

**MEMORANDUM REGARDING GROSS DISPARITY  
IN PROSECUTORIAL TREATMENT OF SHOLOM RUBASHKIN**

**\*\*\*BACKGROUND INFORMATION ONLY –  
NOT TO BE QUOTED OR ATTRIBUTED \*\*\***

**Introduction**

This Memorandum describes the gross disparity between usual procedures in federal criminal prosecutions under the immigration and bank-fraud laws and how Iowa federal prosecutors treated the case of Sholom Rubashkin, the Orthodox Jewish Hasidic businessman who was arrested on immigration-law violations relating to the Agriprocessors plant in Iowa and was found guilty after a jury trial of bank fraud and failure to pay cattle owners promptly.

The enormous disparity between the treatment of Mr. Rubashkin and others who committed similar offenses began with the Immigration and Customs Enforcement (“ICE”) raid on Agriprocessors (“Agri”) on May 12, 2008, and has continued to this day, and has culminated in prosecutors seeking a life sentence for Rubashkin.

**1. Should ICE Have Conducted the Massive May 2008 Raid?**

Because it was apparent from government activity in the neighborhood of Agriprocessors’ Postville plant that ICE might be planning a raid, Agri took the advice of the American Meat Institute and retained the services of Robert W. Kent, Esq., an attorney with the international law firm of Baker & McKenzie. Mr. Kent had represented Swift & Co. – a meat-packer that had been raided by ICE in six states in December 2006, when approximately 1,297 illegal employees were found. When ICE sought to raid Swift again in Texas, Kent persuaded them to proceed without a raid and instead to examine Swift’s employment records and weed out the illegal immigrants. Kent called the Iowa prosecutors on May 9, 2008, and followed up with a faxed letter the same day requesting a meeting and stating that Agri – which was “the largest kosher meat production company in the country” -- wished to cooperate with ICE and avoid the dangers and disruption of a raid. Kent’s requests were summarily denied and the raid took place.

Approximately 600 federal agents in heavy riot gear stormed the Agri plant on May 12, supported by Blackhawk military helicopters. A total of 389 illegal immigrants were arrested and entered guilty pleas in production-line fashion after being told that they could be charged with a major federal criminal felony that the Supreme Court held in 2009 (*Flores-Figueroa v. United States*, 129 S. Ct. 1886) was inapplicable to their situations. The Department of Homeland Security reversed ICE’s raid policy and, since an announcement made on April 30, 2009, will conduct raids only in extremely limited circumstances.

The May 2008 raid received national publicity and ultimately resulted in the bankruptcy of Agri. It demolished Postville’s economic infrastructure, destroyed a legitimate business that was the town’s major employer, wiped out livelihoods of both legal and illegal employees,

forced businesses to shut down, and drove away residents. Postville's population has shrunk by half, and many of those who remain are unable to sell their homes. The town is nearly insolvent. And the raid also demolished the principal source of kosher beef and poultry in the United States, creating kosher meat shortages across the country.

## **2. Was the Post-Raid Treatment of Rubashkin Comparable to Other ICE Raid Targets?**

**(a) Swift & Co.** – Although Swift was a major employer of illegal workers in six states and 1,297 illegal employees were found on those premises in the December 2006 raids, neither the company nor any of its officials were criminally charged. In Iowa, for example, one United Food and Commercial Workers (“UFCW”) official at Swift’s Marshalltown, Iowa, plant was charged in an Iowa federal court with harboring illegal immigrants and was sentenced to one year and one day in prison and a \$2000 fine after being found guilty by a jury. Another Swift employee who had pleaded guilty was sentenced to probation.

**(b) Michael Bianco, Inc. (“MBI”)** – A manufacturer of leather goods and handbags in New Bedford, Mass. was raided by ICE on March 6, 2007, after an undercover operation from which it was learned that Francesco Insolita, the owner, intentionally sought out illegal immigrants and exploited them with punitive fines and terrible working conditions. Approximately 326 illegal workers were detained in the raid. Insolita was sentenced in January 2009 to one year and one day in prison and fined \$30,000. The company was fined \$1.51 million and ordered to pay \$460,000 in restitution.

**(c) Action Rags USA** – A Houston, Texas clothing and rag exporter company was raided by ICE on June 25, 2008 – little more than a month after the Agri raid. Approximately 85% of the business’ workforce consisted of illegal Mexican immigrants, and approximately 150 immigrants were arrested. The owner, Mubarik Kahlon, and two managers were indicted on immigration charges in July 2008. A jury trial was set for June 15, 2009, but on June 10, Kahlon and one manager pleaded guilty. Kahlon was sentenced to two years’ probation and a \$6,000 fine.

