

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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|--------------------------------|---|------------------------|
| BENEVOLENCE INTERNATIONAL |) | |
| FOUNDATION, INC. |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 02 C 0763 |
| |) | Judge Alesia |
| JOHN ASHCROFT, <i>et al.</i> , |) | Magistrate Judge Mason |
| |) | |
| Defendants. |) | |

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANTS’
MOTION TO SUBMIT EVIDENCE *IN CAMERA* AND *EX PARTE***

Benevolence International Foundation, Inc. (“BIF”), by counsel, responds as follows to “Defendants’ Memorandum in Support of Their Motion to Submit Evidence *In Camera* and *Ex Parte*” (Defs.’ Mem.), filed with the Court on April 18, 2002:

INTRODUCTION

Defendants’ conduct at issue in this case constitutes an unprecedented assault on and violation of clearly established constitutional rights. Defendants now seek to compound their misconduct by using secret evidence to respond to plaintiff’s legal challenge. For the reasons stated below, this Court should reject defendants’ request or, at a minimum, strictly limit the use of secret evidence as proposed herein.

BIF is an Illinois charity founded in 1992, and run by United States citizens. BIF provides aid to sick and desperately impoverished people in many countries throughout the world. For many of them, BIF’s charity is literally a matter of life and death.

On December 14, 2001, defendants raided BIF’s offices in Illinois and New Jersey, seizing all of BIF’s records and almost all of BIF’s other property there. Defendants also raided the suburban Chicago home of BIF’s Chief Executive Officer, Mr. Enaam Arnaout, seizing family photographs, his children’s computer, his U.S. citizenship papers, his wife’s personal list of telephone numbers, and

perhaps other items as well. In taking these actions, the defendants apparently (according to their own documents) acted on the mistaken belief that Mr. Arnaout is someone known as “Samir Abdul Motaleb.” As to the Illinois searches and seizures, defendants obtained, after the fact, a blanket “general warrant” that violates the Fourth Amendment. Defendants never obtained a warrant as to the New Jersey search and seizures. Also on December 14, defendants blocked all of BIF’s funds and other assets “pending investigation” and publicly announced (but have never charged or designated) that defendants suspected BIF had links to terrorism. In violation of the most fundamental principles of due process, defendants have never explained their evidence (if any) against BIF, nor offered BIF a hearing at which it could seek to get its property back and its assets unblocked.

Defendants have now had over four months to analyze BIF’s documents, and still have neither brought any civil or criminal action against BIF or any of its officers or employees, nor designated them under any anti-terrorism law.¹ Nor have defendants announced any deadline by which they will either take some sort of action against BIF, or unblock its funds, return its property and allow BIF to recommence its humanitarian, life-saving charitable work.

BIF was forced to institute this lawsuit to obtain relief from defendants’ flagrantly unconstitutional actions. Defendants, again showing their disdain for due process, now seek to introduce secret evidence, which BIF cannot see or respond to, to justify their actions. Defendants claim that they must do so because, “In this case, national security concerns could not be more paramount, as evidenced by the events of September 11 and the continuing engagement of U.S. forces in Afghanistan.” Defs.’ Mem. at 8.

Defendants’ statement is a nonsequitur. BIF’s officers and employees, like all Americans, are appalled by the senseless atrocities that occurred on September 11. BIF was in no way responsible for those acts, and defendants have never asserted otherwise. However, while the terrorists on September 11 destroyed the World Trade Center and 3,000 innocent lives, they should not be allowed to destroy the Constitution. Defendants should not be permitted to ignore the fundamental and

¹ Defendants have designated hundreds of other persons and entities as “Specially Designated Terrorists,” *see* 31 C.F.R. § 595.311,” “Specially Designated Global Terrorists” (until recently called “Foreign Terrorist Organizations”), *see* 31 C.F.R. § 597.309, and “Specially Designated Nationals,” *see* 31 C.F.R. § 500.306.

clearly established principles of our constitutional democracy by invoking the mantra of “national security.” *See Rafeedie v. INS*, 880 F.2d 506, 523 (D.C. Cir. 1989) (“even a manifest national security interest . . . cannot support an argument that [plaintiff] is not entitled . . . to protection under the Due Process Clause”). “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make[] the defense of the Nation worthwhile.” *United States v. Robel*, 389 U.S. 258, 264 (1967).

