

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

USA

V

NO. 2:18-CR- 22

ELIZABETH MCALISTER

Defendant

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Elizabeth McAlister, Defendant above-named, and submits this Legal Memorandum in Support of her Motion to Dismiss.

INTRODUCTION AND BACKGROUND

In 2013 Sam Nunn, former U.S. Senator from Georgia and former Chair of the Senate Armed Services Committee; Charles Schultz, Secretary of Defense to President Ronald Reagan; and William Perry, Secretary of Defense to President Bill Clinton, published a statement in the Wall Street Journal:

The continuing risk posed by nuclear weapons remains an overarching strategic problem, but the pace of work doesn't now match the urgency of the threat. The consequences of inaction are potentially catastrophic, and we must continue to ask: How will citizens react to the chaos and suffering of a nuclear attack? Won't they demand to know what could have been done to prevent this? Our age has stolen fire from the gods. Can we confine this awesome power to peaceful purposes before it consumes us?¹

¹ "Next Steps in Reducing Nuclear Risks," Wall Street Journal, March 5, 2013 commentary by Sam Nunn, George P. Schultz, William J. Perry, Henry Kissinger. Online at: <https://www.carnegie.org/news/articles/wall-street-journal-next-steps-in-reducing-nuclear-risks/>

Nothing less than the survival of humanity is at stake. Additionally, as stated by Francious Bugnion, from the International Red Cross:

Nuclear weapons are characterized in particular by their destructive power, the unspeakable suffering caused by their use, the fact that it is extremely difficult to bring aid to victims, the fact that it is impossible to control their effects in space and time, the risk of escalation and proliferation which any use of nuclear weapons necessarily involves, and the dangers which such weapons entail for the environment, future generations and *the survival of humanity*.

Francois Bugnion, The International Red Cross, 2005²

SUMMARY OF REASONS FOR DISMISSAL

Rule 12 of the Federal Rules of Criminal Procedure authorize motions to dismiss indictments on the grounds of failure to state an offense (12(b)(3)(B)(v)), selective prosecution (12(b)(3)(A)(iv)), and charging the same offense in more than one count (12(b)(3)(B)(ii)). All of these grounds for dismissal are present in this prosecution.

First, the government failed to state an offense because nuclear weapons of mass destruction are unlawful and criminal under US law and the continuing threat of use of them and the use of them constitute the commission of a war crime.

Second, the government failed to state an offense because US international law and the laws of war prohibit use of these weapons of mass destruction.

Third, the government failed to state an offense because the damaged property at issue concealed and protected the production, processing and storage and preparation for use of materials and components of nuclear weapons, illegal weapons of mass destruction. So 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

² The International Committee of the Red Cross and nuclear weapons: From Hiroshima to the dawn of the 21st century. Online at: http://www.icrc.org/eng/assets/files/other/irrc_859_bugnion_eng.pdf

to property cannot be met where the property at issue can only be used in connection with a war crime.

Fourth, the government failed to state an offense because the actions of the government in this matter violate the Religious Freedom Restoration Act.

Fifth, the government is engaged in selective or vindictive prosecution.

Sixth, the government has charged the same offense in more than one count.

FACTS

As the indictment alleges, on April 5, 2018, Father Stephen Michael Kelly, Mark Peter Colville, Clare Therese Grady, Martha Hennessy, Elizabeth McAlister, Patrick O'Neill and Carmen Trotta cut a padlock on a gate in the perimeter fence surrounding Naval Submarine Base Kings Bay in Georgia and walked about for several hours.³ This base is the home port of the US Navy Atlantic Fleet's Trident nuclear weapons fleet. According to the U.S. Navy, Kings Bay is home to 8 ballistic missile submarines and guided missile submarines of the U.S. Navy Atlantic Fleet with the destructive power to destroy millions of members of the human race and to inflict catastrophic damage to life for every person on earth. Upon entering the Kings Bay Nuclear Submarine Naval Base, with spray paint and blood, the Defendants symbolically disarmed the building and its surroundings as a prophetic witness in protected exercise of their religious beliefs.

A. Nuclear Weapons at Kings Bay⁴

Kings Bay is home to several nuclear ballistic missile submarines including: USS Maryland (SSBN 738), USS Rhode Island (SSBN 740), USS Tennessee (SSBN 734), USS West

³ Indictment, Doc. 1, dated May, 2, 2018.

⁴ The proof of these facts is found in the governmental and professional sources and is the subject of ongoing discovery by defendants in this matter.

Virginia (SSBN 736), USS Wyoming (SSBN 742), USS Alaska (SSBN 732), USS Florida (SSGN 728) and USS Georgia (SSGN 729).⁵ The US Navy Commander Submarine Kings Bay Georgia states that six of these submarines are fitted out for Trident II D 5 MIRV thermonuclear weapons: the USS Maryland, the USS Rhode Island, the USS Tennessee, the USS West Virginia, the USS Wyoming, and the USS Alaska submarine each contains has 24 missile tubes for nuclear weapons.⁶ The USS Florida and the USS Georgia each contain 154 Tomahawk missiles.⁷

B. Destructive capabilities of missiles.

The Trident II D 5 Thermonuclear missile's destructive power is significant and devastating. The U.S. Navy Fact File discloses that each of the Ohio-class Trident submarines like the six at Kings Bay are capable of carrying 20 Trident II D 5 nuclear weapons. Each of these individual Trident II D 5 weapons has a range of 4,600 miles and contains Nuclear MIRV (Multiple Independently Targetable R-entry Vehicles). Each Trident costs \$30 million dollars, is 44 feet long and weighs 130,000 pounds.⁸

Each Trident II missile carries an average of four to five warheads each, with the capacity to carry more.⁹ "The Trident D5s carry three types of warheads: the 100-kiloton W76/Mk-4, the

⁵ CNIC Naval Submarine Base Kings Bay, History. Online at:

https://www.cnic.navy.mil/regions/cnrse/installations/navsubbase_kings_bay/about/history.html

⁶ See the individual submarine pages published by the US Navy. For example, here is the one for the USS Maryland: "Commander Submarine Group Ten Kings Bay Georgia,"

<http://www.public.navy.mil/subfor/csg10/Pages/Maryland.aspx>

⁷ <https://www.public.navy.mil/subfor/csg10/Pages/Florida.aspx>

⁸ "United States Navy Fact File Trident II D% Missile,"

http://www.navy.mil/navydata/fact_display.asp?cid=2200&tid=1400&ct=2

⁹ "How US nuclear force modernization is undermining strategic stability: The burst-height compensating super-fuze," March 1, 2017. Online at: <https://thebulletin.org/how-us-nuclear-force-modernization-undermining-strategic-stability-burst-height-compensating-super10578>. Also, according to Lockheed Martin, their manufacturer, "The Trident II D5 is the latest generation of the U.S. Navy's submarine-launched fleet ballistic missiles, following the highly successful Polaris, Poseidon, and Trident I C4 programs. First deployed in 1990, the Trident II D5 missile is currently aboard OHIO-class and British VANGUARD-class submarines." "Overview of Trident II D5 Fleet Ballistic Missile," online at: <https://www.lockheedmartin.com/en-us/products/trident-ii-d5-fleet-ballistic-missile.html>

