UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	:	
	:	
- v. -	:	**No. CR 08-1324 (LRR)**
	:	
	:	**SHOLOM RUBASHKIN'S REPLY**
SHOLOM RUBASHKIN,	:	**TO THE GOVERNMENT'S**
	:	**RESISTANCE TO HIS MOTION**
Defendant.	:	**FOR RECONSIDERATION**
	:	

I. TREATING SHOLOM RUBASHKIN MORE HARSHLY BECAUSE HE IS A JEW VIOLATES EQUAL PROTECTION AND THE BAIL REFORM ACT

According to the prosecutors, all Americans of the "defendant's cultural heritage" are "de facto dual citizens" of Israel. Br. 1-4. All "de facto dual citizens" are "incrementally more likely to flee" to Israel. Br. 3. In plain English: **Jews are more likely to flee and therefore should be detained with greater frequency.**

In attempting to justify this, the prosecutors cannot contest the proposition that a law explicitly differentiating between Jews and non-Jews will generally violate equal protection.[1] Instead, the prosecution argues that equal protection principles are not implicated because it is distinguishing not between Jews and non-Jews, but between individuals with "foreign ties" and those without. Br. 3. "Foreign ties," the prosecution argues, are "routinely relied upon as evidence of flight risk." *Id*.

The noxiousness of this argument lies in its treatment of Jews collectively as a group, deeming all to have foreign ties because of some statute enacted by a foreign government. It is unconstitutional to punish every Jew arrested for presumed ties to Israel. Detaining an ethnic

[1] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227-28 (1995) (rejecting purpose or intent as a relevant considering in analyzing expressly discriminatory government action); *Hirabayashi v. U.S.*, 320 U.S. 81 (1943) ("Distinctions between citizens solely because of their ancestry are … odious").

group because it is collectively deemed to have foreign ties is precisely the mistake made in World War II when the government detained all ethnic Japanese, an action upheld in the now discredited decision of *Korematsu v. United States*, 323 U.S. 214, 219 (1944).[2]

Race or religion is no surrogate for *individualized* proof. Foreign ties must be an *individualized* determination, not based on race or religion. That is true both under principles of equal protection, *see, e.g., U.S. v. Montero-Comargo*, 208 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*) (Hispanic ethnicity may not be considered in making particularized, individual determination as to whether reasonable suspicion exists for investigatory stop near Mexican border), and under the Bail Reform Act, *see* 18 U.S.C. § 3142 (requiring individualized rather than group assessment of factors like "evidence *against the person*" and "history and characteristics *of the person*").[3]

Next, the prosecution claims that even if it has invoked race or religion, it still need not satisfy strict scrutiny. Rather, it is Rubashkin, the prosecution claims, who bears the burden of proof here, and must prove discriminatory effect and discriminatory intent, as if this were a selective prosecution case. Br. 6. The prosecutors are wrong.

This is not a selective prosecution case. Selective prosecution attacks the government's enforcement of a policy that is *facially neutral*. In such cases, the government's consideration of race or religion can only be inferred from the results of a policy's enforcement, because the discrimination is not expressly condoned by the policy. Thus, the party alleging selective enforcement must first prove the alleged discriminatory purpose and effect. *See, e.g., U.S. v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996).

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[2] The Supreme Court has subsequently expressed strong regret over the detention upheld in *Korematsu*. *See Adarand* 515 U.S. at 236; *see also id*. at 275 (Ginsburg, J. dissenting).

[3] In all of the cases cited by the government to show that foreign ties are relevant, the foreign ties were demonstrated by an individualized showing of the person's actions or choice of citizenship. *See* Br. 3-4.

Here, in contrast, that has already been done. The prosecution's policy — by its very nature — is *facially discriminatory*, expressly requiring consideration of a defendant's Jewishness as a factor in determining bail.[4] Thus the prosecutors' *purpose* is clearly to single out Jews (because they allegedly have "foreign ties" as "de facto dual citizens"), and the *effect* of what it proposes will be to single out Jews. Because of their belief in Jewish flight risk, these prosecutors will always ask: "Is the defendant a Jew?"

That is why "strict scrutiny" applies. Under the standard of strict scrutiny, restricted classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. Thus, in this case, strict scrutiny should begin with an individualized determination of whether Rubashkin knew of the Law of Return and sought to avail himself of it in order to flee. Alternatively, the prosecution could try to introduce statistical proof that because of the Law of Return, Jews have successfully fled at rates higher than the general population. *See, e.g., Montero-Comargo*, 208 F.3d at 1131; *Farag v. U.S.*, 2008 WL 4965167, at *21.[5] But whether by direct or statistical proof, such efforts almost never succeed in the criminal context. *See, e.g., U.S. v. Clay*, 640 F.2d 157, 159 (8th Cir. 1981) (noting that "this court has consistently rejected the use of race in combination with other factors" to justify search or seizure); *U.S.. v. Hayden*, 740 F. Supp. 6509, 653 (S.D. Iowa 1990). Even if there is compelling need to take Jewish identity into account for bail, other measures are more narrowly tailored to address the alleged "Jewish flight risk." The bail conditions proposed, including 24-hour personal surveillance by an armed security guard, easily accomplish the same means of preventing flight. The up-to-date extradition treaty provides an effective backstop.