**(d) Miyako Sushi and Panda China Buffets** – ICE raided these restaurants in Ocean City, Maryland in June 2007, on evidence that illegal workers were hired as below-minimum-wage employees (paid in cash) in the restaurants and were provided living accommodations in condominiums owned by the restaurant owners, Bo Hao Zhu and Siu Ping Cheng. The owners pleaded guilty to immigration-law violations and were sentenced on September 12, 2008, to 18 months’ probation. Their partnership was ordered to pay a \$50,000 fine.

**(e) Rosenbaum-Cunningham International, Inc. (“RCI”)** – On February 22, 2007, ICE raided 63 locations in 17 states of a national janitorial service that provided cleaning crews for restaurants. Almost all RCI janitorial employees were illegal immigrants who had no documentation whatever, and they were paid in cash. The owners, Richard M. Rosenbaum, Edward Scott Cunningham, and Christina A. Flocken were charged not only with immigration-law violations, but also with defrauding the United States of more than \$18 million in federal

employment taxes. On March 4, 2008, Rosenbaum was sentenced to 10 years imprisonment, Cunningham to 51 months, and Flocken to 30 months.

The cases described above are typical. No case following an ICE raid has even come remotely close to the draconian threats and punishments imposed on Mr. Rubashkin.

### **3. Were Post-Raid Publicized Arrests and Imprisonment of Rubashkin Warranted?**

Following the nationally publicized Agri raid, the Iowa federal prosecutors conducted an investigation of Agri. The sworn complaint on which the raid was based had acknowledged that Agri had screened job applicants and had, in fact, twice rejected an ICE undercover agent who tried to gain employment with false identity papers. Only when ICE provided him with authentic documentation was he hired. Rubashkin denied that he had knowingly violated the immigration laws and Agri retained Robert Kent to discuss the charges with the prosecutors.

The prosecutors made arrests and filed immigration-law charges against various company employees. Most of these steps were accompanied by substantial local and national publicity. Counsel for Agri and Rubashkin was in regular communication with the prosecutors to attempt a resolution of potential criminal charges against Agri and Rubashkin.

Although he was served with a letter identifying him as a “target” of the investigation, Rubashkin himself remained in his Postville, Iowa, home during the almost six months following the raid. He made one trip to Canada to visit a sick friend and returned promptly to Postville. There is not a scintilla of evidence that he made any effort to flee.

It was clear that Rubashkin would surrender voluntarily if notified of any charges, but the local prosecutors had him arrested without advance warning, to the accompaniment of great publicity, on October 30, 2008. Page A14 of *The New York Times* of October 31, 2008, for example, had a story headlined “Arrest Made in Iowa Plant Case” and a photograph – coverage that would not have appeared had counsel been requested, as is customary in such cases, to bring in his client to answer charges.

An indictment charging one violation of the immigration laws was returned. At Rubashkin’s bail hearing on the indictment, the prosecutors and the Magistrate Judge permitted him to be released on a \$1 million bond and with an ankle bracelet and electronic monitoring. Individual employers charged in all other immigration-law prosecutions have been released either on personal recognizance or on the submission of a nominal bond. No other employer accused of violating the immigration laws has ever been restricted with an electronic bracelet or required to post a bond of \$1 million.

On the day following his release, the Iowa prosecutors had Rubashkin arrested again on an allegation that he had committed bank fraud after his first arrest. Their claim was that, in the routine certifications that Agri made to the St. Louis bank with which it had a \$35 million line of credit, it had falsely represented that it was in compliance with the law when, in fact, it was

harboring illegal immigrants, and that Agri had failed to deposit all checks it received from customers in the “sweep account” that was security for the bank loan and had temporarily used (but had subsequently reimbursed) money for a store and school in Postville that Agri was administering.

Although there was no proof that the bank was actually misled by this conduct or that its loan, on which timely interest payments continued to be made even after the raid, was imperiled in any way, the Iowa prosecutors asserted that this conduct by Rubashkin constituted “non-compliance” with the terms of Rubashkin’s release on bail and asked that he be denied bail and imprisoned.

