IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:08cr131
	)	
SAMI AMIN AL-ARIAN	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO QUASH INDICTMENT FOR SELECTIVE PROSECUTION

Defendant Al-Arian moves the Court to quash the indictment on the grounds of selective prosecution, and to allow discovery on the issue. That motion should be denied. Al-Arian is prosecuted for criminal contempt simply because he refused to obey multiple court orders to testify under immunity. Simply put, there is no factual or legal basis for Al-Arian's allegation of selective prosecution, and it should be rejected.

Al-Arian is an individual who indisputably has first-hand knowledge of the intimate details of a terrorist organization. Through his attorney in closing argument in Florida, he *conceded* that he affiliated with a terrorist group, and advised that group's leaders about its affairs. Moreover, a United States District Judge found him to have been a leader of that terrorist group. That federal judge found him to have facilitated suicide bombings. In light of those facts, the government reasonably sought to compel his testimony in order to obtain the valuable information he has for the grand jury. Yet, Al-Arian disobeyed multiple orders to testify with statutory immunity, even after his legal challenges were considered and rejected by two district judges and two courts of appeal. Al-Arian fails to establish that anyone similarly situated to him was *not* prosecuted for criminal contempt. For these reasons alone, his motion must be denied.

Procedural Background

On May 10, 2006, United States District Judge Gerald Bruce Lee entered an order directing Al-Arian to testify before a grand jury. *See* Order, *United States v. John Doe A01-246 (T-112)*, Grand Jury 06-1 (May 10, 2006) (Lee, J.).[1] The order compelling Al-Arian's testimony also prohibited the use of that testimony against Al-Arian, except in limited circumstances. On October 18, 2006, Al-Arian appeared before the grand jury but declined to answer any questions other than to state his name. Transcript, *United States v. John Doe A01-246*, Grand Jury No. 06-1 (Oct. 18, 2006), at 2-3.

The next day, at a hearing before Judge Lee, Al-Arian claimed that the plea agreement underlying his guilty plea in the Middle District of Florida exempted him from being compelled to testify. Accordingly, Judge Lee instructed Al-Arian to move in the Middle District of Florida to enforce his plea agreement. *See generally* Transcript of Underseal Proceeding, *United States v. Al-Arian*, Cr. No. 06dm175 (Oct. 19, 2006) (Lee, J.). *See also* Order, *United States v. John Doe A01-246 (T-112)*, Grand Jury 06-1 (Oct. 23, 2006) (Lee, J.).

On November 9, 2006, after a hearing, the United States District Judge James S. Moody, Jr. - - the judge who accepted Al-Arian's guilty plea in the Middle District of Florida in May 2006 - - rejected Al-Arian's claim that his plea agreement exempted him from being compelled to testify. Judge Moody found first that giving compelled testimony, which is involuntary, is

[1] All of the documents cited to in this section setting forth the procedural background were filed with the Court contemporaneously with this pleading in the government's filing captioned "Grand Jury Documents Supplied Pursuant to Order of July 27, 2008." Rather than file them again, we respectfully refer the Court to those documents already filed.

different than cooperation, which is voluntary. *See* Order, *United States v. Al-Arian*, Case No. 8:03-CR-77-T-30 TBM, at 1-2 (Nov. 9, 2006) (Moody, J.).

More fundamentally, Judge Moody found:

> Second, contrary to Dr. Al-Arian's contention, the plea agreement does not provide that he does not have to cooperate[,] much less provide that he would never [have] to respond to a grand jury subpoena. The Court has never heard of the Government agreeing that someone would forever be protected from grand jury subpoena. It is incredible that such a novel provision would not be placed in the written agreement in clear and specific terms. And, the contention that "the issue of cooperation was immediately taken off the table and never raised again" is contrary to the wording of paragraph six on page eight of the agreement which provides that, if Dr. Al-Arian does cooperate, such cooperation would be brought to the attention of other prosecuting officers if requested.

Id. at 2. Because the written agreement did not contain any clause exempting Al-Arian from giving compelled testimony, and because it contained an integration clause, Judge Moody ruled that the plea agreement did not prevent the Government from obtaining an order to compel him to testify before a grand jury. *Id.* at 3. Al-Arian appealed that order to the United States Court of Appeals for the Eleventh Circuit.