[4] The prosecution's claim that "[t]he Bail Reform Act is racially neutral on its face," *see* Br. 5-6 n.2, is irrelevant. The policy at issue here is not the Bail Reform Act itself. It is the prosecution's policy to treat Jews collectively based on the Law of Return. That policy is subject to strict scrutiny.

[5] In the defense's view, statistical proof does not suffice, but that is not at issue here, because the government has introduced no proof whatsoever.

Finally, even if Rubashkin must show discriminatory purpose and effect, he can. The prosecutors' "dual citizenship" argument applies not only to this country's 5,300,000 Jews, but potentially to 40,000,000 million other Americans as well.[6] Irish Americans, for example, can claim Irish citizenship if one grandparent is Irish.[7] The same is true for numerous other ethnic Americans.[8] According to the prosecutors, all these people should be treated as heightened bail risks. But the prosecution has never sought to detain these Americans because of their version of the Law of Return, only Jews. That satisfies even the selective prosecution test.

II. RUBASHKIN'S NEW PROPOSED BAIL CONDITIONS WILL "REASONABLY ASSURE" HIS PRESENCE AS REQUIRED[9]

With respect to the 24-hour security firm, the prosecutors argue "it is difficult to imagine . . . relying on a private company hired by defendant." Br. 8. It may be difficult for these prosecutors to imagine, but not for the federal Courts. *See U.S. v. Sabhnani*, 493 F.3d 63, 78 (2d Cir. 2007) (reversing detention order and releasing defendants on the condition that they be guarded by a private security company).[10] Indeed, the infamous Mafia boss John Gotti was similarly released on bail. *U.S. v. Gotti*, No. 7:98-CR-00042 (S.D.N.Y. Jan. 19, 1999) (Dkt. Nos.

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[6] *See, e.g.*, A. Abramson, *With U.S. in Slump, Dual Citizenship in EU Countries Attracts Americans*, Palm Beach Post, June 7, 2008 (*available at* thttp://www.palmbeachpost.com/localnews/content/local_news/epaper/2008/06/07/s1a_dual_citizenship_0608.html) (estimated 40 million Americans) (last visited Dec. 19, 2008).

[7] *See* http://www.inis.gov.ie/en/INIS/Pages/WP07000120#descent (last visited Dec. 19, 2008).

[8] *See* http://www.conssanfrancisco.esteri.it/NR/rdonlyres/C8A08875-C4F9-43C9-B365-BBB4DC45DCCA/0/JURESANGUINISINFORMAZIONI1.doc (Italy); http://www.greekembassy.org/embassy/content/en/Article.aspx?office=11&folder=919&article=20574 (Greece); http://www.servat.unibe.ch/law/icl/am00000_.html (Armenia); http://www.servat.unibe.ch/law/icl/bu00000_.html (Bulgaria); http://www.indiacgny.org/php/showContent.php?linkid=174 (India); http://www.aztlan.net/dualcit.htm (Mexico); http://www.scgchicago.org/english/citizenship.htm (Serbia); http://www.servat.unibe.ch/law/icl/lh00000_.html (Lithuania) (all last visited Dec. 19, 2008).

[9] The prosecutors claims that any new conditions should have been presented at the detention hearing. They also fault the defense for not offering to waive extradition at the hearing. Br. 7. The prosecutors, however, withheld notice of their "risk of flight to Israel" argument until just minutes before the hearing took place. The defense nonetheless offered substantial proof related to this argument. It cannot be faulted for not offering every argument relative to extradition and flight available under the law on only a few minutes notice. Moreover, regarding the security company and the offer of additional bail equity, it took time to get those items in place. At the time of the detention hearing — held just three business days after the arrest — it was not clear that those elements would be available.

[10] The only difference was that in *Sabhnani*, the government selected the security firm. *Sabhnani*, 493 F.3d at 78. If the government objects to the security firm here, Rubashkin will consent to any firm the government chooses.

249, 361 and 386). The prosecution's concern that Rubashkin won't pay the firm, Br. 8, is easily addressed by requiring a 30-day payment cushion, and making timely payment a condition of release. *See* Exhibit F. Alternatively, an entire year's payment can be placed in escrow.