100-kiloton W76-1/Mk-4A, and the 455-kiloton W88/Mk-5 warhead, the highest-yield ballistic missile warhead in the U.S. arsenal."¹⁰

The biggest of the four weapons carried on each Trident missile, the W88/Mk-5 has 455 kilotons of destructive power, making it the most powerful and destructive sophisticated thermonuclear weapon. The US Navy has deployed around 890 of these on US submarines.¹¹

It is useful to compare the destructive powers of the nuclear weapons at Kings Bay with the bombs which the U.S. dropped on Japan. The nuclear bomb dropped on Hiroshima had the blast equivalent of 15 kilotons of TNT; the U.S. bomb dropped on Nagasaki had the equivalent of 20 kilotons.¹² These two bombs killed up to 130,000 people in Hiroshima and 70,000 in Nagasaki.¹³

The smallest of each of the four to five warheads on each of the 20 plus Trident missiles (the ones with *only* 100 kilotons of power) carried on each these submarines have five to six times the destructive power of the bombs the U.S. dropped on Hiroshima or Nagasaki. The biggest warheads have four to five times that power. The destructive power of each one of the six Trident armed submarines berthed at Kings Bay has hundreds of times the destructive power of the bombs the US dropped on Japan.

What does that mean? If only two of these 455 kiloton bombs detonated above a major city, there would be a fireball a mile in diameter, four to five times the heat of the sun, expanding

¹⁰ Bulletin of Atomic Scientists, "Nuclear Notebook: US nuclear forces, 2009," March/April 2009.

<https://www.cndpindia.org/wp-content/uploads/2017/12/Nuclear-Notebook-US-nuclear-forces-2009.pdf>

¹¹ "How US nuclear force modernization is undermining strategic stability: The burst-height compensating super-fuze," March 1, 2017. Online at: <https://thebulletin.org/how-us-nuclear-force-modernization-undermining-strategic-stability-burst-height-compensating-super10578>

¹² "What it would look like if the Hiroshima bomb hit your city," WP, August 5, 2015.

https://www.washingtonpost.com/news/wonk/wp/2015/08/05/what-it-would-look-like-if-the-hiroshima-bomb-hit-your-city/?utm_term=.2570578b7376

¹³ "Hiroshima and Nagasaki: The many retrospectives," August 8, 2014. <https://thebulletin.org/hiroshima-and-nagasaki-many-retrospectives7366>

out at millions of miles per hour. The fireball would instantly ignite fires over an area of 100 square miles. It would vaporize every person and structure for miles and create a blast wave of fire with 750 miles per hour winds. There would be no survivors within five (5) to seven (7) miles of where the bombs exploded.¹⁴

The Trident II D 5 missiles have undergone a significant upgrade in their destructive power recently, tripling the killing force of the weapon, according to the Bulletin of the Atomic Scientists.¹⁵ This boost in the overall killing power of US ballistic missile forces “creates exactly what one would expect to see, if a nuclear-armed state were planning to have the capacity to fight and win a nuclear war by disarming enemies with a surprise first strike.” United States **“submarines now patrol with more than three times the number of warheads needed to destroy the entire fleet of Russian land-based missiles in their silos.”**¹⁶

The Navy reported that Maryland has launched Trident II D5 missiles several times, most recently in 2016.¹⁷ After a previous launch, the US Navy reported, "Maryland's outstanding performance during the FCET's demonstrates that the ballistic missile submarines remain ready and vigilant, in a secure and survivable posture, able to rapidly respond to national tasking. The stealth, agility, payload and persistence of the submarines, in combination with the skill of the

¹⁴ “What would happen if an 800-kiloton nuclear warhead detonated above midtown Manhattan?” February 25, 2015. Online at: <https://thebulletin.org/what-would-happen-if-800-kiloton-nuclear-warhead-detonated-above-midtown-manchattan8023> (emphasis added).

¹⁵ “How US nuclear force modernization is undermining strategic stability: The burst-height compensating super-fuze,” March 1, 2017. Online at: <https://thebulletin.org/how-us-nuclear-force-modernization-undermining-strategic-stability-burst-height-compensating-super10578>

¹⁶ “How US nuclear force modernization is undermining strategic stability: The burst-height compensating super-fuze,” March 1, 2017. Online at: <https://thebulletin.org/how-us-nuclear-force-modernization-undermining-strategic-stability-burst-height-compensating-super10578>

¹⁷ “USS Maryland (SSBN 738) launched unarmed Trident II D5 missile,” September 11, 2016. <https://www.naval-technology.com/uncategorised/newsuss-maryland-ssbn-738-launched-unarmed-trident-ii-d5-missile-5002406/>

submariners, keep the SSBNs undetectable and, therefore, the only survivable nuclear deterrent platform in the United States arsenal.”¹⁸

C. The financial cost of missiles.

The cost of these weapons is staggering. Each Trident missile costs \$30 million and there are at least 20 on each submarine at Kings Bay.¹⁹ In 2018, the Department of Defense announced Lockheed Martin was awarded a \$522 million cost-plus-fixed-fee contract to produce more Trident weapons and to support current weapons.²⁰ The US Congressional Budget Office estimated in 2017 that current plans for nuclear forces in coming decades will be at least \$1.2 trillion in 2017 dollars.²¹ Preparations are already underway to replace a dozen of the Trident carrying submarines at a cost of \$267 billion.²²

D. The Defendants actions in exercise of their religious beliefs.

Seven Catholic plowshares activists entered Kings Bay Naval Submarine Base in St. Mary’s, Georgia on April 4th, 2018. A fundamental basis and tenement of their religious beliefs are to practice peaceful activism to carry forth the prophet Isaiah’s command to “beat swords into plowshares” in its effort to promote peace and prevent nuclear war.²³ The Catholic faith is recognized by the Department of Defense as an official religion. (Ex. A – Office of the Assistant Secretary of Defense Memorandum dated March 27, 2017).

¹⁸ “SSBN Successfully Launches Multiple Ballistic Missiles,” June 14, 2010.

http://www.navy.mil/submit/display.asp?story_id=54063

¹⁹ “United States Navy Fact File Trident II D% Missile,”

http://www.navy.mil/navydata/fact_display.asp?cid=2200&tid=1400&ct=2

²⁰ James LaPorta, “Lockheed awarded contract for Trident II production, support,” March 20, 2018, UPI.

<https://www.upi.com/Lockheed-awarded-contract-for-Trident-II-production-support/4241521546755/>

²¹ “Approaches for Managing the Costs of U.S. Nuclear Forces, 2017 to 2046,” CBO, October 31, 2017.