On November 16, 2006, Judge Lee held another hearing on the matter. Notwithstanding Judge Moody's ruling, Al-Arian (through counsel) notified Judge Lee that he continued to refuse to testify. *See* Transcript of Underseal Proceeding, *United States v. Al-Arian*, Cr. No. 06dm175 (Nov. 16, 2006) (Lee, J.), at 3. Al-Arian's counsel stated that Al-Arian believed that the plea agreement permitted him to refuse to testify "despite Judge Moody's decision." *Id.* Al-Arian's counsel represented to Judge Lee that Al-Arian's "sole basis for refusing to testify" was the plea agreement, and the underlying reasons for his position in the plea negotiations. *Id.* at 6.

In light of Judge Moody's decision that Al-Arian could be compelled to testify, and Al-Arian's refusal to obey Judge Lee's order to testify, Judge Lee held Al-Arian in civil contempt. *Id.* at 8-9. Judge Lee further stated that Al-Arian's personal belief that Judge Moody was incorrect and that Judge Lee's order was therefore invalid was not a just cause for his refusal to testify. *Id.* at 10.

On November 16, 2006, Judge Lee entered an order that stated:

> The Court finds that Dr. Al-Arian was properly summoned to appear before the grand jury, that he has been granted use immunity and has refused to testify. The Court finds that Dr. Al-Arian has no legal cause to refuse to answer questions or to provide evidence to the grand jury. As a result of Dr. Al-Arian's refusal to testify, the Court finds that Dr. Al-Arian is in civil contempt of this Court in violation of 28 U.S.C. § 1826.

Order, *United States v. John Doe A01-246 (T-112)*, Grand Jury 06-1/06-2 (Nov. 16, 2006) (Lee, J.).

On November 27, 2006, Al-Arian appealed that order to the United States Court of Appeals for the Fourth Circuit. In light of the fact that the term of Grand Jury 06-1 was about to expire and his contempt, therefore, was about to be discharged (at least temporarily), he withdrew that appeal on December 7, 2006.

After the term of Grand Jury 06-1 expired without Al-Arian having obeyed the order to testify, Judge Lee issued a new order compelling Al-Arian to testify before a new grand jury, Grand Jury 07-1. *See* Order, *United States v. John Doe A01-246 (T-112a)*, Grand Jury 07-1 (Jan. 17, 2007) (Lee, J.).

At a hearing on January 23, 2007, Judge Lee found that Judge Moody's November 2006 hearing provided Al-Arian a sufficient opportunity to argue that his plea agreement exempted

him from being compelled to testify. *See* Order, *United States v. John Doe A01-246 (T-112)*, Grand Jury 07-1 (Jan. 23, 2007) (Lee, J.), at 1. Finding that Al-Arian had been properly summoned to appear before the grand jury and granted use immunity, and that he had refused to testify but had no legal cause to refuse to do so, Judge Lee again held Al-Arian in contempt. *Id.* at 2. Al-Arian then appealed *that* order of Judge Lee to the Fourth Circuit.

On March 23, 2007, the Fourth Circuit affirmed Judge Lee's Order of January 23, 2007, based on the determination that the plea agreement did not permit Al-Arian to refuse to testify. *In re Grand Jury Subpoena*, 221 Fed. Appx. 250, 251 (4th Cir. 2007). On May 10, 2007, Al-Arian's motion for rehearing and rehearing *en banc* was denied.

On June 22, 2007, Judge Lee denied Al-Arian's motion to vacate the civil contempt order. *See* Order, *United States v. John Doe A01-246 (T-112)*, Grand Jury 07-1 (June 22, 2007) (Lee, J.).

On October 16, 2007, Al-Arian was called to testify before Grand Jury 07-1. Al-Arian provided his name, and in response to the first question, stated:

> I refuse to testify based on my prior plea agreement with the government that I'm not required to testify and cooperate in this or any other investigation. I refuse, therefore, to make any further statements.

Transcript, *United States v. John Doe A01-246*, Grand Jury No. 07-1 (Oct. 16, 2007), at 2. Al-Arian provided substantially the same response to the next two questions.

Al-Arian was then advised, "if you willfully violate Judge Lee's order, you will be subject to a charge of criminal contempt." Al-Arian repeated his refusal to testify. Al-Arian was then shown Judge Lee's January 17, 2007 order, and the order was read to him out loud. Al-Arian was further offered the opportunity to confer with counsel. *Id.* at 4-6. Al-Arian again

repeated his refusal. Al-Arian was advised that, because of the immunity provisions in the order, he had no constitutional right not to testify. Al-Arian repeated his refusal. *Id.* at 7. Al-Arian then again confirmed that he would not answer any questions. *Id.* at 7-8.