As shown herein, the Court need not rule on the secret evidence issue at all, since the factual basis upon which the defendants purportedly acted is irrelevant to four of the grounds upon which BIF is entitled to a preliminary injunction (§ I, *infra*). Further, the statutes on which defendants rely do not entitle them to introduce secret evidence in this case (§ II, *infra*). In addition, defendants’ proposed use of secret evidence here is unprecedented, violates due process, and should not be allowed (§ III, *infra*.) Finally, if the Court does permit any use of secret evidence, it should be narrowly circumscribed (§ IV, *infra*.)

I. The Court Need Not Decide Whether to Admit Secret Evidence, since BIF is Entitled to an Injunction On Grounds as to Which Secret Evidence is Irrelevant.

Four of the grounds upon which BIF seeks a preliminary injunction involve *per se* constitutional violations by defendants (prior restraint, right to counsel, warrantless search and general warrant, and right to a hearing). The secret evidence defendants seeks to introduce can have no relevance to those grounds. The Court can thus resolve whether plaintiffs are entitled to a preliminary injunction on one or more of those grounds without deciding whether the government should be permitted to introduce secret evidence.

The Court should rule on plaintiffs’ entitlement to a preliminary injunction as to those issues first. Doing so is more efficient, since a favorable ruling on one or more of those issues may obviate the need for the Court to rule on the admissibility of secret evidence. *See Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2^d Cir. 1999) (to obtain a preliminary injunction, plaintiffs need only show a likelihood of success on one of their claims).

A. Prior Restraint

Defendants imposed an unconstitutional prior restraint on BIF when they blocked its funds, forbidding it to spend its money on anything without first applying for and obtaining a license from OFAC. P.I. Mem. at 31-39.² Defendants' blocking of BIF's property was done without any standards to guide or limit their discretion, and infringes BIF's First Amendment rights of speech, *id.* at 32-33, free exercise of religion, *id.* at 33, and association, *id.* As such, defendants' actions are unconstitutional under the well-established principle that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). BIF's facial challenge to the statutory and regulatory scheme is unaffected by – and independent of – any factual evidence.

B. Right to Counsel

One particularly offensive aspect of the unconstitutional blocking/licensing scheme at issue is that it applies even to BIF's right to retain counsel. BIF cannot pay attorneys to represent it unless it applies to OFAC for a license to do so and OFAC chooses (again in its unfettered discretion) whether and under what terms to issue a license. OFAC on January 24, 2002 issued such a license to BIF, which specifies what firm BIF may employ, the matters OFAC will permit the firm to be paid for, and the maximum amount of money OFAC will permit BIF to pay. P.I. Mem. at 38 n.5, Ex. H. BIF, having already incurred more attorneys' fees than the limited amount OFAC had allowed in the January 24 license, asked that OFAC issue a second license permitting BIF to spend additional amounts of its money on attorneys' fees. On April 26, 2002, OFAC issued a second license. Ex. Q, *infra*. That license limits the nature of the legal representation and requires BIF to submit its law firm's invoices, and "monthly reports providing information on the legal services," to OFAC, *id.* § III(d) -- thus further intruding upon the attorney-client relationship.

Defendants thus claim the rights to dictate (1) the terms upon which BIF sues them, (2) which attorneys may represent BIF in doing so, (3) how vigorously they may pursue the lawsuit, and (4) to

² "P.I. Mem. at 31-39" refers to those pages of the "Corrected Memorandum in Support of Plaintiff Benevolence International Foundation's Motion for Preliminary Injunction," filed on April 5, 2002.

oversee the attorneys' conduct of the lawsuit. This violates BIF's First Amendment rights to petition for redress of grievances and free speech, as well as its Fifth Amendment due process rights, P.I. Mem. at 38-39, and cannot be justified by any secret evidence.

C. Warrantless Search and General Warrant

Defendants' actions violated two of the most fundamental requirements of the Fourth Amendment. First, a search and seizure of property from a residence or office must ordinarily be pursuant to a search warrant. *See Flippo v. West Virginia*, 528 U.S. 11, 13 (1999).³ Here, defendants never obtained a warrant for the New Jersey searches and seizures, and have taken the position (in communications with BIF's counsel) that the seizures were authorized by the blocking order, which purports to block BIF's "funds and accounts and *business records*," P.I. Motion Ex. D at 1 (emphasis added). But a warrantless search is "invalid unless it falls within one of the narrow and well-defined exceptions to the warrant requirement." *See Flippo*, 528 U.S. at 13. A blocking order is not among those exceptions.

