UNITED STATES DISCTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,
Plaintiff,

v. NO. 3:12-CR-00107

MICHAEL WALLI, (SHIRLEY/PHILLIPS)
MEGAN RICE, and
GREG BOERTJE-OBED
Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR RESPONSE TO THE UNITED STATES' MOTION TO LIMIT THEIR DEFENSES

Thou shalt not be a victim.
Thou shalt not be a perpetrator.
Above all, thou shalt not be a bystander.

U.S. Holocaust Memorial, Washington D.C.

I. INTRODUCTION

On July 28, 2012, defendants Sr. Megan Rice, Greg Boertje-Obed and Michael Walli, passed through four fences in a several hour walk into the Oak Ridge Y-12 Nuclear facility. Upon arriving at the Highly Enriched Uranium Materials nuclear facility, they symbolically disarmed the building and its surroundings. Defendants took such action essentially because the production, processing and storage of hundreds of tons of nuclear weapons materials, which are the ultimate weapons of mass destruction, are not only illegal, but also criminal under U.S. law and under international law. This was one of many such attempts to force the government to comply with its obligation

under the U.S. Constitution and the international treaties which the constitution makes the law of the land.

On November 2, 2012, the United States moved to preclude defendants from being able to introduce evidence in support of certain justification defenses they may present at trial.

Defendants want to tell the jury the truth, the whole truth of what is happening at Y-12. The government wants to hide the facts of what is occurring at Y-12 from the jury.

There is little doubt that if defendants are able to tell the jury the whole story of what is going on at Y-12 and explain the consequences they will never be convicted of anything. If defendants are able to present evidence of what is happening at Y-12 to the jury, the jury will see the truth and the truth will set them free.

The essence of the government's motion is to try to suppress the facts and recast this case as one in which defendants trespassed onto generic government property and damaged generic government property. Under their theory of the case defendants should be tried as if they had broken into a government hog farm and hammered on the waste facility. They ask this court to preclude US law of international obligations like the Geneva Conventions, US law of necessity defense, any mention of God or morality or principle, discussion of the world's largest nuclear material facility and its consequences and even seek to gag defendants from exercising or referring to the First Amendment to the US constitution.

One person who reviewed the government's motion described it as a Motion to Preclude the Truth.

The government's Motion attempts to make the crimes charged against the defendants strict liability offenses and unconstitutionally shift the burden of proof to the defendants. The defendants have reasonably pointed out that the U.S. "national defense policy" at Y-12 has resulted in ongoing war crimes to wit: well documented plans and preparations for ongoing threats to unleash uncontrollable indiscriminate nuclear weapons.

The Prosecutor argues the defendants "have no standing" to raise these issues of the criminality of nuclear weapons as if the defendants were bringing a civil action.

The Prosecutor can and should investigate these war crimes and dismiss these charges against those who reasonably pointed them out. Both military and civilian courts have jurisdiction over such war crimes.

The defendants will bring witnesses to present the indisputable and central evidence of the reality of the effects of nuclear weapons as documented by the Government itself from effects on Hibakusha, downwinders, Atomic Veterans and uranium miners. These weapons produced at Y-12 are ipso facto unlawful in any circumstance because:

The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. See International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, paragraph 35.

Furthermore, the defendants will bring expert witnesses to correct the Government's wholly inaccurate interpretation of the ICJ Opinion which is the most authoritative statement of universally applicable laws of war to the threat or use of nuclear weapons. The weapons produced at Y-12 unequivocally fit into a category of indiscriminate and uncontrollable weapons of mass murder that violate the fundamental and intransgressible rules and principles of humanitarian law and which undergird and are directly incorporated into U.S. law.

Complete nuclear disarmament according to non-violent steps taken in good faith is not just the defendants' "cause," it is the current obligation of all countries including the US.

Justice requires that the defendants be allowed to tell the whole truth about what is at Y-12 and fully present evidence of all relevant defenses to the crimes they are charged with and to introduce all evidence at trial in support of such defenses. The following memorandum sets forth why defendants should be allowed to present these defenses at trial.