On October 17, 2007, Judge Lee again denied Al-Arian's renewed motion to vacate the civil contempt order. *See* Transcript of Hearing, October 17, 2007; Order, *United States v. John Doe A01-246 (T-112)*, Grand Jury 07-1 (October 22, 2007) (Lee, J.).

On January 25, 2008, the Eleventh Circuit affirmed Judge Moody's order of November 9, 2006. *United States v. Al-Arian*, 514 F.3d 1184, 1187 (11th Cir. 2008). The court found that excluding a standard cooperation provision from a plea agreement "does not establish that the government immunized Al-Arian from future grand jury subpoenas. This contention is especially dubious where, as here, the plea agreement contains an integration clause." *Id.* at 1193.

On February 20, 2008, after the Eleventh Circuit issued its decision, the United States applied to Judge Lee for another compulsion order. On February 29, 2008, Judge Lee issued a new order compelling Al-Arian to testify before Grand Jury 08-1, with testimonial immunity. *See* Order, *United States v. John Doe A01-246 (T-112a)*, Grand Jury 08-1 (Feb. 29, 2008) (Lee, J.).

On March 20, 2008, Al-Arian was again called to the grand jury. In the grand jury, Al-Arian provided his name. Then, in response to the first question, Al-Arian stated:

> In light of my plea agreement with the government that I don't have to cooperate or testify and my refusal to waive my pending appeal, I will not testify today and will continue my hunger strike.

Transcript, *United States v. John Doe A01-246*, Grand Jury No. 08-1 (Mar. 20, 2008), at 3.

Argument

Except for those protected by a constitutional, common-law, or statutory privilege, the grand jury is entitled to every person's evidence. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

As the Supreme Court explained:

> In one of the early cases dealing with the Fifth Amendment privilege, the Court observed: "(I)t is only from the mouths of those having knowledge of the (unlawful conduct) that the facts can be ascertained." *Brown v. Walker*, 161 U.S. 591, 610, 16 S.Ct. 644, 652, 40 L.Ed. 819, 825 (1896).
>
> Accordingly, the witness, though possibly engaged in some criminal enterprise, can be required to answer before a grand jury, so long as there is no compulsion to answer questions that are self-incriminating; the witness can, of course, stand on the privilege . . . .

United States v. Mandujano, 425 U.S. 564, 574 (1976).

Further:

> If immunity is sought by the prosecutor and granted by the presiding judge, the witness can then be compelled to answer, on pain of contempt, even though the testimony would implicate the witness in criminal activity. . . . Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected . . . .

Id. at 575-76.

The Supreme Court in *Mandujano* continued:

> [W]hen granted immunity, a witness once again owes the obligation imposed upon all citizens the duty to give testimony since immunity substitutes for the privilege.

Id. at 576.

In accordance with *Branzburg* and *Mandujano*, the government in this case obtained immunity for Al-Arian for his testimony. To avoid prosecution, all Al-Arian had to do was testify truthfully before the grand jury pursuant to the Court's orders. He could have admitted to any crime and still avoided prosecution because, after all, *he had statutory immunity*. Notwithstanding the grant of statutory immunity, he refused to testify again and again.

As noted above, immunity is the Government's "ultimate tool for securing testimony that otherwise would be protected." *Mandujano*, 425 U.S. at 575-76. Here, when Al-Arian was granted immunity, he was obligated to give testimony. After all, "it is only from the mouths of those having knowledge of the (unlawful conduct) that the facts can be ascertained." *Id*. at 574. Simply put, Al-Arian's frustration of the government's "ultimate tool" for securing testimony - - that is the obligation of every individual to provide - - merited prosecution.

Failure to prosecute under the circumstances would dramatically undercut the authority of the Court to order witnesses to testify, and dramatically undercut the ability of the grand jury to do its vital work. As the Supreme Court stated nearly a century ago:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.

Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911). *See Maness v. Meyers*, 419 U.S. 449, 459 (1975) (the "orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed"). *See also United States v. Doe*, 125 F.3d 1249 (9th Cir. 1997) (the government did not abuse its prosecutorial discretion by prosecuting the defendant because "[a] witness who has

been granted immunity and been ordered to testify must do so, or risk punishment for criminal contempt ”). Under these circumstances, prosecuting Al-Arian is well within the discretion of the government to enforce the law.

