

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 1:11cr 561
)	
SYED GHULAM NABI FAI,)	
)	
Defendant.)	

SUPPLEMENTAL POSITION OF THE UNITED STATES
WITH RESPECT TO SENTENCING FACTORS

The United States previously submitted its position on the sentencing of Syed Ghulam Nabi Fai. This supplemental pleading is restricted to responding to the Defendant’s Sentencing Memorandum (“Fai’s Sentencing Memorandum”).

1. Fai’s Remorse for Being Caught

Fai argues that the seriousness of his offenses is substantially mitigated by his “demonstrated remorse.” Fai’s Sentencing Memorandum at 1. The opposite is true. We noted in our original sentencing pleading that in his first letter to the Court (the one that was quoted in the Presentence Report), Fai expressed far more remorse for the damage that he did to his Kashmiri cause by letting the KAC get exposed as an instrument of the ISI than he did for the harm that he caused the American people and Government by concealing that he was bankrolled by a Pakistani intelligence service for decades. In his sentencing memorandum, Fai filed another letter to the Court, but this new letter is just more of the same.

Fai’s new letter to the Court is seven pages and single spaced. Fai’s Sentencing Memorandum, at Exhibit 10. It goes into great detail about the history of Kashmir, but none

about the history of Fai's dealings with the ISI. In fact, nowhere is the ISI even mentioned.

Nowhere is any mention of a single lie that Fai made to the American people and Government in the course of innumerable lies over a period of decades. His letter surely expresses remorse for allowing the KAC to be exposed as a mouthpiece of the ISI, but it otherwise manifests no remorse for his criminal conduct.

2. Fai Worked with the ISI Even Before the KAC was Founded

Fai asserts that “[i]n the early 1990s, Dr. Fai was approached by an official at the ISI with an offer to provide funding to KAC. The initial contact was made through a Pakistani American named Zaheer Ahmad.” Fai’s Sentencing Memorandum at 2.¹ The assertion that the ISI approached him about funding the KAC after Fai already had started the KAC is false, and only furthers Fai’s continued attempts to conceal his connection to the ISI. The KAC was incorporated on April 4, 1990. As noted in Paragraph 12 of the Statement of Facts (“SOF”), however, Fai admitted in a letter to the ISI in 1995 that he had already by that time been working

¹ Defendant’s continued reference to himself even before this Court as “Dr. Fai” is sad and disappointing. As noted in Paragraph 47 of the Presentence Report, the defendant has no doctorate degree. His false representation that he possesses such a degree unfairly dilutes the respect rightly earned by others that actually possess such a degree. *See United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (Bybee, dissenting) (in writing to uphold the constitutionality of the Stolen Valor Act, noting that “[f]alse representations not only dishonor the decorations and medals themselves, but dilute the select group of those who have earned the nation's gratitude for their valor”). *See also United States v. Alvarez*, No. 11-210 Transcript of Oral Argument before the United States Supreme Court, February 22, 2012, at 43 (Breyer, J) (“My theory is that it does hurt the medal, the purpose, the objective, the honor, for people falsely to go around saying that they have this medal when they don't”). While Fai’s misleading characterization of his educational attainments before this Court are relatively benign compared to the deceit inherent in his criminal conduct, it is nonetheless consistent with his attempts to mislead the Government of the United States and the American people for decades.

with the ISI for more than a decade. Indeed, the FBI seized documents from Fai reflecting his work with the ISI before the KAC was first created.

As noted in the Paragraph 13 of the Presentence Report, a confidential informant told federal agents that the ISI created the KAC to propagandize on behalf of the Government of Pakistan. As noted in Paragraph 15 of the Criminal Complaint in this case, that confidential informant ("CW-2") was proven reliable over a long period of time - - and said that, in approximately 1989, CW-2 was aware of the candidates under consideration to operate the KAC and that the ISI selected Fai to do so because he had no overt ties to Pakistan.

3. Fai's Work at KAC Was In Accordance With Instructions from the ISI

Fai suggests that the only connection between the ISI and his work at the KAC was his receipt of funds - - and that his receipt of those funds had "no strings attached." Fai's Sentencing Memorandum at 2-3. The facts in the record establish that such suggestion is false. As the Statement of Facts establishes, Fai entered contracts with ISI approval, and was reprimanded by his ISI handler when he failed to get such approval in advance. SOF ¶¶ 12-13. He reported on his activities to the ISI as instructed by the ISI. SOF ¶¶ 15-16, 21-22, 28-33, 55. He submitted his budgets to the ISI for approval, and reduced them when so instructed by the ISI. SOF ¶¶ 21-23, 29-30, 53. Fai invited people to the conferences under the auspices of the KAC that the ISI instructed him to invite, SOF ¶¶ 26, 36, and chose topics for the conferences that the ISI instructed him to choose. SOF ¶ 34.² The ISI held veto power over the people that Fai invited to