II. SPECIFIC OBJECTIONS TO THE PROSECUTION'S MOTION

A. Relevant Evidence

In this case, the defendants believe that the evidence they intend to submit will be sufficient to create a triable issue. The United States contends that a defendant's right to present evidence in his own defense is not absolute: in order to be admissible, the evidence must be relevant and for an affirmative defense, the defendant must be able to establish its elements. While this is true, it is also true that "[i]n a criminal case it is reversible error for a trial Judge to refuse to present adequately a defendant's theory of

defense." *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976). In fact, "where a defendant claims an affirmative defense, and that 'defense finds some support in the evidence and in the law,' the defendant is entitled to have the claimed defense discussed in the jury instructions." *United States v. Johnson*, 416 F.3d 464, 468 (6th Cir. 2005) (quoting *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976)). The defendant's "burden is not a heavy one," *United States v. Riffe*, 28 F.3d 565, 569 (6th Cir. 1994), and is met "[e]ven when the supporting evidence is weak or of doubtful credibility. . . ." *Garner*, 529 F.2d at 970.

Thus, as long as defendants can meet "a minimum standard as to each element of the defense, assuming the defense is available as a matter of law, a trial judge may not take the question . . . away from the jury." *United States v. Bailey*, 444 U.S. 394, 415 (1980). As set forth in detail below, defendants can show that both the necessity defense and their defenses under international law are relevant to the crimes charged in this case. Furthermore, defendants can establish the minimum prima facie showing that they can meet all elements of the necessity defense. Thus, defendants in this case must be allowed to present evidence on these issues.

B. Prematurity

As a matter of fact and law, the government motion is premature. The upcoming trial in this matter still has outstanding discovery requests and pretrial motions pending. That alone should indicate this Court should not rule on the government's request until after all such motions are decided.

Further, the system of government in the US allows defendants to put on their own defense to any charges leveled by the government, It is the role of the judiciary not

to protect the government but to check that awesome power and protect the constitutional rights of the defendants and to seek justice.

C. The Defense of Necessity

The necessity defense is "designed to spare a person from punishment . . . if he reasonably believed that criminal action 'was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense.'" *United States v. Bailey*, 444 U.S. 394, 409-10 (1980). The rationale behind the necessity defense is that the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the law. Simply put, the defendant properly exercised his or her free will and violated a law in order to achieve a greater good or prevent a greater harm.

In this case, there can be no question that entering into a facility that produces nuclear weapons for active threat or delivery in order to raise awareness of the illegality and danger of such weapons and ultimately prevent their use is a model example of technically breaking the law in order to prevent an exponentially greater harm. Trespass and property damage are minor offenses and much lesser evils compared to the widespread human and environmental annihilation which is caused by illegal and criminal nuclear weapons.

In order to present the justification defense and introduce evidence in support of it, defendants must make a minimal prima facie case showing that there is evidence in support of each element. *See United States v. Riffe*, 28 F.3d 565, 569 (6th Cir. 1994); *Garner*, 529 F.2d at 970. The elements of the justification defense are:

> (1) that defendant was under an unlawful and "present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury," . . . ;
> (2) that defendant had not "recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]," . . . ;
> (3) that defendant had no "reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' " . . . ; and
> (4) "that a direct causal relationship may be reasonably anticipated between the [criminal] action taken and the avoidance of the [threatened] harm."

United States v. Newcomb, 6 F.3d 1129, 1134 (6th Cir. 1993) (quoting *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir.), *cert. denied*, 498 U.S. 872 (1990)) (citations omitted and alterations in original). A fifth requirement is that the defendant show that he did not maintain the illegal conduct any longer than absolutely necessary. *Id.* at 473.

Although, as the government points out, the federal courts have been reluctant to accept the defense of necessity in civil resistance cases (often mistakenly called civil disobedience cases), they have conceded that defendants have a right to present exculpatory evidence to the jury: "As a general proposition, evidence that a defendant exhausted all available legal alternatives, and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury." *United States v. Hill*, 893 F. Supp 1044, 1047-48 (N.D. Fla. 1994). Additionally, as appellate courts have stated, it is appropriate for the district courts to "entertain[] the possibility that a necessity defense could be interposed . . . . [T]he question before us is not whether necessity ever can be a proper defense . . . in the protest context, but, rather, whether [the defendant] showed that he could muster some evidence of a viable necessity defense." *United States v. Maxwell*, 254 F.3d 21, 26-27 (1st Cir. 2001); *See also United States v. Kabat*, 797 F.2d 580, 590-91 (8th Cir. 1986) ("It is

sufficient that the defendants have shown an 'underlying evidentiary foundation' as to each element of the defense, 'regardless of how weak, inconsistent or dubious' the evidence on a given point may seem."). Here, as set forth below, defendants show they will be able to produce enough evidence through expert testimony that the defense of necessity should not be precluded, but should be properly examined by a jury.