The Supreme Court has stated that "the Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal citations omitted). Prosecutorial decisions are entitled to a ‘"presumption of regularity.’" *Id*. Accordingly, a defendant claiming selective prosecution "bears a heavy burden." *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997); *see United States v. Lindh*, 212 F. Supp. 2d 541, 565 (E.D. Va. 2002) ("claims of selective prosecution are not easily established").

To discharge this formidable burden, “a defendant must demonstrate that the prosecution ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’" *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996) (*quoting Wayte v. United States*, 470 U.S. 598, 608 (1985)). Meeting this burden requires the defendant to establish both (1) that "similarly situated individuals" outside of the protected group were not prosecuted, *Armstrong*, 517 U.S. at 465, and (2) that the decision to prosecute was "invidious or in bad faith." *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986).

As evident by its terms, this standard is intended to be a “demanding” and “rigorous” one. *Olvis*, 97 F.3d at 743 (quoting *Armstrong*, 517 U.S. at 463, 468). A defendant must offer "clear" and "credible" evidence in support of each prong of this test in order to establish a viable selective prosecution claim. *Armstrong*, 517 U.S. at 465; *Hastings*, 126 F.3d at 314. Al-Arian fails to satisfy either element of this burden.

Defendants "are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *Olvis*, 97 F.3d at 744. In *Olvis*, the court of appeals engaged in a "fact-focused" analysis, comparing information about charged and uncharged individuals. *Id*. at 744-45. In *United States v. Lindh*, 212 F. Supp. 2d at 566-67, Judge Ellis engaged in this same individualized, fact-specific analysis.

In essence, Al-Arian claims that prosecutors in this district devised a scheme to prosecute him and "secure the punishment denied to them by both the Tampa jury and the subsequent plea agreement." Motion to Quash Based on Selective Prosecution, etc., at 8. According to Al-Arian, it was improper for the government to seek to compel his testimony before the grand jury. *Id*. at 9. He argues that his prosecution is part of a trend of prosecution of Muslims who were ultimately acquitted of terrorism charges or obtained an insufficiently strict sentence. *Id.* at 14. In the end, he points to only one case that is at all similar, and in that case, the Fourth Circuit explicitly approved the government's actions in compelling the testimony about terrorists and terrorist organizations of an individual who previously was acquitted.

In support of his argument, Al-Arian relies on four cases, involving Sabri Benkahla, Abdelhaleem Ashqar, Judith Miller, and Barry Bonds. Miller and Bonds have no similarity to Al-Arian's situation. Al-Arian has his facts wrong with respect to Ashqar. He is correct, however, that the Benkahla situation is instructive. Of course, when the arguments he makes now were previously made by Benkahla, they were rejected by the Fourth Circuit earlier this year. Finally, he omits mention of the case most directly analogous to his own: the prosecution for criminal contempt of Santiago Alvarez and Osvaldo Mitat.

The contempt case involving Judith Miller is not at all comparable to that involving Al-Arian. Most obviously, Judith Miller was a reporter for the *New York Times*. When subpoenaed, she asserted that, on First Amendment grounds, she should not have to reveal the identity of a source from whom she had received information in the course of carrying out her duties as a reporter. In taking that position, Miller had the complete support of her employer, on whose behalf she acted. Further, after staying in jail for civil contempt for 85 days, Miller then relented and, according to published reports, testified before the grand jury. *See*, *e.g.*, http://www.nytimes.com/2005/10/16/national/16 leak.html. Finally, no appellate court considered and rejected her legal objection to the order to testify. In contrast, of course, Al-Arian admittedly had knowledge about the workings of a terrorist organization, refused to testify for more than a year, ignored the decisions of two appellate courts, and never testified at all before the grand jury.[2] In any event, regardless of how one perceives the justice of what happened in the Miller case, the context was so different from the one now before the Court as to make it worthless for purposes of comparison.

The Barry Bonds investigation into the illegal use of steroids by professional athletes also is not remotely comparable to the terrorist financing investigation for which Al-Arian's testimony was sought. Without denigrating the importance of an investigation into steroid use by professional athletes, it is of a different character than an investigation into the financing of an international terrorist organization.