Among other arguments for denying bail to Rubashkin, the prosecutors asserted that Rubashkin could flee to Israel because he is Jewish, although there was no evidence whatever that he had sought to travel to Israel. This same specious contention would justify the imprisonment of any Jewish person ever arrested on any charge. In his opinion denying bail, the Magistrate Judge accepted the Iowa prosecutors’ claim regarding flight to Israel.

Rubashkin spent the next 76 days in prison. No other individual accused of an immigration-law violation and no other non-violent and non-threatening person charged with nothing more than having compromised the security of a bank loan that was otherwise being kept current has ever been denied bail prior to trial on such a charge unless he was apprehended while actually attempting to flee.

#### **4. Why Were Seven Superseding Indictments Filed With Inflated Allegations and a Forfeiture Demand?**

After a hearing held in January 2009, the District Judge found insufficient evidence to keep Rubashkin in prison as a “flight risk” and ordered his release pending trial. In the meantime, the Iowa prosecutors had begun ballooning the immigration and bank-fraud charges with a series of superseding indictments.

The following is a list of the dates and number of counts of the superseding indictments:

First Indictment	November 13, 2008	3 Counts
Second Superseding Indictment	November 20, 2008	12 Counts
Third Superseding Indictment	December 11, 2008	13 Counts
Fourth Superseding Indictment	January 15, 2009	97 Counts
Fifth Superseding Indictment	March 31, 2009	79 Counts
Sixth Superseding Indictment	May 14, 2009	142 Counts
Seventh Superseding Indictment	July 16, 2009	163 Counts

The basic charges of immigration-law violations and bank fraud remained the same throughout this entire series of indictments. In the Third Superseding Indictment the prosecutors added the request that the entire Agri business be forfeited to the United States. That demand – for the forfeiture of an entire business because some of its employees were illegal immigrants – was not made in any other case involving violation of the immigration laws.

The Fourth Superseding Indictment added the allegation under 7 U.S.C. § 195 that Rubashkin had failed to make prompt payments to cattle owners in violation of an Agriculture Department regulation because his payments were, on occasion, several days late. This was the first time in the history of federal law enforcement that such a criminal charge has ever been made.

The number of charges was increased by the Iowa prosecutors not because any new offenses were discovered. Rather, the basic bank fraud allegation was multiplied because each of the bank's advances of funds to Agri under the \$35 million line of credit and each month's report to the bank by Agri was charged as a separate offense. Money laundering was also alleged to have been committed when Rubashkin deposited some funds received from customers to the accounts of a local kosher grocery store and religious school that Agri was maintaining in Postville.

The effect of this deliberate fragmentation of charges was that Rubashkin was ultimately tried before a jury not on one basic charge of submitting false reports to the bank regarding the security for the bank's loan, but on 91 counts of bank fraud, money laundering, and failure to pay cattle dealers. The jury found him guilty on 86 counts.

#### **5. Why Did Prosecutors Prove Immigration-Law Violations at the Bank-Fraud Trial**

Recognizing that the jury would be prejudiced against Rubashkin in considering the bank-fraud allegations if it heard evidence regarding immigration-law violations, the District Judge severed the trial of the 72 immigration violations in the Seventh Superseding Indictment from the 91 bank-fraud charges. Nonetheless, contending that he committed bank fraud when he represented to the bank that Agri was complying with the law, the Iowa prosecutors presented more than two days of highly inflammatory testimony regarding the immigration allegations during the bank-fraud trial. The District Judge denied repeated defense requests for a mistrial.

#### **6. Why Was Rubashkin Denied Release on Bail Pending Sentencing?**

During the almost ten months between his pretrial release (after 76 days in prison), Rubashkin complied punctiliously with all the bail conditions. His probation officer even testified that on one occasion, when his electronic ankle bracelet became dislodged, "he alerted her immediately to allow for its expedient repair." The District Judge found "that Defendant took great pains to comply with the terms of his pretrial release."

Nonetheless, when the jury returned a guilty verdict, Rubashkin was immediately remanded to prison. In a hearing on the Iowa prosecutors' request that he be denied release pending sentencing, the defense offered to post as security approximately \$8 million in the equity of 43 supporters of Mr. Rubashkin and to pay for a 24-hour armed guard that would prevent him from leaving his home without prior authorization. The District Judge granted the Iowa prosecutors' request, and Rubashkin has now been in the Linn County Jail for more than 130 days, in addition to the 76 days he spent in prison between November 2008 and January 2009.

