

No. 04-1084

---

IN THE SUPREME COURT OF THE UNITED STATES

---

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,  
Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.,  
Respondents.

---

*On a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit*

---

RESPONDENTS' MOTION TO STRIKE  
IMPROPER PORTIONS OF BRIEF FOR PETITIONERS

---

Nancy Hollander  
*Counsel of Record*  
John W. Boyd  
Zachary A. Ives  
Freedman Boyd Daniels  
Hollander & Goldberg P.A.  
20 First Plaza, Suite 700  
Albuquerque, NM 87102  
(505) 842-9960

## INTRODUCTION

The government petitioners have filed a brief in which they make significant new allegations of fact that are not based on any evidence in the record but on documentary evidence appearing for the first time in the government's opening brief. These documents include two letters from a police officer in Brazil, various newspaper articles and quotations from web sites, not one of which was ever offered in evidence below and none of which Respondents (UDV) have seen before now. None of these new materials are under oath, none have indicia of reliability, and the UDV has had no opportunity to contest any of them or to cross-examine any document's author or any witness claiming to have relied on them. The government well knows that the facts it is alleging, based on these documents, at a minimum, are in dispute.

The government's effort to buttress its record on appeal is not only highly improper, it underscores what the UDV argued in opposing certiorari: This case should proceed to a final hearing in the district court, rather than be addressed by this Court now, at this interlocutory stage. UDV's position makes even more sense where one side—the government—continues to litigate disputed facts. Therefore, UDV respectfully requests that the Court order the government to remove the improper portions of its brief.

## CIRCUMSTANCES GIVING RISE TO THIS MOTION

The Court granted the government's petition for certiorari to review a decision of the Tenth Circuit Court of Appeals affirming the district court's entry of a preliminary injunction following a two-week evidentiary hearing. In its petition for certiorari, the government asserted that the interlocutory posture of this case should not bar certiorari review because "[t]he admission of more evidence on remand will not assist in resolving the critical and dispositive *legal* questions that are before the Court . . ." Pet. at 25; *see also* Reply in Support of Pet. at 9

n.8 (“[T]he record compiled over nine days of hearings provides an ample backdrop . . .”). After having successfully argued that the record below is sufficient for decision by this Court, the government has now included, in its opening merits brief, entirely new factual assertions based on hearsay evidence that it did not present to any lower court and that is not part of the appellate record. The UDV has always maintained that the record is not complete, but this Court is not the forum for its completion.

Among the documents not in the record are two letters allegedly from a Brazilian law enforcement officer, dated July 7 and 8, 2005. The government quotes from the letters in its brief, claiming the statement that it is illegal to export sacramental *hoasca* if it contains DMT “reflect[s] the current understanding of Brazilian law” and demonstrates that there is currently “an export ban [on *hoasca*] in Brazil.”<sup>1</sup> Pet. Br. at 44 n.32, 48.

The UDV knows that this statement is largely incorrect because, under the preliminary injunction, the UDV is importing its tea from Brazil using DEA documents stating that the tea contains DMT and licensing its importation. Furthermore, the UDV has had no opportunity to determine whether these letters are authentic, truthful, accurate or whether they would withstand cross-examination. However, in the few days it has had to investigate these new assertions, the UDV has discovered that the purported author of the letters, Ronaldo Urbano, appears to have

---

<sup>1</sup> As of this date, although we have requested them, the government has not produced whatever it sent to Brazil that resulted in these letters. Without this information, it is impossible for the UDV to determine whether the government sought a foreign legal opinion in conformity with applicable international law. In addition, the inclusion of the letters raises questions about the bona fides of the government’s *ex parte* request to file its brief in typescript. UDV is aware that the government frequently makes such requests, but in this case, although the government informed UDV (after the fact) that the reason given to the Merits Clerk was merely the press of other business, the dates of the letters (July 7 and 8, 2005) belie that. The reason for the request appears to have been to gain the two days necessary to include the hearsay letters in its brief.

been at the center of a scandal involving Brazilian police officers who have been receiving secret financing from the DEA without fiscal accountability. The Brazilian Attorney General criticized this secret system as anti-democratic and harmful to Brazil's sovereignty. According to an article in *The Judicial Consultant*, an independent publication covering law in Brazil, in one year alone, a minimum of \$5 million dollars passed secretly from the DEA to Brazilian police through this account, which was set up by the former head of the FBI in Brazil. *See Ex. 1 (Consultor Juridico*, March 25, 2005, and informal translation). If this article is accurate, it raises an issue of whether Mr. Urbano is really a neutral purveyor to this Court of the current state of Brazilian law—but this issue belongs in the district court.

