In re Terrorist Bombings of U.S. Embassies in East Africa (Fourth Amendment Challenges)

United States Court of Appeals for the Second Circuit, 2008
552 F.3d 157

[Two other opinions in the same case were filed the same day, dealing with, respectively, the admissibility, sufficiency, and alleged withholding of evidence, and sentencing, 552 F.3d 93; and Fifth and Sixth Amendment challenges, 552 F.3d 177.]

JOSÉ A. CABRANES, Circuit Judge. Defendant-appellant Wadih El-Hage, a citizen of the United States, challenges his conviction in the United States District Court for the Southern District of New York (Leonard B. Sand, Judge) on numerous charges arising from his involvement in the August 7, 1998 bombings of the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania (the "August 7 bombings"). . . .

El-Hage contends that the District Court erred by (1) recognizing a foreign intelligence exception to the Fourth Amendment's warrant requirement, (2) concluding that the search of El-Hage's home and surveillance of his telephone lines qualified for inclusion in that exception, and (3) resolving El-Hage's motion on the basis of an *ex parte* review of classified materials, without affording El-Hage's counsel access to those materials or holding a suppression hearing. Because we hold that the Fourth Amendment's requirement of reasonableness – and not the Warrant Clause – governs extraterritorial searches of U.S. citizens and that the searches challenged on this appeal were reasonable, we find no error in the District Court's denial of El-Hage's suppression motion. In addition, the District Court's *ex parte, in camera* evaluation of evidence submitted by the government in opposition to El-Hage's suppression motion was appropriate in light of national security considerations that argued in favor of maintaining the confidentiality of that evidence. El-Hage's challenge to his conviction is therefore without merit.

I. BACKGROUND

A. Factual Overview

American intelligence became aware of al Qaeda's presence in Kenya by mid-1996 and identified five telephone numbers used by suspected al Qaeda associates. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 269 (S.D.N.Y. 2000). From August 1996 through August 1997, American intelligence officials monitored these telephone lines, including two El-Hage used: a phone line in the building where El-Hage lived and his cell phone. *See id.* The Attorney General of the United States then authorized intelligence operatives to target El-Hage in particular. *Id.* This authorization, first issued on April 4, 1997, was renewed in July 1997. *Id.* Working with Kenyan authorities, U.S. officials searched El-Hage's home in Nairobi on August 21, 1997, pursuant to a document shown to El-Hage's wife that was "identified as a Kenyan warrant authorizing a search for 'stolen property.'" *Id.* At the completion of the search, one of the Kenyan officers gave El-Hage's wife an inventory listing the items seized during the search. *Id.*

El-Hage was not present during the search of his home. *Id.* It is uncontested that the agents did not apply for or obtain a warrant from a U.S. court. . . .

II. DISCUSSION

A. *In Camera, Ex Parte* Review of Evidence

As a preliminary matter, we address El-Hage's objection to the District Court's resolution of his suppression motion on the basis of an *in camera, ex parte* review of evidence submitted by the government. . . . The District Court's failure to hold a hearing, El-Hage urges, cast aside the integral role of the adversarial process in determining the primary purpose of the surveillance and whether the government acted in good faith. We disagree. . . .

. . . [T]he suppression motion at issue here involved a "limited" factual inquiry into the purpose and scope of the contested surveillance based on evidence relating to national security. . . . [T]he District Court observed that "the issues raised by El-Hage's motion were predominantly legal questions and the fact-based inquiry [into whether the surveillance was conducted for foreign intelligence purposes or law enforcement purposes] was limited." *Bin Laden,* 126 F. Supp. 2d at 287. In addition, the District Court found "persuasive [the government's] arguments about [an] ongoing threat posed by al Qaeda and the potentially damaging impact of disclosure [of the surveillance records] on existing foreign intelligence operations." *Id.* Our own review of the record persuades us of the correctness of the conclusions of the District Court with respect to the limited nature of the inquiry into the purpose of the surveillance and the need, at the time, to keep the government's submissions confidential.