1. Imminence of Harm:

The first requirement of the necessity defense requires the defendant to show he or she acted to prevent imminent harm. Nuclear weapons and the threat of their accidental detonation present an immediate threat of catastrophic harm to both people and the environment. As the International Court of Justice held in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*:

> The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations.

See Declaration of Dwyer, paragraph 9 (citing International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* July 8, 1996, paragraph 35).

The U.S. Department of Energy has admitted that Y-12 contains more than 400 tons of highly enriched uranium—enough to build more than 10,000 nuclear weapons. As the declaration of Francis Boyle points out, "the current Administration, at the Y-12 National Security Complex in Oak Ridge, Tennessee, continues to plan, prepare and conspire for threat or use W-75 and W-76-1 nuclear warhead weapons each for

unleashing 100 Kilotons of heat, blast and radiation." Furthermore, "the secondaries and the cases for the W-76 and W-76-1, 100 kiloton nuclear warheads produced or refurbished at the Y-12 National Security Complex are for assembly for active threat or commission of mass annihilation." These facts all indicate that the threat of nuclear weapons and their detonation are real and imminent.

Additionally, the harm posed by the production and processing of nuclear weapons at the Y-12 facility not only includes the threat of nuclear proliferation, but also includes the health risks and injuries caused to the people actually in contact/proximity to the nuclear weapons. This harm is happening and on-going. The mining of uranium for the weapons produced at Y-12 kills and injures workers and the employees at Y-12 suffer harm from illnesses related to their work, such as cancer. Dr. Rosalie Bertell has estimated that, "The global victims of the radiation pollution related to nuclear weapon production, testing, use and waste conservatively number 13 million." Additionally, in medical field it is widely accepted knowledge that all sorts of cancers increased dramatically after the beginning of nuclear testing and after the two nuclear explosions in Japan.

Although, as the government points out, courts have found in the past that the threat posed by nuclear weapons does not meet this imminence requirement, one might question the wisdom of requiring such a strict construction of the imminence factor in civil resistance cases. If forced to wait until a nuclear accident is truly imminent, neither protestors nor anyone else will have the opportunity to take effective action. Some hazards, like nuclear proliferation, are of such potential danger that the imminence requirement must be relaxed to accommodate necessity. It seems foolish for people to

await the occurrence of a nuclear accident, when people may be immersed in fallout and dying and only then, find the circumstances sufficiently advanced as to justify action. As one scholar puts it:

> The strict imminence test is most clearly inappropriate when imposed on citizen actions aimed at preventing nuclear war. The mere possibility of a nuclear war, the litany of horrors whose proportions dwarf all the catastrophes of history, suggests the absurdity of the focus on imminence. Whether nuclear war comes in 20 years or next week, either possibility should satisfy the minimal elements of necessity. Whether the imminence requirement is abandoned altogether or merely construed more leniently, the law should not require that citizens wait until the moment before their incineration before it permits a necessity defense for disobedient action.

See Bernard D. Lambek, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472 (1986).

Note that many jurisdictions do not require this element of imminence in order to qualify for the necessity defense. For example, the Model Penal Code specifically rejects the requirement that the evil which is sought to be avoided be imminent. Model Penal Code § 3.02 cmt 3, at 16-17 (1962). The authors of the Model Penal Code explicitly reject imminence "as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future." *Id.*

The current definition of imminent harm used by this court and others consistently precludes the possibility that even nuclear weapons might constitute a crisis or real emergency. This approach suggests that no set of circumstances will likely meet the definition of imminent harm and that no jury will likely get to hear any evidence of the necessity defense in any civil resistance case. Instead of courts summarily holding that the necessity defense is unavailable to defendants in cases involving protests against nuclear weapons, where a defendant is able to support his position with evidentiary proof,

a jury should be allowed to weigh the factors discussed above and the evidence put on by the defendant to decide whether the harm was imminent and weigh it with other factors to determine if sufficient to negate guilt.

2. No Reasonable, Legal Alternatives to Violating the Law

The defendants had no reasonable legal alternatives to civil resistance in this instance. The defendants have, in the past, attempted numerous other legal means to stop nuclear proliferation, as well as to prevent the United States from breaking international law, and none have been successful. The evidence will show defendants have written letters, lobbied Congress, spoken out, written appeals, and taken every possible legal action to stop the impending nuclear holocaust which will result if the materials at Y-12 are used.

