existence of any ongoing court-authorized electronic surveillance, pursuant to Title III or FISA, upon the request of a defendant. If you have any such authority, we would appreciate you bringing it to our attention.

Of course, if you wish to pursue this matter further, you can file a motion with the Court seeking to compel such disclosure. The Government would then submit a response to the Court setting forth our legal position in detail. If you are going to avail yourself of this option, please contact us to arrange a briefing schedule that we can jointly submit to the Court for approval.

Very truly yours,

JAMES B. COMEY
United States Attorney
Southern District of New York

By: 

Joseph F. Stance
Christopher J. Morvillo
Assistant United States Attorneys
Telephone: (212) 637-1038/1410

Enclosure

cc: Honorable John G. Koeltl (by hand)
Kenneth A. Paul, Esq. (by fax)
David Stern, Esq. (by fax)