In reaching this conclusion, we do not minimize El-Hage's valid interest in examining the government's evidence and challenging the government's assertions. Nor do we doubt the utility of the adversary process to determine facts or ventilate legal arguments in the normal course. Nevertheless, the imperatives of national security and the capacity of "*in camera* procedures [to] adequately safeguard [El-Hage's] Fourth Amendment rights," [*United States v. Ajlouny*, 629 F.2d 830, 839 (2d Cir. 1980)], weighed against holding an evidentiary hearing under these circumstances. *See* [*United States v. Belfield*, 692 F.2d 141, 149 (D.C. Cir. 1982)] ("[I]n a field as delicate and sensitive as foreign intelligence gathering, as opposed to domestic, criminal surveillance, there is every reason why the court should proceed *in camera* and without disclosure to determine the legality of a surveillance." (internal citation and quotation marks omitted)). Accordingly, we conclude that the District Court's decision to resolve El-Hage's suppression motion without a hearing does not constitute error, much less an abuse of discretion.

B. The District Court's Denial of El-Hage's Motion to Suppress Evidence

1. Standard of Review

We review *de novo* the legal issues raised on a motion to suppress evidence. We review a district court's factual findings for clear error, viewing the evidence in the light most favorable to the government.

2. Extraterritorial Application of the Fourth Amendment

In order to determine whether El-Hage's suppression motion was properly denied by the District Court, we must first determine whether and to what extent the Fourth Amendment's safeguards apply to overseas searches involving U.S. citizens. In *United States v. Toscanino*, a case involving a Fourth Amendment challenge to overseas wiretapping of a non-U.S. citizen, we observed that it was "well settled" that "the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens." 500 F.2d 267, 280-81 (2d Cir. 1974); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 283 n.7 (1990) (Brennan, J., dissenting) (recognizing "the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad"). Nevertheless, we have not yet determined the specific question of the applicability of the Fourth Amendment's Warrant Clause to overseas searches. Faced with that question now, we hold that the Fourth Amendment's warrant requirement does not govern searches conducted abroad by U.S. agents; such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness. . . .

. . . While never addressing the question directly, the Supreme Court provided some guidance on the issue in *United States v. Verdugo-Urquidez* . . . . [That guidance] and the following reasons weigh against imposing a warrant requirement on overseas searches.

First, there is nothing in our history or our precedents suggesting that U.S. officials must first obtain a warrant before conducting an overseas search. El-Hage has pointed to no authority – and we are aware of none – directly supporting the proposition that warrants are necessary for searches conducted abroad by U.S. law enforcement officers or local agents acting in collaboration with them; nor has El-Hage identified any instances in our history where a foreign search was conducted pursuant to an American search warrant. This dearth of authority is not surprising in light of the history of the Fourth Amendment and its Warrant Clause as well as the history of international affairs. As the *Verdugo-Urquidez* Court explained, "[w]hat we know of the history of the drafting of the Fourth Amendment . . . suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters." 494 U.S. at 266. In addition, the Warrant Clause appears to have been invested with a meaning at the time of the drafting that differs significantly from our modern view of the requirement. Justice White observed that "at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects," and "it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 604-14 (1980) (White, J., dissenting) (documenting the history of the Fourth Amendment's warrant requirement). Accordingly, we agree with the Ninth Circuit's observation that "foreign searches have neither been historically subject to the warrant procedure, nor could they be as a practical matter." *United States v. Barona*, 56 F.3d 1087, 1092 n.1 (9th Cir. 1995).[7]

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7. A U.S. citizen who is a target of a search by our government executed in a foreign country is not without constitutional protection – namely, the Fourth Amendment's guarantee of reasonableness which protects a citizen from unwarranted government intrusions. Indeed, in

Second, nothing in the history of the foreign relations of the United States would require that U.S. officials obtain warrants from foreign magistrates before conducting searches overseas or, indeed, to suppose that all other states have search and investigation rules akin to our own. As the Supreme Court explained in *Verdugo-Urquidez:*

> For better or for worse, we live in a world of nation-states in which our Government must be able to function effectively in the company of sovereign nations. Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

494 U.S. at 275 (internal citation, quotation marks and brackets omitted). The American procedure of issuing search warrants on a showing of probable cause simply does not extend throughout the globe and, pursuant to the Supreme Court's instructions, the Constitution does not condition our government's investigative powers on the practices of foreign legal regimes "quite different from that which obtains in this country." *Id.*