Second, a warrant must particularize the items that are to be seized. U.S. Const. amend. IV. It categorically forbids the issuance of a "general warrant," which permits the executing officers to seize whatever they want and decide later which, if any, of it is contraband or evidence of a crime. P.I. Mem. at 40-42. The warrant pursuant to which defendants seized BIF's property in Illinois was just such an unconstitutional general warrant, authorizing the search of BIF's premises, and its CEO's home, in order to seize information, material, or property in order to obtain foreign intelligence. *Id.* at 41, Ex. F ¶ 5. The agents in executing the warrant seized all of BIF's records and substantially all of BIF's property, in violation of the Fourth Amendment. *Id.* at 42. The question of the legality of the warrant depends only on the facts apparent from its face, and the undisputed facts of the scope of the seizure.

³ The defendants may attempt to argue, as they have in the *Global Relief Foundation* case, that their blocking and physical seizures of BIF's property were not "seizures" within the meaning of the Fourth Amendment because they were only "temporary." But the seizures are of indefinite duration (over four months now, and counting), and *any* seizure of significant duration is a Fourth Amendment "seizure." P.I. Mem. at 44.

D. Right to a Hearing

The Due Process Clause of the Fifth Amendment requires the government to provide someone it deprives of property or liberty with notice and an opportunity to be heard. P.I. Mem. at 22. This generally means a hearing *before* the deprivation occurs; however, in limited circumstances, the hearing may be provided promptly after the deprivation. *Id.* at 26. Under no circumstances is the government permitted to deprive someone of property or liberty without *ever* affording a hearing. *Id.*; *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985) (undue delay in post-termination proceeding is a constitutional violation.). Yet that is what defendants have done here.⁴

The blocking order's terse explanation of the basis for defendants' blocking of BIF, together with the offer that BIF could send a letter challenging the blocking, did not constitute "notice and an opportunity to be heard" sufficient to satisfy the Due Process Clause.⁵ "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation marks omitted). "[T]he minimum requirements of due process" would include (1) written notice of the specific charges against BIF; (2) disclosure to BIF of the evidence against it; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-

⁴ In *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), the Court held that a subcontractor on a public works project, who as a result of state action was denied certain monies that he claimed were due him under his subcontract, had not been deprived of due process because he could sue in state court to obtain those monies. The Court emphasized that the subcontractor "ha[d] not been denied any present entitlement," unlike the plaintiffs in prior cases who had been denied a present entitlement "to exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Id.* at 196. BIF, unlike G&G, was denied and continues to be denied a present entitlement to exercise ownership dominion over its property and to pursue its charitable endeavors.

⁵ The blocking order stated that it was being issued because "[t]he United States Government has reason to believe that Benevolence International Foundation ('BIF') may be engaged in activities that violate the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 ('IEEPA')." P.I. Mem. Ex. D at 1. No further explanation was given. The order stated that "[i]f BIF believes this blocking action is taken in error and wishes to challenge it, a letter setting forth BIF views should be sent to" defendant Newcomb, the director of OFAC. *Id.*

examine adverse witnesses; (5) a neutral and detached hearing body; and (6) if the hearing body rendered a decision adverse to BIF, a written statement as to the evidence relied on and the basis for the decision. *See Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). The blocking order satisfied none of these requirements.

Defendants also violated due process when they physically seized BIF's property in New Jersey. Defendants seized substantially all of BIF's property in New Jersey without (to BIF's knowledge) *ever* obtaining a warrant or an AGEPSA. P.I. Mem. at 43. Nor have defendants ever offered BIF any sort of a hearing to contest that deprivation of BIF's property. This is a blatant violation of BIF's due process rights, as well as the Fourth Amendment. No secret evidence could justify defendants' failure to provide a hearing as to this seizure, and their blocking of BIF's assets.

In short, all of the four constitutional violations set out above are *per se* violations that cannot be excused or justified by secret evidence - or indeed by any evidence. The Court should thus address those violations before ruling on the secret evidence issue, and enter a preliminary injunction based on those violations.