<https://www.cbo.gov/publication/53211>

²² See 2017 Report by the US Government Accountability Office, “COLUMBIA CLASS SUBMARINE: Immature Technologies Present Risks to Achieving Cost, Schedule, and Performance Goals,” December 2017, GAO-18-158.

<https://www.gao.gov/assets/690/689133.pdf>

²³ Isaiah 2:4, New American Standard Bible.

As alleged by the government, the seven chose to act on the 50th anniversary of the assassination of the Rev. Dr. Martin Luther King, Jr., who devoted his life to addressing what he called the “triple evils of militarism, racism and materialism.” Carrying hammers and baby bottles of their own blood, the seven engaged in symbolic de-nuclearization. They hoped to call attention to the ways in which nuclear weapons kill every day, by their mere existence and maintenance. As Catholics, the defendants proclaimed at the time of their actions: “Pope Francis says abolition of weapons of mass destruction is the only way to save God’s creation from destruction. Clarifying the teachings of our Church, Pope Francis said, ‘The threat of their use as well as their very possession is to be firmly condemned.’”²⁴ Symbolic de-nuclearization is a fundamental expression of these defendants' religious beliefs.

As alleged by the government, the activists went to three sites on the base: the SWFLANT administration building, the D5 Missile monument installation and the nuclear weapons storage bunkers. The activists used crime scene tape, hammers and hung banners reading: “The ultimate logic of racism is genocide - Dr. Martin Luther King”, “The ultimate logic of Trident is omnicide” and “Nuclear weapons: illegal / immoral.” They also brought an indictment charging the U.S. government for crimes against peace. The Indictment stated the following.

KINGS BAY PLOWSHARES (PLAINTIFF),
VS.
UNITED STATES OF AMERICA (DEFENDANT).
INDICTMENT

Today, through our nonviolent action, we, Kings Bay Plowshares—indict the United States government, President Donald Trump, Kings Bay Base Commander Brian Lepine, the nuclear triad, and specifically the Trident nuclear program.

WHEREAS, This program is an ongoing criminal endeavor in violation of international treaty law binding on the United States under the supremacy clause of the U.S. Constitution (Article VI, Section 2): This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

²⁴ See Statement of Defendants online at: <https://www.youtube.com/watch?v=rrcOVKWg-PM&sns=fb>

supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

WHEREAS, The United States is bound by the United Nation's Charter, ratified and signed in 1945. Its preamble affirms that its purpose is to "save future generations from the scourge of war." It directs that "all nations shall refrain from the use of force against another nation." Article II regards the threat to use nuclear weapons as ongoing international criminal activity.

WHEREAS, The Nuremberg Principles, also promulgated in 1945, primarily by the U.S., prohibit crimes against peace, crimes against humanity, war crimes and genocide. They render nuclear weapons systems prohibited, illegal, and criminal under all circumstances and for any reason.

WHEREAS, The U.S. government is obligated as well by the Non-Proliferation Treaty, in force since 1970 that requires the signers to pursue negotiations in good faith and to eliminate nuclear weapons at an early date. The U.S. government is also obligated by the Comprehensive Test Ban Treaty, which prohibits full-scale nuclear explosions.

WHEREAS, the members of the United Nations are currently negotiating a treaty to prohibit nuclear weapons, leading towards their total elimination.

THEREFORE, the work being at done at Kings Bay Naval Submarine Base violates all these agreements and is thus criminal.

Specifically, the Kings Bay Naval Submarine Base refits and maintains submarines, which carry Trident D5 nuclear missiles. The Trident D5 is a submarine-launched ballistic missile (SLBM), built by Lockheed Martin. The Navy currently operates 14 Ohio class submarines. Six have their homeport at Kings Bay. Each submarine carries the capacity to cause devastation equivalent to 600 of the nuclear attacks on Hiroshima, Japan. Thus, the six Tridents maintained at Kings Bay have the capacity to cause the devastation of 3600 Hiroshima-scale attacks.

From the initial mineral mining through testing, storage, and dumping, the production and maintenance of these weapons harms human beings, destroys the environment, and violates international and God's law. Moreover, each day this program steals from all in our nation and world by its theft of much-needed resources. Nor is the Navy or the nation retreating from this violation of international law. The Navy is currently preparing to spend at least \$100.2 billion of the public's money on a new class of 12 Trident ballistic missile submarines to replace the current Trident submarines.

Against these continuing violations of treaty law, we assert our right and duty to civil resistance against nuclear weapons. Furthermore, we affirm as crucial the human right to be free from these crimes. The Nuremberg Principles not only prohibit such crimes but oblige those of us aware of the crime to act against it. "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity...is a crime under International Law". The United Nations Charter further reinforced this principle and made it part of the binding international law. Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide, to which the United States is a signatory, makes it clear that private individuals can be held responsible for acts of genocide.

The ongoing building and maintenance of Trident submarines and ballistic missile systems constitute war crimes that can and should be investigated and prosecuted by judicial authorities at all levels. As citizens, we are required by International Law to denounce and resist known crimes.

For the sake of the whole human family threatened by nuclear weapons, and for the sake of our Planet Earth, which is abused and violated, we indict the Kings Bay Naval Submarine Base and all government officials, agencies, and contractors as responsible for perpetuating these war crimes.

The seven were ultimately arrested and face this criminal prosecution.

LAW AND ARGUMENT

I. THE INDICTMENT FAILS TO STATE AN OFFENSE AGAINST THESE DEFENDANTS.

a. Nuclear weapons are weapons of mass destruction and illegal under U.S. law.

Thomas Rogers, a retired Naval Officer who was assigned to four submarines and commanded an attack submarine armed with nuclear weapons and who taught operational law and rules of engagement to senior Navy Officers, submitted a declaration in this matter.²⁵ In his declaration he concludes that nuclear weapons are illegal and immoral.

Based on my experience and study, I believe that nuclear weapons are illegal and immoral. The Law of Armed Conflict requires a Commander to comply with the principles of Distinction, Proportionality, and Military Necessity. The fact that nuclear weapons are not controllable in time or space and that they possess horrible destructive power precludes them from fulfilling those requirements. Furthermore, Commanders are subject to the Rules and Principles of Humanitarian Law, which prohibit use of weapons that cause undue human suffering, genocide, and destruction of the environment.²⁶

The Navy in its 2007 *Naval Commanders Handbook* states, “[I]t is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or

²⁵ Declaration of Thomas Rogers.