This is not all. The government's brief is sprinkled with other new factual assertions. Unsupported by record evidence, these new assertions rest on hearsay, such as newspaper articles and web sites, each of which grossly prejudices UDV after the close of the evidence. For example, the government asserts for the first time that “[n]early 35 million persons have tried hallucinogens, including more than 10% of high school seniors,” *id.* at 35-6 & n.22; that DMT “is back in favor as a party drug,” *id.* at 39-40 & n.19 (internal quotations omitted); and that UDV might gain “a competitive advantage over the Santo Daime Church” if the Court affirms the decisions below, *id.* at 21 & n.9.<sup>2</sup> Such assertions, which are intended to sound as alarming and as prejudicial as possible, were not made in the district court. If they had been, UDV could quickly have shown them to have no relevant relationship to UDV's use of sacramental *hoasca*.

---

<sup>2</sup> We have not listed the additional citations to newspaper articles and web sites in the government's brief that are hearsay and were never presented to the courts below and which are also improper.

These examples demonstrate why courts require parties to litigation to abide by established rules of procedure and evidence and to present new evidence in the forum where it belongs. Adding them here is an ambush and an attempt to “back-door” a trial on the merits in this Court. If the government feels it must go to these lengths to shore up the record in this case, it cannot seriously contend that the district court abused its discretion in entering a preliminary injunction on the basis of the extensive factual record the parties actually created below. As the government well knows, the record in this case shows that the UDV’s sacramental use of *hoasca* causes no harm and is unlikely, for reasons far too numerous to list here, ever to be diverted to non-sacramental use. If the government feels that it now has evidence to the contrary, it has a readily-available and proper mechanism to get that evidence in the record, and that is at a hearing on the merits, where both sides will have a fair opportunity to place in the record all the relevant evidence they wish.<sup>3</sup> It is wrong to present it here.

### LEGAL ARGUMENT

This Court only considers evidence that is part of the record on appeal. “We take a case on appeal as it comes to us in the record, and receive no new evidence.” *Pac. R.R. v. Ketchum*, 101 U.S. 289, 296 (1880); *see Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 518 (1981) (“Because these additional facts are not part of the record before us, we have not considered them.”); *McClelland v. Carland*, 217 U.S. 268, 283 (1910) (“We shall not enter upon a consideration of these papers, because they are not in the record, as the same has been certified to us by the Circuit Court of Appeals as the one upon which it acted . . . .”); *Schley v. Pullman*

---

<sup>3</sup> The UDV sought to proceed to a trial on the merits while this case is pending in this Court, but the government persuaded the district court not to do so.

*Car Co.*, 120 U.S. 575, 578 (1887) (“[T]he facts, dehors the record, . . . have been improperly introduced into the brief[.]”). As recently as March of this year, Justice Stevens chastised counsel for referring to facts not in the record:

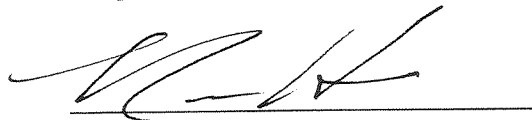
Justice Stevens: “Is all of that in the record?”  
Mr. Friedman: “That is not in the record.”  
Justice Stevens: “Then I don’t think we should talk about it.”

Transcript of Oral Argument at 35, *McCreary County, Kentucky, et al., v. ACLU*, 2005 U.S. LEXIS 5211. Whether facts outside the record are stated at oral argument or are inserted in a brief or in a supplemental addendum outside the record, this Court has correctly refused to consider them. It should refuse to do so in this case as well.

### CONCLUSION

UDV respectfully requests that this Court order the government to re-file its brief after removing all references to—or attachments of—evidence not in the record.

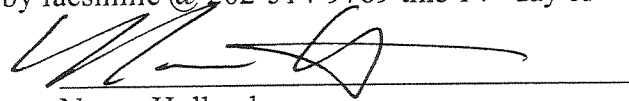
Respectfully submitted,



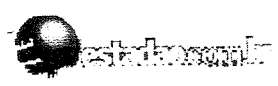
Nancy Hollander  
*Counsel of Record*  
John W. Boyd  
Zachary A. Ives  
Freedman Boyd Daniels  
Hollander & Goldberg P.A.  
20 First Plaza, Suite 700  
Albuquerque, NM 87102  
(505) 842-9960

### CERTIFICATE OF SERVICE

I certify that a copy of Respondents’ Motion to Strike Improper Portions of Brief for Petitioners was sent to Patricia A. Millett, Esq., by facsimile @ 202-514-9769 this 14<sup>th</sup> day of July, 2005.