II. The Statutes on Which Defendants Rely Do Not Permit Them to Use Secret Evidence Under the Facts Presented Here.

Defendants claim that the Foreign Intelligence Surveillance Act (FISA) and the USA PATRIOT Act permit them to introduce secret evidence here. They are mistaken on both scores. First, defendants claim that, "Pursuant to FISA, all of the evidence required to support the FBI's physical search must be submitted to the Court *in camera* and *ex parte*. See 50 U.S.C. § 1825(g)." Defs.' Mem. at 3. Section 1825(g) says no such thing. In pertinent part, it states as follows:

[T]he United States district court . . . shall, . . . , if the Attorney General files an affidavit under oath that disclosure or any adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the physical search as may be necessary to determine whether the physical search of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the physical search, or may require the Attorney General to provide to the aggrieved person a summary of such materials, only where such disclosure is necessary to make an accurate determination of the legality of the physical search.

Section 1825(g) thus authorizes the submission of materials *in camera* and *ex parte* only to the extent that the Attorney General certifies that disclosure of those materials would harm national security. To date, the Attorney General has made no such certification. Although defendants state that he will do so, Defs.’ Mem. at 5 n.2, he will not necessarily do so as to “*all* of the evidence required to support the FBI’s physical search,” Defs.’ Mem. at 3 (emphasis added).

Moreover, this Court is obligated to assess the validity of the Attorney General’s certification, not simply accept it as true. “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). Even where a statute allows for the submission of evidence *ex parte* and *in camera*, the courts must be “mindful . . . of the overriding importance of assuring plaintiffs’ receipt of the most complete information and explanation permissible.” *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff’d by an equally divided Court*, 484 U.S. 1 (1987).

Defendants also give short shrift to the last sentence of section 1825(g), quoted above, which authorizes this Court to release materials to BIF, under appropriate safeguards, where doing so “is necessary to necessary to make an accurate determination of the legality of the physical search.” In *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982), on which defendants rely, the court (construing 50 U.S.C. § 1806(g), the parallel section pertaining to electronic surveillance upon which section 1825(g), pertaining to physical searches, was modeled), explained that such disclosure is “necessary”

where the court’s initial review of the application, order, and fruits of the surveillance indicates that the question of legality may be complicated by factors such as ‘indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of non-foreign intelligence information, calling into question compliance with the minimization standards contained in the order.’

Id. at 147 (quoting S. Rep. No. 95-701, 95th Cong., 2^d Sess. 64 (1978)).

These standards for disclosure are met here. The searches were premised on the false representation that BIF’s CEO, Mr. Enaam Arnaout, was actually one “Samir Abdul Motaleb.” P.I. Mem. at 10; Complaint ¶ 17. Moreover, even assuming that any of the materials seized actually constitute “foreign intelligence information,” given the all-inclusive scope of the defendants’ seizures,

they necessarily included vast quantities of information that is not “foreign intelligence information,” in violation of FISA’s minimization requirements.⁶ Indeed, the defendants have stated that they seized 90 boxes of documents, April 11, 2002 transcript (Ex. S, *infra*) at 12, and admit the seizure included material that is “irrelevant” or “non-pertinent,” *id.* at 7; April 9, 2002 transcript (Ex. R, *infra*) at 7. Since, at the very least, a “significant” amount of the seized material is not foreign intelligence information, *Belfield* and the Senate Report it cites show that it is “necessary” that, if secret evidence is to be used, the Court permit BIF to see the FISA materials (under appropriate safeguards) to assist the Court in determining whether the FISA search and seizure were legal.

The second respect in which defendants misstate the scope of their authority to use secret evidence occurs when they state, “IEEPA, as amended by the USA PATRIOT Act on October 26, 2001, provides for *ex parte, in camera* review of classified materials in any judicial review of an action taken under section 1702, *including the blocking in aid of investigation at issue in this case.* See 50 U.S.C. § 1702(c), (as amended by Pub. L. No. 107-56, § 106, 115 Stat. 272, 278.)” Defs.’ Mem. at 5-6 (emphasis added).