²⁶ Declaration of Thomas Rogers, ¶5.

means of warfare is not unlimited.”²⁷ The *Handbook* states, “Weapons, which by their nature are incapable of being directed specifically against military objectives, and therefore put civilians and noncombatants at equivalent risk, are forbidden due to their indiscriminate effect.”²⁸

As Captain Rogers observed:

Strategic nuclear weapons on submarines are kept on alert and ready for deployment. There is no way those weapons can be used in a way that avoids indiscriminately killing and injuring civilians and doing tremendous environmental damage. It is impossible to detonate multiple 100 and 475 kiloton warheads from Trident missiles and not harm noncombatants.”²⁹

The U.S. Navy, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (August 2017) Section 9.1. states the same:

The law of war prohibits the design, use, or modification of weapons calculated to cause unnecessary suffering or superfluous injury. The terms “unnecessary suffering” and “superfluous injury” are regarded as synonymous and are used interchangeably. In determining whether a means or method of warfare causes unnecessary suffering or superfluous injury, the suffering or injury incurred by the combatant must not be manifestly disproportionate to the military advantage to be gained by the weapon’s use. ³⁰

In fact the use of such weapons are reportable violations according to US Navy, Annotated Supplement to THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, Annex A6-1:

U.S. Navy Reportable Violations ...

5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing that the attacks will cause loss of life, injury to civilians or damage to civilian property that

²⁷ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M \(Jul 2007\) \(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M%20(Jul%202007)%20(NWP))

²⁸ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M \(Jul 2007\) \(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M%20(Jul%202007)%20(NWP))

²⁹ Thomas Rogers Declaration, paragraph 7.

³⁰ US Navy, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (August 2017) Section 9.1. Online at: http://www.jag.navy.mil/distrib/instructions/CDRs_HB_on_Law_of_Naval_Operations_AUG17.pdf

would be excessive or disproportionate in relation to the concrete and direct military advantage anticipated, and which cause death or serious injury to body or health.”³¹

Nuclear weapons of mass destruction are unlawful and criminal under US law and the law of the US Navy. The continuing threat of use of them and the use of them constitute the commission of a war crime.

The U.S. statute for war crimes, 18 U.S.C. § 2441, reads, in pertinent part:

- (a) Offense— Whoever, whether inside or outside the United States, commits a war crime in any of the circumstances described in subsection (b)...
- (b) Circumstances— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States...
- (c) Definition- As used in this section “war crime” means any conduct—
 - (1) Defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
 - (2) Prohibited by Article 23, 25, 27 or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;...”³²

The 1907 Hague Convention, specifically cited in 18 U.S.C. § 2441, includes Article 23 which is set out to protect civilians from indiscriminate killing and injury:

- Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden
- (a) To employ poison or poisoned weapons;
 - (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
 - (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;
 - (d) To declare that no quarter will be given;
 - (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering...”³³

³¹ US Navy, Annotated Supplement to THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, Annex A6-1. Online at: <http://www.jag.navy.mil/distrib/instructions/AnnotatedHandbkLONO.pdf>

³² 21 USC 2441.

³³ Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Online at: <http://www.icrc.org/ihl.nsf/full/195>

Thus, any use of nuclear weapons, which would cause unnecessary suffering, would kill and maim tens of thousands of individuals, would kill and maim tens of thousands of the defenseless, constitutes a U.S. war crime under The Hague Convention.

Likewise, the Geneva Conventions of 1949, Convention IV outlines what the laws of war are as applied to civilians. Article 3 is easily applied to outlaw the use of nuclear weapons:

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...³⁴

Since nuclear weapons can never distinguish between the people at their targets, their use willfully causes widespread death and serious injury to civilians and others taking no part in the hostilities; nuclear weapons further cause violence and murder and all kinds of mutilation and cruel treatment to innocent lives. Nuclear weapons and their possession constitute a war crime prohibited by U.S. law.

Each submarine carries 20 Trident Missiles. Each Trident missile contains multiple independent nuclear weapons. Each of those weapons have the destructive power of 100 kilotons of TNT or 455 kilotons of TNT. The bomb dropped on Hiroshima, that killed up to 130,000 people,

³⁴ Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Online at: <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>

was a 15 kiloton bomb. The report of the International Red Cross visit to Hiroshima on August 29 reads:

Visited Hiroshima thirtieth, conditions appalling stop city wiped out, eighty percent all hospitals destroyed or seriously damaged; inspected two emergency hospitals, conditions beyond description full stop effect of bomb mysteriously serious stop many victims, apparently recovering, suddenly suffer fatal relapse due to decomposition of white blood cells and other internal injuries, now dying in great numbers stop estimated still over one hundred thousand wounded in emergency hospitals located surroundings, sadly lacking bandaging materials, medicines stop please solemnly appeal to allied high command consider immediate air-drop relief action over centre city stop required substantial quantities bandages, surgical pads, ointments for burns, sulfamides, also blood plasma and transfusion equipment stop immediate action highly desirable, also dispatch medical investigation commission stop report follows, confirm receipt.³⁵

Any use of even one of the hundreds of nuclear weapons on the submarines at Kings Bay will inflict damage at least several times larger than what was reported at Hiroshima.

Research by Physicians for Social Responsibility has concluded that:

“In the event of a nuclear war, millions of people would die from a nuclear attack within 30 minutes. A nuclear attack on any city would destroy hospitals and clinics, kill the vast majority of health professionals, wipe out medical supplies, and paralyze communication and transportation systems. Those who survive a nuclear attack can expect illnesses from radiation exposure from nuclear weapons which include: leukemia, multiple myeloma, stomach cancers, colon cancers, lung cancers, breast cancers, thyroid cancers, cataracts, birth defects, infertility, chromosomal aberrations, hemorrhaging, and infections”

And...

“even if just one percent of the world's nuclear weapons were used to attack cities someplace other than the US, it would loft enough soot into the atmosphere to dramatically disrupt the climate of the entire planet. This would cause long-term damage to worldwide agricultural production. The resulting global famine would put two billion people at risk of starvation.”³⁶

³⁵ Fritz Bilfinger, ICRC delegate, the first neutral witness to arrive. See, ICRC nuclear weapons article, *supra*, at page 513.

³⁶ Declaration of Jeffrey Carter Physicians for Social Responsibility.

U.S. courts have begun to recognize that citizens have a right, a constitutional right, to challenge governmental action which can create widespread and lasting damage to the earth. These defendants are engaged in efforts to exercise those rights as a fundamental basis of their Catholic religion.³⁷

The International Court of Justice found:

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 very serious danger to future generations.

Any threat or use of a nuclear weapon is categorically prohibited and constitutes a war crime, crime against humanity or genocide as defined consistently by the U.S. Criminal Code. The Declaration of Professor Boyle clearly states that any planning, preparation, conspiracy for threat or use of even one of these nuclear warheads is unlawful, that is illegal and criminal under US law.³⁸ The operations manuals and command handbooks of the Navy, the Air Force, and the Army, follow the Geneva Conventions and prohibit taking military actions which fail to distinguish between military and civilian targets, cause unnecessary suffering in general, or cause unnecessary civilian loss of life or property.³⁹ The maintenance, storage and potential use of the weapons which are aboard the submarines at Kings Bay are illegal under U.S. law. Any planned use will certainly

³⁷ It is a fundamental constitutional due process violation of the right of citizens to life, liberty and property when government action creates the likelihood of catastrophic damage to the earth and infringe on the rights to a climate system capable of sustaining human life. Further, the government holds our natural resources in public trust and cannot be allowed to unilaterally take action which will create catastrophic damage to the earth. See, Juliana v. U.S., 217 F. Supp 3d 1224, 1248-1259 (D. Oregon, Eugene Division 2016).

