

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.)	

POSITION OF THE UNITED STATES
WITH RESPECT TO SENTENCING FACTORS

The United States hereby submits its position on the sentencing of Syed Ghulam Nabi Fai. According to the Presentence Report, the defendant’s Sentencing Guidelines range is 27-33 months. That range fails to reflect the seriousness of the conduct of conviction, because virtually all of it is based solely on the loss to the Internal Revenue Service that resulted from a tax scam that was only ancillary to Fai’s main offense. By their terms, the Guidelines do not even purport to measure the harm caused by the criminal activity for which Fai is most culpable. In consideration of all of Fai’s criminal conduct, this Court should impose a sentence of 48 months.

I. Description of the Offense

A. Two Decades of Deceiving the People of the United States
While in the Service of the Pakistani Intelligence Service

For more than 20 years, Syed Ghulam Nabi Fai operated the Kashmiri American Council (“KAC”) as a front for the Pakistani intelligence service known as the Inter-Services Intelligence Directorate (“ISI”). By the time that the KAC was incorporated in 1990, Fai already had been working with the ISI for years. See Statement of Facts ¶ 12 (quoting a 1995 letter from Fai to his

ISI contact stating that “You are aware that we have been working together for the cause for over a decade now”).

During the decades that Fai operated the KAC at the instructions of - - and with funding from - - the ISI, Fai acted as an agent of Pakistani Intelligence through lobbying Members of Congress and officials in the Administration and executive agencies, hosting conferences, and generally promoting Pakistan’s political agenda regarding Kashmir throughout the United States. For decades, Fai followed the directives of ISI officials, and annually submitted his budgets and plans to ISI officials for approval. For decades, Fai tried to focus the attention of the people and Government of the United States on alleged atrocities and misdeeds by the Government of India - - and away from the involvement of the Government of Pakistan in sponsoring terrorism in Kashmir and elsewhere.

The law did not purport to bar Fai from carrying water for the ISI. Instead, it only prohibited him from concealing that his actions were underwritten by a foreign intelligence service. Accordingly, the law - - the Foreign Agents Registration Act (“FARA”) - - simply required Fai to publicly register that he was acting at the behest of a foreign government. This, however, Fai refused to do; after all, disclosing that he was paid by the ISI would undercut his effectiveness in spreading the ISI’s message in Washington, D.C. and around the country.

In pertinent part, the FARA provides at 22 U.S.C. § 612:

No person shall act as an agent of a foreign principal unless he has registered his status as such an agent with the Attorney General. The registration statement must include the amount of contributions that the registrant received from any foreign principal, and an accounting of the disbursements of money on behalf of a foreign principal.

Pursuant to the FARA, an agent of a foreign principal is any person who - - at the order or even at the *request* of a foreign principal - - engages in any capacity within the United States “in political activities for or in the interests of such foreign principal,” or “as a public relations counsel, publicity agent, or political consultant for or in the interests of such foreign principal,” or who acts in any capacity “at the request of a foreign principal to represent the interests of such foreign principal before any agency or official of the of the Government of the United States.” 22 U.S.C. § 611(c).

As the Supreme Court explained, the FARA was enacted “to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.” *Meese v. Keene*, 481 U.S. 465, 469 (1987). Further, the FARA “requires all agents of foreign principals to file detailed registration statements, describing the nature of their business and their political activities. The registration requirement is comprehensive, applying equally to agents of friendly, neutral, and unfriendly governments.” *Id.* at 469-70.

Fai’s actions fell squarely within the category of activities for which the FARA mandates registration. The Presentence Report details extensive proof that, at the request of the ISI, Fai engaged in political activities for the Government of Pakistan, served as its public relations counsel and political consultant, and represented the interests of the Government of Pakistan before myriad agencies and officials of the United States.

Fai's connection to the ISI was the central fact that he labored mightily to conceal for decades. He went to extraordinary lengths to conceal that the KAC was funded by and acted at the behest of the ISI. He knew that he was required to register as a foreign agent but refused to do so. Indeed, in March 2010, the United States Department of Justice notified him that he was required to register if he was an agent of Pakistan. He replied with a denial that the KAC had any ties to Pakistan or the ISI. This denial - - and the subterfuge through which he hid his affiliation for years - - exemplified the deceit he manifested towards the people and the Government of the United States for decades.