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[2] It further should be noted that the testimony of Judith Miller was not sought by a United States Attorney but by a Special Prosecutor. A more analogous instance involving a special prosecutor is the indictment of Susan McDougal for criminal contempt for her refusal to testify under immunity in the Whitewater investigation. *See generally United States v. McDougal*, Slip Copy, 2008 WL 2519805 (E.D. Ark. June 20, 2008).

Al-Arian suggests that Ashqar was acquitted of terrorism charges, and then charged with and convicted of contempt of court. Motion to Quash at 15. To the contrary, Ashqar was *first* charged with contempt of court and obstruction of justice and then, in a superseding indictment, charged with both terrorism offenses *and* contempt of court in the same indictment. *See*, *e.g.*, United States Department of Justice, CHICAGO AND WASHINGTON, D.C., AREA MEN AMONG THREE INDICTED IN RACKETEERING CONSPIRACY IN U.S. TO FINANCE HAMAS TERROR ABROAD, August 20, 2004, found at http://www.usdoj.gov/opa/pr/2004/August/04_crm_571.htm. At trial, Ashqar was acquitted of the terrorism charges but convicted (in the same trial) of contempt of court. Mike Robinson, *Two Acquitted of Conspiracy in Hamas Trial*, Associated Press, February 1, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020101230.html (accessed August 1, 2008).

Far more instructive, however, is the Benkahla case. In his motion to quash, Al-Arian describes the case at length. Unfortunately, however, Al-Arian fails to note that accusations of selective prosecution virtually identical to the one he brings here were considered by the Fourth Circuit and rejected in terms that are directly relevant here.

Benkahla moved to dismiss the indictment against him for vindictive prosecution and misuse of the grand jury, but those motions were denied by Judge Cacheris. *United States v. Benkahla*, 437 F.Supp.2d 541 (E.D. Va. 2006). Benkahla argued "that the Government's actions in calling him to testify before the grand jury and prosecuting him for perjury are presumptively vindictive." *Id*. at 552. Like Al-Arian does now, he argued that "the grand jury's investigation was a mere pretext to lay the groundwork for a perjury indictment." *Id*. at 550. Judge Cacheris rejected those claims:

> In this case, the Government had a legitimate reason for calling Defendant before the grand jury. The grand jury had the right to explore every avenue in connection with its investigation.

Id. at 551; *see id.* at 553-54.

Benkahla then was convicted at trial, and appealed. The conviction was affirmed. In affirming the conviction, however, the Fourth Circuit explicitly held that the use of immunity orders to compel testimony even from an acquitted defendant was perfectly proper:

> Law enforcement is entitled to keep investigating a criminal enterprise even after one defendant is acquitted, and if that defendant is presented with a subpoena and cloaked with the dual protections of court-ordered immunity and the guarantee against double jeopardy, he may well be required to admit the very conduct he successfully denied at trial.

United States v. Benkahla, 530 F.3d 300, 307 (4th Cir. 2008). Inasmuch as Benkahla was *acquitted* at the first trial but Al-Arian pled guilty to a serious offense, it is inconceivable that the Fourth Circuit's holding is not at least as applicable to the compulsion order for Al-Arian as it was for Benkahla.

The Fourth Circuit described Benkahla's bench trial before this Court:

> Benkahla's first prosecution was a bench trial that concluded with a full judicial explanation of the verdict-a welcome thing, for a good deal of the law in this area stems from the mysteries of the general jury verdict. *See, e.g., United States v. Ruhbayan*, 325 F.3d 197, 203 (4th Cir.2003) ("[D]oubt as to what was decided by a prior judgment should be resolved against using it as an estoppel."(quotation omitted)). There is no mystery as to why the court acquitted in the first proceedings. What disturbed it was a lack of evidence showing that the jihadist training camp was in Afghanistan rather than Pakistan, and, if it was in Afghanistan, that Benkahla provided any serious form of support to the Taliban while there. "I would find ... that at some point, Mr. Benkahla has fired an automatic AK-47 and RPG" while abroad, the court said. But much of the evidence "is equally consistent in my view with going to a training camp in Pakistan as it would be to go to Afghanistan." The question was nonetheless close; the court stated that it "would be able to find this defendant guilty" on a

> preponderance of the evidence standard. But the charges brought required a high degree of certainty that the camp was located in Afghanistan and that by attending Benkahla was actually fighting or preparing to fight for the Taliban. At the factual heart of Benkahla's acquittal was a measure of uncertainty about those matters. In no way did the court's decision turn on doubt about whether Benkahla attended a jihadist training camp somewhere.