³⁸ Declaration of Professor Francis Boyle.

³⁹ Charles Moxley, John Burroughs, and Jonathan Granoff, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," 34 *Fordham International Law Journal* 595, pages 611-619 (2011).

result in genocide and is prohibited by U.S. criminal statutes and U.S. military law. The defendants cannot be prosecuted for taking action to prevent a war crime.

b. The United States specifically recognizes international law which the possession, storage and threatened use of the missiles violates.

Weapons are intended to protect that which society values, including morality and law. Because of their indiscriminate effect and overwhelming destructive capacity, nuclear weapons can hardly be reconciled with the most basic values of civilization. It is incoherent to plan for the use of nuclear weapons and even threaten to use them even if the only purpose is allegedly to prevent their use. Such a practice is not only unstable but intrinsically violates the highest values society seeks to protect. It is not hyperbole to say that the challenge to human civilization presented by nuclear weapons may be the consummate test of the human race's ability to survive. The very existence of nuclear weapons requires that human societies-- both the most technologically efficient and affluent of societies and societies still struggling to establish their place in the world--overcome the historical and contemporary human burden of aggression and tribalism. Containing the dangers of such human dynamics is one of the purposes of law. Pursuing peace and security based on the rule of law is necessary for any just society. International humanitarian law is an existing body of law universally recognized as necessary to limit war and preserve the possibility of a just peace. That law must now be rigorously applied to nuclear weapons....Lawyers and citizens, states and statesmen, peoples and leaders from countries big and small, must find the wisdom to see that the use and threat of use of nuclear weapons is unlawful under long-established principles of international law and is morally and humanly unacceptable. They must act accordingly, renounce policies of possible use of the weapons, and move forward decisively on a program of action to eliminate them.⁴⁰

International law is a part of US law. International law is explicitly a part of US law by reason of two provisions of the US Constitution. Article VI, Section 2 says: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Article III also explicitly confers on federal courts

⁴⁰ Charles Moxley, John Burroughs, and Jonathan Granoff, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," 34 Fordham International Law Journal 595, pages 694-695 (2011).

jurisdiction over cases involving treaties: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

This was confirmed again in June of 2004, when the US Supreme Court again ruled that U.S. domestic law recognizes international law.⁴¹ The *Naval Commander's Annotated Handbook* states, "At all times, a commander shall observe, and require their command to observe, the principles of international law."⁴² As such, U.S. international law and the laws of war absolutely prohibit use of these weapons of mass destruction. The Declaration of Professor Boyle states "Any planning, preparation, conspiracy for threat or use of even one of these nuclear warheads was and is unlawful, that is illegal and criminal."⁴³

The U.S. Supreme Court has repeatedly ruled that the war powers of the U.S. Congress and Executive are not unlimited. The Supreme Court stated that rules and precepts of the law of nations, including the four Geneva Conventions, specifically apply to the conduct of war. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2786 (2006). In Hamdan the Supreme Court was analyzing whether the President's powers in war time were constricted by laws of Congress like the Universal Code of Military Justice or not. The Supreme Court stated:

The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ

⁴¹ In Sosa v Alvarez-Machain, 124 S. Ct. 2739 (2004) the Supreme Court ruled: "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, e.g., Banco Nacional de Cuba v Sabbatino, 376 U.S., at 423, 84 S.Ct. 923 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); The Paquete Habana, 175 U.S., at 700, 20 S.Ct. 290 ("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"); The Nereide, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (recognizing that "international disputes implicating ... our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."

⁴² *Naval Commander's Annotated Handbook*, *supra* note 1, at 4.

⁴³ Declaration of Professor Francis Boyle, paragraph 8.

itself, insofar as applicable, and with the rules and precepts of the law of nations, including, inter alia, the four Geneva Conventions signed in 1949.

Hamdan at 2786 (internal citations omitted). Thus it is clear that the Geneva Conventions are US law as well as international law.⁴⁴

As noted in the previous section, Convention IV, Article 3, condemns the use of force against civilians and others taking no part in the hostilities of war. So, even apart from 18 U.S.C. 2441 and the war crimes it penalizes, there is no legal authority for indiscriminate weapons of mass destruction such as nuclear weapons.

United States courts also recognize the universality of the crimes involving violations of the rules and principles of humanitarian law. For example, “The universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people... This principle is a departure from the general rule that ‘that character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.’” Demjanjuk v. Petrovsky, 776 F 2d 571, 582 (1985), cert denied 457 US 1016, 106 S Ct 1198, 89 L Ed 2d 312 (1986).

The U.S. Constitution requires that U.S. law must be applied and interpreted consistently with the laws of war, in particular, specific treaties and the rules and principles of humanitarian law that control and prohibit any aggression or any threat or use of any weapon or tactic of mass destruction.

⁴⁴ This is not a new proposition for the US Supreme Court. “International law is part of our law, and must be ascertained and administered by the court of justice of appropriate jurisdiction as often as questions of rights depending upon it are duly presented for their determination. For this purpose, where there is no treaty or controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunal, not for speculations of the authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.” The Paquete Habana, 175 677,700; 20 S Ct 290; 40 L Ed 32 (1900).

In 1996, the International Court of Justice made it clear that nuclear weapons and the rule of law have nearly unresolvable problems coexisting. Its opinion dated July 8, 1996, on the “Legality of the Threat of Use of Nuclear Weapons” states as much.⁴⁵

In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted either in time or place, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous.⁴⁶

Even if aimed at military targets, nuclear weapons cause indiscriminate harm and unnecessary suffering. These rules and principles are universal and fundamental prohibitions. Since the warheads at issue are incapable of distinguishing between civilian and combatant and any threat or use is thus categorically prohibited under binding law. See e.g. paragraph 35, ICJ Opinion

United States law, military law and international law demonstrate that the use and threat of use of nuclear weapons is unlawful under long established principles of international law and humanly unacceptable.⁴⁷

As warned by other experts on the law of war and nuclear weapons:

Lawyers and citizens, states and statesmen, peoples and leaders from countries big and small, must find the wisdom to see that the use and threat of use of nuclear weapons is unlawful under long-established principles of international law and is morally and humanly unacceptable.⁴⁸

⁴⁵ LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS, International Court of Justice, Advisory Opinion, July 8, 1996. <http://www.icj-cij.org/docket/files/95/7495.pdf>

⁴⁶ International Court of Justice. “Legality of the Threat or Use of Nuclear Weapons,” ICJ Opinion on Threat or Use of Nuclear Weapons, para 92. <http://www.icj-cij.org/en/case/95>

⁴⁷ Moxley, *supra*, at 695-696.

⁴⁸ Charles Moxley, John Burroughs, and Jonathan Granoff, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty,” 34 *Fordham International Law Journal* 595, pages 694-695 (2011).