B. The Tax Scam Based on Reimbursement of the "Straw Donors"

Every year that Fai operated the KAC at the request and/or instructions of the ISI, he was required to register with the Department of Justice as an agent of the Government of Pakistan - - but he never did so. Every year that Fai operated the KAC with funding from the ISI, he also was required to disclose to the Internal Revenue Service that the ISI was a source of KAC's funds - - but he never did that, either. Fai's deception of the IRS and his conspiracy with Zaheer Ahmad enabled the various "straw donors" to lower their taxes by asserting charitable deductions for monies that they transferred to Fai and the KAC even though they were reimbursed for such transfers by Ahmad in Pakistan.

This tax scam was not integral to Fai's long-standing operation of the KAC as an ISI front. Indeed, the tax scam was not necessary to Fai's "false flag" operation in any way. In short, the tax scam was only ancillary to his main scam.

II. Sentencing Framework

The Court must impose its sentence after considering the sentencing factors described in 18 U.S.C. § 3553(a), which include the sentencing range established by the Sentencing Commission. *United States v. Booker*, 543 U.S. 220 (2005). A sentencing court should first calculate the range prescribed by the Sentencing Guidelines after making the appropriate findings of fact. *United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005). Following such calculation, “the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence.” *Id.*

III. Sentencing Guidelines Range

A. Tax Loss of Between \$200,000 and \$400,000

The Presentence Report properly calculates the offense level for the aspect of Fai’s conduct that resulted in a tax loss to the Internal Revenue Service of \$344,150. That offense, alone, results in an offense level of 20, and - - after a three level reduction for acceptance of responsibility - - a Guideline range of 24 - 30 months. As noted above, however, Fai’s participation in this tax scam was only ancillary to a far more significant offense.

B. 20 Years of Deceiving the American People and Government Is Worth Far More than an Additional Three Months in Jail

As determined in the Presentence Report, the harm caused to the American people and to the Government of the United States by Fai’s conduct is barely even factored into the calculation of the Sentencing Guidelines. In conjunction with the offense level for the tax loss, Fai’s conviction for deceiving the Department of Justice for 20 years regarding the ISI’s funding of the KAC increases his offense level by only one level, and results in a range of 27 - 33 months

instead of 24-30 months. That three-month enhancement is woefully inadequate to address the harm encompassed by that conviction.

The Sentencing Guidelines do not even purport to measure the harm caused by Fai's concealment of the fact that the influence he peddled through his conferences and campaign contributions was financed by the ISI. In essence, they simply do not account for the harm that Fai caused the American people and the Government of the United States by concealing the fact that the information that he distributed came not from a disinterested domestic source, but from an intelligence agency of the Government of Pakistan.

The Supplemental Addendum to the Presentence Report notes the argument that this information warrants a departure from the prescribed guideline range. The drafters of the Sentencing Guidelines obviously contemplated that, in most cases involving schemes to deceive in violation of 18 U.S.C. § 1001, the applicable guidelines would be based on the financial loss to the victim. The drafters recognized, however, that an upward departure might be appropriate for instances in which a primary objective of the offense was a non-monetary objective, or the offense caused or risked substantial non-monetary harm. In pertinent part, Application Note 19 to 2B1.1 provides:

- A. Upward Departure Considerations. - - There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
 - 1. A primary objective of the offense was an aggravating, non-monetary objective.
 - 2. The offense caused or risked substantial non-monetary harm.

See, e.g., United States v. Jacobson, 4 F.3d 987 (4th Cir. 1993) (Table) (affirming Judge Cacheris's upward departure to sentence a fertility doctor who defrauded his patients with respect to the identity of the father of their children, on the grounds that the fraud guidelines failed to fully capture the magnitude of the harmful conduct). *See also United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995) (affirming an upward departure where the fraud guidelines did not capture the seriousness of false statements to the FDA on new drug applications because the fraud “not only created risks of potentially great harm to consumers of pharmaceutical products, but also severely diminished the confidence which consumers can justifiably have in the FDA approval process”).

The conditions specified in Application Note 19 to 2B1.1 are surely met here. The motive for the crime was not financial; after all, Fai was perfectly entitled to accept the ISI's money legally. Instead, the motive for concealing the money from the ISI was to dupe the American people and their elected officials into believing that the KAC was simply an organization of American citizens rather than a front for a Pakistani intelligence service. Accordingly, a primary objective of the offense was a non-monetary one, and the offense caused substantial non-monetary harm. As a result, the non-monetary harm caused by Fai's scheme - - totally apart from the tax scam - - warrants a significant upward departure.