In fact, defendants’ blocking of BIF pending investigation was *not* taken under 50 U.S.C. § 1702. The PATRIOT Act was enacted on October 26, 2001. Defs.’ Mem. 5. It amends 50 U.S.C. § 1702 to confer on *the President* the power to block pending investigation. 50 U.S.C. § 1702(a)(1)(B). The President’s section 1702 powers may be exercised only after he declares a national emergency, 50 U.S.C. § 1701, and issues an Executive Order published in the Federal Register specifying the provisions under which he or other officers will act, *id.* § 1631. The President has never, at any time following the enactment of the PATRIOT Act, issued an Executive Order delegating his authority to block during the pendency of an investigation to OFAC or any other agency or officer of the United States. Complaint ¶ 31; P.I. Mem. at 7. Executive Order 13224, to which defendants refer, was issued on September 23, 2001, Defs.’ Mem. at 6 n.4, over a month before the PATRIOT Act was enacted, and did not purport to (and could not) delegate the

⁶ “Foreign intelligence information” is (1) information relating to the United States’ ability to protect against a foreign power or its agent’s (a) actual or potential attack or other grave hostile acts, (b) sabotage or international terrorism, or (c) clandestine intelligence activities, or (2) information as to a foreign power or territory relating to the United States’ national defense, security, or conduct of foreign affairs. See 50 U.S.C. § 1801(e).

President's not-yet-existent authority to block pending investigation to OFAC. OFAC's blocking of BIF pending investigation was thus an illegal and *ultra vires* act, not one pursuant to the PATRIOT Act. The PATRIOT Act thus provides no authority for the submission of secret evidence to support that illegal act.⁷ See *Greene v. McElroy*, 360 U.S. 474, 506-07 (1959) (striking down Defense Department's denial of security clearance based on secret evidence, which was of "questionable constitutionality," because no clear showing had been made that the President or Congress had delegated such powers to the Department).

In sum, FISA recognizes that disclosure of defendants' proffered secret evidence is appropriate under the facts presented here, and the PATRIOT Act provides no basis for the submission of secret evidence in this case.

III. Defendants' Proposed Use of Secret Evidence is Unprecedented and Unconstitutional, and Should Not Be Allowed by This Court.

Ours is an adversary system of jurisprudence, founded on the premise that truth will be found from the clash of opposing parties, each presenting its own evidence and rebutting the other party's evidence by vigorous cross-examination and the presentation of contrary evidence. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). The adversary system is subverted, indeed destroyed, if one party is allowed to present secret evidence *in camera* that the other party cannot examine, challenge, and answer. "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system

⁷ Defendants may, as they have in the *Global Relief Foundation* case, submit a declaration by defendant Newcomb as authority for the proposition that defendants had the power to block pending investigation even before the enactment of the PATRIOT Act. However, Newcomb's declaration is not the law, and flies in the face of the clear language of the International Emergency Economic Powers Act (IEEPA), prior to its amendment by the PATRIOT Act. Before the PATRIOT Act, neither IEEPA nor any other statute conferred the power to block pending investigation, and no regulation referred to such a power. It is presumed that Congress, when in the PATRIOT Act it amended 50 U.S.C. § 1702(a)(1)(B) of IEEPA to confer the power to block pending investigation, intended a change in the law. See, e.g., *Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000); *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997).

and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.” *United States v. Nixon*, 418 U.S. 683, 709 (1974).

The Supreme Court has thus repeatedly held that the right to confront and respond to witnesses and documentary evidence is essential to due process. “[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (citation and internal quotation marks omitted). “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

In *In re Gault*, 387 U.S. 1 (1967), the Supreme Court stated:

Due process of law is the primary and indispensable foundation of individual freedom. . . . As Mr. Justice Frankfurter has said: “The history of American freedom is, in no small measure, the history of procedure.” . . . [T]he procedural rules which have been fashioned from the generality of due process . . . enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. “Procedure is to law what ‘scientific method’ is to science.”

Id. at 20-21. The Court accordingly held that due process entitles juveniles to, *inter alia*, the right to sworn testimony by adverse witnesses, and the opportunity to confront and cross-examine them.

In *Greene v. McElroy*, 360 U.S. 474 (1959), the Court, in disallowing the Department of Defense’s use of secret evidence as the basis for denying a security clearance, stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Id. at 496.