Thus, the defendants actions to try to stop massive violations of US and International law cannot be criminal and the charges against them must be dismissed.

c. Symbolic non-violent disarmament of the missiles is reasonable and justified.

Justice and history will not accept that nonviolent protest and symbolic disarmament of weapons of mass destruction should be punished with prison terms in order to protect property which is solely designed to destroy people and property on an unimaginable scale. It would challenge both law and justice to suggest that US law protects fences around illegal weapons which are calculated to kill hundreds of thousands and maim many more.

To help understand the irony of using the courts as protectors against damage to nuclear weapons, it is instructive to consider the Zyklon B case. Zyklon B was a chemical manufactured for pest control that was also used to murder millions of people in concentration camps in Nazi Germany. The nuclear weapons materials at issue in this case can be viewed as very similar to Zyklon B. Unlike Zyklon B, which at least had a legitimate non-lethal use, nuclear weapons have no non-lethal use.

Following up on the Zyklon B example, international authorities have convicted people for war crimes for the production of materials that are used to kill people. The production of Zyklon B was found to be used for systematically exterminating human beings at Auschwitz concentration camp. The producers of the material were found guilty of war crimes by a British military tribunal in March 1946.⁴⁹

Thus, had peace activists broken into the Zyklon B production facilities and been prosecuted for trespass and damage to property, could they legally have raised the illegality of

⁴⁹ The Zyklon B Case: Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, 1st – 8th March, 1946. Online at: <http://www.blacktriangle.org/zyklonbcasesmall.pdf>

the materials themselves as a defense? Justice and history would hope the courts of Germany would have allowed these defenses.

So here, the government must not be allowed to apply the general protection of property statute by ignoring or concealing from the jury the more basic and controlling rules and principles of US and international humanitarian law.

The damaged property at issue protected nuclear weapons, illegal weapons of mass destruction. So the actions taken by defendants to nonviolently expose and symbolically disarm weapons of mass destruction were legal, reasonable and justified.⁵⁰ 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.

All charges must be dismissed because the court may not apply the protection of property statutes in a way that ignores or abrogates the fundamental laws of war. In these circumstances, where the alleged “property” is part of ongoing planning, preparation for illegal and criminal threat of or use of the most grotesque weapons of mass destruction these defendants acted lawfully and reasonably to prevent egregious and fundamentally prohibited of all crimes, war crimes.

In paragraph 20 of his declaration, Professor Boyle notes:

Clearly the Trident II missiles can never be planned, prepared, threatened or used within the Laws of War and any instrumentalities or property furthering that planning, preparation, threat or use is illegal and criminal. All charges must be dismissed because the court may not apply conspiracy or protection of property statutes in a way that ignores or abrogates the fundamental Laws of War. In these circumstances, where the alleged “property” is part of ongoing planning, preparation for illegal and criminal threat of or use or use of the most grotesque weapons of mass destruction these Defendants acted lawfully and reasonably to prevent egregious and fundamentally prohibited of all crimes, war crimes. The gas

⁵⁰ See Professor Boyle declaration paragraph 20.

showerheads at Auschwitz were instrumentalities of crimes. The same principle of international criminal law holds true for Trident II missiles.⁵¹

The general protection of property statutes used as here to “protect” an instrumentality of war can only be read according to the Constitution consistently with and within the internationally recognized laws of war. This prosecution proposes to use the “rule of law” to “protect” the U.S.’s illegal and criminal threat of use of a weapon of mass destruction. Under such a theory, the rule of law furthers the annihilation of human society the very opposite of the actual meaning of the rule of law, whose purpose is for the continuance of human society.

A legal definition of “property” with practical use does not and cannot include threat or use 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 US apply the general protection of property statute, as the prosecutor does here, in a way that ignores or abrogates the controlling laws of war.

Nor can the government claim that US law protects a fence and other property from “damage” but does not prohibit the ongoing graves crimes committed by the instant, intended annihilation threatened by the nuclear warheads protected by the fence. Other courts around the world have decided this is not really property damage which should be penalized.⁵²

⁵¹ Professor Boyle Declaration, ¶ 20.

⁵² In Ireland, five peace activists, calling themselves the “Pitstop Ploughshares” were arrested in 2003 for breaking into an airport hangar and using hammers to cause millions of dollars of damage to a US Navy C48 supply plane which was en route to the war in Iraq. After arguing that they were trying to prevent war crimes, they were unanimously acquitted by a jury on July 25, 2006 after a trial which put the war in Iraq before the jury members. “Not Guilty. The Pitstop Ploughshares All Acquitted on All Charges,” Indy media Ireland, July 25, 2006. Available online at: <http://www.indymedia.ie/article/77460> See also Clare Dyer, “Peace activists offer war crime defence in jet damage trial,” The Guardian, September 3, 2006.

Groups of peace activists in the UK who were charged with criminal damage to property for smashing vehicles used to load bombs and others found with tools and paint to be used against US Air Force planes were tried but not able to be found guilty because their juries hung.

In January 2009, nine people were arrested in Belfast for chaining themselves to the door of Raytheon protesting the supply of military computers to Israeli Defense Forces. In their defense, they argued that Raytheon was aiding and abetting war crimes in Gaza and their actions were intended to prevent these war crimes. They were

The “injury” to the fence and other property alleged here posed no actual harm or injury to anyone. At most these defendants may have insulted the government by illustrating that our weapons of mass extermination are just as illegal and criminal as those belonging to other countries and that non-violent nuclear disarmament is a universal obligation.

d. The government's actions violate the Religious Freedom Restoration Act.

As the attached declaration from Catholic Archbishop Thomas Gumbleton states, it is essential teaching of the Catholic faith that: nuclear weapons are immoral; nuclear weapons have been consistently condemned; the prior use of nuclear weapons by the US has been called “butchery of untold magnitude”: and actions to disarm these immoral nuclear weapons are totally consistent with faith.⁵³

All of these defendants, as members of Catholic Worker communities, take their Catholic faith very seriously. They live simply, they engage in actions to assist the poor and homeless, and they engage in non-violent actions for peace and justice. The evidence in this case, provided by the government in discovery, demonstrates without a doubt that defendants took their actions in accordance with their deeply held religious beliefs that nuclear weapons are immoral and illegal. Thus the government’s prosecution must be dismissed because the government has not alleged nor provided any evidence that this prosecution has been undertaken in accordance with the requirements of the Religious Freedom Restoration Act.

acquitted by their jury in June 2010. George Monbiot, “The courts are starting to accept that the war against Iraq is a crime,” *The Guardian*, October 16, 2006. <http://www.guardian.co.uk/commentisfree/2006/oct/17/comment.politic>

In March 2010, four Australian peace activists, calling themselves the “Bonhoeffer 4” (after the German Anti-Nazi theologian) trespassed onto an air base and shut it down for a day. At their trial in June 2010 the magistrate found them not guilty. “Christian peacemakers’ victory in Australia,” June 23, 2010.