IV. Consideration of the Factors Articulated in 18 U.S.C. § 3553(a)

The statutory maximum sentence faced by Fai is eight years in prison. A sentence to incarceration for 48 months is consistent with the factors set forth in 18 U.S.C. § 3553(a). The history and characteristics of the defendant indicate that he has had benefits of which people all over the world can only dream. Indeed, it was these very benefits that enabled him to commit his

crimes over the past 20 years.¹ Yet, the nature and circumstances of his offenses warrant 48 months in prison. Such a term of imprisonment is necessary to reflect the seriousness of the offense, promote respect for the law that Fai flouted for decades, provide just punishment for the offense, and deter others from engaging in similar conduct in the future.²

While Fai accepted responsibility for his offenses for purposes of the Sentencing Guidelines, his letter to the Court reflects that, sadly, he still fails to recognize the magnitude of the harm that he did to his country. His letter concedes that he damaged the “system of laws in this country which have protected me and my family,” but is otherwise focused solely on the damage that he allegedly inflicted on the cause that he espouses. His letter is bereft of any apology to the people of the United States for deceiving them for 20 years with funds from a Pakistani intelligence service, or of any reference to the damage that he caused to the public discourse about the proper course for this country to take with respect to issues involving Pakistan, India, and Kashmir. In fact, his letter fails even to *mention* the ISI or the Government of Pakistan, much less his receipt of millions of dollars from them to operate the KAC and deceive the people and Government of the United States.

¹ One incident that perhaps should have been included in the “Criminal History” section of the Presentence Report involved an offense of which Fai was publicly accused but never charged: the 1986 murder of Ismail al-Faruqi. Al-Faruqi was the founder of the International Institute of Islamic Thought in Herndon, Virginia. In 1986, Joseph Young, also known as Yusuf Ali, confessed to murdering al-Faruqi and his wife, and claimed that he was inspired to do it by Fai. Fai was never charged with involvement in the crime and there was ample reason to question Young/Ali’s veracity.

² There is no need to consider disparities with sentences imposed in other cases involving defendants convicted of similar conduct, 18 U.S.C. § 3553(a)(6), because there are no such other cases. Finally, the sentence will, in any event, include an order of restitution. 18 U.S.C. § 3553(a)(7).

To his credit, Fai entered his guilty pleas and agreed to a detailed Statement of Facts. He submitted to questioning by the investigating agents for many hours, and candidly answered some of the questions posed to him.³ Had he not manifested his acceptance of responsibility to this extent, we would have sought a longer term of incarceration.

Nevertheless, there should be no dispute that incarceration for approximately two years is generally appropriate for a sophisticated and long-running tax fraud that resulted in a tax loss of over \$300,000. Further, there should be no dispute that the sophisticated and long-running tax fraud that resulted in a tax loss of over \$300,000 was merely ancillary to the far more serious crime that Fai committed by deceiving the people and Government of the United States for over 20 years about the KAC's dependence on the ISI. And, since two years of incarceration is appropriate merely for the ancillary tax crime, incarceration for at least *another* two years is appropriate for the far more serious crime of poisoning the public discourse and concealing that the KAC was the mouthpiece of Pakistani Intelligence. Accordingly, the Court should sentence Fai to incarceration for 48 months, to be followed by four years of supervised release.⁴ Further, he should be sentenced to pay restitution of \$344,150.⁵

³ Fai's answers to many of the questions posed to him since he entered his guilty plea were less than forthright, particularly with regard to his accounting for cash that he received from Zaheer Ahmad's network, his relations with Conspirator AA, his involvement with the Muslim Brotherhood, and Pakistani terrorist groups.

⁴ The supervised release term should include a special condition that the defendant have no contact with any agent, employee, or representative of the ISI or the Government of Pakistan, or any individual that Fai has identified to the FBI as supported by or in regular contact with the Government of Pakistan.

⁵ In view of the forfeiture accomplished through the plea agreement and the restitution to be paid, the United States does not seek any further financial penalty.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2012, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Nina Ginsberg
DIMUROGINSBERG, P.C.
Suite 610
1101 King Street
Alexandria, VA 22314

/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