The government argues that because there may exist other legal methods of trying to prevent the unlawful possession and potential use of nuclear weapons, no matter how ineffective or outlandish such alternatives have proven to be, civil resistance in the nuclear context can never meet this requirement. However, to read this requirement as such ignores the express language of the requirement that there must exist no *reasonable*, legal alternatives to breaking the law. The Supreme Court in *Bailey* specifically made this prong of the necessity defense a test of reasonableness. *Bailey,* 444 U.S. at 410 ("Under any definition of these defenses one principle remains constant: if there was a *reasonable*, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' defenses will fail." (emphasis added)). As such, just because a legal alternative exists does not necessarily mean that

the defense of necessity is precluded. Thus, a defendant must be allowed to present evidence regarding the lack of reasonable legal alternatives to the action taken.

Black's Law Dictionary defines "reasonable" as "Fair, proper, or moderate under the circumstances. According to reason." BLACK'S LAW DICTIONARY 1379 (9th ed. 2009). Thus, a reasonable legal alternative "implies that it is more than available—that it will be effective as well . . ." John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L. Rev. 111, 143 (2007). Futile or unavailing legal options do not equal reasonable legal alternatives. The government suggests that the mere possibility of congressional action is enough to constitute a reasonable legal alternative and preclude the necessity defense. However, given the fact that both Congress and the Executive Branch have approved the illegal continuation of nuclear weapons production, the Court can assume that both branches are complicit in this illegal and criminal act. Given the futility of congressional action, it is not a viable, reasonable legal alternative to defendants' actions. Additionally, the imminence of the threat of nuclear disaster makes the need for change urgent and further makes slow, drawn out legal alternatives to effectuate change unreasonable in this situation.

Thus, again, defendants can show that they had no *reasonable* legal alternatives to engaging in civil resistance in order to prevent the imminent harm posed by nuclear weapons. The very word "reasonable" suggests that a jury should weigh this factor, forcing the conclusion that it is judicial error to preclude the defendants from submitting evidence in support of this element of the affirmative defense.

3. Reasonable Anticipation of Averting the Alleged Harm

In order to meet the reasonable anticipation requirement of the necessity defense, defendants must show they had a reasonable belief that their conduct would avert the alleged harm. To do this, courts have held that defendants must show a "direct causal relationship" between the illegal action taken and the avoidance of the greater harm. U.S. v. Newcomb, 6 F.3d 1129, 1134 (6th Cir. 1993).

It is uncontestable that defendants actions actually exposed and prevented a very serious problem at Y-12.

The United States has had a long history of legislative change prompted by principled and non-violent (though unlawful) political protests. Movements opposing slavery, supporting women's suffrage, civil rights, and other social efforts all show that there is a causal connection between civil resistance and the policy changes sought. Civil resistance is oftentimes the catalyst which calls society's attention to a significant injustice in order to ignite change. Even though the change may take time and other collaborators does not mean that a direct causal connection between the action and the change is lacking. As the declaration of Anabel Dwyer points out:

> There is a long tradition in this country of non-violent direct action to redress grievances. These defendants issued a "wake-up call" by pointing out and exposing the Y-12 National Security Complex personnel's active plans, preparations, participation and conspiracy in continuing threat or commission of nuclear holocaust and environmental devastation. This is surely a grievance if not the grievance that warrants such a considered act in this democracy.

See Declaration of Dwyer, paragraph 16.

Importantly, civil resistance and political protest have proven effective means of direct change specifically in the nuclear weapons context. For example, in 2004, the Navy shut down two radio transmitters in Wisconsin and Michigan which sent extremely

low frequency (ELF) communications to nuclear-armed Trident submarines and contributed to making Trident a first-strike weapon and a "nuclear war trigger." This followed more than twenty years of antinuclear protests, marches, and non-violent civil resistance and disarmament actions to prevent crime much like the ones at issue in this case. Thus, in the face of these important historical examples of change brought about by nonviolent political protests and acts of civil resistance, it would be foolish to summarily proclaim that defendants' actions in this case cannot be directly related to the avoidance of a greater harm.

Defendants who engage in civil resistance in order to effectuate policy change and ultimately eliminate the alleged harm have a right to let the jury evaluate evidence on the causal connection between criminal acts of civil resistance and harm. Thus, again, the court must allow defendants an opportunity to present evidence on the necessity defense.

D. US and International Law

Defendants must be allowed to present evidence relating to their defense under US and international law.

Prosecutors consistently seek to discount this law as international law, but it is US law in international relations.