⁵³ See Declaration of Thomas Gumbleton.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, was enacted by Congress to provide a strong claim or defense to persons whose religious exercise is substantially burdened by the government. 42 U.S.C. 2000bb (b)(2). The statute states:

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁵⁴

RFRA “applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.” 42 U.S.C. § 2000bb-3(a) (emphasis added). This absolutely applies to government enforcement actions, as spelled out in the Attorney General's Memorandum of October 6, 2017 published in Federal Register:

Much like administrative agencies engaged in rulemaking, agencies considering potential enforcement actions should consider whether such actions are consistent with federal protections for religious liberty. In particular, agencies should remember that RFRA applies to agency enforcement just as it applies to every other governmental action. An agency should consider RFRA when setting agency-wide enforcement rules and priorities, as well as when making decisions to pursue or continue any particular enforcement action, and when formulating any generally applicable rules announced in an agency adjudication.⁵⁵

Thus, *under its own rules*, it is required that the government prove two elements before being allowed to go forward with this prosecution. First, the government must prove they have a compelling governmental interest in the protection of nuclear weapons. That has not happened. Since the possession and threatened use of nuclear weapons is illegal it will be impossible for the

⁵⁴ 42 usc 2000bb-1.

⁵⁵ Available online at: <https://www.federalregister.gov/documents/2017/10/26/2017-23269/federal-law-protections-for-religious-liberty>

government to assert it has a compelling governmental interest in that. Second, the government must prove that their decision to charge defendants with three felonies and a misdemeanor for their symbolic disarmament of those weapons is the “least restrictive means of furthering that compelling governmental interest.”

There are many “less restrictive means of furthering that compelling state interest.” For example, instead of threatening to imprison the defendants for years and years, the government could have sought civil sanctions against defendants. Because the government has not carried their burden in this matter, these prosecutions must be dismissed.

The U.S. Supreme Court has ruled that this law is strong and should be liberally construed. “We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from *taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.*” Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2759, 189 L.Ed.2d 675 (2014) (emphasis added). “And Congress mandated that this concept [the ‘exercise of religion’] “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2762 (2014) (quoting RLUIPA § 2000cc-3(g)).

Moreover, in Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In Thomas, a Jehovah’s Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. Id., at 710, 101 S.Ct. 1425. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that +he found morally objectionable (helping to make

the weapons themselves). This Court, however, held that *“it is not for us to say that the line he drew was an unreasonable one.*

Id., at 715, 101 S.Ct. 1425. (emphasis supplied). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778, 189 L.Ed.2d 675 (2014). The government is here seeking to implement a punitive statute on willful and malicious destruction or injury of real and personal property. Seeking to imprison defendants for a period of years (because of alleged injury to a padlock on a gate, concertina wire, a chain link fence, an entryway, a missile display, and a sign) constitutes an attempt to substantially burden defendants’ religious exercise. Because the government has not even attempted to comply with the RFRA, this indictment must be dismissed.

2. THE INDICTMENT MUST BE DISMISSED BECAUSE THE GOVERNMENT IS ENGAGING IN SELECTIVE OR VINDICTIVE PROSECUTION

Defendants assert that the government has declined to prosecute war crimes involving threats of the use of nuclear weapons but has only taken action against those who take actions to object to war crimes.⁵⁶ The current president has threatened nuclear war on more than once occasion in recent months. In 2017, the current President warned North Korea *“North Korea best not make any more threats to the United States,”* Trump told reporters from the clubhouse of his golf course in Bedminster, N.J., where he was being briefed separately on the opioid epidemic. *“They will be met with fire and the fury like the world has never seen.”*⁵⁷

Again in 2018, the current President stated he has a *“bigger and more powerful nuke button”* than North Korea and his works.

⁵⁶ . Other sections of this brief explain how the threat of the use of nuclear weapons violates US law, military law, the law of war and international law.

⁵⁷ Noah Bierman, *“Trump warns North Korea of ‘fire and fury’”* August 8, 2018, Los Angeles Times. Online at: <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-warns-north-korea-of-fire-and-1502220642-htmlstory.html>



Defendants contend that the record is clear that the government has declined to prosecute war crimes involving threats of the use of nuclear weapons but has only taken action against those who take actions to object to war crimes.⁵⁸

The Eleventh Circuit Court of Appeals, in U.S. v Brantley, 803 F3d 1265, 1270 (2015) discussed selective prosecution. While prosecutors enjoy substantial discretion,

[U]nder the Due Process Clause of the Fifth Amendment, 'the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.' At 1271. The burden is on the defendant who "must satisfy a "demanding" burden to establish that she is being selectively prosecuted.... In order to overcome that presumption, a defendant must present clear evidence of a selective prosecution.

Id. at 1271. In other words, a criminal defendant who claims she was subjected to selective prosecution must establish two elements: (1) the discriminatory effect prong of this test requires a showing that "similarly situated individuals were not prosecuted"... and (2) "[t]he discriminatory purpose prong requires that the decisionmaker selected or reaffirmed a particular course of action

⁵⁸ If the government disputes this factual allegation, defendants are simultaneously asking the prosecution in discovery for evidence which will document this challenge. Defendants are requesting the government disclose what actions the government has taken to investigate and/or prosecute possible war crimes and or violations of the military manuals and or the possession and deployment of nuclear weapons by any agency, department or individual in the US government.

at least in part because of, not merely in spite of, its adverse effects upon an identifiable group....Further, in order to obtain an evidentiary hearing on a selective prosecution claim, ‘the defendant must present facts sufficient to create a reasonable doubt about the constitutionality of a prosecution.

If the government disputes this factual allegation, defendants are simultaneously asking the prosecution in discovery for evidence which will document this challenge. Defendants are requesting the government disclose what actions the government has taken to investigate and/or prosecute possible war crimes and or violations of the military manuals and or the possession and deployment of nuclear weapons by any agency, department or individual in the US government.

3. THE INDICTMENT MUST BE DISMISSED BECAUSE THE GOVERNMENT IS CHARGING THE SAME OFFENSE IN MORE THAN ONE COUNT.

In the indictment, defendants are charged with: destruction of property on naval installation, 18 USC 1363, punishable up to 20 years; and degradation of government property, 18 USC 1361, punishable up to 10 years. In this indictment the government is charging the same offense in more than one count and therefore must be dismissed pursuant to Rule 12 (b)(3)(B)(ii). Rule 2 of the Federal Rules of Criminal Procedure states: “These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” F.R.Crim.Pro. 2.

The government is charging the same offense in Counts 1 - 4 of the indictment which constitutes multiplicity related specifically to alleged trespass and destruction of government property. “A multiplicitous indictment violates double jeopardy principles by giving the jury more than one opportunity to convict the defendant for the same offense.” United States v. Jones, 601 F.3d 1247, 1258 (11th Cir. 2010). The test enunciated to evaluate double jeopardy challenges

and described below, is also used “to determine whether an indictment is multiplicitous, verifying that each count requires an element of proof that the other counts do not require.” United States v. Williams, 527 F.3d 1235, 1241 (11th Cir. 2008). Count 1, subparts a, b, and c, are the same exact element of proof required for counts 2 and 3, destruction of property and depredation of property.