Third, if U.S. judicial officers were to issue search warrants intended to have extraterritorial effect, such warrants would have dubious legal significance, if any, in a foreign nation. *Cf. The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 11 U.S. 116, 135 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."). As a District Court in this Circuit recently observed, "it takes little to imagine the diplomatic and legal complications that would arise if American government officials traveled to another sovereign country and attempted to carry out a search of any kind, professing the authority to do so based on an American-issued search warrant." *United States v. Vilar*, No. 05-CR-621, 2007 WL 1075041, at *52 (S.D.N.Y. Apr. 4,

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many instances, as appears to have been the case here, searches targeting U.S. citizens on foreign soil will be supported by probable cause.

The interest served by the warrant requirement in having a "neutral and detached magistrate" evaluate the reasonableness of a search is, in part, based on separation of powers concerns – namely, the need to interpose a judicial officer between the zealous police officer ferreting out crime and the subject of the search. These interests are lessened in the circumstances presented here for two reasons. First, a domestic judicial officer's ability to determine the reasonableness of a search is diminished where the search occurs on foreign soil. Second, the acknowledged wide discretion afforded the executive branch in foreign affairs ought to be respected in these circumstances.

A warrant serves a further purpose in limiting the scope of the search to places described with particularity or "the persons or things to be seized" in the warrant. U.S. Const. amend. IV. In the instant case, we are satisfied that the scope of the searches at issue was not unreasonable. *See* Parts II.B.3, *post.*

2007). We agree with that observation. A warrant issued by a U.S. court would neither empower a U.S. agent to conduct a search nor would it necessarily compel the intended target to comply.[8] It would be a nullity, or in the words of the Supreme Court, "a dead letter." *Verdugo-Urquidez,* 494 U.S. at 274.

Fourth and finally, it is by no means clear that U.S. judicial officers could be authorized to issue warrants for overseas searches, *cf. Weinberg v. United States*, 126 F.2d 1004, 1006 (2d Cir. 1942) (statute authorizing district court to issue search warrants construed to limit authority to the court's territorial jurisdiction), although we need not resolve that issue here.

For these reasons, we hold that the Fourth Amendment's Warrant Clause has no extraterritorial application and that foreign searches of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment's requirement of reasonableness.

The District Court's recognition of an exception to the warrant requirement for foreign intelligence searches finds support in the pre-FISA law of other circuits. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973). We decline to adopt this view, however, because the exception requires an inquiry into whether the "primary purpose" of the search is foreign intelligence collection. *See Bin Laden,* 126 F. Supp. 2d at 277. This distinction between a "primary purpose" and other purposes is inapt. As the U.S. Foreign Intelligence Surveillance Court of Review has explained:

> [The primary purpose] analysis, in our view, rested on a false premise and the line the court sought to draw was inherently unstable, unrealistic, and confusing. The false premise was the assertion that once the government moves to criminal prosecution, its "foreign policy concerns" recede. . . . [T]hat is simply not true as it relates to counterintelligence. In that field the government's primary purpose is to halt the espionage or terrorism efforts, and criminal prosecutions can be, and usually are, interrelated with other techniques used to frustrate a foreign power's efforts.

In re Sealed Case No. 02-001, 310 F.3d 717, 743 (Foreign Int. Surv. Ct. Rev. 2002).

In addition, the purpose of the search has no bearing on the factors making a warrant requirement inapplicable to foreign searches – namely, (1) the complete absence of any precedent in our history for doing so, (2) the inadvisability of conditioning our government's surveillance on the practices of foreign states, (3) a U.S. warrant's lack of authority overseas, and (4) the absence of a mechanism for obtaining a U.S. warrant. Accordingly, we cannot endorse the view that the normal course is to obtain a warrant for overseas searches involving U.S. citizens unless the search is "primarily" targeting foreign powers.

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8. A warrant represents the delegation of the authority of the government to its agent to execute a search on the property identified therein. The subject of a validly issued search warrant has no right to resist the search. *See, e.g.,* Bumper v. North Carolina, 391 U.S. 543, 550 (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.") . . . .