As defendants will show, the production and refurbishment of nuclear warheads at Y-12 for active threat or delivery is a war crime and thus directly violates international law, as well as the law of the United States. As such, the elements of the crimes of criminal damage to property and trespass upon property cannot be met where the property at issue is only being used in connection with a war crime. Therefore, defendants must be allowed to present evidence relating to illegality and criminality of

nuclear weapons under international law because it directly affects whether the government will be able to carry its burden of proving each element of the specific crimes defendants are charged with.

The Supreme Court has explicitly held that the "due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 90 S.Ct. 1068, 1073 (1970). The government cannot prove the elements of trespass and property damage that defendants are charged with beyond a reasonable doubt when the property in question is being used for an unlawful purpose—to produce and house nuclear weapons. U.S. law, military law, and international law all demonstrate that the use and threat of use of nuclear weapons is unlawful and criminal under long established principles of international law and is humanly unacceptable. Thus, it is necessary for defendants to introduce evidence and expert testimony on international law because it is inextricably linked with the prosecution's ability to prove and the defendants' ability to defend against the crimes charged.

1. Nuclear Weapons are Unlawful and Criminal Under International Law and the Continuing Threat of Use of Them Constitute the Commission of a War Crime

International law is part and parcel of the structure of federal law, as held by the Supreme Court in the landmark decision *The Paquete Habana*, 175 U.S. 677, 700 (1990) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.") (aff'd by *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)). As such, federal statutes must be interpreted consistently with international

law. United States v. Flores, 289 U.S. 137, 159 (1933). International law, including treaties and customary international law, must be considered along with Congressional statutes, Constitutional law, and any other pertinent body of law.

As the declarations of Professor Boyle and Dwyer make clear, international law, as part of U.S. law, explicitly prohibits the use or threat of use of weapons of mass destruction which include the nuclear weapons produced at Y-12. "[A]ny threat or use of even one W-76 warhead prepared at Y-12 is categorically and universally prohibited in any circumstance by 'intransgressible' rules and principles of humanitarian law" and constitutes a war crime. *See* Declaration of Dwyer, paragraph 17. Dwyer goes on, in paragraph 20, to lay out the fundamental rules and principles of humanitarian law, including that states can never use weapons that are incapable of distinguishing between civilians and military targets (ICJ Op. § 78) and that states can never use weapons causing unnecessary suffering to combatants (ICJ Op. § 78; 1907 Hague Convention IC, Art. 23(e)). Furthermore, if an envisaged use of weapons would not meet the requirements of humanitarian law, any threat to engage in such a use would also be contrary to that law. Declaration of Dwyer, paragraph 20 (citing ICJ Op., § 78).

Since the nuclear warheads produced at Y-12 are incapable of distinguishing between civilian and combatant and their use willfully causes widespread death and serious injury to civilians and others taking no part in the hostilities, any threat or use is thus categorically prohibited under binding law. *See e.g*. ICJ Opinion, paragraph 35. Furthermore, even if aimed at military targets, nuclear weapons cause indiscriminate harm and unnecessary suffering to combatants—also prohibited under humanitarian law.

Id. Thus, the production and processing of nuclear weapons at Y-12 for active threat or use is unlawful and criminal under binding international law.

E. The Elements of the Crimes of Criminal Damage to Property and Criminal Trespass Cannot be Met Where the Property at Issue Is Only Used in Connection With a War Crime

The charges in this case against defendants all contain elements directly related to the production and processing of nuclear materials for nuclear weapons for active threat or delivery. The federal statutes under which defendants are charged must be interpreted consistently with US and international law: "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations . . ." *MacLeod v. U.S.*, 229 U.S. 416, 434 (1913). Thus, even a general protection of property statute, used as here to "protect" an instrumentality of war, must be read according to the Constitution consistently with international law and within the internationally recognized laws of war. It cannot be applied to ignore or abrogate the laws of war that prohibit any threat or use of the "property" at issue.

Professor Boyle, in paragraph 14, of his declaration, states: "Since the threat or use of the W-76 or W-76-1 is inherently criminal under international and US law, anything used to facilitate its operation is an instrument of a crime." The property at issue in this case that defendants are charged with damaging is fence that conceals, protects and obscures the production, processing, and storage of materials and components of W-76, W-76-1, and other nuclear warheads —all illegal weapons of mass destruction. As such, the property at issue in this case is part of an illegal and criminal threat of use of a weapon of mass destruction.