² Fai argues that his conferences resulted in Declarations "adopted in some instances by representatives from the governments of India, Pakistan, and the region of Jammu and Kashmir." Fai's Sentencing Declaration at 2. They certainly were adopted by representatives of the government of *Pakistan*. For example, the only representatives of any governments on the "Washington Declarations" issued annually by the KAC between 2005 and 2010 were ISI operatives Shawl and Trambo, and Pakistani parliamentarian Inayatullah.

the KAC conferences. SOF ¶ 36. Fai traveled where the ISI instructed him to travel, and did not travel where the ISI instructed him not to travel. SOF ¶ 24.

Fai claims that he concealed his connections to the ISI because revealing them would have undermined “his credibility with his constituents and particularly with the government of India and the indigenous Kashmiri resistance.” Fai’s Sentencing Memorandum at 3. To the contrary, revealing his ISI connection would not have undermined his credibility with the Government of India because he *had* no credibility with the Government of India; the Indian Government understood that Fai was an agent of Pakistan. Further, revealing his ISI connection would not have undermined his credibility with the “indigenous Kashmiri resistance,” because - - just like the KAC - - the “indigenous Kashmiri resistance” to which Fai refers (in particular, Syed Salahuddin and the Hizbul Mujahideen organization) were financially and logistically supported by ISI from the start anyway.

In short, the entity with respect to which Fai most feared losing credibility by revelation of his ISI connection actually was the Government of the United States - - and the people with respect to which Fai most feared losing credibility by that revelation was the *American* people. To prevent the undermining of his credibility before this Court, those are facts that Fai still tries to conceal.³

³ Many writers of the letters submitted by Fai to this Court on his behalf (Fai’s Sentencing Declaration, Exhibit 11) also fail to disclose facts the disclosure of which might undermine their credibility before this Court. For example - - and this is just a sampling from the first ones listed - - Farhan Chak (#6) is a “9/11 Truther.” Arif Kamal (#7) was copied on at least 26 emails to Fai from the ISI. Mirwaiz Umar Farooq (#8) was supported and controlled by the ISI. Attiya Inayatullah (#14) was invited to KAC conferences by Fai at the ISI’s direction. Gautam Navakhla (#15) was introduced to an ISI general for recruitment by Fai at the ISI’s direction.

4. Sentencing Guidelines Calculation Based on Grouping: Fai argues that his conspiracy to deceive the Department of Justice and the FBI regarding his connections to the ISI should not group for purposes of the Sentencing Guidelines with his conspiracy to evade taxes and impede the Internal Revenue Service. We believe that the Probation Officer properly declined to group the two aspects of Fai's criminal conduct because they were aimed at different victims and for different purposes. The tax evasion offense was about only money and directly victimized the IRS. As noted in our earlier pleading, that tax scam was not integral in any way to the 20-year long effort to hide from American policy makers the KAC's connection to the ISI - - the object of which effort was not in any way financial.

That being said, grouping the offenses together would *raise* Fai's guidelines range rather than lower it. This is so because the Probation Officer gave Fai the benefit of the doubt by *not* grouping the offenses. If the offenses are *not* grouped, then Fai's actual Offense Level is 22 instead of 21.

If the offenses are grouped, then Fai's offense level is enhanced by two levels for obstruction of justice. As Application Note 8 to Section 3C1.1 provides:

Grouping Under § 3D1.2(c) - If the defendant is convicted both of an obstruction offense . . . and an underlying offense . . . the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section or the offense level for the obstruction offense, whichever is greater.

Sentencing Guidelines § 3C1.1.

Accordingly, if by reason of § 3D1.2, the count for the obstruction offense - - here, the Section 1001 scheme to conceal KAC's relationship with the ISI from the Department of Justice and the FBI - - is grouped with the count for the underlying offense (in Fai's view, the tax scam) then (pursuant to Application Note 8 to § 3C1.1), "the offense level for that group of closely related counts will be the offense level for the underlying offense [the tax scam] increased by the 2-level adjustment specified by this section or the offense level for the obstruction offense, whichever is greater." Inasmuch as the offense level for the tax scam - - increased by two levels for obstruction - - is greater than the offense level for the Section 1001 scheme, the actual offense level for the group of closely related counts in this case is the offense level for the tax scam (20), *plus* two levels for obstruction.⁴