Id.

Al-Arian suggests that vindictiveness is demonstrated by the fact that United States sought to compel his testimony with a grant of immunity. His situation, however, is remarkably similar to Benkahla's. As in the Benkahla case, proof at the first trial established Al-Arian's affiliation with a terrorist group. After all, in his closing argument, Al-Arian's counsel *conceded* to the jury that Al-Arian was, indeed, a member of PIJ. He *conceded* that Al-Arian advised the senior leaders of PIJ overseas. Instead, William Moffitt argued that Al-Arian was not the *leader* of PIJ, and directed the jury's attention the fact that the acknowledged leaders of PIJ overseas did not do what Al-Arian wanted them to do. *See*, *e.g.*, Transcript of Trial Proceedings, November 9, 2005, at 26 (Fathi Shikaki dismissing Al-Arian's concerns); *id*. at 28 (same); 29 (Al-Arian was "ignored so much that in 1994 he tells them that he really doesn't want to be involved").[3]

As Mr. Moffitt argued:

> Now, in summation I will say this to you: Any discussion of Sami Al-Arian being the most powerful man in the PIJ is fantasy. It never happened. He never had control of the money, never was allowed to make any decisions. Any proposals that Sami made in this whole thing were non-violent -- non-violent, just proposed non-violent activity on the telephone at a time that he did not know that he was being wiretapped. Walk away, and there are conversation where he threatens. There are

[3] The transcript is attached as an exhibit to the government's opposition to Al-Arian's Motion to Quash Indictment Based on 2006 Plea Agreement. Rather than file another copy with this filing, we respectfully refer the Court to the attachment to that pleading.

> conversations that show that he walked away from any supervisory role at all in anything. Understand that. He never was the most powerful man in the PIJ.

Id. at 31-32.

Ultimately, Mr. Moffitt explained to the jury Al-Arian lied about his relationship with PIJ:

> Because once Sami was asked and once he admitted that he had a relationship with the PIJ, the story was never going to be about the abuse of people in Palestine; the story was going to change. It was going to be about this relationship and why had he come here to discuss that abuse. **So, he lied.** Confronted with the same thing, what would you do? Is it evil? Is there a time that a lie is not evil? Is there a time where a lie is expedient and you could consider it the right thing to do? You lie to the newspapers. There's no question about it.

Id. at 34 (emphasis added).[4]

In short, Al-Arian clearly *was* affiliated with PIJ, and clearly had extensive dealings with PIJ leaders. Just as the government properly pursued information about Benkahla's connections with terrorists even after he was acquitted the first time, the government properly pursued information about Al-Arian's connections after he went to trial and ultimately *pled guilty* the first time.

Moreover, as a result of this Court's decision after the Benkahla bench trial, there was a judicial finding, by at least a preponderance of the evidence, that Benkahla had attended a jihad training camp even though he had been acquitted. Accordingly, the government had every right

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[4] While Mr. Moffitt alludes to Al-Arian's lying to the newspapers about his relationship with PIJ, Count 44 of the Superseding Indictment against him in Florida alleged that he falsely denied his affiliation with PIJ to the Immigration and Naturalization Service in his application for citizenship. A copy of the superseding indictment is attached to this pleading.

to investigate who had helped Benkahla get to the camp, who he met at the camp, and who he kept in touch with after returning from the camp:

> On that note, it is worth observing that the investigations in which Benkahla was interviewed and the questions he was asked show no sign of having been manufactured for the sake of a second prosecution. Given the character of the first court's acquittal, the government had every right to think Benkahla had attended a jihadist training camp somewhere (it would have been anomalous for it to have thought otherwise), and, for the best of reasons, the government was still investigating those camps and the people involved in them.

Benkahla, 530 F.3d at 308.

Similarly, as a result of the findings that Judge Moody announced at Al-Arian's sentencing, there was a judicial finding - - by at least a preponderance of the evidence - - that Al-Arian had been a leader of a designated terrorist group. After all, as Judge Moody stated at Al-Arian's sentencing on May 1, 2006, "[t]he evidence was clear in this case that you were a leader of the Palestinian Islamic Jihad." Transcript of Sentencing, May 1, 2006, at page 14, lines 24-25.[5] The Palestinian Islamic Jihad is a group that has been designated a terrorist group by the government of the United States for more than 13 years.[6]

Further, as Judge Moody said at the sentencing:

> And yet still, in the face of your own words, you continue to lie to your friends and supporters, claiming to abhor violence and to seek aid only for widows and orphans.