Therefore, the actions taken by defendants to nonviolently expose and symbolically disarm weapons of mass destruction were legal, reasonable and justified. The elements of the crime of criminal damage to property cannot be met where the property at issue can only be used in connection with a war crime. The binding legal definition of "property" with practical use does not and cannot include threat or use of a first-strike, high-alert weapon of mass destruction such as nuclear warheads that constitute crimes against peace, war crimes, and crimes against humanity or genocide. Nor can the U.S. apply the general protection of property statute, as the prosecutor does here, in a way that ignores or abrogates the controlling laws of war which prohibits any threat or use of any weapon of mass destruction.

Therefore, the prosecution of this case cannot go forward because all charges brought contain elements directly related to the production and processing of nuclear materials for nuclear warheads for active threat or delivery.

F. Nuremberg Defense

The prosecution dismisses the entire body of law created for accountability after the atrocities of World War II in one slight paragraph suggesting defendants have not put forward any reasons to raise these principles. However, defendants have already put forward evidence on this before the court in the references in Professor Boyle's declaration which underscore exactly why resistance to nuclear weapons and the imminent dangers they pose are fully consistent with the Nuremberg principles that empower individuals to act to protect justice and law from rogue government actions which violate both.

G. Moral political or religious grounds for defense

Prosecutors argue it is arrogant for defendants to raise God, morality, political or religious grounds to explain their actions. That would be news to those who fought slavery when it was legal. That would be news to those who fought for the right of women to vote when it was illegal. That would be news to those who fought segregation when it was legal. That would be news to those who fought for recognition of labor unions when they were illegal. That would be news to those who fought discrimination against the disabled when it was legal. That would be news to those who fought against domestic violence when it was legal and in so many other struggles for justice.

H. No distinction between evidence from experts and defendants own testimony

Prosecutors make no distinction between evidence which may be offered by experts and the evidence which defendants themselves may speak about in their own defense. Traditionally even courts which have precluded expert testimony have allowed defendants to explain in their own words why they did what they did and why they think such actions were called for. Prosecutors have ample opportunity in jury charges to instruct the jury to give appropriate weight to such testimony.

This is another example of the prematurity problem of this request by the government.

I. The First Amendment

It is shocking the government seeks to prohibit the First Amendment rights of defendants in advance of their trial. The First Amendment was created exactly for such a situation - to protect citizens from the heavy hand of censorship by the government. Yet here we see the government argue not only that defendants must be precluded from

telling the truth about subjects the government finds uncomfortable and embarrassing but that the citizen defendants are not to be allowed to raise the key constitutional rights in our Bill of Rights.

Were this court to affirm this denial of the constitutional rights of citizens before they speak, the court would itself sanction and engage in prior restraint of freedom of speech – one of the most egregious violations of our shared constitution. Such an action cannot be allowed to happen, no matter what the government wants.

II. GENERAL OBJECTIONS TO THE PROSECUTION'S MOTION

In addition to the specific responses outlined above, there are general objections to the prosecution's motion to preclude their defenses.

Because nuclear weapons threaten our very survival, non-violent transformation away from nuclear weapons is essential to "Secure the Blessings of Liberty to ourselves and our Posterity." U.S. Constitution, Preamble. The Government's Motion continues dangerous denial of fact and misunderstands the binding and controlling law. "The issue: 'It's the criminality of this 70-year industry," said defendant Megan Rice. Wm. J. Broad, *The Nun Who Broke into the Nuclear Sanctum*, N.Y. Times, Aug. 11, 2012, p.1.

Everyone understands and the government admits that Y-12 National Security Complex work involves "the most dangerous materials on the planet including nuclear weapons." Rep. Stearns, Chair, U.S. House Energy & Commerce, Oversight & Investigations Sub Committee Hearing 9/12/12. Yet, the Defendants are presumed guilty of property crimes for walking onto the Y-12 site and painting messages declaring that "humanity rejects nuclearism . . . ." At the very least, "nuclearism" accurately describes

the "business" of the Y-12 National Security Complex which is allegedly secured by the fences.

The cases relied on by the Prosecutor all wrongly presume lawfulness of any/all U.S. preparation, production, threat or use of nuclear weapons.

This court can dismiss the charges against these defendants based alone on admitting evidence of the most directly relevant facts including that Y-12 produces nuclear warheads for "effective" uncontrollable and indiscriminate mass annihilation.