The courts have also repeatedly held that *ex parte* judicial proceedings taken without the involvement of the person whose property is at issue violate due process. *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (absent exigent circumstances, due process prohibits the government in a civil forfeiture case from seizing real property without giving its owner prior notice and an opportunity to be heard); *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (statute

authorizing attachment of real estate upon plaintiff's *ex parte* verification that there is probable cause to sustain the validity of his claim violates due process); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (state replevin statutes authorizing seizure of property upon the *ex parte* application of anyone who claims a right thereto and posts a bond violate due process).

Several courts have applied these principles to the context presented here -- the government's use of secret evidence purportedly showing the opposing party's links to terrorism -- and have held that such use of secret evidence violates due process. See *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066-71 (9th Cir. 1995) (affirming grant of permanent injunction against government's use in deportation proceedings of classified evidence purportedly showing aliens' involvement with terrorist organization); *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989) (affirming grant of preliminary injunction against deportation of resident alien based on secret evidence allegedly showing him to be a terrorist), *on remand*, 795 F. Supp. 13, 18-20 (D.D.C. 1992) (holding that such procedures violate due process); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999) (ordering release of alien whom government had detained and sought to deport based on secret evidence purportedly tying him to terrorist organization), *rev'd in part on other grounds (attorneys' fees)*, 273 F.3d 542 (3^d Cir. 2001).

The courts in these cases recognized the inherent unreliability of secret evidence and the Kafkaesque burden confronting those who must somehow oppose evidence that is hidden from them. In *American-Arab*, the Ninth Circuit applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to assess the use of secret evidence. The court found, first, that aliens who had lived in this country for over 10 years had a strong liberty interest in remaining in their homes. 70 F.3d at 1068-69. Second, in considering the risk of erroneous deprivation and the value of additional or substitute procedural safeguards, the court found that "[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations" than the use of classified information not disclosed to the opposing party. *Id.* at 1069. Indeed, "the very foundation of the adversary process assumes that use of undisclosed evidence will violate due process because of the risk of error." *Id.* Third, the court found that the government had offered no evidence demonstrating that the aliens at issue threatened national security, and had never brought criminal charges against them. *Id.* at 1069-70. Balancing these interests, the court found that the government's broad generalities about national

security did not warrant using a fundamentally unfair process, *id.* at 1070, and thus affirmed the district court’s grant of a permanent injunction against the use of secret evidence, *id.* at 1071.⁸

In *Rafeedie*, all of the judges on the D.C. Circuit found the government’s reliance on secret evidence “profoundly troubling.” 880 F.2d at 525 (Ruth Bader Ginsburg, concurring). The court noted that:

Rafeedie – like Joseph K. in [Kafka’s] *The Trial* – can prevail before the [INS] Regional Commissioner only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government’s confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.

880 F.2d at 516. On remand, the district court, applying the *Mathews v. Eldridge* test, held that the government’s use of secret evidence violated due process. 795 F. Supp. at 18-20.

Most recently, in *Kiareldeen*, the court noted that the D.C. Circuit and Ninth Circuit’s decisions in *Rafeedie* and *American-Arab* show that the government’s reliance on secret evidence “raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness.” 71 F. Supp. 2d at 413.

Defendants cite a number of cases arising under FISA or the Anti-Terrorism and Effective Death Penalty Act (AEDPA) that uphold the use of secret evidence under the particular facts of those cases. None of those cases are controlling here. Most of them are completely irrelevant, involving only secret evidence offered by the government to defend its use of electronic surveillance against criminal defendants.⁹ Only two of the cases (*United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001), and *United States v. Nicholson*, 955 F. Supp. 588, 591

⁸ After this decision, Congress limited the courts’ jurisdiction over certain immigration cases. On a later appeal, the Ninth Circuit held that the courts had jurisdiction over the case despite the statutory amendment, 119 F.3d 1367 (9th Cir. 1997), but the Supreme Court reversed, 525 U.S. 471 (1999). The Supreme Court opinion does not address secret evidence, leaving the Ninth Circuit’s analysis of that issue intact.

⁹ Prior to 1995, FISA only authorized electronic surveillance, not physical searches and seizures of property. *United States v. Nicholson*, 955 F. Supp. 588, 591 (E.D. Va. 1997).