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[5] The transcript is attached as an exhibit to the Government's Opposition to Motion for Release on Bond, filed on July 9, 2008. Rather than file another copy with this filing, we respectfully refer the Court to the attachment to that pleading.

[6] The Palestinian Islamic Jihad was named a Specially Designated Terrorist Entity by the United States government in 1995, and designated an Foreign Terrorist Organization by the U.S. Secretary of State in 1997. *See*, *e.g.*, *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257, 261 (E.D.N.Y.,2007).

> Your only connection to widows and orphans is that you create them, even among the Palestinians; and you create them, not by sending your children to blow themselves out of existence. No. You exhort others to send their children.
>
> Your children attend the finest universities this country has to offer while you raise money to blow up the children of others.
>
> You are indeed a master manipulator.

Id. at 16-17. In light of *that* judicial fact-finding, the government's paramount interest in obtaining Al-Arian's truthful testimony before the grand jury regarding the financing of the terrorist group of which he was a leader cannot be denied.[7]

The Fourth Circuit's reasoning in *Benkahla* is directly applicable to Al-Arian's accusations of selective prosecution. After all, "given the character of the first court's" sentencing, "the government had every right to think" Al-Arian was a leader of a terrorist organization. Indeed, "*it would have been anomalous for it to have thought otherwise*." *Benkahla*, 530 F.3d at 308 (emphasis added). Accordingly, "*and, for the best of reasons*, the government was still investigating" the financing of Al-Arian's terrorist group. *Id.* (emphasis

[7] Benkahla went to trial three years after he first appeared in the grand jury. By the time Benkahla's trial started, several of the individuals about whom he was questioned years earlier had been charged and convicted. As a result, it is easy to see, in retrospect, the nature of the investigations of the individuals about whom Benkahla was questioned. The same is not true with respect to the investigations of the individuals about whom Al-Arian would have been questioned had he testified. While the United States can provide information about those investigations to the Court on an *ex parte* basis, there is no reason why that information should be revealed either to Al-Arian or the public at this time. Nevertheless, it should suffice to point out that three of the 13 unindicted co-conspirators in the indictment of Al-Arian in Tampa - - as well as one of his co-defendants (who remains a fugitive) were individuals in Northern Virginia who were employed by or otherwise closely affiliated with an entity in Northern Virginia that transferred substantial sums of money to Al-Arian. *See generally* the Documents filed with Judge Lee during the hearing on October 19, 2006, filed with the government's pleading captioned "Grand Jury Documents Supplied Pursuant to Order of July 27, 2008."

(added). In essence, in *Benkahla*, the Fourth Circuit flatly rejected Al-Arian's theory of selective prosecution.

A recent noteworthy criminal contempt prosecution that is closely analogous to Al-Arian's prosecution involves that of Santiago Alvarez and Osvaldo Mitat, who were indicted for criminal contempt in the Western District of Texas, on January 7, 2007. Unlike the cases of Judith Miller and Barry Bond's trainer, the cases of Alvarez and Mitat are strikingly similar to that of Al-Arian; indeed, the context of the prosecution of Alvarez and Mitat is virtually identical to that of Al-Arian.

In 2006, Alvarez and Mitat were federal prisoners serving time on weapons charges. *See, e.g.*, Jay Weaver, *Weapons Surrender Lightens Jail Time*, The Miami Herald, June 7, 2007, at Sec. B, p.3. While serving sentences imposed on them in the Southern District of Florida, they were granted immunity and compelled to testify before a grand jury in the Western District of Texas that was investigating the activities of anti-Castro Cubans suspected of terrorist activities. *United States v. Alvarez*, 489 F.Supp.2d 714 (W.D.Tex. 2007). Despite their argument that they were being led into a "perjury trap," Alvarez and Mitat were indicted for criminal contempt when they refused to testify. *Id*. at 718. Their prosecution demonstrates that, in counter-terrorism investigations, charges are brought for criminal contempt on the basis of the subject matter about which defendants refused to testify, rather than the religion that they espouse.[8]

Ultimately, Al-Arian has failed to identify anyone "similarly situated" to him who was *not* charged with criminal contempt. As a result, he has failed to make even a *de minimis* showing of

[8] The attorney of record for the government in *Alvarez* was from the Counterterrorism Section in the Department of Justice.

any discriminatory effect – "the first hurdle in the selective prosecution analysis." *Lindh*, 212 F. Supp. 2d at 566. To be sure, we welcome the defendant to identify other individuals similarly situated to him; that is to say, we welcome Al-Arian to identify to us others who associated with designated terrorist organizations and refused to testify before the grand jury, but were *not* prosecuted - - because we will do our best to prosecute them, too. Needless to say, we will do our best to prosecute them, too - - regardless of their religion.