Such evidence includes:

- The Government admits: "The Y-12 National Security Complex is one of four production facilities in the National Nuclear Security Administration's Nuclear Security Enterprise. The site focuses on the processing and storage of uranium, an activity essential to the safety, security and effectiveness of the US nuclear weapons stockpile." (Inquiry into the Security Breach at the National Nuclear Administration's Y-12 National Security Complex, Aug. 2012 DOE/.IG-0868).

- The Government says that the Defendants "made their way to the Highly Enriched Uranium Materials Facility ("HEUMF"). This building contains a large quantity of weapons-grade uranium" (See Government's Motion in Limine Case 3:12-cr-00107 page 2). The HEU is thus not merely "stored" at Y-12. "Weapons-grade uranium" is a "fissile material" for nuclear weapons defined as "uranium containing uranium-235 and/or uranium-233 in a weighted concentration of equivalent to or greater than 20 percent uranium-235." The US national stocks of HEU as of mid-2008 were 250 Metric Tons (Global Fissile Material Report 2008, International Panel on Fissile Materials (IPFM).

- Similarly, the Government admits that the DOE/NNSA and contractors know that the "secondaries" produced at Y-12 are intended to boost a primary fission explosion for thermonuclear weapons with "effective yields" of at least 100 kilotons of TNT equivalent each at least 7 times the heat, blast and radiation of the Hiroshima bomb.

In this case defendants can clearly show that federal protection of property statutes cannot and should not be applied to fences protecting the activities above as if those fences are "wholly independent" of the property they allegedly protect. The US admits

that the "property" at issue in this case consists of "fences" some of which have signs warning: "Deadly force is authorized beyond this point." It is not merely irony that this sign is intended to "protect" inherently unlawful production of nuclear warheads for threat or use the most deadly force possible. The prosecutor must meet its burden of proof and show that the law authorizes continuing production preparation for threat or use of nuclear weapons, the most deadly force possible. If the courts have no jurisdiction over these issues, as the Prosecutor argues, then this case must be dismissed.

Defendants did the nation a favor in exposing the dangers of Y-12. At a minimum the DOE/NNSA recognizes that the defendants showed that "safe and secure" treatment or "storage" requires a lot more than a few chain link fences or cameras.

Even if the government cannot yet perceive or admit to the grave and ongoing danger of perpetuating nuclear weapons production, these prosecutions are certainly premature. The United States Department of Energy National Nuclear Security Administration ("DOE/NNSA") is currently in the midst of an embarrassing and revealing administrative scramble and contract renegotiation precisely because of what the defendants pointed out: that Highly Enriched Uranium (and all related isotopes) are inherently cataclysmic and highly dangerous.

The defendants will call DOE Secretary Chu and DOE/NNSA Administrator Thomas D'Agostino as witnesses to discuss the curious and hopeful conjunction between the defendants' intent by their act to point out the necessity of transforming the economy and social structure away from nuclearism and DOE/NNSA need for necessary "structural and cultural changes" as a result of the defendants action. "As Secretary Chu has made clear, the incident at Y-12 was a completely unacceptable breach of security

and an important wake-up call for our entire complex….one we must correct and learn from to assure the absolute protection of this Nation's most sensitive nuclear materials. We have taken swift and decisive steps to strengthen security and to replace key personnel but these steps are just the beginning of the structural and cultural changes that we intend to make." (Response to the DOE/IG -868 Special Report cited above from Thomas D'Agostino, DOE NNSA Administrator , Aug. 28, 2012).

Severe environmental contamination of the entire Oak Ridge Reservation, which is a Superfund site, has resulted from 70 years of nuclear weapons production. The Prosecutor acts here to protect those who privately profit from nuclear weapons production and avoid any liability for the costs. In addition, corporate spinoffs, such as Babcock & Wilcox Y-12 Technical Services L.L.C., insist upon profits for both production and dismantlement of nuclear weapons secondaries and cases and demand new unnecessary facilities such as the proposed Uranium Processing Facility (UPF).

In explaining its decision to reject a smaller No Net Production UPF Alternative, NNSA wrote: "Under a No Net Production/Capability-size UPF Alternative, NNSA would maintain the capability to conduct surveillance and produce and dismantle secondaries and cases. NNSA would reduce the production level of facilities to approximately 10 secondaries and cases per year, which would support surveillance and dismantlement operations and a limited Life Extension Program(LEP) workload; however, this alternative would not support adding replacement or increased numbers of secondaries and cases to the stockpile." Final Y12 Site Wide Environmental Impact Statement, Chapter 3, page 27. Bloomberg Business Week describes private investment stock purchase opportunities in Babcock & Wilcox Technical Services Y-12 , L.L.C.

which “engages in the production, refurbishment and dismantlement of nuclear weapons components, storage of nuclear material and the prevention of the proliferation of weapons of mass destruction” (B&W Technical Services Y-12, L.L.C.: http://investing.businessweek.com/research/stocks/private/snapshot) .