(E.D. Va. 1997)) deal with physical searches, and neither addressed the constitutionality of a general seizure of property, as occurred here in violation of FISA's minimization requirements.¹⁰

Further, where the government initiates a criminal prosecution, the Constitution provides the defendant with a number of protections, including the Sixth Amendment rights to a speedy trial, to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, as well as the due process right to be provided with exculpatory evidence in the government's possession. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Here, the defendants, lacking the evidence necessary to prosecute or designate BIF, have in effect imposed punishment in the guise of investigation -- seizing essentially all of BIF's property and freezing its assets -- without bothering to bring charges, let alone secure a conviction. Defendants now seek to use secret evidence to justify their extraordinary and unconstitutional actions. Indeed, the defendants have indicated that they will argue (as they have in the *Global Relief Foundation* case) that they are indeed entitled to summary judgment on the basis of secret evidence.

¹⁰ Indeed, *Squillacote*, 221 F.3d 542 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001), unlike this case, shows the proper conduct of a foreign intelligence search. There, the government had probable cause to believe that the defendants were spies for East Germany. The government, before searching the defendants' house, obtained a search warrant. 221 F.3d at 554. FBI agents executed the warrant over six days, searching from 6 a.m. to 10 p.m. each day. *Id.* The agents seized from the house a miniature camera, a digital diary and memory cards, a doll with a roll of miniature film hidden inside, and copies of two secret U.S. government documents. *Id.* Their search complied with the Fourth Amendment and FISA's minimization requirements, which compel the government, before executing a search, to implement procedures to minimize the acquisition and retention of nonpublicly available information concerning consenting United States persons. *See* 50 U.S.C. §§ 1821(4), 1822(a)(1)(A)(iii), 1823(a)(5), 1824(a)(4).

Here, by contrast, defendants acted without probable cause, did not obtain a warrant before executing the searches (and never obtained a warrant as to the New Jersey searches), and seized all documents and virtually everything else. This flagrantly violated both the Fourth Amendment and FISA. Almost four months *after* the searches and seizures, defendants' attorney admitted that the FBI was *then* belatedly engaged in "minimization . . . [putting] the documents . . . into categories of pertinent and non-pertinent." Tr. April 9, 2002 (Ex. R, *infra*) at 7. As BIF's attorney pointed out, the documents "were supposed to be subjected to minimization procedures before they were seized," *id.* at 9, not months later.

This proposed use of secret evidence as a sword against BIF is an unprecedented, extraordinary and radical departure from past uses of the state secrets privilege.¹¹ That privilege has typically been used as a shield, to protect the government from having to disclose state secrets in discovery. *E.g.*, *United States v. Reynolds*, 345 U.S. 1 (1953). Where, as here, the government is a defendant in a civil suit, its invocation of the privilege normally simply removes from the case the material in question, with no alteration of pertinent substantive or procedural rules. *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), *cert. dismissed*, 493 U.S. 960 (1989). “The result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence.” *Id.* (internal quotation marks omitted); *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (same), *cert. denied*, 465 U.S. 1038 (1984).

Defendants’ proposed use of secret evidence would subvert our system of justice. Due process requires the government, if it believes a person has violated the law and wants to take the person’s property as punishment, to file criminal charges or initiate an asset forfeiture proceeding, present evidence to a court, allow the person to rebut that evidence, and obtain a favorable judgment. The government cannot, unless the Constitution is to be stripped of all meaning, be permitted to seize an American corporation’s assets indefinitely, never bring criminal or civil charges, and obtain dismissal of the corporation’s suit for return of its property by using “evidence” that the corporation

¹¹ The only factually similar decision defendants cite is *Global Relief Foundation v. O’Neill*, No. 02-1869 (N.D. Ill. Apr. 5, 2002). That decision does not bind this Court, *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987), and is unpersuasive, since it addresses none of the constitutional issues raised in this case. More recently, on April 22, 2002, Judge Kessler of the U.S. District Court for the District of Columbia stated that *Holy Land Foundation for Relief & Development v. Ashcroft*, No. 1:02CV00442 (D.D.C.), another case brought by a Muslim charity whose property has been seized and assets blocked by defendants, raises “very significant and distressing allegations” about defendants’ actions. Ex. T, *infra*, at 25. Judge Kessler stated, “the government will have a heavy burden to convince me that they can submit material . . . ex parte [I]n particular in a case with as many ramifications as this case, with as much public interest as has been demonstrated in this case, I . . . feel particularly strongly that unless the law [is] crystal clear . . . everything should be on the public record, so . . . that the public understands full well what we are doing and the reasons for what we are doing.” *Id.* at 24. BIF submits that the same should be true here.

cannot see or respond to. *See American-Arab*, 70 F.3d at 1070 (“Only the most extraordinary circumstances could support one-sided process.”).