3. The Kenyan Searches Were Reasonable and Therefore Did Not Violate the Fourth Amendment.

. . . First, El-Hage insists that his Nairobi home deserves special consideration in light of the home's status as "the most fundamental bastion of privacy protected by the Fourth Amendment." Second, he contends that the electronic surveillance was far broader than necessary because it encompassed "[m]any calls, if not the predominant amount, [that] were related solely to legitimate commercial purposes, and/or purely family and social matters."

To determine whether a search is reasonable under the Fourth Amendment, we examine the "totality of the circumstances" to balance "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson v. California*, 547 U.S. 843, 848 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2001)) (internal quotation marks omitted). . . .

a. The Search of El-Hage's Home in Nairobi Was Reasonable . . . .

Applying that test to the facts of this case, we first examine the extent to which the search of El-Hage's Nairobi home intruded upon his privacy. The intrusion was minimized by the fact that the search was not covert; indeed, U.S. agents searched El-Hage's home with the assistance of Kenyan authorities, pursuant to what was identified as a "Kenyan warrant authorizing [a search]." *Bin Laden,* 126 F. Supp. 2d at 269. The search occurred during the daytime, *id.* at 285, and in the presence of El-Hage's wife, *id.* at 269. At the conclusion of the search, an inventory listing the items seized during the search was prepared and given to El-Hage's wife. *Id.* at 269. In addition, the District Court found that "[t]he scope of the search was limited to those items which were believed to have foreign intelligence value[,] and retention and dissemination of the evidence acquired during the search were minimized." *Id.* at 285.

As described above, U.S. intelligence officers became aware of al Qaeda's presence in Kenya in the spring of 1996. *Id.* at 268-69. At about that time, they identified five telephone lines used by suspected al Qaeda associates, one of which was located in the same building as El-Hage's Nairobi home; another was a cellular phone used by El-Hage. *Id.* After these telephone lines had been monitored for several months, the Attorney General of the United States authorized surveillance specifically targeting El-Hage. *Id.* That authorization was renewed four months later, and, one month after that, U.S. agents searched El-Hage's home in Nairobi. *Id.* This sequence of events is indicative of a disciplined approach to gathering indisputably vital intelligence on the activities of a foreign terrorist organization. U.S. agents did not breach the privacy of El-Hage's home on a whim or on the basis of an unsubstantiated tip; rather, they monitored telephonic communications involving him for nearly a year and conducted surveillance of his activities for five months before concluding that it was necessary to search his home. In light of these findings of fact, which El-Hage has not contested as clearly erroneous, we conclude that the search, while undoubtedly intrusive on El-Hage's privacy, was restrained in execution and narrow in focus.

Balanced against this restrained and limited intrusion on El-Hage's privacy, we have the government's manifest need to investigate possible threats to national security. As the District

Court noted, al Qaeda "declared a war of terrorism against all members of the United States military worldwide" in 1996 and later against American civilians. *Id.* at 269. The government had evidence establishing that El-Hage was working with al Qaeda in Kenya. *Id.* On the basis of these findings of fact, we agree with the District Court that, at the time of the search of El-Hage's home, the government had a powerful need to gather additional intelligence on al Qaeda's activities in Kenya, which it had linked to El-Hage.

Balancing the search's limited intrusion on El-Hage's privacy against the manifest need of the government to monitor the activities of al Qaeda, which had been connected to El-Hage through a year of surveillance, we hold that the search of El-Hage's Nairobi residence was reasonable under the Fourth Amendment.

b. The Surveillance of El-Hage's Kenyan Telephone Lines Was Also Reasonable.

El-Hage appears to challenge the reasonableness of the electronic surveillance of the Kenyan telephone lines on the grounds that (1) they were overbroad, encompassing calls made for commercial, family or social purposes and (2) the government failed to follow procedures to "minimize" surveillance. Indeed, pursuant to defense counsel's analysis, "as many as 25 percent of the calls were either made by, or to" a Nairobi businessman not alleged to have been associated with al Qaeda. El-Hage also criticizes the government for retaining transcripts of irrelevant calls – such as conversations between El-Hage and his wife about their children – despite the government's assurance to the District Court that the surveillance had been properly "minimized." *See United States v. Ruggiero*, 928 F.2d 1289, 1302 (2d Cir. 1991) ("[A]ny [electronic] interception 'shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.'" (quoting 18 U.S.C. §2518(5))).