As Judge Ellis observed in the *Lindh* case, "the decision whether to prosecute [or] whether to bring particular charges . . . . rests entirely in the discretion of the Executive Branch." *Lindh*, 212 F. Supp 2d at 564 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). This principle is particularly significant in light of the presumption of regularity the Supreme Court has conferred on the Executive Branch's prosecutorial decisions, and the probable cause manifest in grand jury's decision to return the indictment. *See Armstrong*, 517 U.S. at 464.

In light of Judge Moody's conclusion that, more likely than not, Al-Arian was a leader of a terrorist organization, there can be no suggestion of "selective" prosecution; indeed, the government could more properly have been accused of dereliction in its responsibilities to investigate terrorism had it *not* obtained a compulsion order to obtain Al-Arian's truthful testimony, and had it *not* sought an indictment of him for failing to provide it. *Calandra*, 414 U.S. at 344 ("A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed").

Finally, a word must be said about the alleged bias of the prosecutor. In essence, Al-Arian argues that a prosecutor who believes that Al-Arian was a leader of a terrorist organization,

that Abu Ali was an Al Qaeda terrorist sworn to destroy our country, and that Al-Timimi solicited young men to commit treason, necessarily is biased against Muslims. In making this claim, Al-Arian makes the same assertion that Al-Timimi made at his own trial - - that he is representative of all Muslims. That claim was false when Al-Timimi made it in 2005, and it is false when Al-Arian makes it today.

As a result of their shared espousal of violence to further their vision of Islam, Al-Timimi and Al-Arian are representative of *one* type of Muslim, but there are many types of Muslims in America and around the world. Many Muslims - - indeed, many *types* of Muslims - - reject the pernicious ideology espoused by Al-Timimi and Al-Arian, and reject their claims to be representative of Muslims generally. Muslims and people of all religions (as well as people of no religion) who reject the use of violence to further their vision of their faith (or lack thereof) deserve to be supported rather than overlooked or ignored simply because individuals whose ideology they reject claim to represent them. Neither Al-Timimi nor Al-Arian represents Muslims generally, and their claims to the contrary should not be accepted merely because they are loudly made.

At the end of the day, we prosecute individuals on the basis of their actions, and not on the basis of their religion.

Accordingly, the motion to quash the indictment for selective prosecution should be denied.

II. Motion for Discovery Related to Selective Prosecution

Al-Arian further moves the Court to compel discovery from the government relating to his claims of selective prosecution. There is no basis for such a motion in this case.

To obtain discovery in support of a selective prosecution claim, "a defendant must produce 'some evidence' making a 'credible showing' of both discriminatory effect and discriminatory intent." *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996) (*quoting United States v. Armstrong*, 517 U.S. 456, 469-70 (1996)). As noted above, Al-Arian fails to make a credible showing in either respect. Accordingly, the Court should deny the motions to compel discovery relating to the claims of selective prosecution.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: /s/

Gordon D. Kromberg
Virginia Bar No. 33676
Assistant United States Attorney
Attorney for the United States
2100 Jamieson Avenue
Alexandria, VA 22314
(703) 299-3700
(703) 837.8242 (fax)
gordon.kromberg@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2008, I electronically filed the foregoing GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO QUASH INDICTMENT FOR SELECTIVE PROSECUTION with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

William E. Olson,
VA Bar. No. 47251
Bryan Cave LLP
700 Thirteenth Street, N.W., Suite 700
Washington, D.C. 20005-3960
Telephone: (202) 508-6000
Facsimile: (202) 508-6200
weolson@bryancave.com

/s/

Gordon D. Kromberg
Assistant United States Attorney
Virginia Bar No. 33676
Assistant United States Attorney
Attorney for the United States
2100 Jamieson Avenue
Alexandria, VA 22314
(703) 299-3700
(703) 837.8242 (fax)
gordon.kromberg@usdoj.gov