Just days ago, the government consented to the release of a Jewish defendant under far less stringent conditions than proposed here, despite that defendant's strong ties to Israel. Bernard Madoff was arrested last week for perpetrating an alleged $50 billion fraud.[11] Madoff, a Jew, has extensive business and personal ties to Jewish organizations and Israel.[12] Although he essentially faces life in prison for his alleged crimes, the government consented to his release on $10 million bail and home detention — limited to the night hours — with electronic monitoring and the surrender of passports.[13] Neither a 24-hour guard nor daytime detention was required.

III. CONCLUSION

Rubashkin should be released on bail. While Rubashkin has offered a particular package, Rubashkin would ask the Court to consider not just the package offered but any other conditions the Court feels necessary. He, his family and friends will endeavor to meet them.

Respectfully submitted,

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[11] *See* D. Henriques & Z. Kouwe, *Prominent Trader Accused of Defrauding Clients*, N.Y. Times, Dec. 12, 2008, at A1 (*available at* http://www.nytimes.com/2008/12/12/business/12scheme.html) (last visited Dec. 19, 2008).
[12] *See, e.g.*, P. Boroff, *Bernard Madoff Arrest Stirs Worry Among Nonprofits*, Bloomberg.com, Dec. 15, 2008 (*available at* http://www.bloomberg.com/apps/news?pid=20601088&sid=aE3.y.3GFS80) (Jewish non-profits); T. Cohen, *Israel's Harel, Phoenix Exposed to Madoff*, Reuters.com, Dec. 15, 2008 (*available at* http://www.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUSLF13567020081215) (Israeli clients) (visited Dec. 19, 2008).
[13] *See* G. McCool, *Madoff Stays Out on Bail, to Get Electronic Monitoring*, Reuters.com, Dec. 17, 2008, (*available at* http://www.reuters.com/article/governmentFilingsNews/idUSN1732753020081217) (last visited Dec. 19, 2008).

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2008, I electronically filed the foregoing *Sholom Rubashkin's Reply to the Government's Resistance to His Motion for Reconsideration* with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

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Magistrate Judge Jon S. Scoles
United States District Court, Northern District of Iowa
4200 C Street SW
Cedar Rapids, IA 52404

Re: *United States v. Rubashkin*
Case No. CR 08-1324 (LRR)

Dear Judge Scoles:

We write in response to concerns raised in the above-referenced matter by the United States government in its *Resistance to Defendant's Motion for Reconsideration of Pretrial Detention and for Expedited Hearing*. In its brief, the government objects to this Court's reliance upon our security services to prevent Mr. Rubashkin from fleeing the country or engaging in any other misconduct prior to his criminal trial. Specifically, the government contends that "even if the security company were contractually obligated to guard defendant, they would be only one missed payment away from being released from such obligations. In essence the Court would be relying upon a private company to take directives from the Court, and it would be relying upon defendant to pay his bills on time." There is no cause for such concern.

First, while Mr. Rubashkin would be paying for our services, we understand that we would be accepting our directive from this Court and would fulfill our obligations to the Court with the same high level of competency and professionalism that we extend to all of our clients. Moreover, because Mr. Rubashkin's proceedings are of such high profile, failing to satisfy the Court's expectations would significantly injure our reputation and, hence, our ability to maintain and grow our business. Thus, we have every incentive to ensure that Mr. Rubashkin complies with his conditions for bail.

Second, we will require a sixty-day advance payment from Mr. Rubashkin, with subsequent payments for the next thirty days due each month thereafter. In this manner, we will always have a thirty-day cushion when each new payment is due. At the commencement of our services, we would submit the payment schedule to the Court. We can also submit proof of payment within two business days after each payment is made. Finally, it is our understanding that one of the conditions of Mr. Rubashkin's release would be the timely satisfaction of each payment. Thus, if any payment were missed, we would immediately notify the Court so that the proper authorities could effectuate his arrest for failing to meet a condition of release.

We have nearly ten years of experience in providing security services in a wide variety of contexts. Moreover the principles of our firm collectively have more than ten years of law enforcement experience with local police authorities. As set forth in the documents accompanying our initial letter, our security officers also have extensive training and experience. We will ensure that all security officers assigned to this job will have at least two years of actual law enforcement experience and/or at least two years of related education. Finally, for this job, we will assign three new security officers every month to ensure the highest level of diligence. The officers will work eight hour shifts and will be relocated for their month-long duty to an

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apartment in Pottsville. Under these conditions, we believe that the government's concerns about retaining us to ensure Mr. Rubashkin's continued presence and good conduct are unfounded.

Sincerely,

Josh Jackson
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