Nancy Hollander



webmail  @estadao.com.br

discador Estadão



# Consultor Jurídico

e-mail:  senha:

Esqueceu sua senha?  Cadastre-se!

Palavras-chave   Busca avançada

- NOTÍCIAS**
- ARTIGOS**
- CURSOS E EVENTOS
- LIVROS
- LINKS

Noticias > Criminal

TÍTULO	IMAGEM	ENVIAR	COMENTÁRIOS	222
--------	--------	--------	-------------	-----

## Dedo na cara Ex-chefe do FBI no Brasil é interpelado pelo MPF

O procurador da República Luiz Francisco Fernandes de Souza convidou, nesta quinta-feira (25/3), o ex-chefe do FBI no Brasil, o português Carlos Costa, para prestar depoimento sobre sua entrevista à revista Carta Capital. Em entrevista ao jornalista **Bob Fernandes**, Costa dava detalhes de como o governo americano controla a Polícia Federal brasileira e ainda sugere que o governo americano teria grampeado os telefones da cúpula do governo brasileiro, no Palácio da Alvorada (residência oficial da Presidência da República) e do Itamaraty.

O depoimento ocorre na próxima terça-feira (30/3), às 14h, no gabinete de Luiz Francisco, em Brasília. O procurador também quer saber para quem o governo americano destina a soma anual de US\$ 5 milhões, para que o Brasil combata o narcotráfico. Além desta informação, Luiz Francisco quer saber de Carlos Costa informações sobre a Conta Cobra – nome que vem da aglutinação de Colômbia-Brasil. Policiais federais envolvidos no combate ao narcotráfico têm revelado que boa parte do dinheiro que a DEA manda ao Brasil, além desses US\$ 5 milhões, chegaria ao Brasil pela Colômbia, justamente pela conta Cobra.

Em 10 de outubro de 2003, Luiz Francisco Fernandes de Souza encaminhou já havia encaminhado recomendação ao diretor da Polícia Federal, delegado Paulo Lacerda, para que tomasse públicas as movimentações da conta secreta número 284.002-2, agência 3476-2, do Banco do Brasil. Esta conta, de Brasília, vem sendo alimentada pela DEA, a toda-poderosa agência norte-americana de combate mundial ao narcotráfico.

Essa conta secreta é movimentada em ações sugeridas pelo governo dos Estados Unidos, sem o conhecimento do Senado, da Controladoria, do TCU e do MPF, segundo ele. "Tomara fossem US\$ 50 milhões e não apenas US\$ 5 milhões, mas que entrassem no orçamento da República, e não caíssem direto na conta de agentes da PF. Temo que essa verba se transforme num grande sistema de grampos que envolva até a CIA", alertou Luiz Francisco.

### Lei a integra da recomendação

OFÍCIO/MPF/PRDF/LF Nº 284

Brasília DF, 09 de outubro de 2003.

Senhor Diretor,

A PROCURADORIA DA REPÚBLICA NO DISTRITO FEDERAL, pelo membro que abaixo subscreve, vem, respeitosamente, expor e apresentar recomendação para que sejam adotadas as providências elencadas no final do texto.

A fundamentação jurídica para este ofício consta no art. 6º, inciso XX, da Lei Complementar nº 75, de 20 de maio de 1993: "Art.6º. Compete ao Ministério

Arbitragem Comercial no Direito de Integração  
Aborda a Arbitragem focalizando o Mercosul e os vários modelos legislativos. **R\$ 30,00**

As Empresas e o Novo Código Civil  
Guia sobre os principais aspectos do Direito da Empresa disciplinado pelo Novo Código. **R\$ 30,00**

Cálculos Trabalhistas  
Em conformidade com a Resolução nº121/2003. **R\$ 48,00**

Coleção de Códigos Lex  
Compre 6, pague 5 e receba 12. Lançamento. **R\$ 145,00**

Consolidação da Legislação Previdenciária  
Legislação que estabelece custos e benefícios da Previdência. **R\$ 107,00**

Legislação do Estado e do Município de SP - 2005  
Leis e decretos do Estado e do município de SP. **R\$ 432,00**

Legislação Federal e Marginalia - 2005  
CD com leis, decretos, medidas provisórias e demais atos federais e marginalia. **R\$ 796,50**

Manual de Prática Trabalhista  
Orienta as empresas nas relações legais com empregados e órgãos da administração pública. **R\$ 88,00**



Público da União: XX -expedir recomendações, visando à melhoria dos serviços públicos e de relevância pública, bem como ao respeito, aos interesses, direitos e bens cuja defesa lhe cabe promover, fixando prazo razoável para a adoção das providências cabíveis". (grifo nosso)

#### DOS FATOS

As revistas "Istoé" e "Carta Capital" noticiaram a existência de fundos secretos, mantidos por governos estrangeiros para pagar atividades policiais no território nacional. Há notícias que a CIA e outros órgãos do governo americano pagaram instrumentos de escuta telefônica para órgãos da Polícia Federal. E que a CIA e a ABIN mantêm amplos acordos e atividades comuns.