4. THE INDICTMENT CONTAINS A DUPLICITOUS COUNT.

Count 1 charges two or more separate and distinct offenses which mandates its dismissal. United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997). As a general rule, duplicitous conspiracy charges are impermissible. Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Orzechowski, 547 F.2d 978, 986 (7th Cir, 1976), cert. denied, 431 U.S. 906 (1977). The rationale for dismissing a single conspiracy count which in fact contains multiple conspiracies is based on the concept of impermissible variance of proof at trial. See Stirone v. United States, 361 U.S. 212 (1960). Duplicitous indictments can prevent jurors from acquitting on a particular charge because they decide to convict on another charge which is improperly lumped together in a single count. Where such a situation occurs, it is also impossible to determine whether all twelve jurors unanimously agree that the defendant has committed even one of the separate offenses contained within the duplicitous count. United States v. UCO Oil Company, 546 F.2d 833 (9th Cir, 1976), cert. denied, 430 U.S. 966 (1977). A duplicitous charge further prejudices the defendant at trial because evidentiary rulings permitting evidence to come in as to one of the separate offenses may be inadmissible on another. United States v. Pavloski, 574 F.2d 933, 936 (7th Cir, 1978); United States v. UCO Oil Company, supra, at 835. Where a count charges two distinct conspiracies carrying different penalties or charges two substantive offenses which differ in the maximum allowable punishment, it is duplicitous. United States v. Ramos, 666 F.2d 469, 473 (11th Cir. 1982)(recognizing that "an accusation that involve[es] charges under two distinct statutes carrying

separate penalties and involving difference evidence . . . [is to be] stricken as duplicitous.) Count 1 of the indictment asserts a violation of more than one federal statute, namely, 18 U.S.C. § 1382; 18 U.S.C. §1361 and 18 U.S.C. § § 371 and 2. (Doc. 1, Count 1) Each has a different penalty and maximum allowable punishment. 18 U.S.C. § 1382 carries a maximum penalty of not more than six months imprisonment (See, Doc. 2- Penalty Certification); 18 U.S.C. § 1361 carries a maximum penalty of not more than 10 years imprisonment; and 18 U.S.C. § 371 carries a maximum penalty of not more than five (5) years imprisonment. (See, Doc. 2 – Penalty Certification). Because there is a danger that the jury will find a conspiracy as to any one of three criminal statutes alleged in the sub-parts which violates the defendant's right to Due Process.

CONCLUSION

Justice is at the heart of this case. It is justice that these fine people ask from this Court. And it is justice which will ultimately judge whether protection of these weapons of mass destruction or the courage of those who attempt to disarm them will be confirmed as right for our world. At the conclusion of World War II, the victorious nations convened a trial for officials of the Nazi regime. Robert Jackson, a former Justice of the US Supreme Court, served as the Chief American prosecutor of the Nuremberg trials. When people tried to defend themselves by saying the laws of their country allowed them to act as they did or that they were just following orders, the Judges of Nuremberg ruled: “The very essence of the Nuremberg charter is that individuals have international duties which transcend national obligations of obedience imposed by the state.”⁵⁹

⁵⁹ 1 IMT Nuremberg, supra note 2, at 223. Transcripts published as 1-42 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945- 10 October 1946 (1947-49). Online at: https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf

It is understood that it is the role of the judiciary to apply the rules of law. It is also understood that most of the judiciary are reluctant to confront the actions of other branches of government when issues of security are raised. However, two very important principles insist that members of the judiciary take courageous stands when issues of life and death arrive in their courtroom.

The first principle is that Justice is what every judge is sworn to do. The oath of office, 28 U.S.C. 453 states: “I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me under the Constitution and laws of the United States. So help me God.” The second principle is that history provides accountability for judicial decisions. In 1967, Dr. Martin Luther King, Jr. reminded us that “the arc of the moral universe is long, but it bends towards justice.”⁶⁰ But it is also true that the law and courts have too frequently found itself on the wrong side of history and justice. Slavery was protected by judicial decisions.⁶¹ Stopping women from voting was protected by judges.⁶² Nazi Germany proceeded unchallenged by their judiciaries,⁶³ as did South Africa in the apartheid era.⁶⁴ If indeed the arc of history bends toward justice, this matter offers this court an opportunity to lead.

As Thomas Jefferson said “I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths

⁶⁰ A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr. 199 (Clayborne Carson & Kris Shepard eds., 2001).

⁶¹ Dred Scott v Sandford, 60 US 393 (1857).

⁶² Doug Linder, “The Trial of Susan B. Anthony for Illegal Voting.” (2001).
<http://law2.umkc.edu/faculty/projects/ftrials/anthony/sbaaccount.html>

⁶³ Ingo Muller, HITLER’S JUSTICE: The Courts of the Third Reich (Harvard University Press 1991).

⁶⁴ Robert Coniglio, “Methods of Judicial Decision-Making and the Rule of Law: The Case of Apartheid South Africa, 30 Boston University International Law Journal 497 (2012).

discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.”⁶⁵

It is noteworthy when considerations of justice are contemplated that the United Nations recently voted to adopt a global Treaty on the Prohibition of Nuclear Weapons with the objective of global disarmament.⁶⁶ One hundred twenty two nations voted to prohibit a full range of nuclear-weapon-related activities, such as undertaking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons.

The American Medical Association and Physicians for Social Responsibility have called for the full elimination of all nuclear weapons worldwide.⁶⁷ This resolution was passed by the American Medical Association in 2015. Like the United Nations, it condemned the development, testing, production, stockpiling, transfer, deployment, threat and use of nuclear weapons because of the devastating effect of using nuclear weapons, even beyond the immense human suffering and substantial death tolls among victims.

The accused are charged with taking action to symbolically disarm weapons of mass destruction. If the defendants took their actions in North Korea or Iran, the U.S. government would hail their actions. The same U.S. government cannot be allowed to criminally prosecute them at home. The charges should be dismissed.

⁶⁵ Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816. This excerpt from Jefferson's letter is one of four inscriptions chiseled in stone at the Jefferson Memorial in Washington, D.C.

⁶⁶ UN conference adopts treaty banning nuclear weapons, UN News, July 7, 2017.

<https://news.un.org/en/story/2017/07/561122-un-conference-adopts-treaty-banning-nuclear-weapons>

⁶⁷ Declaration of Jeffrey Carter of Physicians for Social Responsibility

See also “AMA urges elimination of nuclear weapons,” November 18, 2015. <https://wire.ama-assn.org/delivering-care/ama-urges-elimination-nuclear-weapons>

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Certificate of Service

I certify that this document was served on all parties by filing it electronically on July 2, 2018.

/s William P Quigley
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