It cannot be denied that El-Hage suffered, while abroad, a significant invasion of privacy by virtue of the government's year-long surveillance of his telephonic communications. The Supreme Court has recognized that, like a physical search, electronic monitoring intrudes on "the innermost secrets of one's home or office" and that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967); *cf. Katz v. United States*, 389 U.S. 347, 352-54 (1967). For its part, the government does not contradict El-Hage's claims that the surveillance was broad and loosely "minimized." Instead, the government sets forth a variety of reasons justifying the breadth of the surveillance. These justifications, regardless of their merit, do not lessen the intrusion El-Hage suffered while abroad, and we accord this intrusion substantial weight in our balancing analysis.

Turning to the government's interest, we encounter again the self-evident need to investigate threats to national security presented by foreign terrorist organizations. When U.S. intelligence learned that five telephone lines were being used by suspected al Qaeda operatives, the need to monitor communications traveling on those lines was paramount, and we are loath to discount – much less disparage – the government's decision to do so.

Our balancing of these compelling, and competing, interests turns on whether the scope of the intrusion here was justified by the government's surveillance needs. We conclude that it was, for at least the following four reasons.

First, complex, wide-ranging, and decentralized organizations, such as al Qaeda, warrant sustained and intense monitoring in order to understand their features and identify their members. *See In re Sealed Case No. 02-001*, 310 F.3d 717, 740-41 (Foreign Int. Surv. Ct. Rev. 2002) ("Less minimization in the acquisition stage may well be justified to the extent . . .'the investigation is focusing on what is thought to be a widespread conspiracy[,] [where] more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise.'" (quoting *Scott v. United States*, 436 U.S. 128, 140 (1978) (alteration in original))).

Second, foreign intelligence gathering of the sort considered here must delve into the superficially mundane because it is not always readily apparent what information is relevant. *Cf. United States v. Rahman*, 861 F. Supp. 2d 247, 252-53 (S.D.N.Y. 1994) (recognizing the "argument that when the purpose of surveillance is to gather intelligence about international terrorism, greater flexibility in acquiring and storing information is necessary, because innocent-sounding conversations may later prove to be highly significant, and because individual items of information, not apparently significant when taken in isolation, may become highly significant when considered together over time").

Third, members of covert terrorist organizations, as with other sophisticated criminal enterprises, often communicate in code, or at least through ambiguous language. *See, e.g., United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998) ("Because Ajaj was in jail and his telephone calls were monitored, Ajaj and Yousef spoke in code when discussing the bomb plot."). Hence, more extensive and careful monitoring of these communications may be necessary.

Fourth, because the monitored conversations were conducted in foreign languages, the task of determining relevance and identifying coded language was further complicated.

Because the surveillance of suspected al Qaeda operatives must be sustained and thorough in order to be effective, we cannot conclude that the scope of the government's electronic surveillance was overbroad. While the intrusion on El-Hage's privacy was great, the need for the government to so intrude was even greater. Accordingly, the electronic surveillance, like the search of El-Hage's Nairobi residence, was reasonable under the Fourth Amendment.

In sum, because the searches at issue on this appeal were reasonable, they comport with the applicable requirement of the Fourth Amendment and, therefore, El-Hage's motion to suppress the evidence resulting from those searches was properly denied by the District Court.

III. CONCLUSION . . .

For these reasons, and for those set forth in *In re Terrorist Bombings of U.S. Embassies in East Africa*, [552 F.3d 177] (2d Cir. 2008), the judgment of conviction entered by the District Court against El-Hage is **AFFIRMED** in all respects except that the sentence is **VACATED**, and the case is **REMANDED** to the District Court for the sole purpose of resentencing El-Hage as directed in *In re Terrorist Bombings of U.S. Embassies in East Africa*, [552 F.3d 93] (2d Cir. 2008).