Esta Procuradoria recebeu a denúncia que o setor de combate a entorpecentes da Polícia Federal mantém uma conta corrente secreta número 284.002-2, agência 3476-2 do Banco do Brasil - alimentada pelo DEA - Drug Enforcement Administration. Há notícias que somente este ano foram movimentados cinco milhões de dólares. Estas notícias foram confirmadas pelo próprio delegado Getúlio Bezerra e pelo Coordenador-Geral de Polícia de Repressão a Entorpecentes, Ronaldo Urbano. Fundos secretos sem a fiscalização do Senado, da Controladoria, do TCU, do MPF e sem publicidade são totalmente inconstitucionais e ilícitos.

Não é possível admitir que servidores públicos sejam pagos por governos estrangeiros com prestação de contas à Embaixada dos EUA. É salutar a existência de acordos entre nosso governo e outros países, mas os recursos devem ser inseridos no Orçamento Geral da União e no QDD. Devem ser fundos públicos e nunca fundos secretos.

Fundos secretos e clandestinos controlados pela Embaixada dos Estados Unidos da América, geram um orçamento paralelo e sigilo, um governo invisível sob o controle dos EUA, o que fere a soberania nacional.

O culto ao segredo (omertà) é próprio da Máfia e nunca pode ser admitido num Estado Democrático de Direito. Fundos secretos, sob o comando de um governo estrangeiro, com prestação de contas unicamente a Embaixadas, não são constitucionais. A Constituição prevê a publicidade dos atos estatais e o controle pelo povo (via Parlamento e TCU) dos gastos públicos.

É absurdo permitir a continuidade de um fundo com gastos sem licitação, sem concurso, sem prestação de contas ao TCU, sem o crivo da Controladoria e do MPF. A transparência é o antídoto da corrupção e da usurpação da soberania popular e nacional. O MPF não pode aceitar despesas sem prévia dotação orçamentária, sem inclusão no Orçamento Geral da União e no QDD.

Mesmo o acordo de 1995 exige "memorandos de entendimento" prévios detalhando as operações, metas, estimativas de recursos em dólares e em reais e equipamentos. No entanto, pelo que o MPF soube, sequer este procedimento é adotado na maioria das operações. São secretas e, assim, são ilícitas e ainda ocasiões perfeitas para corrupção, traição etc.

Assim, esta Procuradoria, julgando de boa prudência e tendo como marco delimitatório o ordenamento jurídico, RECOMENDA:

1. A imediata regularização destes gastos com a inclusão dos recursos no Orçamento Geral da União e que todos os gastos que já foram realizados, desde 1995, sejam enviados ao TCU para a devida prestação de contas.

Nos termos do art. 6º da Lei Complementar nº. 75, Vossa Excelência deve dar imediato cumprimento a esta recomendação ou fornecer explicações sobre o não cumprimento.

Atenciosamente,

Luiz Francisco F. de Souza

Procurador da República

Revista **Consultor Jurídico**, 25 de março de 2004



## **Judicial Consultant Finger in the Face**

### **Ex-FBI chief in Brazil questioned by the MPF**

The Republic's Attorney General, Luiz Francisco Fernandes de Souza, invited last Thursday (3/25), the ex-FBI chief in Brazil, the Portuguese, Carlos Costa to make a deposition about his interview to the magazine Carta Capital (Capital Letter). In an interview to the journalist, Bob Fernandes, Costa gave details of how the American government controls the Brazilian Federal Police and suggests the the American government would have tapped the telephones of government officials in the Alvorada Palace (official residence of the President), and at Itamaraty.

The deposition will take place next Tuesday (3/30) at 2:00 pm in the office of Luiz Francisco, in Brasilia. The Attorney General will also want to know for whom the American government sends the yearly amount of US 5 milion, for Brazil destined to fight narco-traffic. Beyond this information Luiz Francisco wants to know information about the Cobra account – a name that comes from the binding of Colombia and Brazil. Federal police involved in the combat of narcotic trafficking revealed that a good amount of the money that the DEA sends to Brazil, above the \$5 million, would have arrived through Colombia, certainly via the Cobra Account.