The law regarding release pending sentencing (the Bail Reform Act of 1984, 18 U.S.C. § 3143(a)) does not authorize the pre-sentencing imprisonment of a defendant who is not a danger to the community if he is not a “flight risk” and his future presence can be assured by any conditions of release. The District Judge stated no reason for imprisoning him other than her unsupported concluding statement that he is a “flight risk.” The Court of Appeals denied bail also without stating any reason. These unexplained denials of bail violate the provision of the Bail Reform Act that requires “a written statement of reasons for the detention.” 18 U.S.C. § 1342(i)(1).

### **7. Why Has Release for Passover Seders Been Opposed?**

Although Rubashkin’s counsel believe that any detention of Rubashkin before sentencing is unlawful and are applying to the Supreme Court to reverse the rulings of the District Court and the Court of Appeals, they filed on March 18, 2010, a motion to permit him to observe the first two days of Passover (March 30 and 31) at home. The motion was opposed by the Iowa prosecutors and was denied by the District Court on the day after it was filed.

Federal law (the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)) protect the religious rights of prisoners in federal custody unless the Government has a “compelling interest” in denying the religious right and is taking the “least restrictive alternative” in enforcing that interest. Neither of these standards was satisfied by the Iowa prosecutors or the District Court in denying permission to Rubashkin to observe the Passover seders in his home.

### **8. Why Are Prosecutors Seeking Life in Prison?**

The jury found in a special interrogatory that Rubashkin did not profit personally from false invoices presented to the lending bank. Evidence of his very modest lifestyle and his extraordinary charity was proffered at his trial but objected to by the Iowa prosecutors and excluded by the District Judge. He is the father of 10 children, including an autistic teenage boy who depends on him. Nonetheless, the Iowa prosecutors are recommending life in prison.

Rubashkin was convicted of corrupting the collateral for his bank loan. Rubashkin had a line of credit that could go up to \$35 million. He never requested more than that amount, and he made timely interest payments to the bank so that he could continue to borrow against the line of credit. Agriprocessors' accounts receivable was part of the collateral for the loan.

It is true that false invoices were generated under his watch. Those invoices, however, were NOT used to seek payment for any product that was not received. The invoices were used to inflate the total accounts receivable shown to the bank so that more could be drawn against the \$35 million line of credit. Until the ICE raid, timely interest was paid on all the money drawn by Agriprocessors. The bank acknowledged that it received approximately \$21 million in profit from the interest payments during the life of the Agriprocessors' loan.

One could argue the false invoices even benefited the bank, because Rubashkin paid additional interest on the increased money he borrowed. Rubashkin always intended to pay the bank back in full and he regularly made payments that showed his good faith.

The only reason the loan was not paid was due to the following unfortunate series of events, which Rubashkin had no control over:

1. The government raid threw Agriprocessor's into bankruptcy
2. After the raid, the bank "called" the loan - and Agriprocessors could not continue to make its payments.
3. There was enough inventory and assets in the company that the loan should have been able to have been paid off if the company and its assets were sold. But the bank (in its greed) refused to consider very serious offers to purchase the company. They insisted they only wanted 100% of the loan paid off and would not even consider any offer slightly below that. There is an affidavit from one individual who offered \$21.5 million for the company in cash (and he was prepared to go higher), but the bank refused his initial offer, came back with no counter-offer and refused to negotiate further. There were other offers for \$17 million and more. But the bank dismissed all the offers out of hand.
4. In the end, the bank ended up being forced to sell off the assets for pennies on the dollar. They claim they lost approximately \$27 million, a figure the government and the judge have accepted.

Under the sentencing guidelines -- the length of the sentence is determined by either the "intended" loss amount or the "actual" loss amount -- whichever is greater -- as of the day of sentencing. Even though everyone acknowledges that Sholom Rubashkin never intended there to be any loss (so the "intended" loss is zero), because there is an alleged "actual" loss of \$27 million, that is the figure that is being used for sentencing. And that figure under the sentencing guidelines amounts to a life sentence.

So even though Rubashkin never intended any loss -- and the "actual" loss was due to circumstances beyond Rubashkin's control, and even though this all began as an immigration case -- where the guidelines are low -- Rubashkin is now facing the possibility of life in prison.

And although they dismissed the 72 immigration-law counts after the jury's verdict on the bank-fraud allegations, the Iowa prosecutors have submitted to the probation office more than 30 pages of unproved inflammatory allegations regarding the employment of illegal workers at Agri. These assertions -- which Rubashkin has never had any opportunity to challenge and disprove -- are designed to prejudice the District Judge against Rubashkin and increase his sentence.