III. CONCLUSION

The effect of the prosecution motion is to suppress the truth about what happens at Y-12 and thus to strip defendants of their due process right to a fair trial.

The Prosecution's Motion seeks to negate the fact defendants followed the very advice the U.S. Government gives to its citizens when it listens to the “better angels” of its nature:

> Thou shalt not be a victim.
> Thou shalt not be a perpetrator.
> Above all, thou shalt not be a bystander.
> U.S. Holocaust Memorial, Washington D.C.[1]

Refusing to be bystanders to plans and preparations to commit a holocaust unprecedented in history, the defendants followed the advice of their government. Is this fact not to be considered by a jury?

This admonition by the Government of the United States to the world was also stated by Justice Jackson in his opening statement at Nuremberg:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these

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[1] A living memorial to the Holocaust, the United States Holocaust Memorial Museum inspires citizens and leaders worldwide to confront hatred, prevent genocide, and promote human dignity…. Located among our national monuments to freedom on the National Mall, the Museum provides a powerful lesson in the fragility of freedom, the myth of progress, the need for vigilance in preserving democratic values. With unique power and authenticity, the Museum teaches millions of people each year about the dangers of unchecked hatred and the need to prevent genocide. And we encourage them to act, cultivating a sense of moral responsibility among our citizens so that they will respond to the monumental challenges that confront our world. http://www.ushmm.org/museum/about/

> defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.
> …
> This war did not just happen-it was planned and prepared for over a long period of time and with no small skill and cunning.
> …
> The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, "under God and the law." The United States believed that the law long has afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons.
> …
> Any resort to war-to any kind of a war-is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes.
> …
> *The case as presented by the United States will be concerned with the brains and authority back of all the crimes.* These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. *We want to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war.*[2]

The Prosecution's Motion to preclude defenses is contrary to this noble history and the most profound lessons learned by humanity.[3] It is contrary to admonitions by the Government of the United States declared before all the world, and to its own citizens,

[2] November 21, 1945 Opening Statement before the International Military Tribunal, Nuremberg Germany. Available online at: http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/

[3] All Judicial Officers and Officers of the Court have legal obligations under international law. See: United States of America v. Alstötter et al., ("The Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948). See also: http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm

that planning and preparation in times of peace for crimes against peace, war crimes and crimes against humanity is contrary to the law of the United States and international law.

This most important lesson of history is forgotten and absent from the motion before this court. Further the motion urges the Court to join in this error of forgetfulness. Courts have so erred before:

> The trials were, of course, farcical. The accused were not allowed to consult their lawyers, who were appointed and instructed by the court. Nor could the accused exchange a word with their lawyers in court. The lawyers, for their part, took next to no interest in proceedings which for them were a mere formality. [4]

A jury trial in and of itself is not due process of law unless accompanied by proceedings that allow the jurors to fairly weigh the "truth, the whole truth and nothing but the truth." Should this Court accept the preclusion of defenses sought by the prosecution, the truth will be among the victims. History is not likely to look kindly on a trial in which the truth about weapons of mass destruction is not allowed to be told.

It is not the job of the judiciary to facilitate government prosecution of citizens. The government in all its power does not need the judiciary to help it. It is the job of the judiciary to be a check on unreasonable power exercised by the government and to protect the right of citizens to a fair trial and put on their defenses to those exercises of government power.

Fundamental to the determination of whether defendants are indeed guilty of the crimes they are charged with are the issues of whether their actions were excused by the defense of necessity for the greater good and whether the illegality of nuclear weapons under international law precludes the government from being able to prove its case

[4] TERRENCE PRITTIE, GERMANS AGAINST HITLER 215 (Little Brown & Co. 1964) (describing the so-called "trial" of some members of the "Rose Kapelle" ('the Red Orchestra')—the best organized, large scale resistance organization in Nazi Germany).

against defendants. Because evidence on both of these defenses is relevant to the case and defendants have made the necessary preliminary showing that they can put on evidence to support their defenses, the court must reject the government's motion to preclude defendants from putting on evidence in their own defense in these matters. These matters are premature at best.

Submitted

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Certificate of Service

I certify that this document was served on all parties by filing it electronically on November 16, 2012. /s William P Quigley