On October 10<sup>th</sup>, 2003, Luiz Fernandes de Souza had already sent a recommendation to the Director of the Federal Police, the deputy Paulo Lacerda, to make public the transactions of the secret account number 284.002-2, Agency 3476-2 of Banco do Brasil. This account, from Brasilia, has been fed by the DEA, the all-powerful North American agency combating drug trafficking in the world.

According to him, this secret account is transacted by actions suggested by the American Government, without the knowledge of Senate, Congress, the TCU or the MPF. Luiz Francisco says "I wish it was \$50 million and not only \$5million, and that it goes directly into the Republic's budget, and not into the hands of the Federal Police. I am afraid this amount will become a huge surveillance system involving even the CIA", he alerts.

### **Read the whole recommendation:**

OFFICIAL COMMUNICATION/MPF/PRDF/LF No. 284  
Brasilia DF, October 9<sup>th</sup>, 2003.

Mr. Director,  
THE OFFICE OF ATTORNEY GENERAL OF THE REPUBLIC IN FEDERAL DISTRICT, through the member subscribed below, comes respectfully, explain and present recommendations for the adoption of measures listed at the end of the text.

The juridical foundation appears in Art. 60, paragraph XX, of the Complimentary Law no. 75, from May 20<sup>th</sup>, 1993: Art. 60. It is the incumbency of the Public Ministry of the Union: XX – to issue recommendations, aiming the betterment of the public services and services of public relevance, as well as in respect to, in the interest of, on behalf of the rights and properties whose defense it is the Ministry's duty to promote, setting dates reasonable to the adoption of adequate measures. (our emphasis)

#### OF THE FACTS

The magazines "Istoe" and "Carta Capital" published the existence of secret funds, maintained by foreign government to pay for police activities in the national territory. There is news of the CIA and other governmental agencies of the American Government paying for wiring tapping equipment for the Federal Police. Also that the CIA and ABIN maintain many agreements and activities in common.

This Office received the allegation that the counter-narcotic division of the Federal Police maintains a secret checking account number 284.002-2, agency 3476-2 of the Banco do Brasil – fed by the DEA – Drug Enforcement Administration. The news states that in this year alone five million dollars was transacted. These allegations were confirmed by the Chief of Police himself, Getulio Bezerra, and by the Director General of the Counter Narcotics Police, Ronaldo Urbano. Secret funds without the supervision of Senate, Congress, TCU, and MPF, without publicity, are totally unconstitutional and illicit.

It is not possible to allow for public servants to be paid by foreign governments accounting to, and attending the expectations of, the American Consulate. It is healthy to maintain relationships between our government and other countries, but the resources must be inserted in the General Budget of the Union and in the QDD. These must be public funds and never secret ones. Funds that are secret and clandestine controlled by the American Consulate generated a parallel budget, secrecy, and an invisible government under the control of the United States, which harms the national sovereignty.

Worshipping of secrecy (omerta) is typical of the Mafia and can never be admitted in a Democratic State of Rights. Secret funds under the command of a foreign government with accountability solely to the Consulates, are not constitutional. The Constitution describes the requirement of making public the expenses of the state and controlled by the people (via Parliament and TCU).

It is an absurd to permit the continuity of funds with expenses with approval, without due process, without accountability to the TCU, and without the seal of approval from the Attorney General and MPF. Transparency is the antidote for corruption and prevents the usurpation of national and popular sovereignty. The MPF cannot accept expenses without previous budget review, and without insertion in the General Budget of the Union and in the QDD.

Even the agreement from 1995 demands "Agreement Memos" detailing the actions, goals, estimated resources in dollars and reais, as well as the equipment. Nonetheless, according to what the MPF found out, not even this procedure is adopted in the majority

of the operations. These operations are secret and thus illicit and furthermore, perfect occasions for corruption, treason, etc.

Thus this Attorney General Office, judging as good prudence and having as boundaries the juridical decree, RECOMENDS:

1. An immediate regularization of these expenditures with inclusion of resources into the General Budget of the Union, and that all expenses that took place since 1995, be sent to the TCU for the appropriate accountability. In the terms of Art. 60. of the Complimentary Law no. 75, Your Excellency, must implement this recommendation immediately or offer explanation about the non-compliance.

Yours truly,

Luiz Francisco F. de Souza.  
Solicitor General