5. Sentencing Guidelines Calculation for Sophisticated Means: Fai argues that his tax evasion conspiracy was not sophisticated. To the contrary, it was extremely sophisticated. After all, the tax fraud scheme involved transfers to the KAC, for which a handful of otherwise unrelated taxpayers around the country claimed large charitable deductions - - even though the taxpayers were reimbursed for those transfers in a foreign country with foreign currency supplied by a foreign intelligence service. Such reimbursement is virtually undetectable by ordinary tax enforcement mechanisms. Fai's argument simply is unpersuasive that a tax fraud based on

⁴ Application Note 8 makes perfect sense because failing to award the enhancement for obstruction on the grouped charges would result in a lower offense level for a defendant convicted of both the tax evasion offense *and* the false statement offense than would result for a defendant convicted of the tax evasion alone. After all, if Fai had been convicted only of the tax evasion, then his offense level still would have been 20 - - but it would have been enhanced by two levels for lying to the FBI on July 18, 2011. Ultimately, his conviction on the Section 1001 concealment charge as well as the tax evasion charge hardly could result in a final offense level that would be *lower* than what he would have had on the basis of the tax evasion charge alone.

virtually undetectable reimbursement of charitable deductions in a foreign country with foreign currency supplied by a foreign intelligence service does not constitute “sophisticated means” for purposes of 2T1.1(b)(2).

Fai never carried more than \$10,000 in cash outside the United States because he knew that he would have to report such currency upon his departure from the United States. Instead, he made arrangements either for Zaheer Ahmad to send him money in the country to which he was traveling, or for someone affiliated with the ISI to deliver money to Fai in that country. *See, e.g.,* SOF ¶¶ 43, 77. Fai also used Ahmad and straw donors to donate to members of Congress, which donations would be credited on Fai’s balance sheets as payments to the KAC from the ISI.

Of course, all of that is in addition to the even more basic fact that the KAC would have lost its tax exempt status had Fai not concealed from the IRS the foreign origin of the bulk of the KAC’s funds every year on the KAC’s 990s in the first place. This fact, alone, belies Fai’s argument that “[a]ny sophisticated means that he may have employed to hide his connection to Pakistan were not tied to the offenses of conviction.” Fai’s Sentencing Memorandum, at 12.⁵ In short, this tax fraud scheme was designed to provide benefits to straw donors in order to get them to launder ISI money to enable Fai to promote his operation of the KAC as an agent of the Government of Pakistan without having to disclose to the Government of the United States that the KAC was funded by a Pakistani intelligence service. As “means” go, these were sophisticated.

⁵ Fai argues that he pled guilty to making false statements and defrauding the Department of the Treasury. Defendant’s Sentencing Memorandum at 12. Actually, he pled guilty to (a) conspiring to conceal material facts from agencies of the Government of the United States; (b) conspiring to defraud the Department of the Treasury; and (c) endeavoring to obstruct and impede the administration of the Internal Revenue laws.

Finally, we note that the Presentence Report properly awarded the two-level enhancement under § 2T1.1(b)(2) because - - by its very terms - - the enhancement is to be awarded where the means were sophisticated *or* a substantial part of the fraud was committed from outside the United States. Even if the means involved in the tax conspiracy were somehow deemed to be other than “sophisticated,” the enhancement is appropriate because a substantial part of the fraud was committed from outside the United States.

6. There Was No Double Counting: Fai argues that a two-level enhancement for “sophisticated means” is double counting because the probation officer already assigned a 12-level adjustment under § 2B1.1(b)(10) for the tax evasion offense because a substantial part of the fraud was committed from outside the United States. Fai’s Sentencing Memorandum at 12. That argument is based on a fundamental misunderstanding of the calculations in the Presentence Report. The 12-level adjustment was made by reason of § 2T4.1(G), on the basis of the stipulated tax loss of between \$200,000 and \$400,000. The only adjustment made under § 2B1.1(b)(10) was a two-level adjustment for sophisticated means; the fact that a substantial part of the fraud was committed from outside the United States is merely an *alternate* justification for that same two-level adjustment..

For the foregoing reasons, as well as those included in our initial pleading setting forth the government's position on sentencing, a term of imprisonment of 48 months is necessary to reflect the seriousness of the defendant's offenses, promote respect for the law, provide just punishment for the defendant's offenses, and afford adequate deterrence to criminal conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, I electronically filed the foregoing
SUPPLEMENTAL POSITION OF THE UNITED STATES WITH RESPECT TO
SENTENCING FACTORS Motion with the Clerk of Court using the CM/ECF system, which
will send a notification of such filing (NEF) to the following:

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