As in *American-Arab*, *Rafeedie*, and *Kiareldeen*, application of the tripartite *Mathews v. Eldridge* test shows that allowing defendants to use secret evidence to defend their actions would violate due process. First, the private interest here is very substantial. Defendants have seized BIF’s property, frozen all of its assets, and shut down its operations indefinitely. Defendants’ actions have devastated BIF, depriving it of property and liberty interests, P.I. Mem. at 21-22, and threaten to completely destroy it, without affording any opportunity for a hearing at which BIF could challenge those actions. Second, the risk of an erroneous deprivation that the use of secret evidence would cause is enormous. “One would be hard pressed to design a procedure more likely to result in erroneous deprivations.” *American-Arab*, 70 F.3d at 1069. Third, defendants have not shown that requiring them to disclose their evidence against BIF, and allowing it to respond thereto, would imperil national security. The fact that defendants, after having had over four months to analyze BIF’s property, have found no basis for bringing criminal or civil proceedings against BIF, or designating it as any sort of terrorist or illegal organization, also belies defendants’ claims of a threat to national security. The *Mathews v. Eldridge* test thus shows that allowing defendants to introduce secret evidence would violate due process. This Court should accordingly deny defendants’ motion to do so.

IV. If the Court Does Allow Defendants to Proffer Secret Evidence, Its Use Should be Narrowly Circumscribed.

Even in the rare circumstances where admission of secret evidence is permissible, the courts must be “vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings.” *Abourezk*, 785 F.2d at 1061. If the Court permits the introduction of secret evidence, it should strictly limit its use, permitting the government to conceal its sources and methods of investigation, but not to shield dubious evidence from the rigors of the adversary system.

To the extent consistent with legitimate national security concerns, BIF should be permitted to learn the nature and contents of the evidence. For example, informants’ names and descriptions of investigative techniques (so-called “sources and methods”) may be deleted from government reports, but the substance of the information therein should be provided to BIF, pursuant to an

appropriate protective order if necessary.¹² Defendants should also be required to create a public index listing assertedly privileged documents, generally describing their contents, and explaining defendants' claims of privilege. See *Abourezk*, 785 F.2d at 1061 (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)).

The introduction of secret evidence should not alter substantive or procedural rules. *In re United States*, 872 F.2d at 476; *Ellsberg*, 709 F.2d at 64. If defendants are permitted to rely on secret evidence in moving for summary judgment, they should be required to file a Statement of Undisputed Facts complying with the Local Rules, setting out the facts (albeit not the confidential sources and methods) that they contend the secret evidence proves, so that BIF may respond thereto. Only then can all evidence, including secret evidence, be evaluated, as the law requires, in the light most favorable to BIF, the summary judgment non-movant.

¹² This is consistent with the procedure the government has proposed for disclosure of detainee interview reports in *United States v. John Walker Lindh*, Crim. No. 02-37A (E.D. Va., Alexandria Div.). Ex. U, *infra*.

CONCLUSION

For all of the reasons stated above, this Court should deny defendants' motion and disallow the use of secret evidence in this case. In the alternative, the Court should narrowly circumscribe any use of such evidence, and allow it to be used only to the extent required by legitimate national security concerns and consistent with BIF's due process rights.

Respectfully submitted,

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Dated: April 29, 2002

LIST OF EXHIBITS

| | <u>EXHIBIT</u> |
|--|-----------------------|
| License issued by OFAC on April 26, 2002..... | Q |
| Transcript of proceedings before Judge Alesia on April 9, 2002..... | R |
| Transcript of proceedings before Judge Alesia on April 11, 2002... | S |
| Transcript of proceedings before Judge Gladys Kessler in <i>Holy Land Foundation for Relief & Development v. Ashcroft</i> (D.D.C. No. 1:02CV00442) on April 22, 2002..... | T |
| Government’s Motion for Protective Order Regarding Detainee Interview Reports and Proposed Order, filed April 16, 2002 in <i>United States v. Lindh</i> , Crim. No. 02-37A (E.D. Va., Alexandria Div.)..... | U |